

**PRACTICAL ANALYSIS OF LEGAL ASPECTS RELATING TO FILM OR TELEVISION PRODUCTIONS:
FINANCING AND DISTRIBUTION AGREEMENTS – HANDLING OF AUDIOVISUAL RIGHTS
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The concise text is based on two seminars which are also available in full text:

PRACTICAL ANALYSIS OF LEGAL ASPECTS RELATING TO FILM OR TELEVISION PRODUCTIONS:
HANDLING OF AUDIOVISUAL RIGHTS (COPYRIGHT, NEIGHBOURING RIGHTS), Seminar held at the
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1. THE FINANCING OF AUDIOVISUAL PRODUCTIONS

The financing of an audiovisual product has to be made with regard to the chances of its exploitation. This means in the case of Greek productions that account must be taken of the conditions of the global audiovisual market.

1.1. THE GLOBAL AUDIOVISUAL MARKET

The Global Production of Movie Films: Offer and Demand in the Market

The production of films has responded to the needs of broadcasters, however, there are different tendencies with regard to theatre productions (movies) and films made for broadcasting (television movies and television series).

The offer and demand on the market are determined by the available rights in films and by the need of programming. The rise of private broadcasting in the European countries and the increase in channels available for the viewers has led to a fierce competition between the broadcasting organisations in the acquisition of film rights. Traditionally, rights were bought for national markets. However, the progress of technique facilitate cross-border broadcasting and the possibility for viewers to choose the language or the soundtrack of the film which is broadcast so that broadcasters may wish to acquire rights for larger territories than under broadcasting licences for traditional television.

The annual production in movie films amounts to some 3,000 world-wide. However, this includes also films which are of less interest for most European broadcasting channels such as sex films or productions of the Indian market. It may be estimated that of the annual European production of some 300 films may qualify for being shown in the traditional television broadcasting. However, the world-wide production of films is not registered and can only be estimated, in any event, the necessary classification of films might render such statistical efforts doubtful.

World Production in Movie Films

In spite of increasing consumption by broadcasting organisations there has been a stagnation in the production of movie films in the US and Western Europe since the 1980s. It is estimated that the cinema production in Western Europe in the years between 1990 and 1999 will be lower than between 1920 and 1929. The relevant figures are:

Years	1920-1929	1930-1939	1940-1949	1950-1959	1960-1969	1970-1979	1980-1989	1990-1999
North-Am.	6,780	5,036	4,086	2,972	1,642	2,978	4,555	5,230
W.-Europe	5,779	5,187	3,848	6,687	8,601	8,447	6,251	5,754

Viewer Preferences

In many European countries there is a clear preference for films of US-American origin. The relevant figures for the origins of first-run movie films in Greece show this very drastically:

Year	Greece	USA	Others
1989	9%	86%	5%
1990	8%	87%	5%
1991	7%	88%	5%
1992	2%	92%	6%

The preferences of viewers of movie films are strong indicators for preferences of television spectators, although the consumer groups may differ considerably.

The number of movie films which are broadcast is comparable in the case of the larger broadcasting organisations which cover the relevant national territory. The national film production constituted a decisive source of programming in France, namely 45%, but also in Italy, 39%. In 1994 the number of films shown in the television amounted to 11,600 in Germany (an increase by 2.4% with regard to the previous year) and to 5,423 in Spain (an increase by 22%). In Italy RAI and Fininvest broadcast 2,786 films in 1994 which was a decrease of 8.9% in comparison to 1993. In France the relevant figures were 983, respectively 919 for 1993 (in France the right of broadcasters to include films in their programs is regulated by law).

The share of US-movie films in programs of European broadcasters varies. Whereas in 1994 US-films constituted 45% of the films broadcast in Italy, the relevant figures were 53% for Germany, 63% for Spain, 64% for the UK and 72% for the Netherlands. The share of non-national European films which are broadcast is relatively high in Austria, 37%, and Germany, 30%, but low, only 7%, in the UK. In Europe 53% of the movie

films which were broadcast originated from the US, 23% from other European countries, 20% were national productions and 4% productions from other international origin.

Development of Production Costs

A comparison of production costs is possible only with caution. State subsidies granted in the different national systems and different types of promotion vary substantially and cannot be compared, since often there is a lack of information. Nevertheless, the differences between costs of US-American and European movie film production are evident. In 1994 the average budget of a US production may have been some US \$11.64 Mio. according to Screen Digest. This is an increase of 21% with regard to 1993. In comparison, the budget of a European movie film was only US \$2.8 Mio. in 1994.

The average negative costs of the US-majors (MGM, MCA-Universal, Columbia, 20th Century Fox, Paramount, Warner Bros. and Walt Disney) increased considerably: from US \$9.4 Mio in 1980 to 28.9 Mio. in 1992 and to US \$53.4 Mio. in 1997.¹ Independent producers suffered from economic difficulties in the early 1990s by reason of high costs and only few economic successes. Whether in the US or in Europe, only 20% of the movie production is economically viable. The production per day was, on average, some 1 to 5 minutes. Productions for broadcasting channels are considerably cheaper. In the US the average price range was from US \$3 Mio. to 10 Mio. Per day some 8 to 15 minutes may be produced.

Films Available for Broadcasting

There may be some 250,000 films world-wide, including productions for the television broadcasting.² The world-wide rights in movie films can only be estimated.³ Of these films the MGM production before 1987 and RKO, Warner, until 1947 belonged to Turner, the Universal production, the Paramount production until 1947 belongs to MCA/Universal, the Columbia/Tri Star production belongs to Sony, the 20th Century Fox production belongs to News Corp., the United Artist (UA) Production and the MGM/UA production belongs to MGM/UA, the Warner production from 1948 onwards belongs to Warner Bros., the Paramount production from 1948 onwards belongs to Paramount and the Orion production to Orion. It may be estimated that the European countries have rights in movie films produced since 1929 of some 25,000.

Rights in movie films are, in general, bought in blocks. This rationalises the negotiations and permits broadcasters sufficient flexibility for their programming activities. Many European public and larger private broadcasting organisations have acquired large stocks of rights in movie films, in particular of US-American origin.

Establishment of Joint Affiliates for Distribution

In the recent years European producers and distributors in the film and broadcasting sectors have created joint subsidiaries in order to market their products. The establishment of joint subsidiaries allows synergetic effects and can permit smaller European companies an improved position in the market.

Constraints of Production

Since only 20% to 30% of films are successful in economic terms, producers encounter considerable risks. This risk may even increase with an augmentation of the production.⁴ The economic returns from a successful production thus have to reimburse the producer with regard to financial losses deriving from flop productions. Accordingly, the producer can avoid risks if his capacities are large enough to produce enough films so that the likeliness of the success of few of his films will balance the losses incurred from the failures. This means, first, that only larger production companies will be able to produce expensive films. Second, these larger production companies will attempt to commercialise also the failures, and for this reason they will make available licences for the right to broadcast successful films only in blocks together with licences concerning less successful productions. Third, producers will attempt to limit licences temporarily, because they have an interest to control the scope of exploitation. Fourth, since successful producers, in order to achieve an output guaranteeing success, need an adequate business organisation, they will be able to organise also the distribution of the production, in general through affiliate companies. Smaller producers will attempt to minimise their risks through the sale of rights before the production actually begins. Broadcasters or distributors who purchase these rights and who are, accordingly, involved in the production, may thus influence the production process.

¹ MPAA, US Economic Review 1998, see <http://www.mpaa.org>

² See the International Filminindex.

³ See for example Paul Kagan Associates, Motion Picture Investor of 31 August 1990 at 8.

⁴ Graham Wilde: 'Der Markt für Fernsehprogramme in Westeuropa 1990 bis 2000', Media Perspektiven 2/1992 at 108.

The prices for productions which are broadcast at prime time (between 18.00 and 22.00) and at other times may differ between 1 and 10. Output deals constitute a business relation between a producer and a broadcaster or distributor of a certain duration. By these agreements the producer undertakes to purchase the producer's films (output) at a certain price which is determined in the agreement. In fact, output deals constitute a form of outsourcing, because the broadcaster can determine the content of the production and adapt it to the needs of his program. On the other hand the producer avoids economic risks, because he does not have to bother about the marketing of his films. German broadcasters such as ARD concluded output deals with US producers, for example Walt Disney, which undertook to supply the ARD annually with some 25 to 30 films. However, long term output deals with a duration of up to ten or more years contain risks deriving from the insecurity of the development of prices.

1.2. AUDIOVISUAL PRODUCTION IN EUROPE

Whereas in 1997 some 1.8 million persons worked in the European audiovisual industry, this figure may increase to 4 million by 2005. Due to economies of scale and the large domestic market, the US audiovisual industry is more competitive than the European industry. Taking into account the weaknesses of the European content producing audiovisual industry, namely:

- the fragmentation into national markets which means that producers are too small to compete on the European and world markets,
- a low rate of cross-border programme distribution and circulation,
- a spiralling and chronic deficit,
- the inability to attract the financial resources for recovery,

the European Union's objectives pursued by its audiovisual policy is twofold:

- first, to establish and ensure the functioning of a true European space for audiovisual services, and,
- second, to contribute to developing a strong, forward-looking programme industry which can compete on world markets and help European culture to flourish and create jobs in Europe.

However, taking into account that the EU Commission's annual budget for the MEDIA II programme is equivalent to the marketing costs of an average US film,⁵ some US\$ 50 Mio., it becomes evident that the effectiveness of the Commission's measures will be limited. The statistics of movie film production shows that the number of productions decreased in the early 1990s, due to the rising costs of film production.

Movie Film Production in European States and the USA

YEAR	France	Greece	Italy	UK	USA
1970	198		240	n.r.	509
1982	164		114	n.r.	330
1990	146		119	55	422
1992	155	14	127	48	425
1993	152	18	106	60	440
1994	115	17	95	70	420
1997	130	24	110	128	389 (1995)

n.r. = no record

Broadcasting of Films in Europe

According to the statistics of the European Audiovisual Observatory⁶ most of the films which were contained in the programs of the European broadcasting organisations originated from the US. In 1996 the estimated spending on television programming in European countries was, in million US\$:⁷ France 2,946; Germany 5,432; Great Britain 4,139; Greece 195; Italy 2,257. Of the whole Western European programming the Greek share amounted to 1%, equivalent to the Danish, Norwegian, Belgian, Portuguese or Finnish share. Overall the German share was 29%, the British 22%, the French 15% and the Italian 12%.

The average price of television series was in 1997, in US\$, in France between 20,000 and 80,000, in Germany between 20,000 and 50,000, in Great Britain between 60,000 and 150,000, in Greece between 3,000 and 5,000 and in Italy some 25,000. Telefilms of a duration of 75 to 90 minutes cost in US\$ in France 40,000 to 150,000; in Germany 75,000 to 250,000, in Great Britain between 50,000 and 120,000 and in Greece between 1,000 and 7,000. In 1996 European broadcasters bought audiovisual productions from AFMA⁸/MPAA⁹ members (in

⁵ According to the MPAA statistics for 1998 the average marketing costs of a feature film was US\$ 50.6, see <http://www.mpa.org>

⁶ European Audiovisual Observatory: Statistical Yearbook 1998, at 107.

⁷ European Audiovisual Observatory: Statistical Yearbook 1998, at 193.

⁸ American Film Marketing Association, members are important independent film producing companies.

millions US\$) Great Britain and Ireland 74/500; France and Belgium: 53/203; Germany and Austria: 113/873; Italy: 84/n.r.

Average Price of TV Programmes in 1997¹⁰ (US\$)

	Series/Serials	TV Movies	Animation	Documentaries
France	20, – 80,000	40,-150,000	4,-15,000	5,-120,000
Germany	20,-50,000	75,-250,000	10,-70,000	25,-35,000
Great Britain	60,-150,000	50,-120,000	7,5-25,000	20,-60,000
Greece	3,-5,000	1,-7,000	0.8-1,500	1,5-2,000
Italy	25,000	50,-150,000	5,-15,000	14,000
Spain	5,-25,000	30,-80,000	2,5-15,000	1,5-8,000

Broadcasters in Greece and their Market Share¹¹

	1993	1994	1995	1996	1997
ET1	8.1	5.9	4.6	4.8	4.1
ET2	5.3	4.2	3.3	3.5	3.6
Megachannel	33.6	26.4	25.8	22.9	22.5
Antenna 1	30.9	27.3	25.7	22.9	22.5
Star	-	5	12.5	14.4	15.4
Skai	-	12.2	10.9	13.7	16.4
SATELLITE CHANNELS	1.4	1.2	1	0.8	0.6
Video	-	-	1.8	2.1	1.9
Others	17.9	17.7	14.4	14.4	14.8

Money Spent on TV-Programming¹² (US\$ Mio.) Purchase of Programmes/Expenses for Programmes

	1991	1992	1993	1994	1995	1996
Belgium	45/183	54/223	46/189	52/216	57/243	52/227
Greece	55/171	61/182	49/140	62/191	67/196	68/195
Netherl.	35/354	41/413	40/403	41/413	48/479	44/437
Sweden	28/326	38/392	33/390	41/444	46/511	54/579

Development of Interactive Media

In 1996 European consumers spent US\$ 3.5 million on interactive entertainment software.¹³ The market grew by 58% during in 1998. It is expected that the market will grow significantly in the next years. In 1996 it exceeded the market of video rental and achieved 82% of the size of the cinema box office. Characteristic of the market was the rise of the sales of CD-ROMs which amounted to 5% of retail spending in 1993 but increased to 67% in 1996. In Europe more than 55 million interactive CDs were sold, some 75% of which constituted CD-ROMs.

The DVD, digital versatile disc, has had a considerable success. In the US it is the fastest growing new format in history, exceeding all industry expectations of growth. It is expected that the titles available will increase to 4,500 by the end of 1999, from 2,100 titles in 1998 and 600 in 1997.¹⁴ In the US the number of households using the Internet was some 31 Mio. in 1998 whereas one year before, the number was only 21 Mio. and in 1996 some 15 Mio. In this state the number of Internet Web Sites increased from 1.27 Mio. in 1997 to 4.06 Mio. in 1998. However, due to technical constraints audiovisual products can only with difficulty be transmitted online. The data flow which moving images require is so considerable that the online communication of

The Legal Basis for the Community's Audiovisual Policy

The legal basis for the Community's audiovisual policy is found in those provisions of the EU Treaty which relate to the principles of the freedoms of movement of workers and of establishment, to the freedom of

⁹ Motion Picture Association of America, members are the large US studios such as Columbia TriStar, Fox, MCA/Universal, MGM, Paramount, Turner, Warner, Walt Disney.

¹⁰ European Audiovisual Observatory: Statistical Yearbook 1998, at 205.

¹¹ European Audiovisual Observatory: Statistical Yearbook 1998, at 314.

¹² European Audiovisual Observatory: Statistical Yearbook 1998, at 193.

¹³ European Audiovisual Observatory: Statistical Yearbook 1998, at 124.

¹⁴ MPAA, 1998 US Economic Review, see <http://www.mpa.org>

movement of goods and the freedom to provide services, but also in the provisions concerning competition, professional training, culture and the common commercial policy. Also the derived law contained in the Directive 'Television without frontiers'¹⁵ contains essential elements of the Community's audiovisual policy.

Growth, Competitiveness and Employment

With regard to the essentially economic tasks of the European Community, its audiovisual policy is essentially based on economic factors. Already in its White Paper 'Growth, Competitiveness, Employment - The Challenges and Ways Forward into the 21st Century' of 1993 the European Commission established the following facts: The economic importance of the audiovisual sector of the economy is underestimated. The technological and regulatory transformation of the audiovisual economy will affect its future growth and development. The European market has a growth rate of 6% annually in real terms. The US benefited most from growth in Europe increasing sales of programming in Europe from US\$ 330 Mio. in 1984 to US\$ 3.6 billion in 1992. By the end of this century the demand for audiovisual products will double in Europe, expenditure on both audiovisual hardware and software growing from ECU 23 to ECU 45 billion. Such growth will accelerate under the impact of new transmission technologies which will multiply and diversify the vectors for distribution (satellite TV, pay-per-view, video on demand, interactive TV. etc.). The number of TV channels is expected to increase from the present 117 to 500 by the year 2000 with an increase of TV broadcast hours from 650,000 to 3,250,000 over the same period. Moreover, encrypted programming hours are predicted to increase by a factor of 30, which implies fundamentally different (and greater) revenue flows. It has been estimated that at least 1.8 million people are earning their living in the EC audiovisual services. In line with the increased growth predicted for the sector, on the condition that the growth is translated into jobs in Europe and not into financial transfers from Europe to other parts of the world, job creation could be of the order of two million by the year 2,000, if current conditions prevail. Furthermore, bearing in mind that, if proper resources are deployed, there is a clear potential for an increase in our share of the market, it is not unrealistic to estimate that the audiovisual services sector could provide jobs, directly or indirectly, to four million people.

1.3. AUDIOVISUAL PRODUCTION IN THE US

In the US audiovisual production is basically made by the large studios which are organised in the Motion Picture Association of America ('MPAA')¹⁶ and the American Film Marketing Association ('AFMA').¹⁷

Developments of the US Audiovisual Market

In the USA the values created by the entertainment industry exceed the value of the motor car manufacturing industry. The film industry and the related industries in the entertainment sector of the economy play an important role for the economic success of the US in the post-war era. The European countries are significant importers of US films and audiovisual products. Some 50% of the films broadcast by the German ARD broadcasting organisation originate from the US. A main reason for the success of US films in the television lies in the preference of spectators for US productions.

Television Movies

Television movies were the subject-matter of roughly 25% of the broadcasting licences purchased from US producers by the German public broadcasting organisation ARD in 1992. There is an increasing tendency towards purchase of rights in television movies, because licences are cheaper than those for movie films. The production costs of US television movies are considerably lower than those of Hollywood movie film productions. The purchase but also the programming of television movies in the European countries is easier. First, television movies may directly be purchased without the regard of rights of film distributors. Second, the purchasing broadcaster does not have to observe restrictions according to which the broadcasting of movie films is allowed only after a certain time has passed after the first showing of the movie films in movie theatres. The convergence of the techniques approximated the production of movie films and television films. Coproductions between movie film producers and broadcasting organisations are common. Also the costs of US television films may exceed the costs of many European movie films.

In the late 1980s some 80% of television series were US productions. This figure is lower now, due to the efforts of many national industries to supply their spectators with own productions. In 1993 the cost price of a US series was between US \$0.8 and \$1.7 mio.¹⁸ The average price of a unit (48 minutes) of a series doubled from US

¹⁵ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, 'Television without frontiers', EU O.J. 1997 L 202/60 (consolidated version: <http://europa.eu.int/en/comm/dg10/avpolicy/twf/tvconse.htm>).

¹⁶ See Internet home page: <http://www.mpa.org/>

¹⁷ See Internet home page: <http://www.afma.com/>

¹⁸ Television Business International, November/December 1993.

\$10,000 in the mid 1980 to some US \$20,000 in the early 1990s, but prices may also achieve peaks of more than \$100,000.

MPAA 1998 US Economic Review:

The Motion Picture Association of America, the members of which are the large US studios, published the following figures for 1998.¹⁹ The figures indicating the change in percentage relate to the result of the last year) box office gross (billions): \$6,949 = + 9.2%; admissions (millions): 1,480 = + 6.7%; admission prices (millions): 4.69 = + 2.4%; high grossing (film rentals) features: 69 (\$ 10 million or more), 37 (\$20 million or more); employment in US motion picture industry: total: 564,800, production and services: 240,200; theatres: 133,500; video tape rental: 171,900; other: 19,200; releases of all companies: 509; releases of MPAA-members: 235; US screens: 34,181 = + 8%; MPAA average negative costs: US \$52.7 Mio. = - 1.4%; MPAA average marketing costs: US \$25.3 Mio. (US \$ 22.1 Mio. for advertising and US \$ 3.2 Mio for print); advertising costs spent for newspaper: 15.9%, network: 24.1%, spot tv: 18.2%, trailers: 4.7%, other: 37.1%; VCR households: 84.1 Mio. = + 4.7%; US TV households: 99.4 Mio; sales of home video cassettes to US dealers: 709.8 Mio. = +5.4 %; sales of blank cassettes to US consumers: 420 Mio. = + 5.5%; DVD titles available 1997: 600, 1998: 2,100, 1999: 4,500; US basic cable households: 67 Mio. = + 1.6%; addressable households: 33.2 Mio. = + 6.4%; US pay cable subscribers: 41.5 Mio. = + 17.4%; US computer households 1997: 44.0 Mio. 1998: 51.2 Mio.; number of US homes using the Internet 1997: 21.8 Mio., 1998: 31.7 Mio.; number of web sites 1997: 1.27 Mio., 1998: 4.06 Mio.

1.4. THE ROLE OF BANKS AND INSURERS

Banks and insurances play an important role in film financing. Whereas banks generally act as intermediaries of investors, insurances provide the necessary security for the investor or producer.

1.4.1. FILM FINANCING BY BANKS

On the European level the following banks are particularly active in the film financing sector: in England the British & Commonwealth Merchant Bank Plc., London, in France the Banque Worms, Paris, in Germany the Bayerische Hypobank, Munich, in Italy the Banca Nazionale del Lavoro, and in the Netherlands Pierson, Heldring & Pierson.

LOAN AGREEMENT: A COMPARATIVE EU/USA APPROACH

National laws may contain special regulations concerning loans for audiovisual products. The possibility to obtain loans on a national basis in the European market differs from country to country. Whereas the system of the grant of public loans is decentralised in Germany according to the federal structure of this country, the system of loans may be organised coherently according to the public granting schemes of other countries. The French Cinematographic Industry Code ('CIC') requires in Article 33 the registration at the public registry of audiovisual and cinema of all rights and receipts of assignment and pledges in order for these contractual transactions to be enforceable against third parties. Article 36 of the CIC grants to any creditor a direct right of payment of its debt on any receipts which are payable by a third party with respect to a given picture of the debtor. The financing of the film industry is made by specialised banks or specialised institutions, for example in France by COFICINE, UFCA or COFILOISIRS. The loans given by banks may be guaranteed in France up to a limit of 70% by the Institut pour le Financement du Cinéma et des Industries Culturelles ('IFCIC').

The US-Approach: Studio- and Other Financing

Financing of films in the US is mainly provided by the majors and by other sources.²⁰ In 1994 the theatrical exploitation of films earned only 40 to 50% of the income from films of the majors. The secondary exploitation of films thus is considerable. Whereas the average production costs of a film of the majors was more than US\$ 50 millions in 1995, the costs for advertising and print only amounted to US\$ 17 million per film. The increasing demand for audiovisual 'content' which is, partially, caused by new media, increases the importance of the large film and television libraries which are operated by the majors and larger entertainment companies. The vertical integration of the media business which means the convergence of the telecommunications, broadcasting and audiovisual production industries makes it more and more difficult for an individual film producer to generate the funding for his project. Elements of success are a successful literary work, an established talent or a director and support by a major studio. There is no public funding of films in the US and there are no tax reductions for films. According to the statistics of the MPAA, the Motion Picture Association of America, which represents the

¹⁹ See the <http://www.mpa.org/useconomicreview/1998/index.htm>

²⁰ See, for example, David H. HOROWITZ and Peter J. DAVEY: 'Financing American Films at Home and Abroad', Columbia VLA Journal of Law & the Arts, vol. 20 No. 3, Spring 1996, 461-493.

interests of the major studios,²¹ the films released by its members accounted for 99% of the income from theatrical exploitation in the US in 1995.

In the US a film producer has the choice between attempting to finance his project by a studio or otherwise. In the first case, he will be employed for hire and lose the artistic control over the film. According to the production-distribution agreement which is concluded between the studio and the producer, the producer will obtain a share in the net-profits. However, the studios may be able to deduce so many positions from their income that the net-profits are likely to be negative. Since top artists and directors may be able to contract a share in the gross profits, the net-profits are likely to decrease even more. In *Buchwald v. Paramount Pictures*²² the plaintiff attempted to challenge the 'net profits' formula, however, the result of the calculation is still very difficult to foresee so that the producer fee should be a decisive element in the producer's negotiations with a studio.

In the case of the non-studio financing of a film, the producer has to obtain the funding from equity investors and pre-sales. Equity investors may be broadcasters or independent film companies. If the producer cannot obtain sufficient funding, he may resort to pre-sales, often to such a high degree that it will be difficult for him to obtain a profit if the film is successful. Bank financing may be available through the guarantees achieved by means of pre-sales. Negative pick-ups means the agreement with a US distributor according to which the distributor will advance the costs of prints and advertising. Negative pick-ups may be concluded in different forms, according to the interests of the distributor who may be willing to finance a substantial part of the production costs, in particular of the story, the actors or the director appear to guaranty success. Also pre-sales are essential for independent film financing. The pre-sales of rights may concern the theatrical exploitation in different territories or secondary exploitation, for example home video rights, pay television rights or broadcast television rights.

Bank loans are available to studios but also to individual film producers, for example if the bank has been supplied with a completion bond from a company which guarantees the production of the film at the envisaged budget. However, the bank may deduce interests and an additional sum for risks involved. Thus non-studio financing of films in the US is not very easy.

The Cycle of Exploitation of a Film

Typically, the period during which a successful film will generate an income from exploitation will last some five years. This concerns particularly the theatrical exploitation and the exploitation by video. The exploitation by broadcasting may extend beyond five years if the film is re-broadcast. The increase of the number of broadcasters led to an increase in the demand for films including re-broadcasts. However, taking into account that, different from the US studios, European producers generally cannot offer 'film libraries' to broadcasters, the exploitation of films by re-broadcasting in Europe is more cumbersome than by purchasing stock from a film library of a US studio.

Coordination of Financing

The role of banks in the financing of a film project in Europe typically involves the coordination of different sources:

- First, the bank coordinates the investments made by private financiers, it cooperates with accountants and tax consultants in order to assure the advantages of tax benefits for private investment.
- Second, the bank coordinates income generated by pre-sales and guarantees which are contracted from distributors, broadcasters and other sources of exploitation.
- Third, the bank coordinates the own financing by the producer and the deferred payments to artists.
- Fourth, the bank coordinates financing under public programs supporting film production such as MEDIA II or national subsidies.

Financing of Films in the Market

Typical sources of the financing of a film are:

Pre-Sales

Pre-sales and guarantees by the distributor, broadcaster and other sources of exploitation are a primary source for the financing of a film. Since exploitation rights are essentially based on copyright the traditional concept of pre-sales relates to territories. Thus the producer will agree on pre-sales with different partners, depending on the territorial markets to which the rights relate. The bank may coordinate the contractual arrangements, examine the creditworthiness of the contractual partners and assist in the assessment of the capability of the contractual partners to perform the contractual obligations.

²¹ See <http://www.mpa.org.mpa.html>

²² US: *Buchwald v. Paramount Pictures*, 13 U.S.P.Q. 2d (BNA) 1497 (L.A. County Super. Ct. 1990).

Basic Exploitation Rights

Distributors are generally granted exclusivity for the territory within which they may exploit the film in movie theatres. But they may also purchase comprehensive exploitation rights including broadcasting and video rights. In return, they are obligated to make payments in instalments, often 20% of the budget or assessed exploitation value at the signing of the deal memo, the remaining instalments at the time of the conclusion of the contract and depending upon the income generated from the exploitation. A certain amount ('guarantees') will be paid in the form of instalments, additional payments depending upon the amount of the income. If the distributor has not been granted the broadcasting, such pre-sales may also be obtained from free-tv broadcasters or pay-tv broadcasters with regard to the times when a film may be used for broadcasting. Also the video rights may be pre-sold independently of the other rights.

Theatrical Exploitation

As basic exploitation rights are generally referred to the theatrical and the non-theatrical exploitation rights. Theatrical rights are those relating to the exploitation of the film in cinemas for public viewing on a regularly scheduled basis against the payment of entry charges.

Video Exploitation

Video exploitation of a film embodied on a videogram is generally separated between home video and commercial video exploitation. Whereas the

- 'home video exploitation' is sub-divided between
 - the sale of the film embodied in a videogram to end users for non-public viewing, and
 - the home video rental which means the exploitation through the rental of the videograms for non-public viewing at a private living place without charges; the
 - 'commercial video exploitation' refers to the exploitation of the film embodied in a videogram in linear form by organisations such as governmental or educational institutions, restaurants, clubs, and on ships, aeroplanes or in hotels, hospitals and prisons.

Television Exploitation

Exploitation of a film by broadcasting may be categorised as

- free tv, which means exploitation through channels which are freely accessible whether in terrestrial, satellite or cable distribution whether against the payment of a public charge or not;
- pay tv, which means exploitation through channels which are accessible against the payment of a subscription fee, whether in terrestrial, satellite or cable distribution.

Electronic Exploitation

Due to the technological development the new types of exploitation have not yet developed their independent market. Electronic exploitation is generally differentiated between offline and online exploitation.

- digital offline exploitation refers to uses by technologies on digital versatile discs (DVD) or compact discs interactive (CDi) or 'interactive multimedia' may fall within video exploitation rights, provided that the type of the carrier and the equipment for viewing does not matter;
- digital online exploitation New types of online exploitation cannot be considered as falling within the right of the exploitation by television, because the reception is not made by a multitude of persons simultaneously. New types of electronic exploitation are:
 - webcasting exploitation which means the right to communicate the film over the Internet to subscribers,
 - on demand exploitation which means the right to communicate the film via encoded signals to home tv sets when the viewer pays for each individual communication on his demand,
 - interactive multimedia exploitation which means the right to communicate the film online to a computer device where the film can be stored and viewed.

Secondary Exploitation Rights

Apart from the sale of traditional exploitation rights, the producer may obtain financing from the sale of 'secondary' rights.

Artistic Formats

Secondary exploitation rights may relate to the exploitation of the soundtrack of the film or to the sale of exploitation rights in different artistic formats such as a novel, a play or a musical.

Merchandising Rights

The producer may sell the merchandising rights in the film. He may use the title of the film and, depending on the agreements with the artists and authors of the script or screenplay, also the names of the persons and characters, their likenesses, or photographs for different types of exploitation which do not relate to the theatrical

and non-theatrical exploitation of the film itself, but to tangible goods. Accordingly, he may sell the right to use the title of the film and photographs for exploitation on merchandising goods such as posters, t-shirts or toys. However, the value of merchandising rights may be difficult to assess before the exploitation of a film, unless the film has a particularly high budget including considerable expenses for advertising. A merchandiser should attempt to obtain exclusive rights. If his rights are non-exclusive, he may have difficulties to stop infringers from violating his rights and to obtain damages without joining the original right holder to the litigation; this is, because a non-exclusive licensee must count with competition by other users of the merchandising rights.²³

Private Financiers

Another source for the financing of a film may be private financiers. Such investments instead of being directly agreed upon with the producer may be coordinated by banks. Private investment may be of interest for a variety of reasons. It may be made as a risk capital, taking into account that only a minority of films will enter the profit making margin. It may also be made in order to benefit from tax advantages.

Profit Sharing

Apart from private financiers the exploitation contracts may contain profit sharing agreements with major actors or authors. By reason of profit sharing the producer avoids the payment of the often considerable sums due to major actors who may be willing to accept a share of profits - if any. Such profit sharing may relate to the gross income or net income from the film. Also residuals may be payable to film authors on the basis of contractual obligations, skeleton agreements of the unions, basic terms of authors' guilds or national laws.

Banks' Tasks

Banks coordinate the financing of film projects. Preliminary to any involvement a bank will need a comprehensive documentation concerning the project, including the screenplay, budget, time schedules, the plan for financing, and information about the parties and companies concerned, guarantees and exploitation rights, insurance and completion bond, private investment and public funding. The credit given by the bank will generally amount to 70% of the guarantees or letters of credit.

The bank's fees will depend upon the amount of the credit, up to 2% of the sum. Banks charge interests on the credit which depends on market conditions. Generally, a bank will require that it is the beneficiary of insurances concerning production, that the conclusion of contracts concerning exploitation may be subject to the bank's approval and that it has a preferential position concerning rights of use and exploitation rights. If the bank does not coordinate the financing of the whole project, it will demand the right of inspection concerning the other agreements relating to the financing of the film. A bank will insist that all agreements relating to the financing and exploitation of the film including the completion bond insurance result in a coherent concept.

1.4.2. FILM INSURANCE

The film insurance business relates to different types of risks. The producer may purchase the coverage either in his own interest or in the interest of an investor.

Completion Bonds

By means of the issuing of completion bonds the insurance guarantees the completion of the project, generally a cinema or television film. If the production costs exceed the budget, the insurance will provide the financing up to the guaranteed sum. Generally, an insurance will issue a completion bond only if the financing of the project is secured, if a comprehensive insurance policy has been provided and if the producer accepts the conditions of the completion bond. These conditions will generally subject the producer to a control of the production and financing of the project. With a completion guarantee the insurance guarantees to investors, beneficiaries of financial institutions involved in the funding of an independent production that the film will be completed for its budgeted costs in accordance with everybody's rights.

Some Typical Risks Insured

Insurances relating to films may cover a variety of risks. Depending upon the individual project, the conclusion of an insurance contract may be recommendable. Some of the risks relating to the film business which can be insured are:²⁴

Pre-production Cast Insurance

By concluding an insurance concerning the pre-production cast the producer insures the risks deriving from the impossibility of performance relating to specific major actors. This may be done when firm monetary

²³ Germany: Court of Appeal of Cologne of 26 March 1999, 'MICHAEL JACKSON', Entertainment Law Review 1999 (not yet published).

²⁴ A. Huber & Co, Internationale Assekuranz-Makler GmbH, Schwanthalerstr. 9-11, D-80336 Munich.

commitments are involved which might have to be written off if the project were abandoned or seriously delayed. Generally, the actor must pass a complete physical test which the producer will have to pay.

Cast Insurance

By means of a cast insurance the producer will insure the risk deriving from extra expenses resulting from the inability of the scheduled artist to perform whether due to accident or sickness, subject to certain exclusions regarding hazardous activities, stunts and flying on a non-commercial basis. The actors and artists will have to pass a medical test prior to the beginning of principal photography which is generally paid by the producer. The coverage attaches normally four weeks prior to the beginning of the principal photography.

Props, Sets & Wardrobe

This insurance covers the producer's own property and the property of others for which the producer is liable by law against all risks of direct physical loss or damage to props, sets, scenery, costume, wardrobe and similar property. It does not include mysterious disappearance and damage caused intentionally or at the direction of the insured.

Extra Expense

The insurance will re-imburse out-of-pocket expenses incurred as a result of interruption, postponement or cancellation of the production directly resulting from damage to facilities, or property which were intended for use in production, for example the damage caused by fire to a location site.

Third Party Property Damage

The insurance will pay for damages to the property of others while it is in the care, custody or control of the production company. Also included is the loss of use, for example the rental charges for a car while the leased car is being repaired. Not covered are damages caused with intent or at the direction of the insured.

Miscellaneous Equipment

The coverage insures cameras, sound and lighting equipment on the same basis as the props coverage, subject to certain exclusions, for example certain mechanical breakdown. It also includes collision and comprehensive coverage on production vehicles subject to certain deductibles.

Negative Film

The insurance will re-imburse the production company for any additional out-of-pocket costs which are incurred in reshooting only the portion which is unacceptable as a result of damage to negative film, video tape, sound tracks, work prints and tapes. It does not include loss caused by faulty processing, faulty camera or faulty stock.

Faulty Stock

The insurance will re-imburse the production company for any additional out-of-pocket costs which are incurred in reshooting only the portion which is unacceptable as a result of damage to negative film, video tape, sound tracks, work prints and tapes caused by faulty raw stock, faulty camera or lenses, or faulty processing by the lab.

Errors & Omissions (Producer's Liability)

The coverage is generally required by a distributor prior to the release of any theatrical or television production. It covers legal liability and defence for the production company against lawsuits alleging unauthorised use of titles, formats, ideas, characters, plots, plagiarism, unfair competition, libel, slander, defamation of character and invasion of privacy.

Workers' Compensation

This insurance is likely to be required by national labour laws. It covers the payments made to an employee who is injured in the course of his employment, including payments for medical treatment, disability benefits or death benefits.

Foreign Workers' Compensation

This coverage may have to be purchased if the production is made abroad. The coverage may depend on the national labour laws of the foreign country.

Commercial General Liability

This coverage protects the producer against claims of bodily injury and/or property damage in connection with the shooting of the film on public streets or on filming sites which may require filming permits. Third party claims involving the use of vehicles are processed under the automobile portion of the policy.

Foreign General & Automobile Liability

The coverage protects against the risks covered by the Commercial General Liability if the production is made abroad.

[Umbrella Liability](#)

This is a general liability coverage for filming. In the US the minimum coverage is US\$ 1 million for a combined single limit. If the use of harbours or airports is involved, it may be recommendable to buy up to US\$ 5 to 10 millions.

[Non-Owned Aircraft Liability](#)

This coverage protects in the case where an aircraft or helicopter is rented, leased or borrowed for use to be shown in the film. The risk insured may include physical damage caused to the aircraft itself (hull coverage).

[Protection & Indemnity](#)

The coverage concerns risks relating to the rental or hiring of watercraft.

[Political Risk & War Risk](#)

This coverage may be purchased if the filming takes place in unpredictable political environments.

[Weather Insurance](#)

The coverage relates to weather conditions, and it compensates for costs arising from delays caused by weather conditions which prevent filming.

[Railroad Protective Liability](#)

This coverage protects the producer in the case of third party liability and physical damage to the railroad and to railroad personnel.

[General Conditions for Film Insurance](#)

German Insurers have established Basic Terms and Conditions for Film Insurances ('BVB').²⁵ These terms regulate *inter alia* the following issues:

[Disclosure](#)

The insured has to inform the insurer of any circumstances which are relevant for the acceptance of the risk. After the making of an application for the insurance the insured may not accept an increase of the risk. He has to inform the insurance of any increase of the risk.

[Premium and Duration of Risk Under Policy](#)

The premium is payable after the policy has been handed over to the insured. Any additional annual rates of premiums may be payable at the beginning of each year after the conclusion of the contract. The risk attaches at the time agreed upon by the parties, even if the insured is asked to pay the premium, or if the premium is paid, after this time. If the insured knows at the making of the application for the insurance that a loss has occurred, the insurance will not be liable for the related payments. The liability of the insurance terminates at the time agreed upon by the parties. Insurance contracts with a minimum duration of one year are extended for another year unless they are terminated by notice at least three months before the expiration. If the insurance contract terminates before the expiration of the contract or if it is resiliated or cancelled the insurer may claim a premium in application of the provisions of the German Act concerning Insurance Contracts ('Versicherungsvertragsgesetz'). In the case of a cancellation the insurer may claim a reasonable fee. If the insured terminates the insurance contract after a loss has occurred the insurer may claim the premium for the actual year. If the insurer terminates the contract, he has to repay the premium for the actual year. This repayment has to be made at an amount taking into account the period until the end of the year in relation to the period of the whole year insured.

[Duties of the Insured](#)

In the case of a loss the insured has the duty to inform the insurance immediately in writing. He must attempt to prevent or minimise the damage and to obey any orders of the insurance. Depending upon the circumstances he has to obtain such orders. On demand of the insurance and if reasonable, the insured has to permit any examinations by the insurance concerning the reason and the amount of the damage, and he has to supply any information in writing and provide any necessary documents. He may not change any conditions at the place where the damage occurred before the insurer has visited the place. However, he may take such measures necessary for reasons of safety or the maintenance of the operations or measures which are necessary for the

²⁵ Deutsche Filmversicherungs-Gemeinschaft DFG Basis-Versicherungsbedingungen für die Film- und Veranstaltungs-Versicherungen (BVB 1997), Geschäftsstelle: Trostbrücke 1, D-20457 Hamburg.

minimising of damages or if the insurance has agreed to such measures or if he has not visited the place within a period of five days after the receipt of the first notice of the loss. In such a case the insured has to keep the damaged parts until the insurance has verified the damage. In the case of a violation of these duties the insurance will be released from his obligations of performance.

Experts

After a loss has occurred the insured and the insurance may agree that the amount of the damage shall be established by an expert. This procedure may also be extended by agreement to any factual conditions of the claim of the insured against the insurance and the amount of the claim. The insured may demand such a procedure by unilateral act. In the case of a consultation of experts each party has to name its expert in writing and may demand that the other party names its expert. If the other party does not name an expert within a fortnight, the first party may ask the territorially competent court to name an expert, provided that it has informed the other party that it will take this measure. Both experts have to name a third expert as a chairman. If they cannot agree, the territorially competent court may name the third chairman. The insurance may not name an expert who is an employee or an employee of a competitor or who is in a permanent business relation with the insurance or a competitor. This rule is also applicable to the selection of the chairman.

The verifications made by the expert must relate to the scope of the damage, in the case of personal injuries to the medical impairment, and, insofar as necessary for the relevant indemnity, to the expenditures required for the repair or the recovery, the insurable interest of the damaged, destroyed or lacking item, the expenditures required in the case of a discontinuance, partial losses and other costs.

The experts have to supply both parties with a copy of their verifications. If the verifications diverge from each other, the insurance has to transmit them to the chairman. The chairman will re-examine the verifications within the scope of facts established by the experts and transmit his decision to both parties. Each party bears the costs of his own expert, the costs of the chairman are shared. The verifications of the experts or the chairman are binding, unless it is proved that they deviate from true facts.

Payment of Indemnity

If the damage shall be payable within a fortnight after the duty of the insurance to make payments has been established with regard to the reason and the amount. After payment becomes due, the insurance has to pay interests, a minimum rate of 4%, a maximum rate of 6%. The insurance may delay the payment if there are doubts about the insured's right to claim the indemnity, if criminal or administrative proceedings have been instituted against the insured or his managers in relation with the loss until the termination of such proceedings. Before the claim for the indemnity is due it may only be assigned by the insured with the consent of the insurance which has to be given in the case of a reasonable ground.

Relation After Loss

The risks insured are not affected by the payment of an indemnity. After a loss has occurred the insurance or the insured may terminate the contract. The notice has to be given in writing within one month after the payment of the indemnity or if the insurance has refused to pay an indemnity. The termination becomes effective within one month after its receipt. The insured may determine that the termination becomes effective at a later date, however, latest at the end of the year insured.

General Conditions for the Insurance of Video Carriers

German Insurers have established General Conditions for the Insurance of Video Carriers ('BITODA 1997').²⁶ These terms regulate *inter alia* the following issues:

Subject-Matter Insured

Insured are video carriers during the production, as finished carriers and as carriers for display.

Risks Insured

The policy covers the risks against unforeseen damages, destruction or loss. Unforeseen are damages which the insured or his representatives did not foresee within due time or which could not have been foreseen without gross negligence by a person with the expertise required for the related professional activities. Not covered are the following risks: damages which were caused by the insured with intent or gross negligence, damage caused by war, damages caused by nuclear energy, damages caused by ordinary wear and tear, indirect damages even if they are caused by a damage relating to an insured risk such as the non-observance of a period for supply, finally, not covered are contractual penalties.

²⁶ Deutsche Filmversicherungs-Gemeinschaft DFG Bedingungen für die Versicherung von Bild-, Ton- und Datenträgern (BITODA 1997), Geschäftsstelle: Trostbrücke 1, D-20457 Hamburg.

Interest Insured

The interest referred to in the policy has to correspond with the insured value and it has to be proved. The verification of the value has to be made during the production by reference to the expenditures which are necessary for the production of the insured subject-matter. Costs for working and profits can be insured on demand.

In the case of final video carriers the value is the price necessary for the recovery of a similar subject-matter, including costs for customs, freight and transport. If the price necessary for the recovery cannot be established, the value is indicated by the sum of expenditures which are necessary for the production of the subject-matter. The value is increased by the expenditures which are necessary for the production of the final product. Costs for working and profits can be insured on demand.

In the case of copies for display the value is indicated by the price necessary for the recovery of copies of a similar quality, including costs for customs, freight and transport. If the interest insured is less than the actual insured value only this amount will be indemnified which corresponds to the relation between the interest insured to the insured value.

Calculation of Indemnity

The insurance will indemnify only the proved expenditures which are necessary for the recovery of the damaged or lost subject-matters within the scope of the interest insured, however, not exceeding the insured value. Expenditures relating to modifications or improvements which are not caused by the damage have to be borne by the insured.

Insurance Concerning Non-Performance

German Insurers have established Basic Terms and Conditions for the Insurance Concerning Non-Performance ('Ausfall 1977').²⁷ These terms regulate *inter alia* the following issues:

Subject-Matter Insured

Insured are damages caused by the discontinuance or delay of a film project as referred to in the policy.

Risks Insured

In the case of an insurance concerning personal non-performance an indemnity will be paid if one or several of the persons referred to in the policy will not be available for the execution of the project by reason of illness, accident or death, whether temporarily or permanently.

In the case of an insurance concerning material damages an indemnity will be paid if the insured project will be discontinued or delayed by reason of unforeseen damages, destruction or loss of subject-matters used for the production of the project. Unforeseen are damages which the insured or his representatives did not foresee within due time or which could not have been foreseen without gross negligence by a person with the expertise required for the related professional activities. The risks not insured are identical with those referred to above in the General Conditions for the Insurance of Video Carriers and, in the case of the insurance concerning material damages, the damages caused by ordinary wear and tear.

Interest Insured

The insurance pays the indemnity up to the sum referred to in the policy. The interest insured must correspond with the expenditures necessary for the production of the insured project and it has to be proved. If certain expenditures shall not be considered as covered by the insurance they have to be mentioned expressly by the insured. If the interest insured is lower than the actual expenditures for the production of the insured project, only this amount will be indemnified which corresponds to the relation between the interest insured to the actual expenditures for the production of the project.

Calculation of Indemnity

In the case of the discontinuance of the project the indemnity comprises the proved expenditures which have been made until the day when the damage occurred including any sums which have to be made by the insured by reason of contractual obligations. There is a discontinuance if the continuation of the project is impossible or if the costs for the continuance equal or exceed the interest insured. In the case of the delay of the insured project the insurance will indemnify the additional costs which are proved by the presentation of invoices and contracts.

²⁷ Deutsche Filmversicherungs-Gemeinschaft DFG Bedingungen für die Ausfall-Versicherung (Ausfall 1997), Geschäftsstelle: Trostbrücke 1, D-20457 Hamburg.

Expenditures relating to modifications or improvements of the insured project which are not caused by the damage have to be borne by the insured.

2. SCHEMES OF SUPPORT FOR THE AUDIOVISUAL INDUSTRY

2.1. NATIONAL SUBSIDIES

National interests and policies determine the type of support and the mechanisms used for its granting. National audiovisual policies of EU Member States sustained systems for the support of national audiovisual industries. By reason of the Community law Member States may no longer discriminate against nationals and undertakings from other Member States, and they are obligated under the EU Treaty to grant them identical benefits accruing to the national promotion of the audiovisual industry. This change was reflected in national legislations and policies, for example in Italy where the requirements of 'Italian' nationality have been extended to cover also nationals from other Member States.

2.1.1 COMMISSION DECISIONS CONCERNING NATIONAL FILM SUPPORT

In the past the Commission had the occasion to consider the compatibility of national laws promoting the audiovisual industry with the EU Treaty. The subsequent observations shall be limited to the discussion of the Commission decision concerning the Greek Law No. 1597 of 1986 and the recent decisions of 1998 concerning the French and the Dutch programmes and the decision of 1999 concerning the German support scheme.

Greek Law No. 1597 of 1986: Support of the Audiovisual Industry

The Greek Law No. 1597 of 12 May 1986 establishes support of the audiovisual industry by:

- in Article 7 concerning distribution by providing for automatic subsidies equal to the public entertainment tax on films screened in cinemas, amounting to 12% in Athens and Salonika and 8% elsewhere- Payment of the subsidies ceases when they equal production costs, on the condition that the theatres show Greek films;
- in Article 18 concerning production by selective aid in the form of participation in film productions or state financing consisting in advances granted by the Greek Cinematography Centre for the production of Greek films; participation in the production of films is of the order of 50% of the costs of the films; financing amounts to 25%. Of 25 full-length films produced in Greece in 1987, 15 were granted State financing which became non-returnable subsidies when revenue from the films did not cover production costs;
- in Article 10 concerning interest rates on bank loans or financing, irrespective of their form, for the production of Greek films may not exceed those applicable to business loans;
- in Article 8 concerning prizes and endorsements for quality accompanied by cash prizes for Greek films completed in the preceding year.

In its decision of 21 December 1988 the EU Commission held²⁸ that the automatic subsidies, the prizes for quality, the terms of the production loans or financing and the compulsory programming rule were incompatible with the (then) EEC Treaty as they were associated with a nationality condition which was discriminatory in respect of nationals of other Member States. Similarly, the Commission held that the selective film production aid provided for by Article 17 of the Law appeared to be awarded at least in practice to films meeting the definition of Greek films in the sense of the Law. Accordingly, the aid was considered discriminatory and incompatible with the common market. The Commission considered that the aids constituted a considerable proportion of the financing which a producer would otherwise have to provide and that they facilitated the production of full-length films in particular. The aids were thus liable to affect intra-Community trade in an economic sector and distorted competition within the meaning of Article 92(1) of the EEC Treaty.

The Greek measures were seen to discriminate against nationals of other Member States and did not comply with Articles 7, 48, 52 and 59 of the Treaty. When considering whether the national measure qualified as the derogation from the application of the rules of competition according to Article 92(3)(c) of the EEC Treaty the Commission observed that the aid did not simply provide a support for the Greek film industry, but that it restricted the possibilities for nationals of other Member States to work as producers or take part in the production of assisted films. The Commission indicated that Article 5 of the Greek law could only be considered compatible with the Treaty if nationals of other member States were treated in the same way as Greek nationals. Additionally, the Commission observed that the obligation to make an original version of the film in the Greek language according to Article 5(1)(b) of the Act constituted a legitimate concern to preserve a national language.

²⁸ EU O.J. No. L 208/38 of 20/07/89, see http://europa.eu.int/eur-lex/en/klif/dat/en_389D0441.html

However, in its decision the Commission indicated that it should be made possible, notably by means of dubbing techniques, for all nationals not knowing Greek to take part in the making of the film. Should this possibility not be recognised, the obligation to make a film in Greek would constitute further or hidden discrimination contrary to the EEC Treaty. Thus by amending Article 5 of the Law in question in line with these criteria, the assistance provided for in Article 7, the prizes and endorsements for quality, Article 8 of the Law and the bank loans and financing for the production of Greek films in Article 10 of the Law would be compatible with the common market. In order for aid to cinema operators to be compatible with the common market, it was considered necessary that films made by other Member States should be treated in the same way as Greek films should the Greek authorities decide to retain the system of compulsory programming. The selective aid scheme provided for by Article 17 of the Law could be based, under Community law, on cultural and artistic evaluation criteria. Entitlement to such aid, cannot be based on the condition of Article 5 of the Law which required the producer of a certain number of participants in the film to be of Greek nationality – the quantitative conditions must apply equally to Greek nationals and to nationals of other Member States. Nationality should also not constitute a criterion applied in practice to the award of aid.

British, French, Dutch and German Film Support Programmes

The schemes adopted by British Screen Finance Ltd. for the grant of aids for film production which, in their most recent version are explained below, were held not to significantly affect competition, because the sums, even if considerable for the individual producer, were relatively modest.²⁹ On 06/09/98 the Commission approved the French film support programme.³⁰ The program which concerned the national aid to film production with a value of some ECU 60 Mio. per annum, provided for benefits from an automatic grant which was applicable to any film made in France. Producers benefit from the full aid provided they spend no more than 15% of the budget abroad. Automatic assignments included a support of FRF 4.5 per cinema ticket sold, 10% of the purchase price paid by a television channel up to FRF 2 Mio. and a grant linked to the number of sold or rented videotapes. The Commission applied certain criteria which are employed to strike a balance between the aims of cultural creation and development of the audiovisual industry. The Commission deemed justified that part of the production budget be spent in the territory of the Member State which grants the aid, provided that such expenditure fosters the continued presence if not the development within that Member State of a human and technical environment required for cultural creation. Thus:

- aid intensity must be limited to 50% with an aim to stimulating commercial incentives inherent to a market economy and to avoiding a bidding contest between Member States;
- aid supplements for certain specific activities must be avoided to ensure that the aid has a 'neutral' incentive effect. This will be the case if it is as proportional as possible to the expenditure so as to grant each activity the same aid intensity,
- the producer must be free to spend 20% of the film budget in other Member States, which favours exchanges within the EU. This means that the full aid must still be available if only 80% if the budget is spent within the Member State which awards the aid. Depending on the development of the single market the Commission considered for the future to lift this 20% ceiling in the common interest.
- cultural content of the production may be ensured in some way, for example by limiting the aid to European productions, excluding non-cultural productions or promoting production by renowned producers.

On 25 November 1998 the Commission approved the aid to film production in the Netherlands³¹ and on 21 April 1999 the German film-production aid scheme.³² The aid programme of the Netherlands provided for support at an annual amount of some ECU 1.25 Mio. for the production to be granted to film production. The project constituted an integrated approach comprising a financing mechanism and tax measures containing aid elements. The tax measures were intended to promote film production in the Netherlands by attracting risk capital. The foundation which administers the money will be accessible to any private producer or investor, including those from abroad, provided that they are taxable in the Netherlands. In order to be eligible for financing, productions should have a net yield of some 15%. The foundation's role would be limited to that of a minority partner. Subsequent investments by the foundation would have to be financed exclusively out of the profits generated by previous productions. The Commission considered the aid as compatible with Article 92(3)(d) of the EU Treaty.

The German scheme provides for an annual aid of some ECU 20 Mio. In its decision in which it approved of the scheme the Commission indicated that it would apply the criteria for approval of film-production promotion measures which it had applied in the French and Dutch measures, namely that they must not exceed a threshold

²⁹ EU Commission, EU O.J. C 1991 249/2.

³⁰ EU Commission press release IP/98/515.

³¹ Commission decision of 25/11/98, press release IP/98/1028.

³² Commission decision of 21/04/99, press release IP/99/246.

of 50% in aid intensity per film and must allow the producer the freedom to spend at least 20% of the production budget in other Member States without losing the entitlement to the full amount of the aid.

2.1.2. SUPPORT OF INTERNATIONAL COPRODUCTIONS BY EU MEMBER STATES

EU Member States have their national schemes for the support of films which correspond with national policies. Of particular interest are schemes for international cooperation within Europe. A brief reference to the UK European Coproduction Fund and the possibility to obtain funding under the Italian laws may suffice. Reference will be made to the definition of the 'European' film according to the Council of Europe's European Convention on Cinematographic Coproduction.

The British European Coproduction Fund ('ECF')

The ECF³³ is a UK-based initiative to promote collaboration between British film producers and film producers from other European States. Funds are available of some US\$3.3 Mio. annually of exclusively British sources. Financing is provided in the form of commercial loans, returns on which are repaid to the ECF and serve to augment the grant. The ECF is administered by British Screen.

Eligibility

Eligible are producers ordinarily resident in the EU with companies incorporated in the EU with a co-producer in the UK who will be the applicant. Preference will be given to applicants who represent companies which are independently owned or controlled by the applicants. The film must be a coproduction involving at least two partners with no link of common ownership, one registered in the UK and at least one other registered in another EU Member State.³⁴ Eligible are feature films intended for theatrical release.³⁵ There must be evidence of commercial demand for the film in the UK and in at least one other EU market; such evidence will normally be expected to take the form of pre-sales, distribution advances, or a minimum guarantee from a sales agent against European exploitation.³⁶ The finance plan submitted must offer the ECF a realistic chance of recoupment and profits.³⁷ The ECF loan will be granted up to 30% of the film's total budget.³⁸ The film project must have a director in place.³⁹

Application

Applications must contain the completed application form, a copy of the screenplay; a one-page outline or description of the story; a copy of the budget topsheet and production schedule; biographies of all key creative personnel; a note on proposed principal casting, comprising only such names as are confirmed or genuinely achievable (no wishlist), a detailed finance plan showing the structure of the coproduction and the respective entitlements of all financing parties.⁴⁰

Criteria for Investment

Additionally which means that it is the aim to promote film production activity in the UK over and above the level which would be generated by market forces alone.⁴¹ Business prospects of the film should offer ECF a reasonable chance of a commercial return in its investments.⁴² The project should strike a balance between proven market confidence as evidenced, for example, by pre-sales, and prospective market returns from territories and media not pre-sold. Casting, subject-matter, production values and other selling points such as the size of the budget, the competence of the producer and the track-record of the director will contribute to the assessment of a project.⁴³

Origination and UK Infrastructure

Preference is given to film projects originated by British talents and initiated by British producers.⁴⁴ Preference is given to film projects which entail substantial employment of British personnel and use of UK production and post-production facilities.⁴⁵

³³ European Coproduction Fund, 14/17 Wells Mews, GB-London W1P 3FL, tel: +44-171-323 90 80; ECF Guidelines effective from September 1997.

³⁴ ECF Guidelines 2(c).

³⁵ ECF Guidelines 2(e).

³⁶ ECF Guidelines 2(f).

³⁷ ECF Guidelines 2(g).

³⁸ ECF Guidelines 2(h).

³⁹ ECF Guidelines 2(k).

⁴⁰ ECF Guidelines 3(d).

⁴¹ ECF Guidelines 4(a).

⁴² ECF Guidelines 4(b).

⁴³ See note above.

⁴⁴ ECF Guidelines 4(c).

Terms of Trade

The ECF loan does not exceed US\$800,000 and it will not represent more than 30% of the film's budget.⁴⁶ Provided that the film is bonded by a Completion Guarantee approved by British Screen, and unless otherwise agreed, the loan will be drawn down in four equal tranches, that is to say 25% on completion of all financial documentation, 25% on commencement of principal photography, 25% on completion of principal photography, 25% on delivery of the film to its international sales agent.⁴⁷ Where the film is not bonded by a Completion Guarantee approved by British Screen, and unless otherwise agreed, the full amount of the loan will be drawn down on delivery of the film to its international sales agent (subject to the retention of US\$ 16,000 pending delivery of an audited final statement of production cost).⁴⁸ The ECF must be a named beneficiary of any Completion Guarantee and an additional insured and joint loss payee on all insurance policies relating to the film.⁴⁹ The ECF requires satisfactory security for the loan in the form of a charge on the production company in respect of the ECF's entitlement to revenues from the film.⁵⁰ British screen has the right to approve the principal casting, all heads of department and the composer of the film, it has the right to approve the international sales agent together with all arrangements for distribution of the film in the UK and the US.⁵¹ The ECF has the right to visit the set, to view rushes and to attend screenings of cuts of the film, but only for purposes of consultation.⁵² British Screen has the right to monitor the progress of production of the film by regular receipt of daily progress reports, cost statements and any other information which may reasonably be required.⁵³ Finally, the ECF receives a credit on copies in the form 'Made with the participation of the European Coproduction Fund (UK)'.⁵⁴

Payment of Revenues

If the UK producer is the principal producer of the film, it is a condition of ECF funding that all net revenues (other than revenues required to finance production of the film) accruing from exploitation of the film in (i) any territory/territories controlled exclusively by the UK producer and (ii) the rest of the world outside any territories controlled exclusively by the co.-producer(s) be paid to the National Film Trustee Company which will collect and disburse these revenues on behalf of the ECF, the UK producer, co-producer(s) and any other equity shareholders and profit participants in the film.⁵⁵

If the UK producer is a minority co-producer of the film, it is a condition of ECF funding that all net revenues accruing from exploitation of the film to the financier(s) of the UK share of the coproduction be paid to the NFTC which will collect and disburse these revenues on behalf of the ECF, the UK producer and any other UK equity shareholders and profit participants in the film.⁵⁶

ECF Participation in Revenues

The 'ECF Royalty' is ECF's participation in all net revenues accruing to the financier(s) of the UK share of the coproduction by means of which ECF recovers its loans and aims at a profit.⁵⁷ The 'Producer's Participation' is the share UK producer's participation in the UK revenues of a film in which the ECF has invested.⁵⁸ The Producer's Participation is intended to act as a support mechanism for producers making European films and to stimulate the development and production of European film in the future.⁵⁹ The ECF Royalty and the Producer's Participation are the 'Joint Participation'. The ECF does not accept recoupment and profit-share arrangements whereby the Joint Participation is less favourable than a pro rata, *pari pasu* entitlement based on the relationship of the ECF loan to other equity investments financing the UK share of the coproduction.⁶⁰ In general, the Joint Participation must be at least as favourable as the entitlements of any equity investor(s) providing finance for the co-producer(s).⁶¹ The ECF Royalty is 90% of the Joint Participation and the Producer's Participation amounts to

⁴⁵ ECF Guidelines 4(d).

⁴⁶ ECF Guidelines 5(a).

⁴⁷ ECF Guidelines 5(e).

⁴⁸ ECF Guidelines 5(f).

⁴⁹ ECF Guidelines 5(g).

⁵⁰ ECF Guidelines 5(h).

⁵¹ ECF Guidelines 5(i).

⁵² ECF Guidelines 5(j).

⁵³ ECF Guidelines 5(k).

⁵⁴ ECF Guidelines 5(l).

⁵⁵ ECF Guidelines 6(a).

⁵⁶ ECF Guidelines 6(b).

⁵⁷ ECF Guidelines 7(a).

⁵⁸ ECF Guidelines 7(b).

⁵⁹ ECF Guidelines 7(c).

⁶⁰ ECF Guidelines 7(e).

⁶¹ ECF Guidelines 7(e).

the remaining 10%.⁶² Recoupment by the ECF is deemed to have occurred when the Joint Participation is equal to the ECF loan, plus any interest/premium if applicable.⁶³ Net profits are treated in the same way, the share of net profits negotiated by the ECF with its co-financiers is a Joint Participation share which is divided as to 90% to the ECF and 10% to the UK producer.⁶⁴

Development Funding

British Screen may elect to use ECF resources to finance the writing and development of a project which has been approved by British Screen's development department in accordance with its own guidelines. The ECF takes a legal charge over the copyright of any project to which it makes a development loan. This security must be (a) redeemed before production of the film starts that is to say not later than the first day of principal photography by a repayment to the ECF of the amount of the development loan plus a premium of 50% and (b) procurement by the producer in favour of the ECF of a 5% share of 100% of net profits on a favoured nations basis.

British Screen

British Screen Finance Limited,⁶⁵ which operates the ECF, is financed by the British government, and its shareholders, Rank, United Artists Screen Entertainment, Granada Television and Channel Four Television. Its purpose is to provide support for British filmmakers in the development and production of cinema films. British Screen's sources are returns on loans made and annual government grants.⁶⁶ The annual grant is some US\$3.3 Mio. which is guaranteed until 1999, and, within the program of the European Coproduction Fund, another US\$3.3 Mio annually, guaranteed until 2000. The total sums available by British Screen and the European Coproduction Fund amount to some US\$8.3 Mio. to US\$11.5 Mio per year. Support is granted to some 20 films a year, and the grants secure, generally, 20% of the film's production budget. The development financing reaches some 30 to 40 projects.

The Italian Film Support Scheme and International Coproductions

Basically, the Italian audiovisual policy is contained in the 'Legge Cinema 1213/65'.⁶⁷ Due to the limited space, only some observations to the basic system of support will be made, particularly with regard to full-length films which are dealt with in the second title, Articles 4 to 9 of the Act. The Italian Cinema Act defines as a film or film work the spectacle which is realised on a support of whatever nature with a narrative or documentary content, provided that it is a work of the mind in the sense of the copyright law, destined to the public, prevailing in film theatres by the owner of the rights of use.⁶⁸ Support according to the Act is given to 'Italian' films.

Film Theatres Showing European Productions

Operators of film theatres who show full-length 'European' production are entitled to enjoy tax benefits. They are granted the same advantages as if they showed 'Italian' films in application of the principle of the freedom of the provision of services in the EU provided they have been declared a 'national' film in the sense of the Council Directive of 15 October 1963 concerning Cinematographic Films.⁶⁹

Support of International Coproductions

International coproductions can qualify for support as national 'Italian' films if they are co-produced with foreign producers, based on special international agreements providing for reciprocity.⁷⁰ The co-producer's share may not be below 20% of the film's costs, unless provided otherwise in the international agreement. In the absence of an international agreement, the Authority for Spectacles can grant the film the coproduction status.⁷¹ The minority share must be corresponded within sixty days to the supply of the material. Failing this obligation which rests with the minority co-producer, the film cannot be recognised as a coproduction. However, in such a case the 'nationality' of the film according to the majority country will not be affected, provided that the

⁶² ECF Guidelines 7(f).

⁶³ ECF Guidelines 7(g).

⁶⁴ ECF Guidelines 7(h).

⁶⁵ British Screen Finance Ltd., 14-17 Wells Mews, GB-London W1P 3FL, tel: +44-171-323 90 80.

⁶⁶ Grants are given through the Department for Culture, Media and Sport.

⁶⁷ ANICA: 'Leggi Cinema 1213/65 e successive modifiche ed integrazioni 1. testo coordinato', ed. by ANICA, Rome 1996.

⁶⁸ Article 4(1) of the Italian Cinema Act.

⁶⁹ Article 18(1) of the Italian Cinema Act.

⁷⁰ Article 19(1) of the Italian Cinema Act.

⁷¹ Article 19(2) of the Italian Cinema Act.

requirements of the recognition of the 'nationality' in the sense of Articles 4 and 10 of the Italian Cinema Act are met.⁷²

The recognition of the 'nationality' of the film is made on the basis of an appropriate application of the Italian producer which must be filed with the Authority for Spectacles at least 30 days before the initial showing of the film.⁷³ The number of coproductions which an Italian company can make with a minority share may not exceed the double of the number of own productions or coproductions with a majority share.⁷⁴

'Nationality' of the Film

The Italian 'nationality' of a film is established by means of criteria which are contained in Article 4(2) of the Act and which are:

- an Italian director,
- an Italian author of the treatment or a majority of Italian co-authors,
- an Italian scriptwriter or a majority of Italian scriptwriters,
- a majority of Italian principal actors,
- three quarters of Italian minor actors,
- soundtrack in Italian language,
- an Italian director of photography,
- an Italian cutter,
- an Italian composer of the music,
- an Italian stage director,
- an Italian dressmaker,
- an Italian cast of characters,
- the photography mainly made in Italy,
- the use of Italian technology,
- the use of Italian studios.

All these elements will qualify as 'Italian' in the sense of the law if the nationality can be determined as one of a Member State of the European Union.

Films which qualify as 'Italian' have to be notified to the Authority concerning Spectacles if they shall benefit from the support according to the Act.⁷⁵ This support concerns incentives for the film theatres, incentives for the production, the grant of certificates and the award of premiums. The declaration whether a film qualifies as 'Italian' is made by the Authority concerning Spectacles.⁷⁶

Support is given on the Basis of a Qualification

Those full-length films qualify for support which have a sufficient artistic, cultural or spectacle quality.⁷⁷ Commercial sex films cannot qualify for support.⁷⁸ The assessment of films is made by a special commission, established according to Article 46 of the Act. Operators of film theatres may benefit from tax reductions according to Article 30 of the Act.

Support through Incentives for Production

A film producer of a qualified full-length film will be granted by the Authority for Spectacles a contribution corresponding with 13% from the gross receipts of the income from theatres during the first two years of running. The contribution is prevalently aimed at the redemption of loan contracts for the production of the film whenever the income is not sufficient to redeem the loans nor to reinvest, and it is guaranteed by a certifying company, for the production of new films of national cultural interest and national production; in the case of a lack of a reinvestment within two successive years from the date of the grant of the contribution, the beneficiary has to repay the part of the contribution which is destined for the reinvestment increased by legal interests. 0.4% of the same contribution is to be paid in equal parts to the film director and to the authors of the story and the script, provided they are 'Italians'.

Support through Grant of Certificates

⁷² Article 19(5) of the Italian Cinema Act.

⁷³ Article 19(5) of the Italian Cinema Act.

⁷⁴ Article 19(6) of the Italian Cinema Act.

⁷⁵ Article 4(9) of the Italian Cinema Act.

⁷⁶ Article 20(1) of the Italian Cinema Act.

⁷⁷ Article 5(1) sentence 1 of the Italian Cinema Act.

⁷⁸ Article 5(1) sentence 2 of the Italian Cinema Act.

The Authority for Spectacles awards by decree a certificate of quality to full-length films which are granted the benefits of this Act and which have particular artistic and cultural qualities.⁷⁹ The certificate may be awarded every six months to no more than ten films which have been granted the benefits of this Act and to no more than 3 films from the countries of the European Union.⁸⁰ The application for the grant of the certificate of quality must be filed with the Authority for Spectacles at least 15 days before the presentation of the master copy which is filed with the SIAE according to Article 4(9) of the Act. The Commission for the Award of Certificates and Premiums⁸¹ renders its opinion on the application and decides accordingly.

Support through Award of Premiums

The award of premiums is made by the Commission for the Award of Certificates and Premiums.⁸² Those films qualify for an award which have been granted certificates of quality and which have been regularly shown in public according to the indication of the SIAE. The amount of the premiums is fixed annually by the Authority for Spectacles.⁸³ The producer receives 71% of the premium, 10% the director, 3% the author of the treatment, 7% the scriptwriter, 2% the composer of the music, 3% the director of photography, 2% the maker of the film sets and 2% the cutter.⁸⁴ Operators of film theatres who show films which have been granted a certificate of quality receive a benefit of 25% of fiscal taxes on income.⁸⁵

2.1.3. 'EUROPEAN' FILMS ACCORDING TO THE COUNCIL OF EUROPE'S EUROPEAN CONVENTION ON CINEMATOGRAPHIC COPRODUCTION

According to the European Convention on Cinematographic Coproduction of 1992⁸⁶ Eurimages is a driving force for the encouragement of European cinematographic coproduction and aims at the establishment of rules which adapt themselves to European multilateral cinematographic coproductions. The Convention is applicable in the case of coproductions with at least three coproducers established in three different states which are party to the Convention. The concept of cinematographic works covered by the Convention is broad and relates to films to be shown in cinemas. A cinematographic work will qualify as 'European' if it achieves weighting 15 points of the following criteria for assessment: Creative group: 3, director: 3, scriptwriter: 1, composer: 7, performing group: 3, first role: 2, second role: 1, third role: 6, technical group: 1, cameraman: 1, sound recordist: 1, editor: 1, art director: 1, studio or shooting location: 1, post-production location: 6. The status of a coproduction is granted by national authorities in correspondence with the Convention.

The minimum contribution by a coproducer must not be less than 10% and not more than 70% according to Article 6(1) of the Convention. If there is no bilateral agreement on coproduction between the state parties, the Convention takes the place of such an agreement in the case of which the relevant percentages are 20% and 80%. The rights of coproducers are established in Article 7 of the Convention which provides that the contract must guarantee to each coproducer joint ownership of the film. In the case of a financial coproduction the minority contribution must be at least 10% but not more than 25% of the production costs, Article 9(1) of the Convention.

2.2. SUPRA-NATIONAL SUPPORT SCHEMES

In recent years national regulations of EU Member States concerning film subsidies have been adapted to Community law. Accordingly, the concept of 'national' films or 'national' producers has been broadened to include also those from other Member States if the film is made within the national territory. Additionally, supra-national support schemes are employed particularly in Europe in order to strengthen the fragmented European audiovisual market.

European and National Subsidies: a Comparative Approach

Since the subsidies granted to the audiovisual industry by the European Union can only be made with due regard to the principle of subsidiarity, the activities of the European institutions can only support and supplement initiatives developed by Member States.⁸⁷ Further, the support granted by the Community should avoid to result in a mere duplication or addition of the support which has been granted on a national basis. Since within recent

⁷⁹ Article 8(1) of the Italian Cinema Act.

⁸⁰ Article 8(2) of the Italian Cinema Act.

⁸¹ Article 48 of the Italian Cinema Act.

⁸² Article 48 of the Italian Cinema Act.

⁸³ Article 9(1) of the Italian Cinema Act.

⁸⁴ Article 9(2) of the Italian Cinema Act.

⁸⁵ Article 9(3) of the Italian Cinema Act.

⁸⁶ See <http://www.coe.fr/eng/legaltxt/147e.htm>

⁸⁷ Recital 22 of the EU Council Decision of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II - Development and distribution) (1996-2000), document 95/563/EC, EU O.J. 1995 L 321/25.

years national films have achieved considerable success in their home markets, the Commission does not attempt to support 'European' works which would, in the national, European and global markets, compete with 'national' works. The Commission attempts to improve the structure of the European audiovisual industry where development is only one sector apart from training and distribution. Taking into account that the creation of a European audiovisual industry which is spread over all territories of the Community may suffer from disadvantages deriving from a lack of size to compete successfully on the global market, professional training in Europe and distribution of works in the Internal Market and abroad should be the major concern of the Community's audiovisual policy.

[Support Schemes and the Need of Adaptation to the Changing Market through Policy Measures](#)

In a speech of 27 November 1998 Mr. Spiridon A. Pappas, Director General for Information, Communication, Culture and Audiovisual⁸⁸ said "Both the Parliament and the Commission have emphasised the need to foster European audiovisual content. The Parliament pragmatically requested the Commission to put forward proposals to strengthen the MEDIA programme to this end. In a recent study by Norcontel: "Economic Implications of New Communication Technologies on the Audiovisual Markets"⁸⁹ it is pointed out that the changing pattern of demand for European product will disrupt existing market structures and the European content industry should react to these new demands in order to realise the full benefits of the new media age. Smaller companies will have to achieve economies of scale, especially in distribution which will increasingly become Europe-wide. The increased fragmentation of the audiovisual markets is likely to mean that the financial return available to producers in any one national market is likely to diminish over time. Therefore it will become important to sell product across national boundaries, which means that there will be an increase of international coproductions. The summary of the report stated: "At the same time, digitalisation will enable a new range of market opportunities, not least, the emergence of transnational tv and offline and online multimedia markets. The selling of product across different delivery media and the optimisation of release windows become an even more important element of a content provider's competitive strategy. In this regard, the process of content creation will require a coordinated approach to the issue of the exploitation of rights across the delivery media from the very outset. In addition, the exploitation of programme archives will present new and important revenue earning potential for the content creation industry. The key to success here will be the abilities to refresh and repackage content in new and exciting ways."

[Automatic Support Schemes](#)

The task of the Commission should thus lie in the facilitation of the establishment of an internal audiovisual market which permit the European audiovisual industry to compete not only on the different national markets of European Member States but also on regional markets and the global market. With this regard, its tasks should not be limited to the grant of support to the industry under the MEDIA programme, but it could, particularly, be extended to examine the effects of support mechanisms on the industry. With this regard the impact of tax schemes used in order to promote the film production and distribution could be analysed by the Commission and be recommended for implementation by Member States, taking into account that such schemes may require less administrative efforts than the selection and control of projects concerning the production and distribution of films. Automatic support schemes thus should be favoured and the Commission should implement strategies for the analysis of their operation, efficiency and, subsequently, their introduction in the Member States.

[Facilitation of New Media Services by Statutory Licensing](#)

In the US the legal provisions concerning secondary compulsory and statutory licensing schemes according to Articles 111 and 119 of the US Copyright Act were designed to promote the new cable and satellite broadcasting services by permitting the secondary exploitation of audiovisual works,⁹⁰ and the compulsory licensing provisions concerning web-casting in the new US Digital Millennium Copyright Act of 1998 will increase the possibility to use audio material for new digital media. Similar measures with a positive impact on the content and distribution industry could be recommended by the Commission for the introduction by Member States.

[Convergence of Telecommunications, Informations and Media Technologies](#)

The EU Commission indicated in the Communication on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications for Regulations⁹¹ that it was widely recognised that current measures to promote European audiovisual content production would have to be adapted to the digital

⁸⁸ Pappas, Spiridon A.: "The European Commission's Thinking on Audiovisual Regulatory Authorities", speech at the Seminar on "Audiovisual Media and Authorities", Vienna, 27/11/98, see http://europa.eu.int/comm/dg10/avpolicy/key_doc/regul_en.html

⁸⁹ See http://europa.eu.int/comm/dg10/avpolicy/key_doc/new_comm/new_comm.html

⁹⁰ See for example Fritz ATTAWAY: 'Testimony presented to the Copyright Office Report on Compulsory Licensing of Broadcast Signals', 12/11/97, http://mpaa.org/legislation/press/97/97_11_12.htm

⁹¹ EU document COM(1999) 108 EN final, Executive Summary, at 9.

environment. The following elements were often put forward as part of a favourable framework for European content production:

- a stable, consistent and coherent regulatory framework,
- regulatory requirements with regard to the production of European audiovisual content,
- strong copyright protection,
- fiscal incentives and financial guarantees and targeted support mechanisms such as the MEDIA programme,
- open and interoperable technical standards (through the particular standards chosen should not, as a rule, be imposed by regulators but developed through self-regulation).

[Convergence and the Example of the US Telecommunications Act and the US Federal Communications Commission](#)

Whereas the regulatory environment of the converging sectors of the economy is regulated by numerous laws, by-laws and public authorities, in the US the Telecommunications Act of 1996 regulates telecommunications, television, broadcasting, satellite and cable television, electronic publishing and even the Internet. With the Federal Communications Commission there is a single administrative authority which has competence in these sectors. It results that the US economy's regulatory environment is much more favourable for the audiovisual industry, because the system is easier to understand and unitary within the whole US market, whereas the regulatory systems applicable in the Internal market are different from Member State to the other.

[2.2.1. EU PROGRAMMES](#)

The European Union's activities concerning the support of the film industry are concentrated in the MEDIA programme.

[MEDIA I](#)

The Media I programme was developed by the Commission with the purpose of the promotion of the European production of movie and television films. The program had a duration of five years (from 1990 to 1995). The grant of the financial support is dependent upon the cooperation between at least three independent producers originating from three different Member States. The support is limited to a maximum of 50% of the production costs. The project supports the training, production, distribution and financing. Concerning the promotion of the production the project supports a variety of institutions engaged in the promotion of the writing of scripts, animated cartoons, and the development of European production technologies. Financial support is granted through special funds which also offer advice for auditing, investment and legal questions. Within the sector of the distribution supported were the European Film Distribution Office (EFDO), Hamburg, which promotes the distribution of low budget films, the EURO-AIM-project for the promotion of independent European producers or the BABEL-Funds for the promotion of multilingual adaptations of European productions.

[MEDIA II](#)

Media II⁹² aims at the promotion and developing of the European individual programme industry. It covers the training of European professionals, the development of production projects aimed at the European and world market and the transnational distribution of European films and television programmes. The Media II programme is based on the EU Council Decision of 10 July 1995.⁹³ The programme takes into account of the experience of the Media I programme. Thus the programme has been extended to the pre-production and post-production phases with particular regard to the needs of small and medium-sized enterprises, to cooperation between producers and distributors/cinema owners/broadcasters.⁹⁴ Whereas US audiovisual industry has little problems with structural objectives - there is hardly concern about the spreading of the growth throughout all states - European audiovisual industry has to be developed around a multitude of film and broadcasting centres. The Media II programme even attempts to develop potential in areas where there have been few activities in the audiovisual production, particularly in small countries or regions with less widely spoken languages.⁹⁵

[Council Decision Establishing Media II](#)

The Council Decision establishing Media II contains 7 Articles and an Annex which establishes rules concerning actions to be taken and the implementation procedure. Whereas Article 1 of the Decision states the Council's intention to establish the Media II programme, Article 2 contains a definition of the aims.

⁹² EU Commission: Media II (1996-2000) (<http://europa.eu.int/en/comm/dg10/avpolicy/media/en/home-m2.html>).

⁹³ EU Council Decision of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II - Development and distribution) (1996-2000), document 95/563/EC, EU O.J. 1995 L 321/25.

⁹⁴ See Recitals 13 and 16 of the EU Council Decision of 10 July 1995, Note above.

⁹⁵ Recital 20 of the EU Council Decision of 10 July 1995, Note above.

Concerning development the aims are:

- to promote, by providing financial and technical assistance, the development of production projects submitted by companies which include the enhancement of the audiovisual heritage and are aimed, in particular, at the European market, to encourage an environment favourable to initiative and to the development of the companies and to encourage networking among them,
- to promote the development of production projects which include the enhancement of the audiovisual heritage which make use of new techniques of creation and animation, to support an environment favourable to initiative and development by companies and to encourage networking among them.

Concerning distribution the aims are:

- to strengthen the European distribution sector in the field of cinema and video by favouring the networking of European distributors and encouraging them to invest in the production of European cinema films,
- to favour wider transnational distribution of European films by way of stimulation measures concerning their distribution and their exhibition in cinemas, and to encourage the networking of operators,
- to promote the circulation, in the European Union and outside it, of European television programmes capable of appealing to a European and world audience and to encourage independent European producers and European broadcasters to cooperate in the production of such programmes,
- to actively support linguistic diversity of audiovisual and cinema works,
- to facilitate the promotion of independent European production and its access to the market by the implementation of promotion services and actions.

Article 3 of the Decision lays down the conditions for Community funding which may not exceed 50% of the cost of operation. The funds which are available for the programme amount to ECU 265 million. The sums spent within the programme must be cleared within the annual budget. Beneficiaries of the programme must be enterprises in the possession of Member States or their nationals.

The financial support under the programme may only be given in the form of loans, repayable advances or subsidies, Article 4 of the Decision. Article 5 of the Decision establishes the responsibility of the Commission for the execution of the programme. Additionally, a Committee shall be established consisting of representatives of Member States and chaired by the Commission. The draft measures of the Commission are submitted to the Committee which delivers its opinion. The Commission will also keep the Committee informed about on the financial allocation agreed in the framework of the programme (amounts, duration, internal distribution of finances and beneficiaries).

Article 6 of the Decision states that the programme is open also to the participation of associated countries. Finally, Article 7 obligates the Commission to ensure that actions under the Media II programme are subject to prior appraisal, monitoring and subsequent evaluation. Beneficiaries shall submit an annual report to the Commission. 2 years and 6 months after the implementation of the programme and also after the completion of the programme the Commission shall present to the European Parliament, the Council and the Economic and Social Committee an evaluation report on the results of the programme, accompanied, where needed, by proposals.

[Actions to Be Taken under MEDIA II](#)

The Annex to the EU Council Decision of 10 July 1995⁹⁶ defines the actions to be taken. The initiatives concerning the development sector are addressed to the development of content for cinema and television through the provision of assistance for writing techniques, the establishment of financial arrangements and business plans, the encouraging of a favourable environment for initiative, also with regard to new technologies, and, additionally, networking. The concept of the support of production is thus broad enough to comprise a variety of actions.

In the distribution sector, the Annex mentions video and cinema distribution. Support will be achieved by a system of subsidy, repayable, for cinema distributors and video publishers of European films in order to favour the networking of European distributors, the encouraging of distributors to invest in adequate promotion and distribution costs for European films, to encourage video publishing and distribution of European works and to support linguistic diversity of European works. Subsidies will also be granted to distributors with regard to films

⁹⁶ EU Council Decision of 10 July 1995 on the implementation of a programme encouraging the development and distribution of European audiovisual works (Media II - Development and distribution) (1996-2000), document 95/563/EC, EU O.J. 1995 L 321/25.

distributed outside their national territory. Also television broadcasting is supported through the encouraging of independent producers to make television films provided that at least two broadcasters from several Member States involved. Additionally, access for independent producers and distributors shall be improved to the European and world market, particularly through promotion, assistance and bringing enterprises together at commercial events.

Implementation of MEDIA II

The implementation of the Media II programme is outlined in the Annex to the Council Decision of 10 July 1995.⁹⁷ According to this provision the Commission shall ensure that there is a good geographical spread among professionals participating in the programme and that Europe's cultural diversity is reflected. Funding shall not exceed 50% of the costs of a project. The approval of an application presupposes the Commission's appraisal. Concerning the implementation of the programme, experts and specialists may be consulted. Between the Commission and Member States a mutual exchange of information shall take place, particularly through the activities of Media desks. The support is generally awarded through the procedure of calls for proposals which are published in the EU Official Journal which is also available online.⁹⁸ They may also be available on the EU Commission Directorate General X's website.⁹⁹ The number and content of such calls for proposals may change every year according to the policy and means available, some of the characteristic calls shall be described below.

MEDIA - Training

The aim of Media-Training is to give professionals in the audiovisual industry the skills needed to manage projects and business with real potential on the world market and, in particular, the European Market. The training covers the following fields: economic and commercial management, including legal aspects, the use and development of new technologies for the production of audiovisual programmes (including the conservation and enhancement of Europe's film and audiovisual heritage), and screenplay techniques.¹⁰⁰

MEDIA - Development

The programme Media II-Development¹⁰¹ has the aim of promoting the development of production projects, directed, particularly, to the European market, and of creating a favourable environment for the development and networking of European production companies. There are three types of support available: first, support for the development of one or more audiovisual works, second, support for the development of European production companies and, third, support for 'industrial platforms'. Within the Development programme the Commission has indicated the successful results of Calls for proposals, for example the Call for proposals 3/96 and 6/96.¹⁰² Within the Call 3/96 ECU 4 million were awarded. The projects funded represent a large variety of concepts, relating to fiction, documentary, animation, new technologies, but loans were also granted to companies for applications relating to personnel, equipment or overheads. The results of the Call for proposals 6/96 164 loans were granted amounting to awards of ECU 4,7 million. The largest number of awards was made to France, 32, followed by the UK, 29, Germany, 17, Belgium, 11, Spain, 10, Netherlands, 8, Ireland, 6, Italy, 6, Austria, 5, Denmark, 4, Iceland, 4, Sweden, 4, Norway, 3, Finland, 1, Greece, 1 and Portugal, 1. Concerning the categories of projects, 46% was granted to fiction, 24 to company loans, 20 to documentary, 4 to animation and 4 to new technologies.

In subsequent calls¹⁰³ support was awarded for the development of audiovisual works submitted by European independent production companies. Applications could be made for projects in the form of a script or a treatment. The support encouraged the development of works aimed at the European and world market. Selection criteria were the quality and originality of the concept, the track record of the applicant company and the members of its team, the production potential and the transnational potential. Subject-matter of support were fiction, whether for cinema or broadcasting, creative documentaries, animated films, creative new technology productions or productions enhancing the European audiovisual heritage. Support was given in the form of reimbursable loans. The limit for support was 50% of the development budget. The maximum support amounted to ECU 75,000 for a project, but generally did not exceed ECU 35,000. 100% of the interest-free loan was due on the first day of principal photography.

⁹⁷ See Note above.

⁹⁸ See <http://europa.eu.int/eur-lex/>

⁹⁹ See <http://europa.eu.int/comm/dg10/>

¹⁰⁰ See the EU Commission's communication Media-Training (http://europa.eu.int/en/comm/dg10/avpolicy/media/en/train_h.html).

¹⁰¹ EU Commission communication Media Development (http://europa.eu.int/en/comm/dg10/avpolicy/media/en/devel_h.html).

¹⁰² Media-Development-Press Releases 3/96 and 6/96, Note above

¹⁰³ See Media - Development, Call for proposals 6/97, Guidelines for the submission of proposals to obtain financial support, No. 3.1.

Concerning the support for the development of European independent production companies support was available for European independent production companies developing audiovisual projects aimed at the European or world market. Loans were awarded for the expansion of the company into new areas of production, or into new markets whether geographical or sectorial, significant increases in the company's use of external expertise, the acquisition of assets such as other companies or shares in other companies, rights and options or joint ventures with other companies. Support was available for the establishment of a business plan up to ECU 10,000 at a maximum of 50% of the costs for its preparation or for company development support up to ECU 150,000 at a maximum of 50% of the costs of the implementation of the plan.

MEDIA - Distribution

Concerning distribution, the Media II program has the following Aims:¹⁰⁴

- to encourage European distributors to invest in cinema film production and to set up cross-border structures to distribute the films,
- to encourage television companies to cooperate in investing in the production of works aimed at the European and world market and to set up cross-border structures to transmit those works,
- to support linguistic diversity of programs,
- to stimulate access to commercial events promoting European productions, in particular independent ones,
- Community support working shall not exceed 50% of the cost of operations.

The actions to be undertaken by the Commission with regard to distribution and transmission are the following:

- Improving film and video distribution for European works with high circulation potential on the European and world market by:
 - supporting the introduction of European distribution mechanisms encouraging distributors to contribute to funding production of works with commercial potential on the European and world market,
 - promoting networking of European distributors, with joint commercial strategies on the European and world market;
- Improving circulation opportunities for television programmes aimed at the European and world market by:
 - introducing a mechanism encouraging television companies to contribute to the financing of works with high circulation potential made by independent production companies and to distribute them on the European market,
 - by supporting linguistic diversity by means of dubbing, subtitling and multilingual production;
- Promoting independent productions by:
 - improving access for independent producers and distributors to the European and world market by operating services and promotional activities and commercial events, such as markets, fairs and festivals, organised at European and international level.

Within the Media II Distribution¹⁰⁵ programme the Commission awarded grants to a variety of activities, including transnational distribution of European films and the networking of European distributors, the networking of cinemas, video publishing and distribution of European films and audiovisual programmes, television broadcasting of European audiovisual works, the marketing of licensing rights of European audiovisual works and the promotion and access to the market. According to the Call 5/96 the Commission awarded loans of ECU 9 Mio. to 86 European distributors, supporting 240 distribution campaigns in 18 European countries concerning 37 European films. Within the Call 5/97 the Commission supported the distribution and transmission of European audiovisual works and films. The aim of the support is the establishment and consolidation of cooperation networks between European distributors and the transnational distribution of European films. Support is given to groupings of at least three European distributors operating in three different countries, preferably with different languages which propose to distribute one or more recent European films. The Commission granted also support for video publishing and distribution of European films and audiovisual programmes. Within call 5/97 EU 25.7 Mio. were spent on this project. The object of the support was the promotion of the publication and distribution of catalogues of recent European films and

¹⁰⁴ Article 2 No. 2 of the Proposal for a Council Decision on a programme to promote the development and distribution of European audiovisual works (Media II - Development and Distribution) (1996-2000), document (95/C 108/05), COM(94) 523 final - 95/0027(CNS), EU O.J. C 108/8 of 29 April 1997.

¹⁰⁵ Communication of the Commission - Media II - Distribution (<http://europa.eu.int/en/comm/dg10/avpolicy/media/en/distrib.html>).

audiovisual programmes by European publishers and distributors, in all video formats intended for home use, including video cassettes, video discs, CD-I and CD-ROM. Finally, support was granted to the marketing of licensing rights of European audiovisual works under the Call 5/97. The object of the support was to encourage independent European distributors to compile and market catalogues of European audiovisual works (drama, documentaries, animated films). Within the call 8/97¹⁰⁶ the European Commission, with the aim to strengthen the European distribution sector in the field of cinema and video, to favour wider transnational distribution of European films by introducing an automatic support system for the distribution of European films in the form of a pilot project, and with the aim to promote the circulation of European television programs, to support linguistic diversity of audiovisual and cinema works has called for proposals relating to the support for transnational distribution of European films and the networking of European distributors. From the 1997 budget the Commission will contribute to this program ECU 25.7 Mio. The funding is limited to a maximum of 50% of the costs of the project and the remaining finance has to be guaranteed by the recipient. The support under the program was given to at least three European distributors operating in three different countries, preferably with different languages, which propose to distribute one or more recent non-national European films. For support eligible were European films or audiovisual programs. These are any works of fiction or documentary majority produced by one or more European companies with significant participation by European professionals.¹⁰⁷ The purpose of the support was the encouragement of the establishment and consolidation of cooperation networks between European distributors and the transnational distribution of non-national European films.

New Support Schemes under the MEDIA Programme

Within the Working group 2 of the Birmingham "European Audiovisual Conference" the following schemes had been recommended for distribution:

- the current theatrical scheme should be maintained and more financial resources should be allocated to it in order to increase its impact on distribution business in Europe,
- the automatic support schemes should be extended to other areas of content distribution, such as video and television programmes,
- the establishment of a coherent export credit guarantee scheme,
- the gathering and dissemination to exporters of data and facts on marketing conditions outside the EU,
- underwriting of commercial risks associated with the establishment of distribution/sales offices in key non-EU territories,
- the joint marketing initiatives such as dedicated markets/events outside the EU.

In its communication to the European Parliament and the Council of Ministers: "Audiovisual Policy: next steps",¹⁰⁸ the Commission indicated that it will pursue the analysis of the feasibility of new support mechanisms, in particular:

- the pursuit of the European Guarantee Fund,¹⁰⁹
- securitisation schemes which is a way for obtaining funding for production by the pre-sale, to financial institutions, of the future revenues of a slate of films,
- a system of export guarantees to cover the risks linked to the promotion of European works on external markets,

¹⁰⁶ EU Call for proposals 8/97, Implementation of a Program Encouraging the Development and Distribution of European Audiovisual Works, Media II Development and Distribution (1996-2000), Support for the Distribution and Transmission of European Audiovisual Works and Films, Support for the Transnational Distribution of European Films and the Networking of European Distributors.

¹⁰⁷ According to the definitions of the Guidelines for the submission of proposals to obtain financial support:

- these films and works will be considered national in the country contributing the largest share of the financing of the coproduction,
- distribution is any commercial activity designed to bring to the attention of a wide audience a film or television program on various types of format; it may include aspects of the technical publishing of an audiovisual work, the dubbing and subtitling, copying, dispatching and so on, but also the marketing and promotional activities, the production of trailers and publicity material, the purchase of advertising space, the organisation of promotional events and so on,
- a cinema distributor is any European company which, having bought contractually the distribution rights to a film for a given territory, directly distributes it, negotiates the release dates for public showing and assumes responsibility for the associated distribution costs,
- a European company is a company owner, whether directly or by majority participation, by nationals of Member States of the European Union and registered in one of these countries.

¹⁰⁸ Document COM (1998) 446 final of 14/07/98, http://europe.eu.int/comm/dg10/avpolicy/key_doc/nextsteps_en.html

¹⁰⁹ See <http://europa.eu.int/comm/dg10/avpolicy/egf/egf-en.html>

- an insurance/loan scheme for the establishment of sales and distribution offices in certain key markets,
- the creation of a database on the main external markets for the use of European exporters.

INFO 2000

The EU's INFO 2000 programme was adopted by the Council decision of 20 May 1996.¹¹⁰ It is designed to stimulate the development of a European multimedia content industry. Its objectives are, according to Article 1 of the Decision, to create favourable conditions for the development of the European multimedia content industry, to stimulate demand for and use of multimedia content, to contribute to the professional, social and cultural development of the citizens of Europe and to promote the exchange of knowledge between users and suppliers of multimedia products and knowledge infrastructure. The programme covers the period between 01/01/96 to 31/12/99 and the financial support amounts to ECU 65 Mio. The programme is managed by DG XIII of the EU Commission.

2.2.2. EURIMAGES

The EURIMAGES programme for the promotion of the production of European audiovisual products requires the participation of at least three independent producers originating from Member States for the coproduction of movie films and documentary films.¹¹¹ Some 20 European countries took part in the project in 1992 and the project is expanding into the east European countries. The program focuses particularly on the participation of producers from the smaller Member States. During the initial period from 1989 to 1991 Eurimages supported some 100 European films.

In its first seven years of activity (1989-1995), EURIMAGES assisted the coproduction of 356 feature films and 67 documentaries involving over 800 European producers. The total production value of the coproductions amounted to approximately FF 7,400 million of which FF 779.14 million was covered by EURIMAGES contribution. EURIMAGES financial assistance, often a determining factor in producers gaining access to further financing, creates a significant multiplier effect which benefits the European industry as a whole. EURIMAGES has also assisted 44 distributors in the distribution of 140 European films throughout its member States. In 1994-1995, EURIMAGES supported 19 cinemas: 2 in Poland, 6 in Turkey, 3 in Bulgaria, 2 in Czech Republic, 1 in Cyprus, and 5 in Switzerland with a total amount of FF 3.8 million. These cinemas have agreed to dedicate at least 50% of their programme schedules to European films.

Eurimages Guide

The European Fund EURIMAGES was established at the end of 1988 as a Partial Agreement of the Council of Europe. As at May 1999, the Council of Europe numbered 41 members.

Its aim is to promote in its Member States through financial assistance the coproduction, distribution, exhibition and other forms of exploitation of creative cinematographic audio-visual works. The Fund has therefore two complementary objectives:

- the first is cultural, in that it endeavours to support works which reflect the multiple facets of a European society whose common roots are evidence of a single culture;
- the second is economic, in that it invests in an industry which, while concerned to demonstrate that cinema is one of the arts and should be treated as such, is also aiming at commercial success.

The EURIMAGES Guide which can be obtained from the organisation provides information about the support schemes.

EURIMAGES Structure

EURIMAGES' Partial Agreement was originally concluded between twelve member States of the COUNCIL OF EUROPE. Currently, it is composed of more than 25 States. EURIMAGES is managed by a Board, to which each member State of the Fund appoints a representative. The Board of Management determines the policy and conditions of financial assistance and takes all the decisions consequential to the regulations set out in Resolution (88) 15 which established the Fund. In reaching decisions on financial assistance the Board principally takes account of the quality of the projects and the professional standing of the key persons involved. The Board of Management usually meets six times a year. The President ensures the continuity of the political action of the Fund. The Secretariat, lead by the Executive Secretary, organises the meetings of the Board and

¹¹⁰ Council Decision of 20/05/96 adopting a multiannual Community programme to stimulate the development of a European multimedia content industry and to encourage the use of multimedia content in the emerging information society (INFO 2000), document 396D0339, O.J. No. L 129/24 of 30/05/96.

¹¹¹ Partial Agreement on the European Support Fund for the Coproduction and Distribution of Creative Cinematographic and Audiovisual Works, "EURIMAGES" 1988, see <http://www.coe.fr/eng/act-e/eapeurim.htm>

implements its decisions. The Fund's resources come primarily from the contributions of its Member States and from the repayment of its financial assistance.

EURIMAGES Programme

The Board of Management has agreed, in the light of its financial resources, to concentrate upon three funding programmes:

- a. Assistance for coproduction,
- b. Assistance for distribution,
- c. Assistance for cinemas

Assistance for Coproduction

Assistance for coproductions is awarded to full-length feature films and to films in the documentary genre.

Full-length Feature Films

The basic requirement for full-length feature films to be eligible for financial assistance is that independent producers established in at least three member States (not including the UK in 1996) should participate in the project. Financial assistance may not exceed 15% of the budget of a film or FF 5,000,000. Special consideration is given to projects originating in countries of low cinematographic production levels.

Films in the Documentary Genre

The basic requirement for films in the documentary genre to be eligible for financial assistance is that independent producers established in at least two different member States (not including the UK in 1996) should participate in the project, and that the film should have been pre-purchased by distributors or broadcasters in at least three different member States (not including the UK in 1996) of the Fund, including those in which the project originates. Financial assistance may not exceed 15% of the budget of a film or FF 1,000,000. Special consideration is given to projects originating in countries of low cinematographic and audiovisual production levels.

Assistance for Distribution

This programme is available to member States which do not have access to the distribution support administered by the MEDIA II Programme of the European Union. Currently they are: Bulgaria, Cyprus, the Czech Republic, Hungary, Poland, the Slovak Republic, Switzerland and Turkey. Distributors from these countries may apply for distribution assistance for films originating in any of the EURIMAGES member States (not including the UK in 1996) and distributors from any member State may apply for distribution assistance for films originating in the eight above-mentioned States. No distributor, however, may apply for a film originated in its own State. Financial assistance is given towards the distribution costs. Assistance may not exceed 50% of the costs and the maximum contribution from the Fund may not exceed FF 100,000.

Assistance for Cinemas

This programme is available to the eight member States which do not have access to the cinema support projects of the MEDIA II Programme, at present: Bulgaria, Cyprus, the Czech Republic, Hungary, Poland, the Slovak Republic, Switzerland and Turkey. In these countries cinemas of one or more screens, which agree to programme a minimum of 50% of European films may receive financial assistance towards their programming costs. The maximum contribution from the Fund may not exceed FF 200,000 a year. All the member States benefit from this programme since its objective is to distribute and screen European works, and thereby open new markets for their film industries. The management of this programme is carried out for EURIMAGES by EUROPA CINEMAS. Further information is available from the Secretariat.

2.2.3. AUDIOVISUAL EUREKA

Audiovisual Eureka¹¹² is an inter-governmental and pan-European programme. Its aim is directed towards the achievement of a European audiovisual market. The organisation has more than 30 members, including Austria, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Sweden, Switzerland, Turkey and the United Kingdom. Other members are the European Commission and the Council of Europe as associate members. Audiovisual Eureka was established in the late 1980s. Taking into account of the increasing importance of the European Union in the audiovisual sector of the economy, Audiovisual Eureka focuses on the role as an intermediary between the countries of the European Union which are not Member States of the EU and the programmes and instruments of the EU and of those of other European authorities.

¹¹² See <http://www.aveureka.be/>

To Audiovisual Eureka's tasks belong the establishment of networks of partners, the exchange of information, the dissemination of experiences, the identification of difficulties and the outlining of solutions and the search for essentially financial support. Thus Audiovisual Eureka is the appropriate organisation for the providing of contacts with persons working in those central and East European countries which are not (yet) Member States of the EU. Audiovisual Eureka focuses on three key areas for the audiovisual cooperation: training, development and distribution. The programmes are addressed to professionals whose work exceeds national activities, and who are not entitled to support under the EU programmes.

The training programme of 1998 related to new technologies, banking and financial engineering in the audiovisual sector. In the development sector activities centred on the support of producers during the AGORA meeting, Greece, the World Summit of Children on television for Children, London, MIPCOM Junior, Cannes, and the Television conference for Central and Eastern European experts in Poznań. The promotion of distribution centred on the CirCLE 98 project (Circulation of Coproductions in the Larger Europe) which aims at the improvement of cooperation with distributors from east European countries and the organisation of a screening of the best productions of Central, Eastern and Southern Europe.

2.2.4. INDIRECT SUPPORT: EU DIRECTIVE 'TELEVISION WITHOUT FRONTIERS'

A variety of measures may constitute the indirect support of films. Particular regard will be given to measures on the European Community and on the national level. The indirect support for films on the European Community's level is ensured by the application of the quota system and - until the amendments to the Directive in 1997 - by the providing for delays between theatrical releases, broadcasting and video releases.

The Directive 'Television without Frontiers'

The amended Directive 'Television without frontiers' of 1997¹¹³ sustains the basic regulations of the Directive of 1989. The definition of the term 'television broadcasting'¹¹⁴ remained unchanged so that the Directive is applicable only to traditional broadcasting services and not to new types of media services such as video-on-demand. But from the technical point of view the concept of television broadcasting is wide, comprising not only satellite broadcasting which is expressly referred to in the Directive but also broadcasting by cable and cable-retransmission according to the jurisprudence of the European Court of Justice.¹¹⁵ The Directive contains also a regulation of teleshopping.¹¹⁶ It is the purpose of the Directive to effectively establish the Internal Market for broadcasting services. But the Directive only lays down the minimum rules which are needed to guarantee the freedom of transmission in broadcasting - it does not affect the responsibility of Member States with regard to the organisation of broadcasting; thus the systems of licensing, administration, taxation, financing and the content of programmes remain unaffected.¹¹⁷

After the adoption of the Directive of 1989 the Commission issued reports on the application of the Directive. The second report of 1997¹¹⁸ explained the increasing economic importance of television broadcasting in Europe. It indicates that within the recent six years the number of television channels has doubled to now 250 channels, two thirds of which are private. Whereas in January 1996 there were only 10 digital services broadcast by satellite, there were some 330 one year later. Particularly, the Commission reports on its experience with the implementation of the provisions concerning the protection of minors and the regulation of advertising. Somewhat laconic the Commission points out that each Member State has an obligation to ensure that all

¹¹³ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552 EEC on the Coordination of certain Provisions laid down by Law, Regulation of Administrative Action in Member States concerning the Pursuit of Television Broadcasting Activities, EU O.J. L 202/60-72 of 30 July 1997 (http://europa.eu.int/en/comm/dg10/avpolicy/twf/9736_en.html; consolidated version: <http://europa.eu.int/en/comm/dg10/avpolicy/twf/tvconse.htm>).

¹¹⁴ Article 1(a) of the Directive of 1997 defines 'television broadcasting' as 'the initial transmission by wire or over the air, including that by satellite, in non-encoded or encoded form, of television programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services'.

¹¹⁵ European Court of Justice of 10 September 1996, case C-11/95, Commission vs. Belgium.

¹¹⁶ Article 1(f) of the Directive of 1997 defines 'teleshopping' as 'direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment'.

¹¹⁷ Recital 14 to the Directive 'Television without frontiers' of 1989.

¹¹⁸ 2nd Report from the Commission to the European Parliament, the Council and the Economic and Social Committee on the application of Directive 89/552/EEC 'Television without frontiers' (http://europa.eu.int/en/comm/dg10/avpolicy/key_doc/cine97_e.htm).

programmes transmitted by broadcasters under its jurisdiction respect the rules of the Directive and, more generally, the law applicable to programmes intended for an audience in that Member State.

Promotion of European Productions

The Directive 'Television without frontiers' contains provisions which promote the development of European fiction films addressed to an international audience with the aim to improve the competitiveness of the programme industry.¹¹⁹ The Directive of 1997 does no longer sustain the system of statutory regulation of the delay between the first theatrical release of a film and its television broadcasting or marketing by video cassettes. Instead, the Directive mentions that the question of specific time scales for each type of television showing of cinematographic works is primarily a matter to be settled by means of agreements between the interested parties or professionals concerned.¹²⁰ However, the concept of promoting European productions remains somewhat vague. Recital 27 the Directive of 1997 states that broadcasting organisations, programme makers, producers, authors and other experts should be encouraged to develop more detailed concepts and strategies aimed at developing European audiovisual fiction films which are addressed to an international audience. According to Recital 30 the proportions of European works should be achieved taking economic realities into account.

Articles 4 to 9 of the Directive of 1997 deal with the promotion of distribution and production of television programmes. The Directive obligates Member States to ensure that broadcasters reserve for European works a majority proportion of their transmission time.¹²¹ Article 5 of the Directive establishes that basically at least 10% of the transmission time respectively 10% of the programming budget of broadcasters should be spent for European works. The definition of the term 'European work' focuses essentially on the place from where the work originated.¹²² In the case of coproductions with non-Member States the subsistence of a 'European work' may be assumed if the works are mainly made with authors and workers residing in one or more European States.¹²³

3. THE INTERNATIONAL SYSTEM OF THE PROTECTION OF AUDIOVISUAL WORKS AND PRODUCTS

The exploitation of films requires a considerable investment with the aim to maximise profits beyond the compensation of the production costs. The basis for the investment is the security about the exclusivity in exploitation within the territories concerned. This exclusivity is ensured by copyright and neighbouring rights which belong to authors, producers or broadcasters and by contracts which transfer the exploitation rights to distributors, broadcasters or producers of videos and DVD. Original works of the mind such as films, broadcasts, music or literary works are protected by copyright. These works may only be used if the rights for this use has been acquired from the copyright owner or right holder. Likewise neighbouring rights are protected, however, in principle, at a lesser degree. Whereas copyright is granted to the authors of original works of the mind, neighbouring rights are given upon a particular performance which the legislator considered worthy of protection. Examples for neighbouring rights are the rights of the film producer, of the producer of phonograms, of performing artists. Whereas the copyright has, in general, a duration of 70 years after the death of the longest living author, the duration of protection by neighbouring rights is often limited to 50 years after the publication of the phonogram or videogram, or after the performance. Confusingly, copyrights and neighbouring rights are often dealt with in the same body of legislation, and often without a clear separation between the different types of rights. The easiest way to differ between copyright and neighbouring rights is to memorise the different types of works of copyright. These are literary works, works of music, works of the arts, works of photography or cinematographic and audiovisual works. Other products are protected by neighbouring rights, for example phonograms or videograms and live performances of artists.

3.1. COPYRIGHT AND INTERNATIONAL ASPECTS

The Berne Convention for the Protection of Literary and Artistic Works, in short, 'Berne Convention'¹²⁴ is the most important international convention concerning copyright. It establishes basic principles, some of which are indicated below with particular reference to audiovisual works.

¹¹⁹ Recitals 27 and 28 of the EU Directive 'Television without frontiers', 1997.

¹²⁰ Recital 32 of the EU Directive 'Television without frontiers', 1997.

¹²¹ Article 4(1) of the Directive 'Television without frontiers', 1997.

¹²² Article 6(1)(a) of the Directive 'Television without frontiers', 1997.

¹²³ Article 6(3) of the Directive 'Television without frontiers', 1997.

¹²⁴ Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979, http://www.wipo.org/eng/iplex/wo_ber0_.htm

3.1.1. PRINCIPLES OF THE BERNE CONVENTION CONCERNING AUDIOVISUAL WORKS

The Berne Convention does not use the terms 'film' or 'movie', it uses the expression 'work of cinematography'. However, in practice this does not make a difference, the essential requirement for protection being that there is an original work of the mind. Accordingly, contracting states may use in their copyright laws the terms 'work of cinematography', 'audiovisual work' or 'film' interchangeably.

Work of Cinematography as Original Work of the Mind

All contracting States are obligated to grant protection to original works of the mind. According to Article 2(1) of the Berne Convention the expression 'literary and artistic works' includes a large variety of works, for example cinematographic works to which are assimilated works expressed by a process analogous to cinematography. Whereas some national copyright laws, for example the modern Greek Copyright Act in Article 2(1),¹²⁵ use the term 'audiovisual' works, others are based on the lengthy wording used by the Convention. For purposes of simplicity, subsequently, the term 'audiovisual work' will be used. Concerning the borderline between works protected by copyright and products which are not protectable, the human involvement in the making of the film will be of essential importance. Only if there is sufficient human involvement, copyright protection is given. Thus films made by automatic cameras will not qualify for copyright protection, similarly products made by remote sensing.

National Treatment

Protection according to the Berne Convention is given on the basis of the principle of 'national treatment'. This means that an author of a contracting state enjoys copyright protection for his works in any other contracting State just as nationals of the relevant contracting State, Article 5(1) of the Berne Convention.

Nationality of Author

The 'nationality' of an author depends upon national laws of the contracting States of the Convention, but also an author who is not a national of a such a State will be assimilated to nationals of that country, provided that he/she has the habitual residence in this State, Article 3(2) of the Berne Convention.

No Formalities

Copyright protection does not depend upon any formalities, Article 5(2) of the Berne Convention. This means that protection is granted 'automatically', as soon as a work is made. In the case of audiovisual products with complicated production processes it may be difficult to determine at which stage protection attaches. Generally, it is required that a work is 'complete' and 'organic'.¹²⁶ The Greek Copyright Act establishes the rule that the audiovisual work shall be deemed to be accomplished when the master from which copies for exploitation are to be made, is approved by the author.¹²⁷

Term of Protection According to Greek Law

Article 7(2) of the Berne Convention establishes as the minimum duration of protection fifty years after the work has been made available to the public with the author's consent, or, failing such an event within the fifty years which follow the production, fifty years after the making of the work. However, States may provide for a longer duration. Greek law establishes as a general rule in Article 29(1) of the Copyright Act that the copyright in a work shall last for the author's lifetime and for 70 years after his death, computed from the end of the year of death. This rule is applicable also for audiovisual works, and in the case of joint authorship the death of the last surviving author will be relevant, Article 30 of the Act. However, since Article 9 of the Greek Copyright Act states that the principal director of an audiovisual work shall be considered as its author, audiovisual works will generally not be considered as works of joint authorship according to Greek law. The duration of the protection will thus depend on the life of the principal director. If the audiovisual work was published after the death of the principal director, the protection lasts for 70 years, computed from the end of the year in which the work was lawfully published for the first time, Article 31(2) of the Greek Copyright Act.

EU Term of Copyright Protection Directive

The EU Term of Copyright Protection Directive¹²⁸ deals with cinematographic and audiovisual works in Article 2. According to subsection 2 of this provision the term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons

¹²⁵ Greek Copyright Act (Copyright, Related Rights and Cultural Matters, Law No. 2121/1993, amended subsequently).

¹²⁶ See, for example, (Italy) Trib. Rome of 04 October 1993 'RAI v Petrucci', *Il Diritto Industriale* 1994/401 with regard to a work made for television broadcasting.

¹²⁷ Article 34(1) sentence 3 of the Greek Copyright Act.

¹²⁸ EU Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, EU O.J. L 290/9 of 24.11.1993, <http://www2.cho.lu/legal/en/ipr/termprot/termprot.html>.

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 audiovisual work. Recital 11 of the Directive states that the achievement of a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of literary and artistic creation in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running.

US Law

According to the common law copyright, protection was granted for a period of 14 years which could be prolonged for another 14 years upon demand.¹²⁹ The Copyright Act of 1909 introduced a term of protection of 28 years which, upon application, was extended to another 28 years. A presupposition of protection was the observation of formalities: the copyright notice had to be affixed to each copy of the work, containing the name of the owner of the copyright and the year of first publication; the work had to be registered with the US Copyright Office, and two copies of the work to be deposited. According to the Motion Picture Agreement between the US Copyright Office and the motion picture industry the deposition of films was possible as video cassettes. The Copyright Act of 1976 stated that in the case of a work made for hire the copyright endured for a term of 75 years from the year of its first publication.¹³⁰ Special provisions were made for works the term of which subsisted on the 01 January 1978, the date of the entry into force of the Copyright Act of 1976. In the meantime, the US law has been brought in compliance with the 70 years protection term applicable according to the EU law.

Copyright in Pre-existing Works

The author of an audiovisual work will acquire the copyright in the work, independent of any copyright in the pre-existing works (for example in the music, novel or pictures), Article 14bis(1) of the Berne Convention.

Initial Ownership of Copyright

The determination of ownership of copyright in an audiovisual work is a matter for legislation in the country where protection is claimed, Article 14bis(2)(a) of the Berne Convention. But whereas in application of the US-work for hire doctrine the film producer or even financier may acquire the initial copyright in an audiovisual work, the laws of many European states provide that the creators of the audiovisual work are its authors – according to Article 9 of the Greek Copyright Act the principal director shall be considered as author. However, in the latter case, contracting States of the Berne Convention must establish that those authors may not object to the exploitation of the audiovisual work, unless expressly agreed upon, Article 14bis(2)(b) of the Berne Convention. Generally, these provisions shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the audiovisual work or to the principal director thereof, but the contracting States are free to regulate this differently in their national laws, Article 14bis(3) of the Berne Convention.

Presumption of Authorship and Title of Copyright According to Greek Law

If a work carries a notice that authorship vests in a certain person or persons this person(s) shall be presumed to be the author, Article 10(1) of the Greek Copyright Act. In the case of audiovisual works Article 10(2) of the Act specifies that this natural or legal person whose name or title appears on a copy of the work in the manner usually employed to indicate the right holder shall be presumed to be the right holder of the copyright in the particular work. Both presumptions can be rebutted by evidence to the contrary, Article 10(3) of the Act. The indications relating to authorship and ownership of the copyright which may be contained, for example, in the credits of a film thus give the colour of a title.

3.1.2. INTERNATIONAL PROTECTION

The 'Berne Convention' establishes an international system of protection by copyright by means of which the author does not obtain a unitary copyright for the territories of all contracting States but a bundle of national copyrights in the contracting States. The TRIPS is based on protection by Berne, but in certain aspects it is more explicit and more comprehensive.

Berne Convention

In application of the principle of territoriality the copyright owner holds a bundle of national copyrights each corresponding with the national copyright system of a Member State of the Convention.

¹²⁹ § 1 of the US Copyright Act of 1790.

¹³⁰ § 302(4) of the US Copyright Act of 1976; if the film is not a 'work made for hire', it might constitute a joint work in which case the copyright endures for a term consisting of the life of the last surviving author and the relevant period of years after such last surviving author's death, see § 302(c) of the Act.

Conflict of Principles: State of Protection and State of Origin, the Solution Adopted in Greek Law

On the concept of territoriality is based the principle of the state of protection, which means that essential questions concerning the nature of the copyright are not subject to the freedom of contract but have to be ascertained by reference to the relevant national law of that state where protection is claimed. However, the Berne Convention does not regulate this situation. Whereas German law, for example, uses the principle of the state of protection in order to solve conflicts of laws,¹³¹ the Greek Copyright Act endorses in Article 67(1) the principle of the state of origin: Copyright in a published work shall be governed by the legislation of the state in which the work is first made lawfully accessible to the public, and if it is an unpublished work, copyright shall be governed by the legislation of the state in which the author is a national. In the case of audiovisual works this means that a Greek court will apply US copyright law when concerned with the question of the authorship concerning a film which was first shown in the US. Thus it may hold that the initial author of the film was a producer, if the audiovisual work was 'made for hire' in the sense of Article 101 of the US Copyright Act,¹³² even if the principal film director was a Greek and if the film was made in Greece. On the other hand, it may apply Greek copyright law concerning the authorship of a film which was made in the US, if the film was first shown in Greece. According to Article 67(3) sentence 1 of the Greek Copyright Act the determination of the subject, object, content, duration and limitations of the copyright shall be governed by the law established in subsection (1). However, the statute exempts expressly the copyright licence contract from this regulation. Accordingly, it has to be differentiated between, first, the law of the state which is applicable with regard to the determination of the subject, object content, duration and limitations of the copyright and, second, the law which is applicable to the contract. This may be a different law, for example a law chosen by the parties to the contract. Concerning issues of infringement of the copyright, Greek law endorses the principle of the state of protection in Article 67(3) sentence 2 of the Act. According to Article 67(4) of the Act the rules contained in subsections (1) and (3) shall not be applicable if they run contrary to an international convention ratified by Greece. However, with regard to the Berne Convention, TRIPs and the WCT it can be said that these agreements do not contain an regulation which would be in conflict with the solutions adopted by the Greek legislator in subsections (1) and (3).

Law Applicable to the Licence Contract

According to Article 67(3) of the Greek Copyright Act, in the case of a licence contract concerning copyright the law applicable to the contract will not be determined in application of Article 67(1) of the Greek Copyright Act, but in application of the general principles of the Greek international civil law.

The Principle of National Treatment

The principle of national treatment, is of great relevance to the protection by copyright in the countries of the Convention. According to this principle the content of copyright protection depends upon the national law, and the national legislator has to provide the minimum protection afforded by the Berne Convention.

According to the principle of the national treatment a state of the Convention has to treat a person originating from another state like his nationals for purposes of copyright protection. Accordingly, a European state has to grant the nationals from other states of the Convention the same scope of protection as his own nationals and likewise the US has to grant European authors the same protection as national authors. Thus a US producer who owns the copyright may enjoy protection for his film not only in the US but also in other states of the Berne Convention. However Article 5 of the Convention merely concerns the scope of protection, that is to say the content of the exclusive rights. The issues of the ownership of the copyright, in particular the initial ownership, or the transfer of the copyright will be decided upon the general principles of the international civil law.

The Berne Convention provides for minimum protection of works in the states of the Convention. Thus the States of the Convention protect the moral rights of authors,¹³³ the right in the making of a film¹³⁴ and the right in the film work.¹³⁵ Subject to limitations according to national laws, the Convention provides a minimum of exclusive rights, for example the broadcasting right.¹³⁶ According to the Berne Convention formalities are no prerequisite for protection.¹³⁷ The term of the protection extends to a minimum of the author's life plus fifty years, in the case of joint authors the period of fifty years begins at the death of the last surviving author.¹³⁸ In

¹³¹ See Arnold VAHRENWALD: "Copyright and International Contracts Concerning Audiovisual Works: Freedom of Contract v. State of Protection", (1998) ENT.LR 259-265.

¹³² See below, No. 7.1.2.

¹³³ Article 6bis of the Berne Convention.

¹³⁴ Article 14 of the Berne Convention.

¹³⁵ Article 14bis of the Berne Convention.

¹³⁶ Article 11 of the Berne Convention.

¹³⁷ Article 5(2) of the Berne Convention.

¹³⁸ Article 7(1)(6) of the Berne Convention.

the case of film works States may reduce protection to a period of fifty years after the publication.¹³⁹ The Berne Convention for the Protection of Literary and Artistic Works¹⁴⁰ does not regulate issues of the international civil law relating to contracts.

Corporeal Exploitation: Rights of Reproduction and Distribution

The right of reproduction is the right to authorise the reproduction of the work.¹⁴¹ According to Article 9(3) of the Berne Convention a visual recording shall be considered as a reproduction in this sense. The right of distribution is the exclusive right to authorise the distribution of (corporeal) reproductions of the work. The Greek Copyright Act provides for the right of reproduction in Article 3(1)(a) in a modern way, by express inclusion of 'any means, such as mechanical, photochemical or electronic means'. Concerning the right of distribution the Greek Act refers in Article 3(1)(d) to the corporeal nature by reference to distribution as relating to 'the original or copies of the work via a transfer of ownership, a rental arrangement or public lending, and, notably with reference to the use of copies, the imposition of limiting conditions on a transfer of ownership or a rental or public lending arrangement'.

Non-corporeal Exploitation: Rights of Broadcasting and Communication to the Public

The right of broadcasting is the exclusive right to authorising the broadcasting of the work or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images, or any communication to the public by wire or by rebroadcasting of the broadcast of the work when this communication is made by an organisation other than the original one or the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.¹⁴² The Greek Copyright Act defines this right in Article 3(1)(g) as the right of broadcasting or rebroadcasting of the work to the public by radio or television, by wireless means or by cable or by any kind of wire or by any other means, in parallel to the surface of the earth or by satellite. The concept of the term 'public' is broadly defined in Article 3(2) of the Act.

The right of communication to the public is the exclusive right of authorising the communication of the work to an audience. According to Article 3(1)(e) and (2) of the Greek Copyright Act the right of the communication of the work to the public means the right to use, perform or present the work in a manner when the work thereby becomes accessible to a circle of persons wider than the narrow circle of the family and the immediate social circle of the author, regardless of whether the persons of this wider circle are at the same or at different locations. The Greek Act thus uses a modern language which is close to the definition of the term in Article 8 of the WCT.

Right of Cinematographic Adaptation and Reproduction

The right of cinematographic adaptation and reproduction is the exclusive right of authorising the cinematographic adaptation and reproduction of a literary or artistic work and the distribution of the works thus adapted or reproduced and also of authorising the public performance and communication to the public by wire of the works thus adapted or reproduced.¹⁴³ The Greek Copyright Act establishes the right of adaptation in Article 3(1)(c).

TRIPS

According to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods¹⁴⁴ ('TRIPS') standards of copyright protection established by the Berne Convention and Rome Convention¹⁴⁵ are also obligatory for contracting States of TRIPS.¹⁴⁶ Article 3 of TRIPS provides for national treatment so that all Members have to grant to nationals of other Members a treatment no less favourable than that which they grant to their own nationals with regard to protection of intellectual property.

Most-favoured-nation Principle

Article 4 of TRIPS contains the most-favoured-nation principle. According to this principle discrimination in comparison with other foreign rights owners shall be avoided. However, exceptions from this principle are

¹³⁹ Article 7(2) of the Berne Convention.

¹⁴⁰ See for the text the WIPO home page <http://www.wipo.org/>

¹⁴¹ Article 9(1) of the Berne Convention.

¹⁴² Article 11bis(1) of the Berne Convention.

¹⁴³ Article 14(1) of the Berne Convention.

¹⁴⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (http://itl.irv.uit.no/trade_law/documents/freetrade/wta-94/art/ia1c.html).

¹⁴⁵ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), http://www.wipo.org/eng/iuplex/wo_rom0_htm

¹⁴⁶ Articles 1(3) and 2(2) of TRIPS.

permissible.¹⁴⁷ But in the absence of such exceptions, TRIPS Members participate in the highest protection standard of all existing and future copyright conventions and agreements.¹⁴⁸

3.2. NEIGHBOURING RIGHTS

The Berne Convention protects authors of original works of the mind. If a product does not qualify as a 'work' in this sense, its makers enjoy a considerably lesser protection. The difference between 'works of the mind' and other products in the audiovisual sector is particularly the involvement of human activity. It cannot be doubted that the film made on the basis of a screenplay made by a director will be protected by copyright, however, the images taken by an automatic camera with the purpose to observe customers in a bank will not qualify for protection as a 'cinematographic work'.

Whereas the Berne Convention with its large number of contracting States provides for a nearly global protection of works of the mind to which belong cinematographic works, the owners of neighbouring rights are internationally protected at a much lesser degree. This is due to the fact that the international conventions relating to the protection of neighbouring rights met with less acceptance than the Berne Convention. However, since the TRIPS obligates contracting states not only to the standards of protection afforded by the Berne Convention but also by the Rome Convention, it can be expected that the international standards of protection of neighbouring rights will improve.

The Greek Copyright Act deals with neighbouring rights in Articles 46 to 53. Article 47 of the Act protects producers of videograms against the unauthorised direct or indirect reproduction and distribution, transfer of ownership and rental of videograms. The rights of broadcasting organisations are established in Article 48 of the Act, and the rights of audiovisual performers in Article 46.

3.2.1. TYPES OF NEIGHBOURING RIGHTS

There are different types of neighbouring rights. Generally, one differs between performers' rights and producers' rights. To the first group belong the rights of actors, singers, dancers or musicians. Within the second group are classed the rights of producers of videograms and of broadcasting organisations.

Producers' Rights

The EU Rental and Lending Right Directive¹⁴⁹ stresses that copyright and related rights protection must adapt to new economic developments such as new forms of exploitation. It states that the creative and artistic work not only of authors but also performers necessitates an adequate income as a basis for further creative and artistic work. Particularly the high and risky investments required for the production of films necessitate the possibility for securing that income and recouping can effectively be guaranteed through an adequate legal protection of right holders concerned. In order to achieve this aim, the Directive provides for a harmonised legal framework in the Member States, supporting activities of self-employed persons. The Directive avoids not to conflict with the international conventions on which many Member States' copyright and related rights laws are based, in particular concerning neighbouring rights the Rome Convention.¹⁵⁰ However, the Rome Convention relates to the protection of producers of phonograms only, it does not protect producers of videograms or films.

According to the EU Rental and Lending Right Directive which harmonises the producer's rights in films within the EU the term 'film' has to be understood as a cinematographic or audiovisual work or moving images whether or not accompanied by sound. The neighbouring rights protection within the EU thus extends also to moving images which do not constitute a 'work' in the sense of copyright protection. Producers have the exclusive right to authorise or prohibit the direct or indirect reproduction of the first fixations of films, in respect of the original and copies of their films.¹⁵¹ Additionally, producers of the first fixations of films, in respect of the original and copies of their films, have the exclusive right to make available to the public these objects including copies thereof by sale or otherwise.¹⁵² Both the reproduction and distribution right may be transferred, assigned or

¹⁴⁷ Exemptions from this duty are contained in Article 4(a) to (d) and relate, for example, to rights of performers, producers of phonograms and broadcasting organisations not regulated by TRIPS.

¹⁴⁸ Paul KATZENBERGER: 'TRIPS and Copyright Law', in: From GATT to TRIPS, ed. by Friedrich-Karl Beyer and Gerhard Schrickler, VCH Publishing, Weinheim 1996, 59-92 at 75.

¹⁴⁹ EU Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, EU O.J. L 346/61 of 27/11/92 <http://www2.echo.lu/legal/en/ipr/rentlend/rentlend.html>

¹⁵⁰ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), for the text see the WIPO home page <http://www.wipo.org/>

¹⁵¹ Article 7(1) of the Rental and Lending Right Directive.

¹⁵² Article 9(1) of the Rental and Lending Right Directive.

subject to the granting of contractual licences.¹⁵³ Article 3(3) of the EU Term of Copyright Protection Directive¹⁵⁴ establishes that the rights of producers of the first fixation of a film shall expire 50 years after the fixation is made. However, if the film is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the date of the first communication to the public, whichever is the earlier.

Broadcasters' Rights

The broadcasters' rights are, similar to producers' rights considered as neighbouring rights which are granted by the state in order to permit the exclusive exploitation in return for the often considerable financial investments necessary for the production of these broadcasts. Due to the fact that the Rome Convention¹⁵⁵ which protects broadcasting organisations' neighbouring rights met with much less acceptance than the Berne Convention, the EU provided for the approximation of the relevant laws in Member States in order to achieve harmonised conditions for the exploitation of broadcasts in the internal market.

According to Article 6(2) and (3) of the EU Rental and Lending Right Directive broadcasting organisations have the exclusive right to authorise or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite; however, a cable distributor shall not have this right where it merely retransmits by cable the broadcasts of broadcasting organisations. Article 7(1) of the Directive provides for the exclusive right to authorise or prohibit the direct or indirect reproduction of fixations of the broadcaster's broadcast. The exclusive right to authorise or prohibit the rebroadcasting of a broadcast includes wireless means as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against the payment of an entrance fee, Article 8(3) of the Rental and Lending Right Directive.

The broadcaster's right includes also the distribution right that is to say the exclusive right of a broadcasting organisation in respect of fixations of their broadcasts to make available these objects, including copies thereof, to the public by sale or otherwise. Both the reproduction and distribution right may be transferred, assigned or subject to the granting of contractual licences.¹⁵⁶ Article 3(4) of the EU Term of Copyright Protection Directive states that the rights of broadcasting organisations shall expire 50 years after the first transmission of a broadcast, whether this broadcast is transmitted by wire or over the air, including by cable or satellite. Recital 19 of the Directive considers that the rights of broadcasting organisations in their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite, should not be perpetual and that it is therefore necessary to have the term of protection running from the first transmission of a particular broadcast only. This provision is understood to avoid a new term running in cases where a broadcast is identical to a previous one.

Performers' Rights

Audiovisual performers are internationally protected at a lesser degree than performers of phonograms.¹⁵⁷ The Greek Copyright Act protects both types of performers in Article 46, and it gives them a moral right in Article 50. The Rome Convention defines in Article 3(a) performers as 'actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works'. According to the Greek Act performers are protected against the fixation of their interpretation or public performance of the recording, against the direct or indirect reproduction of the recorded interpretation or performance, or against the distribution of the recording by means of the transfer of the property, rental or public lending, against the broadcasting and communication to the public of the interpretation or performance.¹⁵⁸ Within the EU the protection of performers is generally envisaged by the Rental and Lending Rights Directive with regard to the right in the recording of the performance, the right of reproduction, the right of distribution and the rights of broadcasting and communication to the public,¹⁵⁹ and internationally the Rome Convention contains obligations for contracting states concerning the protection of performers.¹⁶⁰

¹⁵³ Articles 7(2) and 9(2) of the Rental and Lending Right Directive.

¹⁵⁴ EU Council Directive 93/98/EEC of 29 October 1993 on the harmonisation of the duration of protection of copyright and certain neighbouring rights, EU O.J. L 290/9 of 24/11/93, <http://www2.echo.lu/legal/en/ipr/>

¹⁵⁵ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention), http://www.wipo.org/eng/iuplex/wo_rom0_htm

¹⁵⁶ Articles 7(2) and 9(2) of the Rental and Lending Right Directive.

¹⁵⁷ See below, No. 3.3.4.

¹⁵⁸ Article 46(2) of the Greek Copyright Act.

¹⁵⁹ Articles 6(1), 7(1), 9(1) and 8(1) of the EU Rental and Lending Right Directive.

¹⁶⁰ Article 4 of the Rome Convention.

3.2.2. INTERNATIONAL PROTECTION

International protection of neighbouring rights is characterised by a less harmonised degree than the international protection of copyright. But since TRIPS obligates signatory states to provide for protection of neighbouring rights according to the Convention of Rome's standards, the international protection is improved. On the international level, the situation has been improved by the WPPT, however, this Treaty is applicable only in the case of audiograms or phonograms. Audiovisual performers are protected under this Treaty only insofar as they are also audio performers.

Principles of State of Origin and State of Protection

According to Article 67(2) of the Greek Copyright Act the neighbouring rights shall be governed by the legislation of the state in which the performance is realised or in which the visual or audiovisual recording is produced or in which the television broadcast is transmitted. Thus three standards may be applied by Greek courts with regard to the possible application of the legislation concerning neighbouring rights. According to Article 67(3) the determination of the subject, object, content, duration and limitations of the neighbouring rights shall be governed by the legislation applicable according to subsection (2), however, with the exception of exploitation licence contract. Concerning the protection by neighbouring rights, the law of this state will be applicable where protection is sought, Article 67(3) sentence 2 of the Greek Copyright Act.

Law Applicable to the Licence Contract

According to Article 67(3) of the Greek Copyright Act, in the case of a licence contract concerning neighbouring rights the law applicable to the contract will not be determined in application of Article 67(2) of the Greek Copyright Act, but in application of the general principles of the Greek international civil law.

Principle of Reciprocity

According to Article 67(4) last sentence of the Greek Copyright Act the relation with right holders in states which are not parties to international conventions ratified by Greece, Greek courts will offer protection for foreign right holders only if the legislation of the relevant state offers adequate protection to related rights stemming from acts effected in Greece (principle of reciprocity).

The Game Boy Case

Neighbouring rights protect makers of products which do not qualify for protection as 'works' in the sense of copyright (that is to say works of copyright in the sense of the Berne Convention) but which the legislators nevertheless considered worthy of protection. Subject matter of these rights may be images or sequences of images (which do not qualify as photographic works or cinematographic or audiovisual works) or the performance of an artist. The relevance of the difference between protection by copyright and by neighbouring rights may be illustrated by Austrian jurisprudence which concerned the unauthorised importation of videograms containing the play 'Game boy' from Japan.¹⁶¹ Had the electronic games constituted works of cinematographic art, the Austrian court explained, that by reason of the Berne Convention of which both Austria and Japan are contracting States, the Japanese plaintiff would be entitled to protection in Austria for their cinematographic works published abroad. But this Convention does relate to neighbouring rights, in particular those protecting the producer of videograms which do not constitute audiovisual works. Videograms are thus not protected by copyright in the sense of the Berne Convention but by neighbouring rights. Even if such protection is given within the EU the protection of performers is generally envisaged by the Rental and Lending Rights Directive with regard to the right in the recording of the performance, the right of reproduction, the right of distribution and the rights of broadcasting and communication to the public,¹⁶² and internationally by the Austrian Copyright Act, it does not protect foreign producers in the absence of an international convention or a bilateral treaty. Accordingly, on the basis of the Berne Convention, cassettes manufactured by foreigners which were not published in Austria would only be entitled to protection in Austria if they contained audiovisual works. Mere games which do not constitute such works constitute videograms, and since there is no international agreement applicable in the relation between Austria and Japan, the Japanese producer remains without protection by neighbouring rights in Austria.

3.3. PROTECTION BY WIPO TREATIES

WIPO,¹⁶³ the World Intellectual Property Organisation, Geneva, administers the Berne Convention and other international treaties and conventions relating to intellectual property. The provisions concerning audiovisual works in the Berne Convention did not suggest the adaptability to recent developments in the audiovisual sector. Thus an adaptation of the Berne Convention with the aim to accommodate it to the developments of the digital

¹⁶¹ (Austria) Supreme Court of 17 December 1991, 'Game boy', IIC 1993/531.

¹⁶² Articles 6(1), 7(1), 9(1) and 8(1) of the EU Rental and Lending Right Directive.

¹⁶³ WIPO home page: <http://www.wipo.org/>

technology seemed hardly recommendable. Therefore, the necessary adaptation was proposed in Treaties which were adopted by the WIPO Diplomatic Conference in December 1996.

3.3.1. WIPO COPYRIGHT TREATY ('WCT')

The WCT was adopted by the WIPO Diplomatic Conference in December 1996. It broadens the copyright protection afforded by the Berne Convention. Signatories are obligated to protect copyright management information. The scope of protection by copyright is extended to the communication of works to the public whether the communication is made simultaneously or consecutively to a plurality of persons.¹⁶⁴ Thus the Treaty makes clear that particularly online-communications of works need the authorisation of the right holder.

The WIPO Copyright Treaty's Electronic Rights of Communication to the Public

The reasons of the Draft Treaty explain that the technological developments which have made it possible to make protected works available in many ways which differ from traditional methods. This has become a source of concern in connection with the categories of works not covered by the exclusive right of communication as regulated by the Berne Convention. The extension of the concept of communication by the Treaty would increase the scope of copyright protection. The new rights will accrue to the copyright owner so that he will be the person to authorise the use of the work with respect to the increased communications rights. It may be expected that the new rights will be effective with the adoption of the Treaty.

The WIPO Copyright Treaty which was agreed upon at a diplomatic conference in December 1996 establishes in Article 8:

'Without prejudice to the rights provided for in Articles 11(1)(ii), 11bis(1)(i), 11ter(1)(ii), 14(1)(i) and 14bis(1) of the Berne convention, authors of literary and artistic works shall enjoy the exclusive right of authorising and communication to the public of their works including the making available of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them'.

The Right of Communication to the Public

The notes to this Article of the Draft WCT state: "In the Berne Convention the exclusive right of communication to the public of works has been regulated in a fragmented manner. The most comprehensive provision is found in Article 11(1)(ii) of the Berne Convention. This provision grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorising any communication to the public of the performance of their works and paragraph (2) confirms that these authors enjoy the same rights in translations as they enjoy in their original works. Similar provisions concerning the communication to the public of recitations of literary works are set forth in Article 11ter. According to Article 14(1)(ii) of the Berne Convention, authors of literary or artistic works have the exclusive right of authorising the communication to the public by wire of their works adapted or reproduced by means of cinematography. Article 14bis(1) grants the same protection to the cinematographic works themselves. The exclusive right in certain forms of communication to the public has been provided for in a special provision in Article 11bis(1) concerning all categories of literary and artistic works. These rights are (1) the right of broadcasting, (2) the right of communication to the public by wire and the right of rebroadcasting of a broadcast, and (3) the right of public communication of the broadcast by loudspeaker, etc. The provisions of paragraph (1)(i) of that Article cover, in addition to the right of broadcasting, the communication of works to the public 'by any other means of wireless diffusion of signs, sounds or images'."

Modern Technologies Facilitate New Types of Uses of Audiovisual Works

The notes of Article 8 of the draft WCT continue to explain the need to adapt the law to technological changes: "Technological developments have made it possible to make protected works available in many ways that differ from traditional methods. This is a source of concern in connection with the categories of works that are not covered by the provisions on the right of communication in the Berne Convention. In addition, the interpretation of these provisions may differ. It has become evident that the relevant obligations need to be clarified and that the rights currently provided under the Berne Convention need to be supplemented by extending the field of application of the right of communication to the public to cover all categories of works. The right of communication does not presently extend to literary works, except in the case of recitations thereof. Literary works, including computer programs, are presently one of the main objects communicated over networks. Other affected categories of works are also not covered by the right of communication, significant examples being photographic works, works of pictorial art and graphic works. (...) The second part of [Article 8] expressly states that communication to the public includes the making available to the public of works, by wire, or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. The relevant act is the making available of the work by providing access to it. What counts is

¹⁶⁴ Article 8 of the WCT.

the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user.”

On-Demand Communication

The notes to Article 8 of the draft WCT state: “One of the main objectives of the second part of [Article 8] is to make it clear that interactive on-demand acts of communication are within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public may have access to the works from different places and at different times. The element of individual choice implies the interactive nature of the access. The features described in the preceding Note entail important delimitations of the relevant acts. The provision excludes mere private communication by using the term ‘public’. Furthermore, the requirement of individual choice excludes broadcasting from the scope of the provision. [Article 8] leaves intact the rights provided for in the listed Berne Convention provisions. The proposal supplements existing Berne Convention protection by adding a right of communication to the public for all categories of works, including literary works, to which the existing right of communication does not apply. These elements in the proposal constitute new rights or an additional dimension to the right of communication. However, the features that have been confirmed in the second half, the ‘making available’ part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention. Nevertheless, other interpretations may also exist concerning obligations under the Convention. The objective of the proposal is to harmonise the obligations and to avoid any discrepancies that may be caused by different interpretations.”

The Term ‘Communication to the Public’ in the Sense of the Treaty

The notes to Article 8 of the draft WCT explain the broad concept of the term ‘communication to the public’: “The expression ‘communication to the public’ of a work means making a work available to the public by any means or process other than by distributing copies. This includes communication by wire or wireless means. The technology used may be analogue or digital, and it may be based on electromagnetic waves or guided optical beams. The use of the non-restrictive term ‘any’ in front of the word ‘communication’ in [Article 8], and in certain provisions of the Berne Convention, emphasises the breadth of the act of communication. ‘Communication’ implies transmission to a public not present in the place where the communication originates. Communication of a work can involve a series of acts of transmission and temporary storage, such incidental storage being a necessary feature of the communication process. If, at any point, the stored work is made available to the public, such making available constitutes a further act of communication which requires authorisation. It should be noted that storage falls within the scope of the right of reproduction (...). As communication involves transmission, the term ‘transmission’ could have been chosen as the key term to describe the relevant act. The term ‘communication’ has been maintained, however, because it is the term used in all relevant Articles of the Berne Convention in its English text. (...) It seems clear that, at the Treaty level, the term ‘communication’ can be used as a bridging term to ensure the interoperability and mutual recognition of exclusive rights that have been or will be provided in national legislations using either the term ‘transmission’ or the term ‘communication’. The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant. What is transferred or communicated is the work. The term ‘public’ has been used in [Article 8] as it has been used in the present provision of the Berne Convention. It is a matter for national legislation and case law to define what is ‘public’. However, the aspects dealt with in Note (...)10. should be taken into account the ‘public’ consists of individual ‘members of the public’ who may access the works from different places and at different times.”

Protection of Technological Measures

According to Article 11 of the WCT contracting parties are obligated to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures which are used by authors in connection with the exercise of their rights under the Treaty or the Berne Convention and which restrict acts, in respect of their works which are not authorised by the authors concerned or permitted by law. This obligation means that the importation, manufacture or distribution of protection-defeating devices or the offer or performance of services having the same effect shall be made unlawful. Contracting parties are free to choose the appropriate remedies according to their own legal traditions.

The Protection of Copyright Management Information

The WCT protects in Article 12 copyright management information. Such information is information which identifies the work, its author, or the owner of any right in the work, or information about the terms and conditions of use of the work, any numbers or codes which represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public. Thus the definition covers rights management information in the electronic form only. The Treaty

obligates contracting parties to provide adequate and effective legal remedies against any person who knows or who should know that it will induce, enable, facilitate or conceal a copyright infringement:

- to remove or alter any electronic rights management information without authority,
- to distribute, import for distribution, broadcast or communicate to the public without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

The US Digital Millennium Copyright Act of 1998 even prohibits the ‘passing off’ of information which is wrongly declared as copyright management information.¹⁶⁵

3.3.3. WIPO PERFORMANCES AND PHONOGRAMS TREATIES (‘WPPT’)

The WIPO Performances and Phonograms Treaty¹⁶⁶ is separated into five Chapters: general provisions, rights of performers, rights of producers of phonograms, common provisions and administrative and final clauses. Concerning the making of audiovisual products, Article 6 is of particular importance. According to this provision performers enjoy the exclusive right of authorising the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance and the fixation of their unfixed performances. This provision is basically contained in the Rome Convention¹⁶⁷ and the TRIPS Agreement.¹⁶⁸

WPPT Does not Relate to Audiovisual Fixations

The Treaty does not include rights of performers with regard to audiovisual productions. Notes 2.14 to 2.18 on Article 2 of WIPO’s Draft Treaty stated that the relevant Committee charged with the drafting of the Treaty held its first session in June-July 1993. At the conclusion of the debate in the first session a consensus developed that all issues concerning the rights of performers should be discussed, including the questions surrounding audiovisual fixations. It was observed that ‘nothing in the terms of reference determined by the Governing Bodies precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions’. The Director General of WIPO then stated that in due time the International Bureau would prepare a document on audiovisual fixations.

During the third session of the Committee of experts many delegations expressed support for the inclusion in the new instrument of a right of performers in audiovisual fixations. WIPO’s International Bureau prepared a discussion paper on this subject.¹⁶⁹ Arguments were presented in favour of and in opposition to the inclusion of these new rights, and a review of the relevant provisions of the Rome Convention, the TRIPS Agreement and various national laws and regional instruments was undertaken. In the fourth session the EU suggested that certain rights of performers should be extended to audiovisual fixations, whereas the US presented a proposal confining the protection of performers to sound recordings only. But it became clear from the proposals and the deliberations of the Committee of Experts that it would not be possible to present a proposal that would reasonably satisfy the interests of the different positions. In the final version of the Treaty the version did not include a reference to audiovisual fixations.

3.3.4. WIPO COMMITTEE OF EXPERTS ON A PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES

On 15, 16 and 19 September 1997 the WIPO Committee of Experts on a Protocol concerning Audiovisual Performances discussed the possibility of a treaty concerning the protection of audiovisual performances. In the Report¹⁷⁰ the Committee stated that discussions were based on the memoranda prepared by the International Bureau of WIPO, in accordance with existing national and regional legislation concerning audiovisual performances and information received from WIPO Member States and from the European Community concerning audiovisual performances. According to the Chairman’s summary the general discussion was very useful. Many delegations expressed regret that protection of performers with respect to audiovisual performances was not included in the WPPT. All delegations reaffirmed that the work on a Protocol addressing this issue should continue in the framework of WIPO. Specific aspects which delegations had mentioned were, particularly:

- the possible scope of the protection,
- the specific rights to be granted to performers,

¹⁶⁵ Section 1202(a)(1) of the US Digital Millennium Copyright Act of 1998.

¹⁶⁶ WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996, WIPO document CRNR/DC/95.

¹⁶⁷ Article 7 of the Rome Convention provides performers with the right to prevent, 1st, the broadcasting and communication to the public of their unfixed performances without their consent except where the performance is already a broadcast performance, and, 2nd, the fixation of their performance without their consent.

¹⁶⁸ The TRIPS Agreement guarantees certain rights to performers in their unfixed performances.

¹⁶⁹ WIPO document INR/CE/IV.

¹⁷⁰ WIPO document AP/CE/I/4 of 19 September 1997.

- the aspect of moral as well as of economic rights,
- the objective of obtaining protection for performers as much in parallel as possible with the protection of authors,
- the desire to do away with the discrimination of audiovisual performers in respect of their legal protection.

The Chairman also indicated that it had been pointed out that the Berne Convention contained specific rules on cinematographic works. The need for a flexible treaty had been underlined, namely that it should be adapted to divergent concepts in national legislations and to the realities, that is to say, contractual practices, collective bargaining and collective management of rights. Further elements mentioned were the principle of national treatment and the issues of the transferability of rights and applicable law. The Protocol should be of a complementary nature, in relation to the WPPT. Concerning future work the Committee will meet in May/June 1998, discussing possible drafts for a Treaty. It seems regrettable that the work of the Committee of Experts deals with the rights of audiovisual performers only, without including the rights of the producers of videograms. Parallel to the WPPT Treaty which covers both performers and producers of phonograms, the international protection provided for by a WIPO treaty, which complements the WTTP in the audiovisual sector, should also cover the rights of the producers of videograms, taking into account the considerable investment which they undertake and the insufficient international protection.¹⁷¹

3.4. AUDIOVISUAL PRODUCTS AND INTERNATIONAL TRADE: THE WTO

The WTO (World Trade Organisation)¹⁷² is the only international institution which deals with the rules of trade between nations. GATT, the General Agreement on Tariffs and Trade, which also established an organisation, has been replaced and amended by the WTO Agreements. The agreements bind governments to keep their trade policies within agreed limits. Whereas GATT only dealt with goods, the WTO Agreements now include also the regulation of services and intellectual property. The Uruguay round which lasted from 1986 to 1994 led to the establishment of the WTO which started its operations in 1995.

Aims of WTO Agreements

- to help trade flow as freely as possible,
- to achieve further liberalisation gradually through negotiation,
- to set up an impartial means of settling disputes.

GATT/GATS/TRIPS

The GATT,¹⁷³ GATS¹⁷⁴ and TRIPS¹⁷⁵ agreements are directed towards the facilitation of the exchange of goods and services by recognising intellectual property rights. The idea behind the facilitation of the international trade is made evident by the introductory words of the signatory States to the GATT of 1947, subsequently amended: 'Recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods, being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in the international commerce'. Thus the international trade is viewed as a motor for the improvement of the conditions for living on a global basis. The audiovisual industry is subject to these rules of the WTO Agreements, even if it is not expressly addressed. Thus the relevant provisions of the WTO Agreements will be introduced below.

3.4.1. GATT

The GATT relates to the international trade in goods. It contains the following essential principles:

- Most-Favoured-Nation-Treatment: Customs duties and charges imposed on or in connection with the importation or exportation of goods shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties,¹⁷⁶

¹⁷¹ The insufficient international protection of the producers of videograms is made evident by the 'Game Boy' case, Austria, Supreme Court of 17 December 1991, IIC 1993/531, discussion under 'Copyright and Neighbouring Rights'.

¹⁷² World Trade Organisation ("WTO") home page: <http://www.wto.org/>

¹⁷³ General Agreement on Tariffs and Trade.

¹⁷⁴ General Agreement on Trade in Services.

¹⁷⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods.

¹⁷⁶ Article I of GATT.

- A contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in a schedule attached to the Agreement,¹⁷⁷
- National treatment concerning internal taxation and regulation, which means that a contracting State recognises that internal taxes and other internal charges, laws and regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, should not be applied to imported or domestic products so as to afford protection to domestic production.¹⁷⁸
- National treatment concerning importation of products, which means that the products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products,¹⁷⁹
- National treatment concerning distribution of imported products, which means that the products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use,¹⁸⁰
- National treatment is not applicable to governmental procurement or to the payment of subsidies, which means that the principle of national treatment does not concern laws and regulations relating to products purchased for governmental purposes or concerning the payment of subsidies exclusively to domestic producers or subsidies effected through governmental purchases of domestic products,¹⁸¹
- General elimination of quantitative restrictions, which means that prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party;¹⁸²
- Safeguards for the balance of payments, which means that restrictions mentioned above are possible in order to safeguard a contracting party's external financial position,¹⁸³
- Non-discriminatory administration of quantitative restrictions, which means that prohibitions or restrictions on the importation of a product from the territory of another contracting party may only be applied if it concerns the importation of the like product of all third countries,¹⁸⁴
- Notification of Subsidies, which means that a contracting party which grants subsidies shall notify the contracting parties in writing of the extent and nature of the subsidisation, of the effect and of the quantity of the affected products imported into or exported from its territory and of the circumstances making the subsidisation necessary,¹⁸⁵
- General exceptions from the application of GATT in case of public morals and national treasures of artistic or historic value, which means that subject to the requirement that such measures are not applied in a discriminatory manner, a contracting party may enforce any measures necessary to protect public morals¹⁸⁶ of imposed for the protection of national treasures of artistic, historic or archaeological value.¹⁸⁷

Accordingly, there is no general 'cultural exception clause' which would authorise a contracting party to exempt certain cultural goods from the application of the agreement, unless the goods fall within the definition of national treasures of artistic, historic or archaeological value. However, there is a special Article concerning films.

Article IV of GATT: Special Provisions relating to Cinematograph Films

Article IV of GATT relates to audiovisual products. It states:

Article IV. Special Provisions relating to Cinematograph Films.

If any contracting party establishes or maintains internal quantitative regulations relating to exposed cinematograph films, such regulations shall take the form of screen quotas which shall conform to the following requirements:

(a) Screen quotas may require the exhibition of cinematograph films of national origin during a specified minimum proportion of the total screen time actually utilised, over a specified period of not

¹⁷⁷ Article II of GATT.

¹⁷⁸ Article III(1) of GATT.

¹⁷⁹ Article III(2) of GATT.

¹⁸⁰ Article III(4) of GATT.

¹⁸¹ Article III(8) of GATT.

¹⁸² Article XI of GATT.

¹⁸³ Article XII of GATT.

¹⁸⁴ Article XIII(1) of GATT.

¹⁸⁵ Article XVI of GATT.

¹⁸⁶ Article XX(a) of GATT

¹⁸⁷ Article XX(f) of GATT.

- less than one year, in the commercial exhibition of all films of whatever origin, and shall be computed on the basis of screen time per theatre per year or the equivalent thereof;
- (b) With the exception of screen time reserved for films of national origin under a screen quota, screen time including that released by administrative action from screen time reserved for films of national origin, shall not be allocated formally or in effect among sources of supply;
- (c) Notwithstanding the provisions of sub-paragraph (b) of this Article, any contracting party may maintain screen quotas conforming to the requirements of sub-paragraph (a) of this Article which reserve a minimum proportion of screen time for films of a specified origin other than that of the contracting party imposing such screen quotas; Provided that no such minimum proportion of screen time shall be increased above the level in April 10, 1947;
- (d) Screen quotas shall be subject to negotiation for their limitation, liberalisation or elimination.'

Article IV of GATT is occasionally referred to as a kind of 'cultural exception clause' by means of which nations may exempt cultural goods from the application of provisions ensuring the free trade.¹⁸⁸ Whereas the Swiss practice of licensing the right of the importation of films to distributors may be based on the quota system of Article IV GATT, it may be questionable whether the quota system contained in the EU's Directive 'Television without frontiers' can be based on this provision. Article IV of GATT is directed towards the regulation of trade in goods. Films are conceived as corporeal goods. This might exclude the possibility to extend its application to broadcasting programmes which could be understood as services falling under the regulation contained in GATS which does not contain a similar rule as Article IV of GATT. Accordingly, quota systems may be maintained if national audiovisual products can be qualified as goods in the sense of cinematograph films. The issue of the application of the 'cultural exception principle' to the WTO Treaties was the subject-matter of a written question to the Council of a Member of the European Parliament,¹⁸⁹ however, in the answer the Commission stated that during the Uruguay round the 'cultural exception' was not a subject-matter of discussion.

3.4.2. GATS

The GATS relates to the international trade in the providing of services. It contains the following essential principles:

- Most-favoured-nation treatment: a Member State must accord to service and service suppliers of any other Member treatment no less favourable than that which it accords to similar services and service suppliers of any other country.¹⁹⁰ In the case where a monopoly supplier does not act in accordance with the obligation of the most-favoured-nation treatment, a Member State shall ensure that its obligations deriving from the principle are met.¹⁹¹
- Market access: a Member State shall grant services and service suppliers of other Member States treatment no less favourable than that provided for under the terms, limitations and conditions agreed in its Schedule.¹⁹²
- Liberalisation of trade in services: the GATS does not prevent its Members from being a party to an agreement liberalising trade in services (such as for example the EU) provided that such an agreement has substantial sectoral coverage and provides for the absence of discrimination.¹⁹³
- Recognition: Member States may recognise the education, experiences, requirements met or licences and certifications granted in a particular country with regard to the authorisation for the providing of services.¹⁹⁴ If a Member States has made arrangements with other states for the recognition of qualifications, licences and the like, it shall also afford opportunity for other interested Members of the GATS to negotiate their accession to such arrangements.¹⁹⁵

¹⁸⁸ See for example Sandrine CAHN and Daniel SCHIMMEL: 'The Cultural Exception: Does It Exist in GATT and GATS Frameworks? How Does it Affect or Is It Affected by the Agreement on TRIPS?', *Cardozo Arts & Entertainment*, vol. 15:281 (1997) 281-314; Francisco Henriques DA SILVA: 'Les Six Points de Mons et Leur Suite', in: *L'Europe et les Enjeux du GATT dans le Domaine de L'Audiovisuel* (1994) at 131,138; Clint N. SMITH: 'International Trade in Television Programming and GATT: 'An Analysis of Why the European Community's Local Program Requirement Violates the General Agreement on Tariffs and Trade'', *10 Int. Tax & Bus. L.* 97/118 (1993).

¹⁸⁹ Written question E-218/95 by Jean-Pierre Raffarin (PPE) to the Council of 22 February 1995, Answer by the Commission on 06 February 1996, *EU O.J. C 79/1* of 18 March 1996.

¹⁹⁰ Article II(1) of GATS.

¹⁹¹ Article VIII(1) of GATS.

¹⁹² Article XVI of GATS.

¹⁹³ Article V of GATS.

¹⁹⁴ Article VII(1) of GATS.

¹⁹⁵ Article VII(2) of GATS.

- Business practices: Member States shall ensure that the business practices of service suppliers other than those of monopoly or exclusive suppliers based upon national laws, shall not restrain competition and thereby restrict trade in services.¹⁹⁶
- Payments: Member States shall not apply restrictions on transfers and payments.¹⁹⁷
- Subsidies: Member States shall enter into negotiations with a view to developing multilateral disciplines to avoid trade-distorting effects which subsidies may have on trade in services.¹⁹⁸
- Future liberalisation: Member States shall enter into new rounds of negotiations with a view to achieving a progressively higher level of liberalisation.¹⁹⁹

The EU Commission's Audiovisual Policy towards GATS 2000

Taking into account of the fact that, differently from the GATT, the GATS did not address the issue of audiovisual policy, the Commission is concerned to observe the European industry's interests during the negotiations of the GATS 2000. In the invitation for the consultation the Commission observed that evolutions in the audiovisual sector itself as well as the general trends of liberalisation of services in the WTO raise new questions on what has to be secured in this multilateral trade body to allow for the pursuit and development of policies and measures in the field of audiovisual policy, both at national and European and national levels. The Commission has issued a questionnaire on audiovisual services.²⁰⁰ On the basis of the replies it aims at establishing its policy during the negotiations. However, it seems to be questionable whether answers to such general questions as 'what are the existing policies and measures we need to protect from the application of GATS positive rules and disciplines? What are the public interest objectives pursued by such policies and measures?' may hardly contribute to the establishment of an inherent and comprehensive strategy for the negotiations.

3.4.3. TRIPS

The TRIPS aims at the reduction of distortions and impediments to international trade, taking into account the need to promote effective and adequate protection of intellectual property rights and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. The definition of the term 'intellectual property' is broad, by reference to the Paris Convention (1967).

Basic principles of TRIPS with particular regard to the protection of copyright and neighbouring rights are:

- national treatment (each Member State shall accord to the nationals of other Members a treatments which is no less favourable than that which it accords to its own);²⁰¹
- most favoured nation treatment (any advantage with regard to the protection of intellectual property granted by a Member to the nationals of any other country shall be accorded to the nationals of all other Members);²⁰²
- copyright protection shall be given on the basis of the provisions contained in the Berne Convention;²⁰³
- protection of neighbouring rights has to be granted for performers, producers of phonograms and broadcasting organisations.²⁰⁴

The reference to the Berne Convention and the definition of the scope of neighbouring rights in Article 14 of TRIPS creates factually a global minimum standard for copyright protection. However, up to now producers of videograms are not included within this protection, but WIPO is actively involved in the improvement of this protection. Concerning broadcasting organisations, Member States are obligated to grant them the exclusive rights of fixation, reproduction of fixations and the re-broadcasting by wireless means of broadcasts as well as the communication to the public of television broadcasts. TRIPS does not address the right of re-broadcasting by cable which, according to the laws of some countries, can be made against the payment of a reasonable remuneration. By means of the right of the communication to the public the broadcaster may prohibit the online-communication of broadcasts without their authorisation which is a right granted under the WIPO Copyright Treaty. Yet it may not always be easy to differentiate between a cable re-broadcasting which may be permissible against the payment of a reasonable remuneration, depending upon national legislation, and the online-communication to the public.

¹⁹⁶ Article IX(1) of GATS.

¹⁹⁷ Article XI of GATS.

¹⁹⁸ Article XV of GATS.

¹⁹⁹ Article XIX of GATS.

²⁰⁰ See http://europa.eu.int/comm/dg10/avpo9licy/internat/gats2000/consultdoc_en.html

²⁰¹ Article 4 of TRIPS.

²⁰² Article 5 of TRIPS.

²⁰³ Article 9(1) of TRIPS.

²⁰⁴ Article 14 of TRIPS.

The TRIPS envisages that Member States provide strong criminal protection, at least in cases of wilful copyright or trademark piracy on a commercial scale.²⁰⁵ Section 4 of TRIPS (Articles 51 to 60) establish special requirements related to border measures. It is envisaged that a right holder shall have the right to institute proceedings for a suspension of release of goods with the customs authorities if he suspects that they are counterfeit trademark or pirated copyright goods. It is a condition that he provides adequate evidence to satisfy the competent authorities that there is prima facie an infringement of his intellectual property rights. The applicant must also provide a security of equivalent assurance to protect the defendant and the competent authorities and to prevent abuse of his rights. The duration of the suspension is generally ten days within which a decision on the merits of the case must be initiated by the plaintiff.

4. INTERNATIONAL CONTRACTS AND ARBITRATION

The globalisation of the film market leads increasingly to the conclusion of contracts with foreign parties and affecting the territories of other countries. Which laws are applicable to such a contract? Is it useful to provide for arbitration in order to avoid the resort to courts? Parties to audiovisual contract should observe particular rules which may help them to solve their problems.

4.1. INTERNATIONAL CONTRACTS

Those who concluded international contracts relating to films, whether concerning production or exploitation, have to observe the same guiding principles:

- freedom of contract
- state of origin
- state of protection
- international labour law.

4.1.1. INTERNATIONAL PRIVATE LAW AND INTERNATIONAL PROCEDURAL LAW

The international private law regulates issues which may arise from the application of different and also conflicting national legal systems. Generally, legal redress can only be obtained from courts. In application of the principle that a state has to ensure legal security the power to grant legal redress has been transferred to the courts. The increasing globalisation of the audiovisual market has the consequence that authors, producers, distributors or broadcasters do not only have to deal with the national legal system of the state of which they are nationals, but also with the laws of states applicable in those markets to which their activities relate. In the civil law which governs contracts and the law of obligations, the interworking of the different national legal systems is regulated by the international civil law. This legal field is not a coherent body of legal rules contained in an international treaty, but it is regulated by numerous international treaties with more or less contracting states and by customary law.

Contracts with Effect beyond National Borders

Parties to a contract may regulate their business within the national territory of which they are nationals. The relevant national law is applicable to such contracts. In the case where the parties regulate their business (also) abroad or if they determine that foreign laws should be applicable to their contractual relation, the rules of the international civil law may be applicable to such contracts.

Choice of Law

The choice of the law applicable to the contract is made by the parties in evaluation of their interests. In application of the principle of freedom of contract, it is up to the parties to determine the law which shall be applicable to their contractual relation. This is a basic rule of the international private law.²⁰⁶ In the case of international production contracts it may be reasonable to choose the law of the state where the main work will be performed. In the case of contracts relating to the global exploitation of audiovisual products, often the law of the State of California will be chosen of the parties, taking into account that in this state there is a considerable bunch of litigation and arbitration in the audiovisual sector so that the legal infrastructure relating to conflicts in audiovisual law exists. But also the law of a European state may be chosen, for example in the case of cooperation contracts between companies from different European states. The laws of many European states contain provision concerning audiovisual production contracts, mainly in copyright laws. With regard to the fact that often contracts in the audiovisual sector are comprehensive instruments, the choice of the law applicable to the contract is of less importance than the choice of the arbitration.

²⁰⁵ Article 61 of TRIPS.

²⁰⁶ See, for example, Article 3 of the Convention on the Law Applicable to Contractual Obligations of 1980 ('Rome Convention').

Since in international contracts the stipulation of the law of a European state may be difficult to achieve, taking into account the often limited territorial extension of European states, it may be recommendable to choose as the law applicable to the contract, either the Principles of European Contract Law of 1998²⁰⁷ or the UNIDROIT Principles of International Commercial Contracts (1994).²⁰⁸ The advantage of choosing such a body of law is that these principles are 'neutral' in nature, that is to say that no party will be able to consider itself as 'favoured', because the applicable law is the law of its state of origin. In the case where the communication between the parties is made by electronic means it may, additionally, be appropriate to stipulate the applicability of the rules contained in the UNCITRAL Model Law on Electronic Commerce (1996).²⁰⁹

The Principle according to which the Law of that State Is Applicable with which the Contract Has the Closest Connection

According to the international civil law of many countries the parties are free to determine the applicability of the national law to their contract they think fit.²¹⁰ In the case where the parties did not regulate the applicable law, in general, the laws of this State will be applicable to the contract with which the contract has the closest connection.²¹¹ This will be the state in which the party which has to bring the characteristic performance has, at the time of the conclusion of the contract:

- its ordinary place of residence,
- its main headquarters or,
- its main registered office.

What is the characteristic performance of the contract? In general, the characteristic performance is defined as the performance by means of which the function of the legal relation is explained in the economic, sociological and functional sense. Thus in the case of a copyright licence the party which exploits the copyright performs the characteristic performance so that his place of residence or his headquarters or registered office will determine the law applicable to the contract if the parties did not regulate the issue expressly in the contract.²¹²

Contracts Relating to Audiovisual Products and Related Services

Since the principle of the freedom of contract governs international law of contract, the parties to contracts relating to audiovisual contracts and related services are, basically, free to write into their contracts what they think fit. However, this principle is modified in particular ways. First, in international contracts relating to the making of audiovisual products and related services the parties have to observe the principles of the international labour law. This means that by their stipulations the parties cannot do away with the application of principles of national labour law which may be applicable to the contract. Second, in international contracts relating to the making and exploitation of audiovisual products and related services the parties have to observe the principles of special rules relating to copyright.

4.1.2. INTERNATIONAL AND NATIONAL LABOUR LAW

Principles of international labour law can be particularly relevant to audiovisual production contracts where artists and staff come from varying nations and where their activities relate to different places. Basically, the general principles of the international labour law have been established by agreements and recommendations on the initiative of the International Labour Organisation ('ILO').²¹³ In principle, the parties to an international contract have to observe the laws of the state where the employees perform their duties. This means that they cannot, by means of an international contract, avoid the application of the rules of the relevant national labour law. In the audiovisual industry collective agreements can play an important role. Generally, the competence of private bodies to regulate legal issues in collective agreements is understood as the lawmaking power's partial transfer of the right of legislation to private persons. According to the prevailing view, collective agreements have legal force only within the national territory for which they were made.²¹⁴ It may be possible to stipulate that the collective agreement applicable in a foreign state should also be applicable to the contractual relation in another state;²¹⁵ such a clause would be based on the principle of freedom of contract.

²⁰⁷ http://itl.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.perview.html

²⁰⁸ http://itl.irv.uit.no/trade_law/doc/Unidroit.Contract.Principles.1994.html

²⁰⁹ http://itl.irv.uit.no/trade_law/doc/UN.Electronic.Commerce.Model.Law.1996.html

²¹⁰ See, for example, Article 27 of the German Introductory Code of the Civil Code.

²¹¹ See, for example, Article 4 of the Rome Convention of 1980; Article 28 of the German Introductory Code of the Civil Code.

²¹² Arnold VAHRENWALD: 'Recht in Online und Multimedia', looseleaf, 3rd supplement 1998, Luchterhand, Neuwied 1996.

²¹³ International Labour Organisation ('ILO') (<http://www.ilo.org>).

²¹⁴ IPRG Kommentar, Schulthess, Zurich 1993, No. 52 to Article 121 of the Swiss Federal Code concerning the International Civil Law, at 1014.

²¹⁵ Manfred REHBINDER: 'Schweizerisches Arbeitsrecht', 9th ed., Berne 1988, at 198.

The collective agreements of a state will be applicable to a national of that state even if he works abroad on the condition that also that nation's laws are applicable to the contractual relation. The change of the place of work may also lead to a change of the collective agreements applicable to the employment relation. This will be the case if the parties stipulated that the law of the state should be applicable to the contractual relation where the employee has his residence or where the employer is main office and if the employee, during the performance of his contractual duties, changes his place of residence or where the employer changes his main office from one state to the other.²¹⁶

4.1.3. CONTRACTS RELATING TO AUDIOVISUAL PRODUCTS AND COPYRIGHT

The national rules of the international civil law may contain special provisions applicable to contracts regulating copyright issues. This is, for example, the case in the Swiss regulation of the international civil law. It is the purpose of the rules contained in the international private law to determine the law which is applicable to a contract with a connection with the law of a foreign state. Differently from the determination of the law applicable in the case of the violation of the copyright, the establishment of the law applicable to a contract aims at the avoidance of conflicts which may arise from the applicability of different national legal systems to copyright contracts.

Greek Law of Copyright or Neighbouring Rights Contracts: the Principles of Freedom of Contract, State of Origin and State of Protection

The Greek Copyright Act contains a special regulation of conflicts of laws in Article 67.

Greek Law and the Determination of Subject, Object, Content, Duration and Limitations

The concepts of subject, object, content, duration and limitations are not particularly defined by the act. Thus Section II of the Act (Article 6 to 11) deals with the initial subject of copyright and Article 6 with the initial right holder. The Greek Copyright Act regulates the 'object' of the right in Article 2. 'Object' in this sense means the protected subject-matter, in particular the particular category of protected works such as the audiovisual work. The notion content will mean the scope of the relevant right. Section I of the Greek Copyright Act (Articles 1 to 5) deals with object and Content of Copyright. Defined are the economic rights (Article 3), the moral rights (Article 4) and the droit de suite (Article 5). The notion of the duration refers to the duration of the term of protection. The notion of the limitation of the right means that copyright or neighbouring rights are not granted by the state without limitations in the public interest. Such limitations, for example concerning fair use or private copying, which are, in the case of the Greek Copyright Act contained in Section IV (Articles 18 to 28) are little harmonised and differ from state to state.

Article 67(3) first sentence of the Greek Copyright Act states that the determination of the subject, object, content, duration and limitations of the copyright respectively neighbouring rights shall be determined:

WITH REGARD TO COPYRIGHT IN A PUBLISHED AUDIOVISUAL WORK,

by the legislation of the state in which the audiovisual work was first made lawfully accessible to the public,

WITH REGARD TO COPYRIGHT IN AN UNPUBLISHED AUDIOVISUAL WORK

by the legislation of the state of which the author (the principal director, Article 9) is a national

WITH REGARD TO NEIGHBOURING RIGHTS OF PERFORMERS

by the legislation of the state in which the performance is realised,

with regard to neighbouring rights of producers of videograms (audiovisual recordings)

by the legislation of the state in which the audiovisual recording is produced

WITH REGARD TO NEIGHBOURING RIGHTS OF BROADCASTING ORGANISATIONS

by the legislation of the state where the broadcast is transmitted.

Greek Law and Licence Agreements

But according to Article 67(3) last clause of the first sentence of the Greek Copyright Act the above principles are not applicable in the case of an exploitation licence arrangement. This means that the law applicable to the licence contract will be determined in application of the general principles of international private law.

Greek Law and the Principle of the State of Protection

Concerning the protection of a right (whether copyright or neighbouring right) the Greek legislator provided for the application of the principle of the state of protection in Article 67(3) last sentence. This means that in particular infringement issues will have to be decided according to Greek law, no matter where the film was made, what nationality the principal director has or where the film was first shown.

²¹⁶ See IPRG Kommentar, Schulthess, Zurich 1993, No. 53 to Article 121, at 1015.

Principle of the State of Protection

Copyright law is subject to the principle of territoriality. This means that national copyright law is applicable only within the national territories to which the laws extend. Thus the copyright owner does not own an 'international' copyright but a bundle of copyrights each of which depends upon the relevant national law. The coming into being, the scope and the termination of the copyright are determined according to the principle of the country of protection. This means that the principle of the country of protection determines in particular the following issues:

- 1st, the initial ownership of copyright,²¹⁷
- 2nd, the scope and effects of copyright which may exceed the minimum protection of the Berne Convention,²¹⁸
- 3rd, the transfer of the copyright,²¹⁹
- 4th, the violation of the copyright.²²⁰
- 5th, the enforcement of the copyright,²²¹

The parties to a copyright contract cannot by stipulation regulate these issues differently from the relevant national laws in application of the principle of the state of protection. The strict application of the principle of the country of protection to copyright contracts would lead to the consequence that a contract which relates to the global grant of use of copyright would have to comply with the copyright laws of any country in the world. However, in the international law of contract the principle of the country of protection is superseded by the principle of the applicability of the law of the state with which the contract has the closest connection.²²² Accordingly, the principle of the state of protection is applicable only where the core of the copyright legislation is concerned.

The following cases may illustrate the above mentioned principles.

Ad 1: Initial Ownership of Copyright

In the case 'Casino affair' the German Federal Supreme Court²²³ held: 'The law of the state where protection is claimed does not only decide on the effect of the protection of copyright but also on the question who is the author and initial owner of the copyright in a film.' The initial ownership of copyright in films has been decided differently by national legislators. Whereas the circle of persons who count as authors is small according to German law where it does not include the composer of the film music or the writer of the script who are considered as authors of pre-existing works, Italian law comprises a larger circle of persons under the authors of a film which includes also the scriptwriter and the composer of the music²²⁴ and the French Copyright Act explicitly includes authors of pre-existing works in the circle of joint authors of the cinematographic work.²²⁵

²¹⁷ The coming into being of copyright depends upon national laws, differences may particularly concern issues of authorship, in the case of audiovisual works it depends upon national laws whether authors are, beyond the film director, also the composer of the film music or the writer of the script, and in the case of works for hire, it depends upon national laws whether the copyright arises with the employees or the employer.

²¹⁸ The minimum scope of copyright is established in the Berne Convention, beyond, countries may extend copyright protection in special cases, for example computer software; in the case of moral rights, for example, it is well known that continental European countries tend to conceive these rights more comprehensively than countries with common law systems.

²¹⁹ The types of contracts relating to copyright are regulated by national laws, for example, the assignment of copyright is not possibly according to German law, the author may only grant a licence for the right of use; according to German copyright law the grant of rights for new technical types of use which were not known at the time of the conclusion of the contract are without effect, whereas according to US law it is possible to grant rights relating to future techniques for the use of the copyright.

²²⁰ The question whether there is a violation of the copyright depends upon the relevant national law.

²²¹ According to the German and the Italian law the exclusive copyright licensee acquires an independent right to pursue infringers.

²²² See above, 'The Principle according to which the Law of that State Is Applicable with which the Contract Has the Closest Connection'

²²³ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²²⁴ Article 44 of the Italian Copyright Act states: 'The author of the subject, the author of the scenario, the composer of the music and the artistic director shall be considered as co-authors of a cinematographic work.'

²²⁵ Article 14 of the French Copyright Act of 1984 states: 'Authorship of an audiovisual work shall be deemed to belong to the physical person or persons who brought about the intellectual creation thereof. (2) In the absence of proof to the contrary, the co-authors of an audiovisual work made in collaboration are presumed to be 1. the author of the script. 2. the author of the adaptation. 3. the author of the dialogue. 4. the author of the musical compositions, with or without words, especially composed for the work. 5. the director. (3) When an audiovisual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work.'

Ad 2: Scope and Effects of Copyright

The scope and effects of the copyright has to be decided in application of the state of protection. The claims which a person can make whose copyright has been infringed have to be determined according to the law of the state where protection is sought.²²⁶ This means that the general principle of tort law according to which the jurisdiction at the place where the criminal activity occurred is applicable is not relevant for the purpose of the determination of the jurisdiction concerning copyright infringement. This means also that in the case of a copyright infringement the parties cannot choose the applicable law or make an agreement concerning the applicable law: 'The legal order which determines the scope of protection of intellectual property rights is beyond the power of disposition of the parties.'²²⁷

Ad 3: Transactions in Copyright

The question whether the rights granted by the copyright are transferable, are decided in application of the principle that the law of that state will be relevant for this purpose which is applicable in the territory where protection is sought.²²⁸ This means that in the case of an international copyright contract the national copyright law of each state where protection is sought will be applicable concerning the question whether the transaction is effective.

Example No. 1: Transferability of Copyright

The US copyright owner of a film transfers his copyright globally to his Italian contractual partner. In the contract the parties stipulate that the law of the US State of California shall be applicable to the contract. Is the contract effective in Germany where copyright cannot be transferred but in the case of succession, Article 29 of the German Copyright Act?²²⁹ Concerning the effectiveness of the transaction made by the parties with regard to Germany, a court may not apply the law of the US State of California, because the parties may not, by contractual stipulation, deviate from the particular rules established by national copyright law. The reason behind this regulation is that in the view of the German legislator the copyright is inseparable from the individual creator of the work and his personality so that only the economic exploitation rights may be transferred. Accordingly, in German copyright law the Italian partner would not be considered as having acquired the copyright in the film. However, the interpretation of the contract would lead to the assumption that the parties intended the creation of an exclusive copyright licence, so that the Italian partner would, for German territory, be considered as the exclusive licensee of the US copyright owner. With regard to Italy, in application of the Italian Copyright Act²³⁰ transactions in the proprietary aspects of copyright are lawful.

Example No. 2: Exploitation Rights concerning Future Technologies

The US copyright owner of a film which was produced and shown in the cinemas in 1980 transferred the exploitation rights globally, including rights in future exploitation methods, to an Italian purchaser in 1985. The parties agreed that the law of the US State of California should be applicable to the contract. Did the Italian licensee acquire the rights in digital uses of the film for German territory? According to the law of the State of California clauses which concern the grant of exploitation rights in unknown technical uses are valid. However, with regard to the individual national territories the parties do not have the power to go beyond the regulation introduced by the relevant legislator (principle of state of protection).

Whereas the grant of exploitation rights concerning future technologies is lawful according to Californian law, the German law establishes in Article 31(4) of the Copyright Act that the grant of exploitation rights concerning yet unknown types of use and related obligations are without effect. The reason behind this regulation is that the German legislator wanted the author to retain any profits from future technical uses of his work, thus preventing that distributors and future purchasers of rights which were not at all involved in the creative process of the making of the work could make 'windfall' profits. Accordingly the Italian licensee could not acquire the right to

²²⁶ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35; BGHZ 118/394 at 397, 'Alf'; BGHZ 126/252 at 255, 'Rights abroad'; ULMER: 'Die Immaterialgüterrechte im internationalen Privatrecht', 1975 at 51; von BAR; 'Internationales Privatrecht', 2 vol.s No.s 702 et seq. and 710; SIEHR: Praxis des internationalen Privat- und Verfahrensrechts 1992/31.

²²⁷ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²²⁸ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²²⁹ Article 29 of the German Copyright Act states: 'The copyright may be transferred in execution of a disposition in a will or to joint heirs by means of a repartition of the inheritance. Apart from these cases the copyright cannot be transferred.'

²³⁰ Article 107 of the Italian Copyright Act states: 'The rights of utilisation belonging to the authors of intellectual works, as well as the connected rights having a patrimonial character, may be acquired, alienated or transferred under all methods and forms allowed by law, subject to the application of the rules contained in this chapter.' According to Article 110 of the Act the transfer of rights of utilisation must be established in writing.

exploit the film by digital communication technologies in German territory, because these technologies were unknown at the time of the conclusion of the contract in 1985. The stipulations concerning the grant of rights in future uses remained without effect with regard to the territory of Germany.

Example No. 3: Extra-Contractual Rights

A British film producer grants an exclusive licence for the exploitation of his film to an Italian distributor. The contract between the British producer and the British composer of the film music which related to the global exploitation of the film stipulated the payment of a lump sum to the composer for the composition of the film music. Can the composer rely on Article 46(4) of the Italian Copyright Act²³¹ and claim an additional payment from the persons who show the film in publicly in Italy? Article 46(4) of the Italian Copyright Act does, in fact, not concern the contractual duties of the producer with regard to the composer of the film music, but the duties of the operator of a cinema who shows the film and upon whom the law imposes an additional duty of payment for the benefit of the composer, irrespective of any contractual arrangements between the composer with the producer or the distributor with the cinema operator. It seems that in application of the obligation of non-discrimination under the EU Treaty also a British composer should be able to claim the additional payment. Whether also US composers would be able to rely on Article 46(6) of the Italian Copyright Act appears questionable. The answer may be affirmative, if the rule would fall under the 'national treatment' principle. However, the principle of 'national treatment' according to the Berne Convention and TRIPS concerns only the protection of intellectual property,²³² but not the configuration of contractual obligations relating to their exploitation.

On the other hand, it might well be argued that the right of certain film authors in an additional remuneration belongs to the scope of the rights which the legislator established by means of the copyright. In this sense also the rights of authors which are mandatorily administered by collecting societies would fall within the scope of the copyright. Accordingly, all film authors who are nationals of other Member States of Berne or of TRIPS will be able to claim 'national treatment' according to Italian law.²³³ In order to avoid problems deriving from a different scope of copyrights in different states, international contracts should contain a clause by means of which authors authorise the producer to claim any extra-contractual rights abroad, also with regard to rights administered by collecting societies.

Example No. 4: Moral Rights

Moral rights²³⁴ do not belong to the commercial aspects of copyright and they are generally considered as personality rights. Would a contractual clause be effective by means of which an Italian major actor in a contract with his producer waves his moral rights in a film? Assuming that the contract provided that the law of the US State of California would be applicable to the agreement, what is the situation in English, French, German or Italian law? First, it is questionable whether the principle of the state of protection is applicable at all in the case of moral rights, because the issues of the determination of the scope of the right and the effectiveness of transactions in these rights is not so much a question of copyright (in the literal sense of the word the exclusive right to reproduce a work) but of the personality right (a person's right in his name, inviolability of his body, health, honour). In this sense the Italian Copyright Act refers to these rights in Chapter III Section II as 'Protection of Rights in the Work concerning the Defence of the Personality of the Author'. Accordingly, the international private law would, concerning the applicability of the law, focus on principles of tort law. But even assuming the applicability of the principle of the law of the state of protection, it emanates that according to German law the general waiver would be without effect. Only with regard to a particular individual violation of the moral rights the author may, according to German law, waive his rights for the benefit of the violator.

²³¹ Articles 44 to 50 of the Italian Copyright Act concern cinematographic works. Article 46(4) of the Italian Copyright Act states: 'The authors of music, of musical compositions and of the words which accompany music shall be entitled to collect directly from persons publicly showing the work a separate payment in respect of such showing. In the absence of agreement between the parties, the payment shall be fixed according to the provisions of the Regulations.'

²³² See Article 3(1) of TRIPS according to which each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.

²³³ See, for Germany, Wilhelm NORDEMANN in Fromm/Nordemann: 'Urheberrecht', 8th ed., Kohlhammer, Stuttgart 1994, Nr. 2 to Article 6 of the German Collecting Societies' Act, who, giving up their opinion asserted in earlier editions of the work, consider that even though the text of the law in Article 6(1) of the Act expressly obligates collecting societies to act in the interests of Germans, this duty would, in application of the duty of 'national treatment' according to the Berne Convention, also relate to nationals from other Member States in those cases where the administration of rights through collecting societies is mandatory..

²³⁴ In the case of films, in particular the right of paternity (to be named as an author) and the right of integrity (the right to object to deformations and distortions of the work).

Differently, the waiver of moral rights is effective according to the principles of English copyright law whereas Italian law considers the moral rights as 'inalienable'.²³⁵

Ad 4: Copyright Infringement

In application of the principle of the state of protection it has to be decided whether the activity of a licensee falls within the scope of the exploitation rights afforded by copyright.²³⁶ However, if the licence is limited by contractual stipulations, the question whether there is a breach of contract has to be decided by reference to the law applicable to the contract. But differently, in application of the principle of the state of protection, it has to be decided whether an activity counts as a contributory infringement.²³⁷

Ad 5: Enforcement of Copyright

The possibilities to enforce the copyright depend upon the law of the state of protection. thus the question whether the infringed person avails herself of protection by preliminary measures has to be decided in application of the principle of the state of protection.²³⁸ Likewise the claims based on the copyright infringement are subject to the law of the state of protection, since this is the law of the country where the intellectual property right was affected.²³⁹ However, taking into account the harmonisation of intellectual property laws through TRIPS Member States have to provide for the following remedies:

- preliminary measures,²⁴⁰
- injunctions,²⁴¹
- damages,²⁴²
- right of information, (optional)²⁴³
- disposing and destruction of infringing articles and of materials and implements used to produce them,²⁴⁴

²³⁵ Article 22(1) of the Italian Copyright Act.

²³⁶ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²³⁷ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²³⁸ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²³⁹ Germany, Federal Supreme Court of 02 October 1997, 'Casino affair', MMR 1998/35.

²⁴⁰ Article 50 of TRIPS, subsection 1 states: 'The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement.'

²⁴¹ Article 44 of TRIPS: Article 44(1) states: 'The judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right, immediately after customs clearance of such goods. Members are not obliged to accord such authority in respect of protected subject-matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject-matter would entail the infringement of an intellectual property right.'

²⁴² Article 45 of TRIPS: Article 45 states: '(1) The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of his intellectual property right by an infringer who knew or had reasonable grounds to know that he was engaged. (2) The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorise the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not know or had not reasonable grounds to know that he was engaged in infringing activity.'

²⁴³ Article 47 of TRIPS states: 'Right of Information. Members may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.'

²⁴⁴ Article 46 of TRIPS concerns other remedies. It states that 'the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.'

- indemnification of the defendant.²⁴⁵

4.2. ARBITRATION CLAUSES AND AGREEMENTS

Arbitration clauses and arbitration agreements are particularly envisaged in international contracts. The purpose is to avoid the subjection of the contractual relation to the national courts of the state of which one party is a national. International arbitration thus aims at the maintenance of the equality of the legal chances of both parties in conflicts arising from the contractual relation. Apart, arbitration may offer further advantages such as a speedy procedure, arbitrators who are specialists in the legal field concerned and less costly proceedings.

4.2.1. INTERNATIONAL ARBITRATION

Contracts often contain an arbitration clause, referring the case to an arbitration tribunal in the case of controversies about the interpretation or the application of the contract. Arbitration proceedings may be speedier than court proceedings and cheaper. Arbitration may follow the rules of established arbitration proceedings, for example those of the International Chamber of Commerce in Paris or the United Nations UNCITRAL-Arbitration Rules, but they may also be established ad hoc.²⁴⁶ In the US the American Arbitration Association (AAA) offers a panel of arbitrators which also include entertainment lawyers. In 1983 the American Film Marketing Association (AFMA) established an international arbitration tribunal which aims at an efficient resolution of disputes. Typically, the arbitration relates to agreements between producers and distributors or distributors and foreign sub-distributors. Also the US artists' and employees' guilds offer arbitration, in particular in the case of contingent compensation claims.²⁴⁷

Legal Problems of International Arbitration

International arbitration implies, inter alia, a decision about the institution charged with the arbitration, its rules, the applicable law and the place of the arbitration. Within recent years the increase of national legislation and international treaties what may be called 'legislative competition' has complicated the issue by making the choice more difficult. The problem may be summarised as follows:²⁴⁸ 'International practitioners encounter increasing difficulties in finding their way through the flood of new laws. Legislative competition in an ideal market for international economic arbitration could lead to an optimised allocation of resources, that is to say an improved choice of arbitration venues and drafting techniques. However efficient competition always presumes knowledge of the offered services which relates to both the available arbitration laws and the centres which administer international arbitrations. It is above all the place of the arbitration in a third, neutral country which influences the contractual symmetry. The efficient use of the parties' respective bargaining positions and the resulting optimised choice of the arbitral venue in the arbitration agreement presupposes that the parties' negotiations are based on legal and factual considerations which coincide with the status of the legal environment and the factual infrastructure at the place of arbitration agreed by them. Frequently, however, misconceptions exist as to the perceived attractiveness of arbitration centres and arbitration laws.'

4.2.2. ARBITRATION LAWS

National laws concerning arbitration may be contained in a special law, such as the Arbitration Act of England of 1996²⁴⁹ or in provisions contained in the national laws concerning civil procedure.²⁵⁰ The United Nations Commission on International Trade Law ('UNCITRAL') adopted a Model Law on International Commercial

²⁴⁵ Article 48 of TRIPS states: '(1) The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses which may include appropriate attorney's fees. (2) In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, Members shall only exempt public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of such laws.'

²⁴⁶ See, for example, Klaus Peter BERGER: 'International Economic Arbitration', Kluwer, Deventer and Boston 1993.

²⁴⁷ See Section 50 of the US Screen Actors Guild Television Agreement, Section 9 of the US Producer Screen Actors Guild Codified Basic Agreement, the US Writers Guild's Television and Theatrical Basic Agreement, Article 10(A) or the US Directors Guild of America Basic Agreement, Section 2-101.

²⁴⁸ Klaus Peter BERGER: 'International Economic Arbitration', Kluwer, Deventer 1993, 7.

²⁴⁹ Arbitration Act 1996 (of England) (http://itl.irv.uit.no/trade_law/doc/England.Arbitration.Act.1996.html)

²⁵⁰ See, for example, Articles 1025 to 1048 of the German Code of Civil Procedure.

Arbitration in 1985²⁵¹ which was transformed into national law by many countries.²⁵² It contains the following regulations:

- International Arbitration, that is to say that, principally, the parties to the arbitration agreement must have their places of business in different States.
- Arbitration Agreement, which is defined as the agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement. The Model Law contains the formal requirement that the agreement shall be in writing.
- Arbitral Tribunal

The Model Law regulates the number of arbitrators - normally three - their appointment, grounds for the challenge of arbitrators, the challenge procedure, the arbitrator's failure or impossibility to act and the appointment of a substitute arbitrator.

- Jurisdiction

Chapter IV of the Model Law concerns the jurisdiction of the arbitral tribunal. The regulation envisages that the arbitral tribunal may rule on its own jurisdiction. The arbitration clause in a contract will be treated as an agreement independent of the other terms of the contract so that the voidness of the contract does not affect the validity of the arbitration clause. According to the Model Law pleas which challenge the tribunal's jurisdiction must be raised at an early time. The tribunal has also power to order interim measures.

- Conduct of Proceedings

The conduct of the arbitral proceedings is regulated in Chapter V. Principles established within this chapter are:

- the parties shall be treated with equality,
- the parties are free to agree on the procedure to be followed by the arbitral tribunal,
- the parties are free to agree on the place of arbitration,
- the commencement of arbitral proceedings is the date when the respondent is served the writ,
- the parties are free to determine the language of the proceedings,
- the statements of claim and of defence shall be filed within the time agreed by the parties or determined by the tribunal,
- the hearings and relevant dates are fixed by the tribunal,
- the documents, statements and other information supplied to the tribunal by a party shall also be communicated to the other party,
- the tribunal may appoint an expert to report to it on specific issues to be determined by the arbitral tribunal,
- the tribunal or a party may request from a competent court assistance in taking evidence.

- Making of Award

The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Railing any designation by the parties, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Decisions must be made by a majority of members. If the parties settle the dispute during the proceedings, the tribunal will record the settlement in the form of an arbitral award. The award shall be made in writing, and it has to be signed by the arbitrators. It shall state the reasons upon which it is based. Finally, the award shall indicate the date and place of arbitration. A copy of the award will be delivered to each party. The award may be corrected upon the application of a party within 30 days of the receipt of the award.

- Recourse against Award

In principle, the arbitral award is binding, however, an award may be set aside by a court or other national authority for certain functions of arbitration assistance and supervision if:

- a party was under some incapacity or the arbitration agreement was not valid,
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was unable to present his case,
- the award is not correct, dealing with a dispute not contemplated or not falling within the terms of the submission to arbitration,
- the arbitral tribunal was not in accordance with the agreement of the parties,
- the court or other national authority for certain functions of arbitration assistance and supervision finds that the subject-matter of the dispute is not capable of settlement by arbitration or the award conflicts with the public policy of this state.

- Enforcement of Awards

Foreign arbitral awards shall be recognised as binding. The enforcement will be made by the competent court upon application in writing. Chapter VIII of the Model Law deals with the recognition and enforcement of

²⁵¹ UNCITRAL Model Law on International Commercial Arbitration (1985) (http://itl.ircv.uit.no/trade_law/doc/UN.Arbitration.Model.Law.1985.html).

²⁵² Presently more than 20 States, including Australia, Canada, Finland, Hungary, India, the Russian Federation, Scotland and within the US also California.

awards. The recognition and enforcement of arbitral awards may be refused if the party furnishes to the court proof that the party was under some incapacity or that the agreement was not valid under the law to which the parties subjected it, or that the party was not given proper notice of the appointment of an arbitrator or of the proceedings or if the award does not deal with the dispute contemplated or fell without

4.2.3. ARBITRATION CLAUSES

In their contracts the parties may stipulate that any questions relating to the interpretation of the contract and any legal disputes arising from the contract shall be referred to arbitration. The parties may agree on arbitration according to the special and individual contract in an 'Ad Hoc Clause' or they may refer to established arbitration rules and bodies.

Ad Hoc Clauses

A typical *ad hoc* clause relating to arbitration is as follows:

- Any difference, dispute or claim arising out of or in connection with this contract concerning its validity, scope, meaning, interpretation, application or termination including all agreements to modify or supplement the contract and all acts of the parties which are based on it shall be finally settled by arbitration.
- The seat of arbitration shall be in ...
- The Arbitral Tribunal shall consist of three members [alternatively, and please modify the subsequent text correspondingly] a sole arbitrator.
- The party which desires to refer a dispute to arbitration shall notify the other party by a formal demand in writing to this effect which shall be duly served upon the respondent party by registered letter. The demand shall include the name and address of the appointed arbitrator, who may be a citizen of any country, as well as the subject of the dispute and the claim...
- The respondent party shall, within one month after service of such communication appoint its arbitrator and notify the first party about it by registered letter stating the name and address of the arbitrator.
- Should the party which has received the notification of the dispute being referred to arbitration fail to appoint the second arbitrator within the indicated period, the latter, at the request of the other party shall be appointed by...
- If the two arbitrators, selected in accordance with the above provisions, within one month after the appointment of the second arbitrator, fail to agree on the appointment of the third arbitrator, who shall act as chairman of the Arbitral Tribunal, the latter, at the request of either party shall be appointed by...
- If an arbitrator is unable to perform his task due to death, resignation or any other reason which renders participation in the proceedings impossible, he shall be replaced by an arbitrator to be appointed according to the rules applicable to the appointment of the replaced arbitrator.
- After consultation with the parties, the Arbitrators shall select a time, date and place at which each session of the arbitration shall take place. The parties and their counsel shall be notified in writing by the Chairman of such times, dates and places.
- The parties shall extend to the Arbitral Tribunal (Arbitrator) all facilities for obtaining any information required for the proper determination of the dispute. The absence or default of either party shall not prevent or hinder the arbitration procedure in any or all of its stages.
- The language of the arbitration shall be English. Parties may use French... for their pleadings and written statements, but each party must furnish an English translation thereof if the other party so requests. Parties may be accompanied at their expense by their own interpreters.
- The arbitrators shall apply the law of [State...] to the substance of the dispute, the Private International Law Rules being excluded.
- The award shall be issued within 12 months from the election of the Chairman and no later than forty five (45) days following the last hearing in the matter. Failure to comply with this deadline shall not ipso iure terminate the mandate of the Arbitral Tribunal (Arbitrator).
- The award which shall set out the reasons for the decision, shall include a direction concerning the allocation of costs and expenses of and incidental to the arbitration, including arbitration fees.
- The parties shall comply in good faith with any provisional measures indicated by the Tribunal. If a party does not comply, or complies insufficiently, with any such measure, the Tribunal (Arbitrator) may draw therefrom the conclusion it deems appropriate.

4.2.4. ARBITRATION RULES

In the case where the parties to the contract stipulate the application of certain arbitration rules instead of a foreign arbitration law, these rules will constitute procedural stipulations of the parties and they become an integral part of the arbitration agreement. The arbitration rules thus assume the function of a 'mini code of civil procedure'.²⁵³ The different institutions involved in arbitration have arbitration rules which govern the arbitration proceedings. The consequence of the choice of the arbitration according to certain arbitration rules, for example

²⁵³ Van den BERG/Van DELDEN/SNIJDERS: 'Arbitragerecht', Zwolle 1988, at 14.

according to AFMA's Rules for International Arbitration is that the relevant national laws of the parties will no longer be applicable: ...'international commercial arbitration may be entirely 'detached' or separated from the 'national' laws of the parties: it shall only be governed by the rules of arbitration chosen by the parties or referred to by the parties in their agreement... One thing is clear beyond all question: once the parties have chosen a law to govern the arbitration proceedings, there is no room for the laws of the country of the parties. In other words, once the parties have agreed to submit to international arbitration under the Rules of the International Chamber of Commerce, there is no possibility to rely, against the ICC rules, upon any provision of the (... national laws of the parties). I must find that the ICC Rules, expressly accepted by the parties, constitute the law governing the objection raised by the defendant'.²⁵⁴

The effect of the choice of arbitration rules thus is that national arbitration laws are not applicable unless the latter rules are mandatory. The parties may not exclude the application of mandatory provisions. With this regard Section 4 of the English Arbitration Act 1996 contains a straightforward regulation by listing any mandatory provisions in a schedule. Mandatory norms are those which reflect the 'public' interests of states and which have been enacted as part of the substantive law. Such mandatory norms may be export and import control laws, exchange control regulation, price laws, antitrust, labour, customs, tax laws and similar rules.²⁵⁵

4.2.5. THE PROPOSED EUROPEAN SYSTEM FOR ARBITRATION

The proposed European Arbitration System for the Audiovisual and Electronic Media Market²⁵⁶ focuses on the fact that the globalisation of the audiovisual economy leads to an international exploitation of audiovisual works and products. The traditional international law of contract may require a producer or distributor to institute legal proceedings before the national courts of the state where his contractual partner is a resident or where he operates his offices. By means of the European System of Arbitration the parties to an audiovisual contract can choose to subject any controversy arising from the contract to the arbitration. The new European System for Arbitration offers the following advantages:

- The use of new technologies: The European System of Arbitration system responds to the need for a reliable, quick and professional judiciary system which operates at reliable costs. The arbitration system will make use of new technological means (video conferencing, communication of encrypted data, digital signature) in order to achieve a speedy operation).
- National centres for arbitration: the arbitration system operates through national centres where an arbitrator offers his services by using the technology which establishes the network of the European System for Arbitration. Any lawyers involved in the arbitration may use this network. Thus the European System for Arbitration is integrated into the national legal systems, in particular concerning the rules of legal procedure. The European System for Arbitration thus responds also to the need to operate a
- A central bureau for electronic documentation: the files of the arbitration will be stored and kept electronically at the national centre and at a central bureau for documentation.
- A proposal of an international law applicable to contracts (complementary to national laws): parties to an international contract often have the problem of the choice of law applicable to the contract. The European System for Arbitration will propose the choice of an international system (European Principles of the Law of Contract (1997) and the UNCITRAL Model Law concerning electronic commerce), supplemented by rules of the relevant national law.
- The European System for Arbitration: the first system to use video-conferencing in Europe. The Arbitration Rules will provide for a fair and speedy arbitration at reasonable costs. The use of new technological means for cross-border communication will facilitate the procedure through the substitution of hearings by video-conferences combined with an online-protocol. Video-conferencing will reduce time and costs which are spent for traditional litigation before courts.
- Full recognition of arbitral awards: the arbitral awards will be recognised and enforceable according the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards.
- The arbitration complies with measures proposed by EU Commission: Article 17 of the proposed directive concerning electronic commerce of the EU Commission of November '98 calls upon Member States to facilitate arbitration (O.J. C 30/4 of 05/02/99). Also the European Parliament, in a resolution of May '98, stressed the need for arbitration in cross-border activities.
- The establishment of a comprehensive online-presence: the Internet Home Page will assume essential importance. It will be established in close connection with MAGICA, Rome. It will contain the list of arbitrators and the information about the framework for arbitration.

²⁵⁴ ICC Award No. 1512 (Second Preliminary Award), Yearbook Commercial Arbitration 1980, at 174, 176.

²⁵⁵ Klaus Peter BERGER: 'International Economic Arbitration', Kluwer, Deventer 1993 at 688.

²⁵⁶ See MIP-TV NEWS of 15/04/99 at 33.

4.2.6. NEW YORK CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 contains the following basic principles: According to the Convention contracting States shall recognise an agreement ‘in writing’ under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship.²⁵⁷ The stipulation of an arbitration clause presupposes an agreement in writing in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.²⁵⁸ Also new means of communication by electronic data interchange and online transmission of data are considered as exchange of documents in the sense of the New York Convention.²⁵⁹ The Convention obligates contracting States to recognise arbitral awards as binding.²⁶⁰ The Convention regulates under which conditions an award shall be recognised and enforced.²⁶¹

5. CONTRACTUAL ISSUES AND SCOPE OF RIGHTS

Transactions in copyright and neighbouring rights are determined by changing markets. The technological progress which facilitated the increase of broadcasting programmes led to an increase in the demand for content. The importance of the non-theatrical exploitation of films increased and the acquisition of rights to use films for new types of broadcasting became essential for the economic operation of these new services.

In Europe the increasing importance of television broadcasting caused not only the decline of movie theatres during the 1970s and 1980, it also caused changing structures of production. Whereas in Europe the national broadcasting companies of the 1950s and 1960s were the only organisations which could afford to purchase and operate the technical equipment, the increase of competition in broadcasting by privately organised broadcasters in the 1980s and 1990s induced them to commission audiovisual productions from independent producers. The private broadcasters, generally, have no in-house productions and their staff and equipment is often only sufficient to make news and events reporting. This means, that the broadcasters are considerable commissioners of audiovisual productions.

In the US the majors also produced television series and serials which were sold on an hourly rate. After the majors had encountered sinking profits, they granted rights according to a syndication system. This means that the majors concluded directly contracts with the some 1,200 local US television broadcasters, only a sixth of which are joined with the three large networks. The biggest broadcasting companies in the US, namely CBS, NBC and ABC are also large media undertakings. But since 1972 also the studios increased their profits from the marketing of films. The exploitation of films by videos and television caused a decrease of the importance of the theatrical exploitation which, since 1985, contributed less than half of the income of the studios. New markets are pay-television and the exploitation through digital media, online or offline. The market structure of the producing companies in the US changed to nine ‘studios’ which hold a market share of some 90%. These were Paramount Pictures, Warner Brothers and Twentieth Century Fox Pictures, Universal Pictures and Columbia Pictures, Metro-Goldwyn-Mayer and United Artists (MGM/UA Communications), Walt Disney Productions and Orion Productions. The majors often avail of large film archives which are of considerable importance, since any broadcasting or digital communication of films which are protected by copyright requires the consent of the rightholder. The majors often participate in the income made by the cinemas. In the case of the exploitation by video, the majors obtain a guaranty sum as a licence fee, but mostly they do not participate in the income.

²⁵⁷ Article II(1) of the New York Convention.

²⁵⁸ Article II(2) of the New York Convention.

²⁵⁹ Klaus Peter BERGER: ‘International Economic Arbitration’, Kluwer, Deventer 1993 at 139 et seq.

²⁶⁰ Article III of the New York Convention states:

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

²⁶¹ Article IV of the New York Convention states:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
 - (a) duly authenticated original award or a duly certified copy thereof;
 - (b) the original agreement referred to in Article II or a duly certified copy thereof.
2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Another means of exploitation of films is the rental and sale of videos, but also pay-television and, increasingly, television on demand and other digital transmissions. Generally, films are rented on videos some six months after their first display in movie theatres, one year later they are offered in pay-television programs and after one additional year they are offered by television broadcasting whereas the sale as videos follows some years later. There are also less successful films, 'B-Pictures', which are not even shown in the cinemas but only on television and marketed as videos.

Types of Contracts

Whether the parties to a contract designate their agreement as an 'assignment' of copyright, as the 'grant of exploitation rights' or as a 'copyright licence', most courts will look at the content of the agreement and the stipulations by the parties instead of the 'labelling' of the contract. Thus even if the parties to a contract declare that the subject-matter of the contract is the transfer of the copyright globally for all countries, a court in Germany, where the transfer of the copyright is not permissible by statute, will interpret the contract as the grant of the exclusive right of exploitation with regard to German territory.

A basic difference of the legal systems of the US and those of many European continental legal systems consists in the possibility to transfer the copyright in audiovisual works. In the US § 101 of the Copyright Act permits a range of comprehensive transactions in copyright -

‘A ‘transfer of copyright ownership’ is an assignment, mortgage, exclusive licence or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive licence’.

The Greek Copyright Act states in Article 12:

‘The economic rights may be transferred between living persons or mortis causa.’

Article 13 of the Act envisages the grant of exploitation rights and licences.²⁶²

The Italian Copyright Act provides in Article 107:

‘The rights of use which belong to the authors of the work, since the related rights have a patrimonial nature, can be acquired, sold or transferred in any manner and form permitted by the law, subject to the provisions of this Chapter.’

Differently, the French Intellectual Property Code establishes in Article L.131-3:

‘Transfer of authors’ rights shall be subject to each of the assigned rights being separately mentioned in the instrument of assignment and the field of exploitation of the assigned rights being defined as to its scope and purpose, as to place and as to duration,’

and in Article L. 131-4 sentence 1:

‘Assignment by the author of the rights in his work may be total or partial.’

Very restrictively, the German Copyright Act states in Article 29:

‘Copyright may be transferred in execution of a testamentary disposition or to co-heirs as part of the partition of an estate. Copyright shall not otherwise be transferable.’

However, the grant of an exploitation right (copyright licence) is possible, but Article 31 of the Act states in subsection 4 and 5:

‘(4) The grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect.

(5) If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant.’

This means that according to US law, but also according to Italian law, film authors may transfer the copyright respectively the right of use to producers comprehensively and with regard to any possible uses including unknown future uses. In more restrictive copyright systems, for example in Germany, the copyright remains with the authors and in any contracts which they conclude with a producer the scope of the rights transferred has to be defined, because otherwise the rights will remain with the authors. Also rights for the use of future and unknown technologies cannot be conferred by authors according to the restrictive German copyright law. These provisions which allegedly work for the benefit of authors may, in fact, create obstacles to an efficient contractual practice. First, it means that the contract will have to contain an enumeration of the rights of use granted by the author as

²⁶² See below, No. 8.2.

complete as possible. Second, it means that only rights can be transferred with regard to uses which are actually known by the parties at the time of the conclusion of the contract.

5.1. REGULATION OF CONTENT OF CONTRACT BY STATUTE

Another characteristic difference between the US contractual practice and the practice of many continental European countries derives from the fact that some European copyright laws contain provisions regulating contracts of audiovisual works. The US Copyright Act does not contain any provisions which would limit the contractual freedom of the parties in this sense. These provisions contained in the copyright laws of some European countries are deemed to reflect ideally the social typology of the special contract. The provisions thus appear as special regulations with regard to the contractual types which are regulated in the civil codes and, just like these, they may be mandatory or non-mandatory.

Article 34 of the Greek Copyright Act: Rules Relating to Audiovisual Production Contracts

Article 34 of the Greek Copyright Act contains a comprehensive regulation of audiovisual production contracts:

- (1) “A contract dealing with the creation of an audiovisual work between a producer and an author shall specify the economic rights which are to be transferred to the producer. If the aforementioned provision is not met, the contract shall be deemed to transfer to the producer all the economic rights which are necessary for the exploitation of the audiovisual work, pursuant to the purpose of the contract. When the master from which copies for exploitation are to be made, is approved by the author, the audiovisual work shall be deemed to be accomplished. No alteration, abridgement or other modification shall be made to the definitive form of the audiovisual work, as the latter has been approved by the author, without his prior consent. Authors of individual contributions to an audiovisual work may exercise their moral rights only in relation to the definitive form of the work, as approved by the author.
- (2) The contract between the producer of an audiovisual work and the creators of individual contributions incorporated in the work, shall specify the economic rights which are transferred to the producer. If the aforementioned provision is not met, the contract between the producer and the authors of individual contributions, other than the composers of music and writers of lyrics, shall be deemed to transfer to the producer those powers under the economic rights which are necessary for the exploitation of the audiovisual work, pursuant to the purpose of the contract. Where the contributions to an audiovisual work are capable of separate use, the economic right in relation to other uses shall remain with their authors.
- (3) The author of an audiovisual work shall retain the right to a separate fee for each form of exploitation of the work. The aforementioned fee shall be agreed as a percentage, specified in the relevant contract. The calculation of the percentage shall be based on gross revenues or on combined gross revenues and expenditure, realised in the course of the exploitation of the work. The producer of the audiovisual work is obliged once a year to give the author of the work all information concerning the exploitation of the work, in writing, showing him also all relevant documents. Short advertising films shall be exempt from the provisions of this paragraph.
- (4) When visual or audiovisual recordings carrying a fixation of an audiovisual work are the object of a rental arrangement, the author shall in all cases retain the right to an equitable remuneration. This provision shall apply also in the case of a rental arrangement relating to sound recordings.”

Article 37 of the Greek Copyright Act: Royalties of Composers of Film Music

Concerning royalties appertaining to the composers of film music, Article 37 of the Greek Copyright Act states: “The minimum fee payable to the composers of musical and song accompaniment of films, shown to the public in cinema halls or other spaces, shall be 1 per cent of gross receipts after deduction of the public entertainment tax.”

Definition of ‘Gross Receipts’

The terms ‘gross receipts’ of Article 37 or ‘gross revenues’ or ‘combined gross revenues and expenditure’ of Article 24(3) are not defined in the Act. The American Film Market Association’s (AFMA) International Multiple Rights Distribution Agreement contains the following definition of the term ‘gross receipts’:

“Gross receipts means the sum on a continuous basis of the following amounts derived with respect to each and every licensed rights.

- (1) All monies or other consideration of any kind (including all amounts from advances, guarantees, security deposits, awards, subsidies, and other allowances) received by, used by or credited to distributor or any distributor affiliates or any approved sub-distributors or agents from the licence, sale, lease, rental, lending, barter, distribution, diffusion, exhibition, performance, exercise or other exploitation of each licensed right in the film, all without any deductions and,

- (2) All monies or other consideration of any kind received by, used by or credited to distributor or any distributor affiliates or any approved sub-distributors or agents as recoveries for the infringement of any licensed right in the film and,
- (3) All monies or other consideration of any kind received by, used by or credited to distributor or any distributor affiliates or any approved sub-distributors or agents from any authorised dealing in trailers, posters, copies, stills, excerpts, advertising accessories or other materials used in connection with the exploitation of any licensed right in the film or contained on videograms embodying the film."

Art. L. 132-23-30 French Intellectual Property Code: Audiovisual Production Contracts

An example of the regulation of audiovisual production contracts is contained in Articles L. 132-23 to -30 of the French Intellectual Property Code concerning audiovisual production contracts:

"Article L. 132-23. The natural or legal person who takes the initiative and responsibility for making the work shall be deemed the producer of an audiovisual work.

Article L. 132-24. Contracts binding the producer and the authors of an audiovisual work, other than the author of a musical composition with or without words, shall imply, unless otherwise stipulated and notwithstanding the rights afforded to the author by Articles L. 111-3, L. 121-4, L. 121-5, L. 122-1 to L. 122-7, L. 123-7, L. 131-2 to L. 131-7, L. 132-4 and L. 132-7, assignment to the producer of the exclusive exploitation rights in the audiovisual work.

Audiovisual production contracts shall not imply assignment to the producer of the graphic rights and theatrical rights in the work.

Contracts shall lay down the list of those elements that have served to make the work that are to be conserved as also the conditions of conservation.

Article L. 132-25. Remuneration shall be due to the authors for each exploitation mode.

Subject to Article L. 131-4, where the public pays a price to receive communication of a given, individually identifiable audiovisual work, remuneration shall be proportional to such price, subject to any decreasing tariffs afforded by the distributor to the operator; the remuneration shall be paid to the authors by the producer.

Article L. 132-26. The author shall guarantee to the producer the undisturbed exercise of the rights assigned.

Article L. 132-27. The producer shall be required to exploit the audiovisual work in conformity with the practice of the trade.

Article L. 132-28. The producer shall furnish at least once a year to the author and the joint authors a statement of revenue from exploitation of the work in respect of each exploitation mode.

At their request, he shall furnish to them all evidence necessary to establish the accuracy of the accounts, in particular copies of the contracts in which he assigns to third parties all or a part of the rights he enjoys.

Article L. 132-29

Unless agreed otherwise, each of the authors of an audiovisual work may freely dispose of the part of the work that constitutes his personal contribution, for the purpose of exploiting it in a different field, within the limits laid down in Article L. 113-3.

Article L. 132-30

Judicial rehabilitation of the producer shall not imply termination of the audiovisual production contract.

Where the making or exploitation of the work is continued under Article 31 et seq. of Law No. 85-98 of January 25, 1985, on the Judicial Rehabilitation and Liquidation of Enterprises, the receiver shall be required to respect all of the producer's commitments, particularly as regards the joint authors.

In the event of sale of all or a part of the enterprise or of liquidation, the receiver, the debtor or the liquidator, as appropriate, shall be required to establish a separate lot for each audiovisual work that may be subject to assignment or to auction. He shall be required to inform, on pain of nullity, each of the authors and co-producers of the work by registered letter one month before any decision on assignment or any procedure for sale by auction of property held *indivisum*. The acquirer shall similarly be held to the obligations of the seller.

The author and the joint authors shall have a right of pre-emption in respect of the work unless one of the coproducers states his intention to acquire. Failing agreement, the purchase price shall be fixed by expert opinion. Where the activities of the enterprise have ceased for more than three months or where liquidation is ordered, the author and the joint authors may require termination of the audiovisual production contract."

5.2. ACQUISITION OF RIGHTS

Works, products and services can freely be bought on the market. However, whether this material may also be used for other than individual and personal purposes, for example for the making of an audiovisual product or for copying does not depend upon the property in the material acquired. Exclusive rights which are based upon copyright legislation may limit the possibilities to use works, products or performances.

Material for Acquisition

Footage (this is the term for material such as film, video or audio tape) may be bought from producers, film archives, broadcasters or other sources. If the footage is protected by copyright, the use of the footage requires the prior authorisation of the copyright owner or the right holder. According to the EU copyright harmonisation,²⁶³ the copyright in works such as cinematographic works extends to the life of the longest living author plus 70 years after his death. The acquisition of the copyright in films may thus well extend to the beginnings of cinematography and cover films the authors of which are uncertain, unknown or hardly to be found. Special problems may arise if the authors have passed away and the copyright is owned by a multitude of heirs. Other problems may be caused if the existence of contracts by means of which the exploitation rights were transferred is uncertain or controversial. Before the negotiation for the acquisition of rights begin, these questions will have to be solved and if there is no easy solution, it may be recommendable to refrain from the idea to acquire rights for the use of such works.

Scope of Rights Acquired

The scope of the rights to be acquired depends upon the use which is envisaged. Thus the parties should agree upon the territory, the time and the type of use which may be made of the work.

Relevant Territory

Concerning the territory, the rights may be acquired for national territories or parts of it, for regions, or globally. Problems may arise with online uses when cross-border communications are unavoidable or with uses via satellite communications of the work when the footprint of the satellite cannot be easily identified. In the case of satellite or cable broadcasting of works within the EU it should be borne in mind that according to the EU Directive concerning Copyright relating to Satellite Broadcasting²⁶⁴ right holders in EU Member States cannot object to the cross-border satellite broadcasting of a work if the broadcaster owned the broadcasting rights in the Member State where the signals to the satellite were emitted.

Relevant Time

With regard to the time for which the rights are acquired it is essential to establish the period, during which the work is protected. If the copyright protection lapses within the near future, it may not be worth it to start contractual negotiations. Also in the US the common term relating to copyright protection is now the longest living author's life plus 70 years. Information whether works are protected by copyright or neighbouring rights may be obtained from archives kept at national libraries, film libraries, archives of collecting societies, copyright clearance centres and similar institutions. Also lawyers can offer services concerning copyright clearance.

Whereas copyright protection extends to most of the countries relevant for exploitation due to the Berne Convention, the protection by neighbouring rights is more limited. International conventions protecting neighbouring rights such as the rights of performers or the rights of the producers of phonograms or videograms are granted on a national basis and they vary substantially from country to country. Within the EU it has to be observed that in application of the principle of non-discrimination nationals of other Member States may claim protection under the neighbouring laws of a Member State, even if the Member States of which they are nationals do not provide for a similar protection.

Relevant Types of Use

Different types of use may be needed, depending upon the purpose of the agreement. An Italian broadcaster may need the copyright licence to broadcast a US film once within the part of the national territory which is served by his broadcasting company. A US producer may be interested to acquire the complete copyright from the author of a novel of which he wants to make a film version and publish it traditionally and digitally and exploit the characters. Essentially, the purchaser of rights should prepare the acquisition of rights by defining the scope of the rights which he needs. Often the seller of the rights will only be prepared to sell or to grant licences with regard to individual rights. His interest lies in selling or licensing on a comprehensive basis, because in this case he can obtain a higher price or royalty.

²⁶³EU Directive 'Term of Protection of Copyright', EU Official Journal L 290/9 of 1993.

²⁶⁴ EU Directive concerning Copyright and Neighbouring Rights Relating to Satellite Broadcasting and Cable Retransmission, EU Official Journal L 248/15 of 1993.

In order to benefit from the different elasticity of demand in the different markets it may be recommendable for the rightholder to sell the rights according to specific uses. In principle, the rightholder may limit the rights which he sells as he thinks fit. This means that, for example, he may sell only the broadcasting rights for terrestrial broadcasting and retain the rights for satellite broadcasting and cable broadcasting. However, it may be more rational to sell rights on a comprehensive basis, taking into account that it may not easily to find a purchaser of the remaining rights.

Coditel vs. Ciné Vog

In the case 'Coditel vs. Ciné Vog' the European Court of Justice²⁶⁵ was concerned with the copyright in the film 'Le Boucher' which was owned by the company Les Films la Boétie. The defendant had obtained the exclusive licence to show the film in Belgium. The licence had a duration of 7 years. The contract contained a clause according to which the film should not be broadcast by Belgian broadcasters before the lapse of 40 months after the theatrical release. The licence which had been granted for the German territory did not contain a similar clause so that the film was broadcast in Germany more than two years before it could have been broadcast in Belgium. Coditel received the broadcast in Belgium and transmitted it via its cable diffusion network in the whole country. It relied on the argument that its conduct was based on the freedom to provide services in the sense of Article 49 of the EU Treaty.

However, the Court considered that intellectual property rights, even though they are not expressly mentioned in Article 49 as different from Article 30 of the Treaty, must be observed: 'Whilst Article 59 [Article 49 of the Amsterdam draft of the Treaty] prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to create artificial barriers to trade between Member States.' The Court also differentiated that the cable transmission of a broadcast constituted an exploitation independent from the broadcasting of the film so that it was not covered by the broadcasting licence which had been granted to the German licensee.²⁶⁶ The Court also considered that the clause according to which the broadcasting of the film in Belgium could only be made 40 months after the film's theatrical release was covered by the essence of the copyright.

The copyright owner's practice of granting broadcasting licences for national territories was not held to amount to an 'artificial barrier to trade'. The Court established: ...'that the provisions of the Treaty relating to the freedom to provide services did not preclude an assignee of the performing right in a cinematographic film in a Member State from relying upon his right to prohibit the exhibition of that film in that State, without his authority, by means of cable diffusion if the film so exhibited is picked up and transmitted after being broadcast in another Member State by a third party with the consent of the original owner of the right.'

5.3. EXHAUSTION OF THE DISTRIBUTION RIGHT IN THE EU

Copyright gives exclusive exploitation rights. These exploitation rights relate to the corporeal exploitation: the reproduction and distribution, or to the incorporeal exploitation: the communication to the public. Since the copyright in a work exists as a bundle of national copyrights, the rightholder might attempt to use his rights in order to object to the importation of reproductions of the work from one State to the other. However, within the Community's Internal Market the European Court of Justice sustained the principle of the exhaustion of the exploitation right according to which the copyright owner may not use the copyright to object to the importation of protected goods which have been lawfully marketed within a Member State by the copyright owner or with his consent.

This principle is also applicable to audiovisual products such as video cassettes. But Article 30 of the EU Treaty states also that intellectual property rights which include copyright must be observed. Since copyright is granted for national territories a conflict may arise between diverging interests if the scope of the rights differ between Member States or if the copyright owner grants licences to different persons for the different territories of Member States. Basically, the conflict is solved in application of the principle of 'exhaustion' of the distribution right.

²⁶⁵ European Court of Justice Case 62/79, E.C.R. 1980/881, 'Coditel vs. Ciné Vog Films I'.

²⁶⁶ It may be assumed, however, that in the case where the broadcasting licence relates to a certain territory the cable transmission which relates to this territory and which merely constitutes a technical improvement of the broadcasting technology will be covered by the broadcasting licence.

Once a protected product has been sold by the copyright holder or with his consent in a Member State, the copyright owner has drawn the 'monopoly' profit which copyright awards so that with regard to this reproduction his rights are 'exhausted'. Thus he does not have the possibility to object to the importation of the article to another Member State by means of the use of his copyright in that Member State - his distribution right is 'exhausted' within the whole Community. But Article 30 of the Treaty permits derogations from the principle of the freedom of movement of goods on the basis of copyright only if these derogations are necessary for the purpose of safeguarding rights which constitute the specific subject matter of copyright.

The 'exhaustion' affects only the distribution right and not the other rights of exploitation which copyright gives. Thus the purchaser of a video cassette may not reproduce the article, show it in a cinema or broadcast it, because the 'exhaustion' does not affect the copyright owner's right of reproduction, of theatrical display or of broadcasting. The reason lies in the fact that only with regard to the distribution of the individual copy which has been sold by the copyright owner or with his consent, the copyright owner was able to draw the 'monopoly' profit. The other exploitation rights are not affected. In particular the broadcasting right will not be 'exhausted', if the copyright owner has authorised a broadcaster to show a film on television. The copyright owner retains the right to control the use of the broadcasting right, for example by limiting the licence in time or to a specified number of broadcastings. After the exercise of these exploitations, the copyright owner disposes fully of the exploitation rights - it would not be justified to assume the 'exhaustion' of the copyright, because the nature of the exploitation of an audiovisual work by reproduction, communication to the public or broadcasting lies in the control of the number of exploiting acts and only by retaining this control the copyright owner can draw the 'monopoly' profits which the copyright grants.

The reason for this 'exhaustion' of the distribution right lies in the fact that the copyright owner has already exploited the exclusive rights which the legislator granted. Thus with the drawing of the 'monopoly' profit with regard to the distributed reproduction the rights of the copyright owner with regard to this individual article are 'exhausted'. A typical example of the exploitation of corporeal rights is the distribution of videos of the protected work.²⁶⁷ Accordingly, the rightholder with regard to videos of a film in the Community who sells videos in France for US\$ 10 and in Italy for US\$ 5 cannot rely on his copyright in order to prevent the importation by third persons of videos from Italy to France and their sale at a price of US\$ 7.

However, the principle of exhaustion is hardly applicable in the case of the incorporeal exploitation of a work, that is to say if the work is communicated to the public. Examples are the cases of broadcasting or a presentation in the cinema.²⁶⁸ The principle of exhaustion which related always to the specific reproduction which has been marketed and distributed, is not applicable in the case where such a video is exploited in an incorporeal manner. Thus the person who acquires a video may resell the video without infringing the copyright owner's distribution right, but if he shows the video in public or if he rents it to the public without the authority of the copyright owner, he will commit a violation of the copyright owner's exclusive right of communication to the public.²⁶⁹ In the case of an incorporeal exploitation, for example through the grant of a broadcasting licence, the right in other types of incorporeal exploitations, such as theatrical exploitation, is not exhausted. The licence to broadcast may also be limited to time or to the number of broadcasts: any successive broadcasting will infringe the copyright. A licensee who has obtained the exclusive right of communication to the public of a film in a Member State may object to the 'importation' by cable of broadcastings of the film from another Member State, even if the copyright owner of the 'exporting' state authorised the 'exportation'.²⁷⁰

Warner Bros. vs. Christiansen

In the case 'Warner Bros. vs. Christiansen'²⁷¹ the plaintiff owned the copyright in the film 'Never Say Never Again'. The defendant, a Danish citizen, bought a video cassette of the film in the UK and imported it to Denmark where he rented it in a video shop. According to UK law the copyright owner could, at that time, not prevent the rental of video cassettes after the sale. Differently, according to Danish copyright law he would have retained the rental right. The defendant relied on the fact that according to UK law the copyright owner could not control the dealings in the video cassette after the first marketing. Accordingly, a copyright owner who voluntarily marketed a video cassette in this country would have to accept that his rights were 'exhausted' within the whole Internal Market. The plaintiff, however, argued that the principle of the freedom of movement of goods was subject to the observance of intellectual property rights, Article 30 of the EU Treaty. In the Court's view the rental right in Denmark was not 'exhausted' by the sale of the video cassette in the UK. Taking into

²⁶⁷ European Court of Justice of 11 July 1985, 1985/26052, 2603, 'Cinéthèque'.

²⁶⁸ European Court of Justice of 18 March 1980, 1980/881, 902, 'Coditel'; of 06 October 1982, 1982/3381, 3400, 'Coditel II'.

²⁶⁹ European Court of Justice of 17 May 1988, 1988/2605, 2630, 'Warner Brothers/Christiansen'.

²⁷⁰ European Court of Justice of 18 March 1980, 1980/881, 904, 'Coditel I'.

²⁷¹ European Court of Justice, E.C.R. 1981/165, 'Warner Bros. vs. Christiansen'.

account that the copyright owner holds a 'bundle' of national copyrights the existence and scope of which has to be decided on the basis of national law, this view appears convincing.

5.4. TRANSBORDER BROADCASTING AND THE SATELLITE AND CABLE COPYRIGHT DIRECTIVE

In the field of copyright the Community has been concerned with the effects of cross-border communications. Since copyright licences are often granted for national territories only, broadcasting licences may be limited to a certain national territory. In the case of traditional terrestrial broadcasting cross-border effects ('overspill') were unavoidable. But jurisprudence considered these effects as negligible and not infringing the relevant rightholder's copyright.

Satellite Broadcasting

In the case of satellite broadcasting, the communication is made to those national territories which are covered by the satellite's footprint. If the copyright owner has granted exclusive copyright licences to different licensees in the national territories, the satellite broadcasting of a work may effectively be hampered if the authorisation of all licensees was required to whose territories the work could be broadcast via satellite. The Satellite and Cable Copyright Directive²⁷² establishes the principle that, for purposes of copyright, the broadcasting takes only place in the national territory from which the broadcaster sends the signals up to the satellite, but not in those national territories to which the broadcasting signals are transmitted from the satellite.

With regard to the use of works in a manner which exceeds national boundaries it should be pointed out that the copyright is strictly dependent upon the national territory. Thus any use of a work protected by copyright in Germany which also constitutes a use in the territory of another state where copyright protection subsists requires the authorisation of the copyright holder in this country.

EU Directives

The EU Directive 'Television without frontiers'²⁷³ does not relate to copyright, it solves problems relating to media law in the case of cross-border broadcasting. This is expressly recognised in the Satellite and Cable Copyright Directive²⁷⁴ where Recital 12 expresses the need to supplement the Directive 'Television without frontiers' by a Directive which relates to copyright issues.

The Signal-emitting State according to the Satellite and Cable Copyright Directive

Article 1(2)(b) of the Satellite and Cable Copyright Directive establishes the fictive act of communication to the public by satellite as occurring solely in the Member State where, under the control and responsibility of the broadcasting organisation, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. Accordingly, only the copyright laws of this state will be applicable where the broadcast was emitted.

Broadcasts from non-Member States

If the broadcast is emitted from a non-Member State which provides inferior copyright protection than in Member States, the Act of communication to the public shall be deemed to have occurred

- in the Member State from the territory of which the signals are transmitted to the satellite from an uplink situation or, if there is no use of an uplink station,
- in the Member State where the broadcasting organisation which has commissioned the act of communication to the public by satellite has its principal establishment in the Community.

Does the Satellite and Cable Directive Intrude on Rights of Rightholders in Member States?

If a satellite broadcasting is made from a non-Member State outside of the European Economic Area the copyright protection of which is comparable to the protection in the countries of the EU, it seems that only the copyright law of this state will be applicable. However, such a solution would place the European copyright owner at a disadvantage, in particular with regard to the practical difficulty to enforce copyrights in non-Member States.

The Directive does not take into account that it makes a difference whether a copyright owner has to pursue his rights in a non-Member State which provides a level of protection comparable to the protection in Member States like in the US or whether he may institute legal proceedings in a Member State, because the level of

²⁷² 'Satellite and Cable Copyright Directive', Directive 93/83, EU O.J. L 248/15.

²⁷³ EU Directive 89/552/EEC.

²⁷⁴ EU Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

protection in the non-Member State is insufficient.²⁷⁵ The application of the principle that the broadcasting may be deemed to have taken place in the signal-emitting non-Member State, but only, if this State provides a sufficient level of protection, may thus cause considerable damage to copyright owners in the EU. The application of the principle of the regard of the signal-emitting State in the case of non-Member States may be useful, but unless the principle has been recognised internationally, the EU has no reason to waive ownership rights of their citizens for the benefit of broadcasters from non-Member States.

The Expropriating Effect of the Application of the Principle of the Signal-emitting State

The application of the principle of the signal-emitting state within the EU may have expropriating effects for copyright owners. Assuming, a copyright owner has granted licences for the broadcasting of his work to different licensees in the several Member States who paid a royalty for the licence - the Belgian, Dutch, French, German, Italian and Spanish licensees will be 'expropriated' if the signals are emitted from a station on Luxembourg territory. The Directive thus may deprive the licensees of the other European Member States of the fruits of their acquisition when they have made considerable payments for the purchase of rights which are deprived of value, because the licensee from Luxembourg can broadcast the work via satellite free to all other EU Member States. The Directive may also cast in doubt the value of the copyright of the original holder who wants to market his right in the Member States. The Directive thus should provide for damages in order to balance the expropriation of copyright owners and licensees, since the copyright as an intellectual property right is protected by the constitutions of Member States.²⁷⁶

The Judgement 'Satellite Broadcasting' and Former Greek Law

In a case where the satellite broadcaster had withdrawn from German territory and emitted his signals to the satellite from Swiss territory, the District Court of Stuttgart held in the judgement 'Satellite Broadcasting':²⁷⁷ "It cannot be accepted that the rights of the copyright owner respectively those of the owner of neighbouring rights are evaded by withdrawing the place of emission of signals behind the national borders." The Court did not have to apply the law of the Satellite and Cable Directive, because the relevant modification of the German Copyright Act had been introduced only in the Parliament in April 1996 and still awaited its passing in 1997, but general principles of copyright law. According to these principles the Court seems to accept that the act of exploitation of a copyright by broadcasting does not only occur where the broadcasting is made but where it can be received.²⁷⁸ The Court expressly stated: "The traditional view does not correspond with modern developments, in particular in cases where satellite broadcastings can be received directly in several states (...). In such a case also the copyright law of the receiving state is applicable." The German judgement corresponds with former Greek law in Article 35(3) of the Copyright Act which stated that the broadcasting of a work via a satellite, offering reception over the whole of or a substantial part of Greece, should be lawful only when the broadcasting organisation, from where the uplink is released, has acquired the poser or has been granted the licence to transmit broadcasts by television in Greece.

Cable Re-transmission

Within the Internal Market the re-transmission by cable of broadcasting programs from other Member States must be made with due regard to the respective copyright and neighbouring rights. However, such re-transmissions may not only take place on the basis of individual contractual agreements, but also on the basis of collective contractual agreements between copyright owners, holders of related rights and cable operators.²⁷⁹ According to Article 9(1) of the Directive Member States must ensure that the right of copyright owners and holders or related rights to grant or refuse authorisation to a cable operator for a cable retransmission may be exercised only through a collecting society. If a rightholder did not transfer the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage these rights.²⁸⁰ If no agreement can be concluded with regard to authorisations of cable re-transmissions, mediation must be available according to Article 11 of the Directive. In practice this may be a cumbersome process. However, taking into account that in the US the Telecommunications Act provided for compulsory licensing in the case of certain cable and satellite broadcasts with the aim to facilitate market access for these new and expensive technologies, it may be conceivable that an efficient procedure could be established which supports the management of re-broadcasting by cable.

²⁷⁵ Arnold VAHRENWALD: 'Recht in Online und Multimedia', Luchterhand, 1996, 1st supplement, March 1997, No. 6.1.3, page 4.

²⁷⁶ Note above, at 5.

²⁷⁷ Germany, District Court of Stuttgart, 'Satellite Broadcasting', GRUR int. 1995/412, 413.

²⁷⁸ Arnold VAHRENWALD: 'Recht in Online und Multimedia', Luchterhand, 1996, 1st supplement, March 1997, No. 6.1.3. at 6.

²⁷⁹ Article 8(1) of the Satellite and Cable Copyright Directive.

²⁸⁰ Article 9(2) of the Satellite and Cable Copyright Directive.

One Copyright for Satellite Broadcasters in the EU but Many for Cable Services

The EU policy thus assumes a split approach between cable re-transmission and satellite broadcasting within the internal market. Whereas the satellite broadcaster in the Community just needs the copyright licence for broadcasting in the Member State where the signals are emitted to the satellite, the cable operator needs the copyright licence in all Member States where the audiovisual work is fed into the cable and retransmitted. But at least the Directive provides the cable operator with security concerning his position with regard to retransmission of programs. In Recital 10 of the Satellite and Cable Directive the Council had indicated that cable operators in particular cannot be sure that they have actually acquired all the programme rights covered by contractual agreements.

6. COPRODUCTION CONTRACTS

Distribution agreements are an essential means for the financing of a film production. But distribution is also a tool for the communication of the film as a cultural good and as such the subject-matter of public policy.

6.1. THE NECESSITY OF COPRODUCTIONS²⁸¹

The practice of coproduction agreements in the film production shows that the advantages deriving from financial pooling are the most important benefit whereas increased costs from coordination are essential disadvantages. Theoretically coproductions should be able to enter easier different national markets than purely national products. However, it seems that viewers do not necessarily appreciate the efforts undertaken by producers from different states. Particularly, in Europe the economic success of coproductions was disappointing. This may, partially, be explained by the fact that films resulting from coproductions, instead of conquering all the national markets of the co-producers, rather tend to lose national markets. The vision that European coproduction could lead to cross-fertilisation of creative talents and ideas all over the different European countries, that it could extend the markets for European programming or generate cultural bonding out of cultural diversity is not proven. But taking into account the often limited possibilities of European producers to obtain a sufficient funding for their projects, particular in the smaller European countries, the support which is given to coproductions by the European Council (Eurimages) or by the European Commission (Media II) but also by national support schemes is of considerable importance.

6.1.1. ESSENTIALS OF COPRODUCTIONS

Basically, the co-producers should clear certain problematic issues before the conclusion of a contract. A risk which is typical for coproductions concerns the consequences of the insolvency of a party to the coproduction contract. If, for example, the coproduction contract can be analysed as a joint venture, the insolvency may affect the whole project, without, however, releasing the other (solvent) party from obligations which were incurred by the insolvent party within the framework of the joint venture.

Pre-contractual Negotiations

- confidentiality of the project
- securing of the rights necessary for the production, possibly through an option:
 - novel, script
 - music
- timescale for production including establishment of places of photography.
- financing plan:
 - estimation of costs, development of budget
 - funding and securing of guarantees, sources of finance
 - approvals concerning funding
- production plan:
 - allocation of functions, the roles of the co-producers in the management of the production
 - responsibilities of the co-producers for the budget and distribution of benefits
 - production schedules, languages
 - talents
 - ownership of rights
- exploitation and distribution of revenues

²⁸¹ See: Colin HOSKINS, Stuart McFADYEN, Adam FINN and Anne JACKEL: 'Film and Television Coproduction', *European Journal of Communication*, 1995, vol.10(2), 221-243; Marc THOMAS: 'Financing Audiovisual Works in France and in Europe', *Columbia VLA Journal of Law & the Arts*, vol. 20, No. 3, Spring 1996, 495-519; Dorothy VILJOEN: 'The Key to the Negotiation of Audiovisual Coproduction Contracts', Council of Europe Press, Strasbourg 1994; J. WATSON, ed.: 'Coproduction in Europe', IPPA, London 1994.

- termination of contract, allocation of rights in case of termination
- transfer of rights and obligations by co-producer
- exclusion of partnership
- choice of the law applicable to the contract
- arbitration clause

6.1.2. ELEMENTS OF THE COPRODUCTION CONTRACT

Financing

- financing plan
- contracts for production finance
- cash-flow, currency fluctuations
- production budget
- bank account, powers
- accounting reports
- overspend and underspend
- distribution of benefits from the production budget
- distribution of gross revenues, net profits among co-producers

Organisation

- managing producer, allocation of functions among co-producers
- consultation and approvals concerning script and treatment, production schedule, budget, appointment and replacement of staff and artists, rough cut and fine cut
- rights of consultation and information, of approval
- production credits, publicity, promotional material, trailers

Acquisition of Rights

- underlying rights in pre-existing works
- copyright in production contracts with writers and composers
- copyright in production contracts with director, artists and staff
- copyright in the production
- exploitation according to territorial and product markets
- distribution and licences
- accounting

Contractual Obligations

- representations and warranties
- duties of co-producers
- breach of obligations
- force majeure
- insolvency
- substitution of a coproduction partner
- exclusion of partnership
- transfer of rights and duties
- choice of the applicable law
- arbitration

6.2. COPRODUCTIONS IN EUROPE

Particular difficulties in contractual issues derive from the fact that in Europe the application of different national laws to the coproduction contract should be avoided. Thus the clause concerning the choice of law should clearly establish which law is applicable to the contract. Another problem derives from the mandatory provisions of copyright. Different from the US 'work for hire' principle according to which the producer will be the initial owner of the copyright, in many European countries the ownership will arise in the creator. Accordingly, coproduction contracts should clearly establish to whom the exploitation rights belong with regard to copyright arising in the creative artists, directors or other authors.

The coproduction contract is not a special contractual type. Thus not much case law has developed. Concerning the obligations of the parties the European coproduction contracts may rely on the rules established in the civil code of the relevant country the law of which is applicable to the contract. The legal regulations of the civil code concerning 'force majeure' or the impossibility of performance, the breach of the contract or damages may be applicable to the contract if the parties do not expressly regulate the issue in the contract. And even if they

regulate the issue in contractual stipulations it may be that mandatory provisions of the national law override the solution adopted by the parties. But the principle of freedom of contract, according to which the parties are free to choose the law applicable to their contract, may give them sufficient possibilities to cope with this problem. It should be observed, nevertheless, that mandatory provisions of national labour law or the requirements of banks and other financing sources may limit this freedom.

Also the different requirements of national funds or third parties from the states of the co-producers may create problems for European coproductions. Thus the European co-producers should undertake to inform each other about possible funding by third persons and the terms and conditions contained in the relevant offers of contracts. The risks deriving from the failure of the financial agreement affect also the other co-producers so that a careful assessment of the possibilities of financing by third parties must be made in the case of European coproductions. The risks from defaults of a co-producer to the whole coproduction must be considered for any stage of the production.

It may also be appropriate to establish an independent company for production of the film which acquires the relevant rights and deals with the financing. However, in this case problems may arise from the taxation of profits according to the different national legal systems. If the company is established *ad hoc*, just for one project, it should be considered that the company's life will have to last until the last payment for a credit is made which may exceed considerably the period when gains are made. The parties should clearly establish their responsibilities with regard to the continuing management of the company and the liabilities concerning the payment of taxes and the employment of staff. With this regard it may be advisable to establish charts from the very beginning of the cooperation relating to, inter alia:

- the types and rates of taxes applicable,
- the legal classification of revenues,
- the types and rates of deductions,
- exemptions and refunds under tax and support schemes,
- the status of workers and employees under the contracts,
- the schemes if social security applicable,
- the labour regulations and labour laws applicable,
- collective agreements applicable.

In the case of European coproductions, the parties may have to take care concerning currency fluctuations. It may be appropriate to buy currency futures in order to hedge against possible losses. The national regulations concerning taxes and salaries differ considerably in Europe. Thus the level of VAT and of social contributions payable on remunerations of the staff may change in the different countries.

PARTICULAR PROBLEMS OF EUROPEAN COPRODUCTIONS

The European situation is characterised by the weakness of the audiovisual market. Whereas a working EU internal market is established in most sectors of the economy, the European audiovisual market is still fragmented. This is partially due to the fact that the markets for audiovisual media are identical with national cultures which have grown historically. The difficulties concerning the attempt to realise a true European broadcasting organisation offering a European program illustrate the problem to overcome traditional cultural borders. The film industry in the European countries is often dependent upon broadcasting organisations which finances productions, but also upon a variety of public grants and support schemes which are offered on the European and national level.

The establishment of an internal market for the audiovisual industry would have to create a harmonised structure for the funding and distribution of films. However, whereas the EU may regulate economic affairs, it has only limited powers in the cultural field to which belongs the audiovisual sector.²⁸² Thus it is likely that within the foreseeable future the conditions for European audiovisual production and distribution will not be integrated or harmonised. But the success of the US producers and distributors shows that a big market is a pre-condition for undertaking which want to challenge the global market. Whereas the US majors and also the independents have achieved the 'economies of scale' sufficient to attract financing for the making of audiovisual productions in a market where only 20% of the films are economic successes, the European producers do hardly avail themselves of the capacity to finance films without public grants or the cooperation with broadcasters.

²⁸² According to Article 128(1) of the EU Treaty the EU contributes to the cultural development of Member States, according to subsection 2 it promotes the cooperation between Member States and supports their activities in the audiovisual sector.

6.3. COPRODUCTIONS WITH BROADCASTERS

The public broadcasters and certainly private broadcasters are an important factor in the commissioning of audiovisual productions. In the case of the German public broadcasting organisation ARD, the share of in-house productions fell from 68% to 57%, to 49% and even 48% from 1978 to 1983, 1989 and 1992. The share of outsourcing productions increased during the same time from 7% to 9%, 11% and 12%. The acquisition of licences for the broadcasting of films increased also, namely from 18% to 25%, 28% and 39%. The share of programs which were taken over from other broadcasters remained at 2% to 3%.²⁸³

6.3.1. THE PROGRAMMING POLICY OF BROADCASTERS NECESSITATES COPRODUCTION

The importance of the role of broadcasters for the improvement of the European audiovisual competitiveness was particularly recognised in the report from the high level group on audiovisual policy chaired by Commissioner Marcelino Oreja²⁸⁴ of 1998. The programming policy of both public and private broadcasters favours independent production for certain reasons. First, during the beginning of the television era in the 1950s broadcasting organisations had to build and operate the most modern and technically advanced studios and facilities, because there were no alternatives. Broadcasting production was in-house production.

Private broadcasters which developed their services in the late 1970s had a different policy. Apart from news services and a very narrow range of other services they use outsourcing as practically the method of production. This has considerable cost advantages over the public broadcasters' traditional production method. It allows a maximum of flexibility, combined with a lowering of costs and a reduction of staff. The introduction of competition in the production stage permits the private broadcasters to operate with a fraction of costs for personal which public broadcasters pay. However, public broadcasters cannot adopt personnel management strategies which are open to private broadcasters,²⁸⁵ but they benefit from the employment of freelance producers who contribute privately organised dynamics and vitality. This tendency corresponds with the European Commission's policy to implement a program quota of at least 10% of independent European productions.²⁸⁶

Outsourcing Rate of Public Broadcasters at 50%

The tendency of public broadcasters to use outsourcing for their programming seems to have come to a standstill at a percentage of roughly 50%. This may be favoured by a harmonisation of the levels of in-house productions and outsourcing, the increase in number and in competition amongst private broadcasters who demand more productions from private producers, and the increase in costs from productions of sports and European entertainment programs (Eurovision). It is also conceivable to increase the marketing strategies of public broadcasters, for example by improving the exploitation of their programs - in 1992 the ARD obtained mere 2.5% of its income from the sale of programs and coproductions. Taking into account that national productions are very popular amongst viewers, the German public broadcasters have made efforts to show in the early evening program increasingly not bought productions but series which were made in-house or by independent producers. These series, which are broadcast during the prime time, are essential for the attractiveness of the programs and for the income of the public broadcasters which, in the case of the ZDF, derives from advertising at a rate of 40%.

Public Broadcasters Acquire Rights in Block Licences from Larger Producers

Another strategy of public broadcasters was the purchase of licences, mainly of US productions, in large numbers. In order to avoid cost increases from the distribution segment of the film market, broadcasters acquire blocks of licences directly from larger producers: Degeto, the company which purchases rights for the ARD, bought licences for 165 US films in early 1990. Also on the European level broadcasters attempt to harmonise their programming activities. Thus in 1988 Channel Four of the UK and the German ZDF established with other European broadcasters the ECA, a joint production organisation which spent some DM 165 mio. in 1990/91.

Film Promotion by Broadcasters

Since 1974 the German movie film industry and broadcasters established in subsequently modified 'Film-Broadcasting-Agreements' guidelines for the promotion of film production. According to the Agreement of 1993 the ARD and ZDF paid annually an amount of some US\$ 15 mio. for the support of film producers. The German movie film production suffers from the fragmentation of the market according to the different German provinces which have the lawmaking power in cultural affairs so that something like a national German film cannot develop.

²⁸³ Sources: ARD Annual Reports.

²⁸⁴ See http://europa.eu.int/comm/dg10/avpolicy/key_doc/hlg2_en.html

²⁸⁵ BVerfGE 59/231.

²⁸⁶ Article 5 of the EU Directive 'Broadcasting without Frontiers'.

6.3.2. THE ROLE OF PUBLIC AND PRIVATE BROADCASTERS IN EUROPE

The role of public broadcasting organisations in the funding of films may be traced back in history to the patronage of the arts by the ancien régime or absolute powers. At the beginning of the century, film markets were essentially national markets. In the footsteps of the ancien régime culture was a matter of public funding, at least in many European countries. With the development of international communications the entertainment business was increasingly subject to inspirations from the US, possibly with an exception in some ‘classical’ subjects. European states encountered this challenge by fostering the national audiovisual industry, partially by limiting the importation of US films or by imposing taxes on the importation of foreign films. Thus the Alfieri laws in Italy increased the share of national films in the cinemas from 15% at the beginning of the 1930s to more than 50% within two years. An example of the protectionist legislation which survived the GATT and TRIPS agreements can be seen in the Swiss laws concerning the distribution of films which impose quotas on the importation of foreign films in order to protect the national film economy.²⁸⁷ Public broadcasters in many European countries still have the public task of maintaining the cultural identity, improving the education and fostering the knowledge and the arts - altogether elitist principles. By reason of this public task they are less dependent upon ratings and they can afford to engage in coproductions with film producers also in artistic projects. The role of public service broadcasting was again stressed in the Resolution of the Council and of the Representatives of the Governments of the Member States’ Meeting within the Council of 25/01/99.²⁸⁸

6.4. COPRODUCTIONS IN THE US

Different from the European coproduction contracts, US coproduction contracts do not have to deal with different languages and national legal systems. In particular the administrative procedure required for the approval of a project in the case of public broadcasters may pose hurdles for cooperation (television broadcasters are the leading commissioners of films in Europe), but also the approval of national subsidy funding concerning the share of the co-producer. Thus European coproductions do not only have to consider bi-lateral but multi-lateral agreements. Accordingly, the status of the parties to a European (multi-lateral) coproduction contract may vary more than a US agreement involving different co-producers. Correspondingly, the decisive questions of who exercises editorial control, who owns the relevant rights (essentially copyright and neighbouring rights) but also of who can claim which share of profits will vary according to the different interests reflected in the contractual stipulations.

7. ACQUISITION OF RIGHTS FOR PRODUCTION

In the contracts relating to the production of the audiovisual work the producer has to secure the rights for the subsequent exploitation of the film.

7.1. ACQUISITION OF EXPLOITATION RIGHTS

Transaction in copyright may concern different types of contracts and different stages in the marketing of the product.

Acquisition of Rights concerning Pre-existing Works by Producer

If the producer wants to make use for his project of pre-existing works or products protected by copyright or neighbouring rights, for example a record or photographs, he has to acquire the rights for the use of the pre-existing work from the relevant right holder. He does not only need the right to use the pre-existing work for the production of his new work but also the right to make use of the pre-existing work for purposes of the exploitation in his new project.

Acquisition of Rights in Cinematographic Adaptation

This type of contract is concluded between the authors or right holders of pre-existing works and the producer. The contract relates to the grant of a licence concerning the copyright for the use of a pre-existing work against the payment of a royalty or the transfer of the copyright against a remuneration. The parties may use contractual forms.²⁸⁹

In German law it has been considered whether the contract bears a resemblance to the publishing contract according to which the publisher is impliedly obligated to publish and distribute the author’s work in application

²⁸⁷ See above, ‘The Distribution System in Switzerland’; however the Swiss legislation was modified recently.

²⁸⁸ EU Document 499Y0205(01), EU O.J. Nr. C 030/1 of 05/02/99.

²⁸⁹ See, for example Götz von OLENHUSEN: ‘Filmarbeitsrecht’, at 374: ‘Verfilmungsvertrag’, at 384: ‘Filmdrehbuchvertrag’, at 393: ‘Filmmusikvertrag’ and at 395: ‘Allgemeine Bedingungen zum Filmmusikvertrag’.

of the rules contained in the German Publishing Act. However, the Imperial Court held in the judgement 'Only a dancer'²⁹⁰ that not even in the case of an exclusive licence for the use of a work the producer is obligated to make the production and to distribute the film. The Court reasoned that the special contractual situation of the publishing contract which is regulated in a special law, would not be applicable to the film industry where particular conditions relating to the commercial risks made the author less worthy of protection.

The Contractual type is particularly regulated in Article 88 of the German Copyright Act:

"(1) If an author permits another person to make a cinematographic adaptation of his work, he shall be deemed, in doubt, to have granted the following exploitation rights:

1. the right to use the work in its original form or as an adaptation or transformation for the purpose of producing a cinematographic work;
2. the right to reproduce and distribute the cinematographic work;
3. the right to publicly present the cinematographic work if it is a work intended for presentation;
4. the right to broadcast the cinematographic work if it is a work intended for broadcasting;
5. the right to exploit translations and other cinematographic adaptations or transformations of the cinematographic work to the same extent as the work itself.

(2) In doubt, the rights referred to in paragraph (1) shall not be deemed to include the right to remake the cinematographic work. In doubt the author shall be deemed to have the right, after the expiration of 10 years from the conclusion of the contract, to utilise his work otherwise for cinematographic purposes.

If the producer does not exercise the rights which have been granted to him, the author cannot revoke the contract for non-exercise in application of Article 41 of the German Copyright Act, because this right is excluded in the case of film contracts according to Article 90 of the German Copyright Act. Thus the author of a novel who has granted a licence to the producer for the making of a film on the basis of his novel cannot revoke the contract, relying on the provisions of the German Copyright Act, if the producer does not undertake the necessary steps towards the production. The author will have to stipulate the right of revocation in the contractual agreement.

Acquisition of Rights from Authors by Producers

Authors of the audiovisual work such as the writer of the screenplay, the composer of the music, the major actors, the film director or the cutter will have to transfer the exploitation right in the work to the producer, unless the producer himself can obtain the initial copyright in the audiovisual work or unless the law regulates the producer's right to exploit the authors' copyright which is foreseen in many national copyright laws.

Acquisition of Copyright concerning the Creation of a Film According to Greek Law

Article 34(1) of the Greek Copyright Act specifies that a contract which relates to the creation of an audiovisual work between an author and a producer shall specify the economic rights which are to be transferred to the producer. If this is not the case, the contract shall be deemed to transfer to the producer all the economic rights which are necessary for the exploitation of the audiovisual work, pursuant to the purpose of the contract.

Acquisition of Copyrights concerning Contributions to the Film According to Greek Law

Article 34(2) of the Greek Copyright Act states that the contract between the producer of an audiovisual work and the creators of individual contributions incorporated in the work, shall specify the economic rights which are transferred to the producer. If this is not the case, the contract between the producer and the authors of individual contributions, other than the composers of music and writers of lyrics, shall be deemed to transfer to the producer those powers under the economic right which are necessary for the exploitation of the audiovisual work pursuant to the purpose of the contract. But where the contributions to an audiovisual work are capable of separate use, the economic right in relation to other uses shall remain with their authors.

Acquisition of Neighbouring Rights Concerning the Creation of a Film According to Greek Law

Article 46 of the Greek Copyright Act establishes in subsection (3) that a producer is presumed to have acquired the necessary neighbouring rights if he concludes with a performer a contract for work according to which the performer has to undertake the relevant performances. The performer has the right in a remuneration with regard to any rights of exploitation which belong to him as neighbouring rights. In particular, the performer has the right in an equitable remuneration concerning any exploitation of a recording of the audiovisual product by rental. The performer cannot assign or waive the neighbouring rights during his lifetime, but he may transfer the management of these rights to a collecting society, Article 46(5) of the Greek Copyright Act.

In the case of the broadcasting or communication to the public of audiovisual recordings, the user has to pay an equitable remuneration to the performers whose performances are carried on the recordings and to the producers

²⁹⁰ German Imperial Court of 16 June 1923, RGZ 107/62 at 66.

of the recording; the remuneration is payable to a collecting society, Article 49(1) of the Greek Copyright Act. Performers cannot assign this right, Article 49(2) of the Act, and the remuneration will be distributed between performers and producers at equal shares, Article 49(3) of the Act. Contracts relating to such rights must be in writing, Article 49(3) of the Act. Contracts relating to such rights must be in writing, Article 52(a) of the Act.

No Acquisition of Rights for Free Use

The acquisition of rights is unnecessary if the use envisaged does not violate any subsisting exclusive rights. Thus smaller parts of films, audiovisual products, music or artistic performance can possibly be used freely, without the need to obtain the copyright owner's authority. Such a free use may be based on the regulation of the fair use of works protected by copyright which is provided for by some national copyright legislations. Examples are the use for the purpose of quotation, for the reporting of news events, for private copying or for private archiving. However, the national regulations differ widely and what is permissible in one country under the name of 'fair use' or 'private use' may require a licence from the rightholder in the other country.

Acquisition of Rights from Authors Against a Remuneration According to Greek Law

Article 34(4) of the Greek Copyright Act establishes that the author of an audiovisual work shall retain the right to a separate remuneration for each form of exploitation of the work. The aforementioned remuneration shall be agreed as a percentage, specified in the relevant contract. The calculation of the percentage shall be based on gross revenues, without exception, or the gross expenditure or on the combined gross revenues and expenditure, realised in the course of the exploitation of the work. The producer of the audiovisual work is obliged once a year to give the author of the work all information concerning the exploitation of the work, in writing, showing him also all relevant documents. According to Article 34(4) of the Act the author retains a right to an equitable remuneration, when visual or audiovisual recordings carrying a fixation of an audiovisual work are the object of a rental arrangement. In the case of the remuneration of composers, Article 37 of the Greek Copyright Act establishes that the minimum fee payable to the composers of musical and song accompaniment of films which are shown to the public in cinema halls or other spaces, shall be 1% of gross receipts after the deduction of the public entertainment tax.

Special Case: Television Contracts

According to Article 35(1) of the Greek Copyright Act, the rebroadcasting of a work by television does not require the consent from the author additional to the consent granted for the first broadcasting – provided that the parties did not regulate this issue differently in their contract. But when a broadcasting organisation rebroadcasts a work, it is obligated to pay an additional remuneration to the author. The Act establishes that for the first rebroadcast, the fee payable shall be at least 50% of the initial fee agreed for the first broadcast, and for each subsequent broadcast the additional fee shall be 20% of the initial fee. Unless the parties stipulate otherwise in the contract, the broadcasting organisation may not grant third parties the authorisation to broadcast or rebroadcast the work.

7.1.1. OWNERSHIP OF RIGHTS

Whereas the Berne Convention regulates the categories of works which merit protection and also the minimum scope of protection it does not regulate the issue of the initial ownership of the rights. This is a matter which rests exclusively with national law in application of the principle of the state of protection. Accordingly, the issue whether persons involved in the production of a film will be authors or not and whether they will obtain copyright must be decided by reference to the relevant national law. Since these laws differ, it is advisable to include into contracts with staff, employees, independent contractors or artists a copyright clause by means of which the person transfers to the producer on a comprehensive basis all rights for the exploitation of the film by whatever means, for any purposes and all territories and without temporal limitation.

Authors of Audiovisual Works and the Berne Convention

The Berne Convention regulates in Article 14bis the ownership in cinematographic works and the limitation of certain rights of certain contributors.

Ownership of Audiovisual Works.

According to Article 14bis(2)(a) of the Berne Convention the ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed. This means that it depends upon the national law which persons have to be considered as authors of the audiovisual work.

Limitation of Authors' Rights

According to Article 14bis(2)(b) of the Berne Convention those persons who, in application of the national law, become the authors of an audiovisual work, may not object to the exploitation work if they have agreed to contribute to it and unless the contract regulates this issue differently. However, this rule is not applicable to the authors of scenarios, dialogues and musical works created for the marking of the audiovisual work or to the director thereof unless the national law provides to the contrary, Article 14bis(3) of the Berne Convention.

'Maker' of the Audiovisual Work

Article 15(2) of the Berne Convention provides that the person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be the maker of the said work.

7.1.2. INITIAL OWNERSHIP AND COPYRIGHT CLEARANCE

In the case of pre-existing audiovisual works it may not be clear, to whom the copyright belongs. Copyright clearance presupposes the examination of to basic question: who owned the copyright initially and to whom was the copyright or the exploitation rights transferred and who was granted a copyright licence. A basic difference between US copyright law and the law of many European states lies in the regulation of the initial ownership of the copyright in audiovisual works. Whereas the application of the 'work for hire' doctrine according to US law leads to the result, that the producer can acquire the original copyright in the work, the copyright laws of many European states establish that the initial ownership in the copyright belongs to the authors who create the work.

Particularly in the case of music the identification of the copyright holder may create problems, because the playing of music does not necessitate legible texts about the author of the work whereas in the case of literary works, the name of the author is commonly indicated and also in the case of audiovisual products the names of the creators of the work are, generally, indicated in the credits. The problem of the identification of the initial owner of the copyright in audiovisual or cinematographic works lies at the basis of the copyright clearance.

Initial Ownership According to US Copyright Law

In the case of films it may not be easy to identify the copyright owner. Whereas the international Berne Convention establishes that cinematographic works are protected by copyright it does not regulate the issue of the initial ownership of the copyright in cinematographic works which is left with Member States.

The US Copyright Act states that the initial ownership of the copyright in a work vests in its author or authors.²⁹¹ This is similar in the copyright laws of many European states. However, the US Copyright Act makes an important exemption from this principle. If a work is made for hire, the employer or other person for whom the work was prepared is considered the author.²⁹² The producer of an audiovisual work who hires the persons who create the work thus owns the copyright, unless the parties have expressly agreed otherwise in a written instrument signed by them.²⁹³ If the US-producer is not the commissioner or employer, the initial copyright vests with the persons who are creatively involved in the making of the work as joint authors. These are, in particular, the director, the cameraman, the cutter, the writer of the text and script, the composer of the film music, the film architect, the person who arranges special effects, the maker of the costumes and, exceptionally, also artists.

Authorship in US Films: The 'Work Made for Hire' Doctrine

In the case of films made before 1925, generally the director/producer acquired the original ownership of the copyright. If other persons were involved in the creative process they were, mostly, paid and supervised by the director so that he obtained the copyright according to Article 26 of the US Copyright Act of 1909. After the establishment of the studios in 1925 the creative persons engaged with the making of the films were employed as personnel so that the 'majors' acquired the initial ownership of the copyright. This view is also supported by the clauses used in film contracts according to which the persons working for the studios considered their contribution as a 'work made for hire'.

In the case where the rights for the making of a film vested with the authors of a book or novel, the studios purchased the copyright or acquired a licence for the making of a film. After 1948 and before the entering into force of the Copyright Act of 1976 the initial authorship vested in the producer of the film who concluded the contracts with the persons engaged for the production and who produces the film. The 'majors' could only acquire the initial copyright if they concluded a contract with the producer according to which the film should be produced as a 'work made for hire'.

²⁹¹ § 201(a) of the US Copyright Act.

²⁹² § 201(b) of the US Copyright Act.

²⁹³ § 201(b) of the US Copyright Act.

After 01 January 1978 the producer will be the initial owner of the copyright if he employs the persons engaged with the making of the work so that these are his employees or, if the work is made by independent contractors, if he concludes a contract expressly a term that the work is 'made for hire'. With regard to audiovisual works the US Copyright Act defines the work made for hire as 'a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, (...) if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire'.²⁹⁴ Otherwise the initial ownership of the copyright belongs to the creative persons involved in the creation of the work.

Authorship in Films Made in European States

The international copyright conventions do not regulate the question in which person the copyright of an audiovisual or film work arises. The basic rule is that the initial copyright vests in the person who creates the work.²⁹⁵ Accordingly, the persons involved in the creation of the film, the film creators would be the initial owners of the copyright. But who belongs to this group of persons? The group may include the film director, top artists, the cutter, the make-up artist, the dressmaker, the film architect, the composer of the film music, but also the writer of the script, screenplay, and dialogues. National laws differ: whereas Italian law²⁹⁶ considers (non-exclusively) as joint authors of the film work the author of the script and of the screenplay, the composer of the music and the film director, the circle of authors is more limited in German law where the authors of the script and of the screenplay or the composer of the music will not become joint authors of the audiovisual or film work but authors of pre-existing works which are used for the film.²⁹⁷

But even if the film creators are initial owners of the copyright according to the laws of many European countries, these laws may also provide that the film producer is authorised to use and exploit the copyright. Thus according to Article 45(1) of the Italian Copyright Act the exercise of the rights in the economic utilisation of the cinematographic work belongs to the person who has organised the production. According to Article 89(1) of the German Copyright Act those persons who undertake to cooperate in the production of a film, should they initially acquire the copyright grant, in case of doubt, the producer an exclusive right to utilise the cinematographic work as also translations and other adaptations or transformations of the cinematographic work in any known manner. Thus even in those countries which apply strictly the creator principle concerning the initial ownership of the copyright the producer is, by provisions of statutory law, placed in the position to use and exploit efficiently the audiovisual or film work. Thus differences in the scope of the right remain, in particular with regard to moral rights and the rights in unknown technical uses. If, in application of the work for hire doctrine, the producer is the initial owner of the copyright, the moral rights vest in his person. If the film creators are the initial owners of the copyright, the moral rights vest with them, and, due to their nature as personal rights, they cannot be transferred.

7.2. CONTRACT WITH THE WRITER

In the contract with the writer of the screenplay the producer of a movie or television film has to obtain comprehensive adaptation rights.

THE AGREEMENT BETWEEN THE UK WRITERS' GUILD OF GREAT BRITAIN AND PACT

The Agreement between the UK Writers' Guild of Great Britain and Producers Alliance for Cinema & Television contains the following regulations:

- The scope of the agreement differs between
 - feature films with a budget:
 - in excess of USD 3.3 mio., a budget:
 - between USD 1.2 and 3.3 mio.,
 - television films with a budget of:
 - USD 1.2 mio. and more
 - films with a budget below USD 1.2 mio.,
 - television series and serials with format provided other than by the writer.

Depending upon the category of classification, the writer has to be paid a minimum fee. The fee payable in turn depends upon the stage of the work produced by the writer. The different categories are the treatment, first draft, second draft and the principal photography script. The payment depends also upon the different types of

²⁹⁴ § 101 - definition of 'work made for hire', of the US Copyright Act.

²⁹⁵ See for example Article 7 of the German Copyright Act.

²⁹⁶ See Article 44 of the Italian Copyright Act.

²⁹⁷ See Article 89(3) of the German Copyright Act.

exploitation, such as television series and serials, theatrical distribution, free television, pay television, videogram and non-theatrical use.

WRITER'S OBLIGATIONS

The writer's obligations, generally, concern the following duties: to write the treatment, subsequent drafts and principal photography script of the work as requested by the producer, to carry out the necessary research and studies for the work, to use his best abilities and skills in the preparation and making of the work, to deliver the work timely on the dates specifically identified in the agreement, to deliver the work in the format identified in the agreement, to make incidental or minor revisions upon the producer's demand, to attend meetings and conferences with the producer which the producer may reasonably require for the planning and preparation of the work, to pass to the producer any copyright in products of the writer's services, provided that payment is made for the stage in respect of which the services were rendered, to transfer the copyright,²⁹⁸ alternatively, grant comprehensive rights for the use and exploitation, amendment and adaptation of his work to the producer. The latter rights should be stipulated expressly, for example the right of translation or of the adaptation in electronic forms.

WRITER'S WARRANTIES

A writer's warranties in general contain the following undertakings, that the writer: accepts the engagement and that he has no commitments which would conflict with his contractual duties, can acquire the original copyright in the work, ensures that his work is original and does not infringe any copyright, ensures that his work does not contain defamatory material, indemnifies the producer, should the work infringe third person's rights, in particular copyright, or contain defamatory material, will not divulge and information about his work, the contract and the production to third persons unless specifically authorised in writing by the producer, duty to negotiate in good faith with the producer the conditions for any uses in the form of books, if the principal photography has not begun within two years after the conclusion of the contract, the writer may buy the rights in the original script on a payment of 50% of the sums received. Other clauses in the Agreement relate to the illness of the writer and to the producer's duties.

7.3. CONTRACT WITH AN ACTRESS/ACTOR

If the actress/actor is considered as an employee, the general principles of the relevant national law applicable in the case of intellectual property rights acquired in a relation of work will be applicable. Beyond, particular regulations may be found in national copyright law.

FRENCH MODEL CONTRACT (DIXIT) CONCERNING THE EMPLOYMENT OF MAJOR ARTISTS

The French audiovisual industry can rely on a variety of books containing model contracts concerning film production are, for example 'La Production Audiovisuelle'.²⁹⁹ Concerning the model contract with a major artist, with a secondary artist, with a minor and with a television film artist. In France contracts with artists are subject to the collective agreements, namely the Convention Collective Nationale de la Production Cinématographique of 29 March 1973 and the Convention Collective Nationale des artistes-interprètes engagés pour des émissions de télévision. The regulations in the contract with the top artist which may affect intellectual property are the following:

REMUNERATION

The salary may be paid in a lump sum and according to the days and weeks or months of photography. Additionally, French law requires a payment in application of the French copyright law, Articles L. 212-4 to L. 212-9 of the French Intellectual Property Code. This additional remuneration amounts to 2% of the net receipts from the exploitation after the deductions for the production costs. The percentage is allocated between all the artists in relation to their contractual remuneration whereby the exceeding salaries are lowered. The relevant sums are collected and paid to the artists by the collecting society ADAMI.³⁰⁰ The model contract envisages the following percentages: 50% of the total sum from the theatrical exploitation, 30% of the sum from the exploitation by television broadcasting, 10% of the sum from the exploitation by sale or rental by video and 10% by any other means of exploitation, now known or unknown. Also a certain minimum payment has to be made in application of the French copyright law.

²⁹⁸ According to clause 25 of the Agreement between the Writers' Guild of Great Britain and Producers' Alliance for Cinema & Television the copyright in the writer's work shall be the sole property of the producer for all media.

²⁹⁹ Catherine MARTEL: 'La Production Audiovisuelle - 2 - Les Contrats', DIXIT, Paris 1994, 113-150.

³⁰⁰ ADAMI (Société pour l'Administration des droits des Artistes et Musiciens-Interprètes, 103 rue La Boétie, F-75008 Paris.

In the case where photography is necessary in excess of the time envisaged in the contract, the parties may provide that the top actor receives an additional compensation. The parties may also provide for additional payments in the case where the receipts exceed a certain sum within a certain period.³⁰¹ The producer undertakes to keep books concerning the exploitation of the film and the parties name their representatives who are responsible for making and receiving the payments. The producer undertakes to register the contract with the Public Register of Cinematography.

OTHER REGULATIONS

Other regulations in the contract concern synchronisation, for example that the producer will not proceed to the synchronisation of the major artist's voice without his prior consent. The producer may undertake not to use doubles or stunts with other performers without the top actor's prior consent. He may be obligated to employ a special hairdresser, dressmaker etc. for the major artist. The major artist may obtain the right to receive photographs which show his portrait, chosen from the film's sequences. Only those photographs will be published by the producer which have been approved by the top artist. The top artist will receive 10 copies of the film in video form. Concerning credits it may be provided that the name of the top artist will be mentioned in the credits, advertisements etc. in a prominent place, before the title of the film in special letters. The relation with the mentioning of other top artists' names can be specially regulated. The name and the photographs of the top artist may only be used by the producer for the purpose of the advertising for the film. Advertisements require the prior approval by the top artist. Concerning advertising the major actor may agree to participate in publicity actions concerning the film and in film festivals at the expenses of the producer.

7.4. CONTRACT WITH A FILM DIRECTOR

It may be controversial, whether the principles of labour law will be applicable to contracts with directors.

7.4.1. IMPLIED GRANT OF THE EXPLOITATION RIGHTS BY DIRECTORS

In the labour relationship it is, in general, recognised that the employer benefits from the intellectual property rights which the employee creates in the exercise of his contractual duties. Different from the US copyright law the producer does not acquire the initial copyright - the doctrine of the work for hire does not have a parallel in the European countries. In the case of the film production, the copyright laws of the European countries may contain special provisions, for example establishing an exploitation right of the producer.³⁰² This means that the film author may be deemed to have transferred the copyright or granted a licence for its exploitation to the producer. Such a rule is, for example, contained in Article 34(1) of the Greek Copyright Act.

In the judgement 'Triumph of the Will' which concerned the Leni Riefenstahl production of the National Socialist German Workers' Party national assembly of 1934, the German Federal Supreme Court³⁰³ held that the person who by reason of a contractual obligation makes a film for another person grants him impliedly the right of exploitation. However, whether this will generally be the case, may be doubtful. In the case concerned the party had obviously a strong interest in the exploitation of the film by its own.

The grant of the right of use or the transfer of the copyright may also be envisaged in skeleton agreements agreed upon between the unions and film producers or broadcasters. Even if the contract does not transfer these rights on the producer by reason of an express clause or a clause contained in a skeleton agreement, the grant of such rights may be provided for in the copyright acts. Thus the copyright act may contain a regulation according to which the author who undertakes to participate in the production of a film grants the producer the right in the exploitation of the film.³⁰⁴ Concerning the scope of the exploitation right, it should be observed that copyright

³⁰¹ Concerning the exploitation of the film the model contract makes reference to the reports in the professional journal CINECHIFFRES.

³⁰² Article 94 of the German Copyright Act states: Protection of Producers of Films (1) The producer of a film shall have the exclusive right to reproduce, distribute and use for public presentation or broadcasting the video recording or video and audio recording on which the cinematographic work is fixed. The film producer shall further have the right to prohibit any distortion or abridgement of the video recording or video and audio recording which may jeopardise his legitimate interests. (2) The right shall be transferable (3) The right shall expire 25 years after the publication of the video recording or video and audio recording; however, it shall expire 25 years after production if the recording has not been published during such period. (4)'...

³⁰³ Germany, Federal Supreme Court of 10 January 1969, 'Triumph of the Will', UFITA 55/1970 at 313.

³⁰⁴ Article 89 of the German Copyright Act states: 'Rights in Cinematographic Works (1) Any person who undertakes to participate in the production of a film shall be deemed, in doubt, to have granted, should he acquire a copyright in the cinematographic work, to the producer of the film an exclusive right to utilise the cinematographic work as also translations and other adaptations or transformations of the cinematographic work in any known manner. (2) If the author of the cinematographic work has in advance granted to another person

laws often protect the allegedly weaker party, the author. Thus the German Copyright Act states that the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant when the types of use to which the exploitation right extends have not been specifically designated when the right was granted.³⁰⁵ But in order to accommodate the producer's need in the commercially viable exploitation of films, the copyright acts may also contain provisions which expressly limit the film authors' rights. Thus the right in the recognition of authorship may be limited. According to the German jurisprudence³⁰⁶ a popular film actor has the right to be mentioned only in the credit titles and in posters but not in the adverts of the cinemas. The moral rights of film authors may also be limited to cases of gross distortions of their works and contributions concerning the production and exploitation of the film.³⁰⁷

7.4.2. RIGHT OF ARTISTIC CONTROL AND FINAL CUTTING

Depending upon the purpose of the project, the right of artistic control may be allocated between the director and the producer. In the US the studios or the producer retain by means of contractual clauses the right of artistic control. In the case of independent producers the degree of control may differ.³⁰⁸ The director will exercise a higher degree of the right of artistic control if he directs a low budget film involving his personal engagement which may include the writing of the script and acting.

The director's right of final cutting relates to the film itself and, in the absence of contractual stipulations, not to the cutting and editing for television versions³⁰⁹ or video versions. The right of final cutting may be regulated more comprehensively in the continental European countries where the artistic influence of the director is more appreciated than in the US where the director is considered more as an employee. Thus in Germany it can be expected that the director will supervise the final cutting of the film³¹⁰ whereas according to the Basic Agreement of the US Directors Guild of America the director differs between the director's cut³¹¹ and the final cut which will be made by a person named by the employer, the producer.³¹² Obviously, a conflict between artistic and commercial considerations may lead to considerable risks for the marketing of the film. In particular the decision about the question whether the film shall have a happy 'Hollywood ending' or follow a literary model may give rise to controversies between a director and the producer. Thus in the case of films with high budgets it may be recommendable to balance the director's right of artistic control in the interest of the investors with supervising rights of the producer.

Article 34(1) sentence 3 of the Greek Copyright Act states that when the master copy from which copies for exploitation are to be made, is approved by the author, the audiovisual work shall be deemed to be accomplished. No alteration, abridgement or other modification shall be made to the definitive form of the audiovisual work, as the latter has been approved by the author, without his prior consent. The Greek Act thus conceives of the right of final cutting as a typical moral right which appertains to the film director, even if the contract is silent on this point.

7.4.3. UK PACT CONDITIONS OF ENGAGEMENT FOR DIRECTORS: COPYRIGHT CLAUSE

The UK Producers Alliance for Cinema & Television ('PACT') conditions of engagement of directors contain a comprehensive copyright clause. According to this clause the director, as beneficial owner, assigns to the producer the entire copyright throughout the universe for the full period of copyright and all renewals and extensions thereof (and thereafter, insofar as director is able, in perpetuity) and to the extent relevant by way of present assignment of future copyright and all other rights whatsoever in all products of the director's services hereunder including without limitation all literary, dramatic, artistic and musical material contributed by the director to the programme (the said copyright and products are herein referred to as 'the products'). The director hereby irrevocably grants to the producer throughout the world:- (i) all consents under Part II of the UK 1988

the exploitation right referred to in paragraph (1), he shall nevertheless remain entitled to grant that right to the film producer, with or without limitation. (3) Authors' rights in works used to produce the cinematographic work, such as novels, screenplay and film music shall remain unaffected.'

³⁰⁵ See Article 31(5) of the German Copyright Act.

³⁰⁶ Germany: Labour Court of Munich of 03 February 1958, UFITA 27/1959 at 104,105.

³⁰⁷ See Article 93 of the German Copyright Act.

³⁰⁸ John M. KERNOCHAN: 'Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects', Columbia VLA Journal of Law & the Arts, vol. 20, No. 3, Spring 1996, 379-459 at 414.

³⁰⁹ US: *Preminger v. Columbia Pictures*, (1966) 49 Misc 2d 363, 267 NYS2d 594, affd (1st Dept) 25 App Div 2d 830, 269 NYS2d 913, affd 18 NY2d 80, 219 NE2d 431.

³¹⁰ Horst von HARTLIEB: 'Handbuch des Film-, Fernseh- und Videorechts', 3rd ed., C.H. Beck, Munich 1991 at 113.

³¹¹ Basic Agreement of the Directors Guild of America, Article 7.501.

³¹² Basic Agreement of the Directors Guild of America, Article 7.206.

Copyright Act to enable the producer to make the fullest use of the products; (ii) the right to and to authorise others to issue publicity concerning the director's services in connection with the programme and to use the director's name likeness and biography and the products in connection with the advertising, publicising, promotion and exploitation of the programme but so that without the director's prior written consent such use shall not suggest that the director endorses recommends or uses any commercial products or services other than the programme. The director recognises that the producer has the unlimited right to edit copy after add to take from adapt or translate the products and, with regard to the products and the programme, hereby irrevocably waives (without prejudice to the director's rights under Condition 8) the benefits of any provision of law known as 'moral rights' (including without limitation any rights of the Director under Sections 77 to 85 inclusive of the UK 1988 Copyright Act) or any similar laws of any jurisdiction. The director shall do all such acts and execute such documents as the producer may require to vest in or confirm to the producer or its successors in title and licensees the copyright and all other rights assigned or granted or purported to be assigned or granted by the director to the producer in connection with the engagement.

This comprehensive copyright clause is indicative of the necessity to observe the national laws of the different Member States of the EU, in spite of all attempts for a harmonisation in this sector. Thus the comprehensive grant of the copyright would hardly be upheld by a German court, with particular regard to future copyright, and it is unlikely that a French court would accept the general waiver of moral rights.

8. DISTRIBUTION AGREEMENTS

The recognition of film distribution as a political issue was evidenced by Article IV of GATT according to which States were permitted to introduce a quota system with regard to the import of cinematograph films.

8.1. INTERNATIONAL DISTRIBUTION AGREEMENTS

Basically, the producer's problem in the marketing of his audiovisual product lies in the balancing of the need to obtain pre-sales against the aim to retain profits. Whereas pre-sales may be necessary to finance the production, only the retention of profits will allow the producer to benefit from a successful exploitation of the film. The distributor who makes a pre-sale may pay the producer the double amount of the sum which he would have to pay for an ordinary distribution fee. But in the case of a pre-sale, the producer's possibilities to participate in the successful exploitation of the film are reduced. The producer's aim should could thus be to participate in the distribution of films, an aim which is pursued by distributors which are organisations of independent producers or film directors, such as the German company Weltvertrieb im Filmverlag der Autoren. The US majors have solved the problem by setting up a world-wide network of affiliates which organise the distribution, for example Buena Vista Italia in Italy or Warner Bros. Film GmbH in Germany. These distributors sell the films which are produced by the majors, but they also distribute other films so that in particular small producing companies in Europe can benefit from the distribution network of the majors' distribution affiliates.

The larger distributors sell their films in packages. This means that theatres cannot buy single films, but they have to purchase films in blocks. Package deals minimise the distributor's risks from flops, because the theatres have to market and program also those films which they consider of less interest. On the other hand, package deals minimise the marketing chances for films which are offered by smaller distributors. According to the Italian Authority for Competition and Market which has in a series of cases very carefully analysed the Italian film market, some 60 first run theatres in Rome decide upon the success of films on the national level. 50 of these theatres are operated by two chains which are, basically, controlled by the Cecchi Gori group and Mediaset. The Authority arrived at the conclusion that it is very difficult for independent producers whose films are not distributed by the larger distributors to be considered in the programming of the Roman first run theatres. However, the Authority considered that this situation did not give rise to antitrust measures, because the situation corresponded with the competitive development of the market. In fact, the situation is similar in other European countries.

8.1.1. DEAL MEMO AGREEMENTS

In a deal memo the parties of a distribution contract agree preliminary to the conclusion of the formal long term contract on essential issues of their cooperation. Since important issues are preliminarily determined in such a deal memo, the parties should attempt to draft it very carefully. Included could be, inter alia, the following aspects:

Key Elements

- there should be explicit references to key elements (scriptwriter, composer, director, major actors/actresses),
- the indication of the film budget could be binding, possibly through its certification or the verification by independent experts,

- taking into account the technological progress, the focusing on national borders may increasingly become inappropriate, so that the licensing of rights could focus on languages instead of territories,
- the licensor's commitment concerning the promotion of the film including his marketing efforts, the inclusion of a sales company and advertising budgets could be binding,
- the grant of new electronic rights should be regulated, possibly also with regard to old contracts concluded by the parties,
- the definition of new electronic rights could, instead of focusing on technical factors, include viewers' aspects, for example 'any transmission of the film to home television screens without interruption',
- the incidence of national censorship regulations should be regulated; it may be important for the distributor to obtain the right to modify or adapt the film so that it may obtain approvals by national censorship authorities,

8.1.2. DEAL MEMO AND LONG FORM CONTRACT

Since the delivery of the film is a decisive condition for payments, relevant periods concerning the notice of delivery, release of the film and holdback periods must not conflict with each other. There is a need to clear the relation between the deal memo and the long form contract, particularly with regard to the question whether issues mentioned in the deal memo were essential for the contract, and whether they constituted terms or conditions. The latter issue is important for the reason that generally 20% of the payments have to be made by the distributor on the signature of the deal memo. Distributors need protection in the case of bankruptcy of the local distributor. Distributors need the right to sub-contract and negotiate rights. Particularly, the role of banks and of third parties should be cleared in the contract insofar as relevant for the relation between producers and distributors.

8.2. EXPLOITATION CONTRACTS AND LICENCES: THE GREEK SOLUTION

The Greek Copyright Act differentiates in Article 13 between exploitation contracts and licences. Exploitation contracts are characterised by the duty of exploitation whereas licence contracts, whether exclusive or non-exclusive, do not confer upon the licensee any such duty.³¹³ Exclusive exploitation contracts and licences empower the other contracting party to exercise the rights conferred by the contract or licence excluding any third person, Article 13(3) sentence 2 of the Greek Copyright Act. Non-exclusive contracts merely give the right to the other contracting party to exercise the rights conferred by the contract or licence in parallel to the author and other contracting parties, Article 13(3) sentence 3 of the Act. But economic rights may also be transferred, Article 12(1) of the Greek Copyright Act. Such a transfer assumes the nature of an assignment of the copyright, however, the moral rights are not transferable, Article 12(2) of the Act.

Any contracts dealing with the transfer of economic rights have to be in writing, Article 14 of the Greek Copyright Act.

8.2.1. EXTENT OF GRANT OF RIGHTS

According to Article 15(1) of the Greek Copyright Act the parties to a distribution contract may restrict the rights which are conferred, their scope and duration, the geographical application and the extent or the means of exploitation as they think fit. In the case of silence, the transfer of the exploitation right, the exploitation contract or licence is limited to a duration of five years, Article 15(2) of the Act.

If the contract is silent or without specification on the extent and the means of exploitation, the rights granted are deemed those which are necessary for the fulfilment of the purpose of the contract, Article 15(4) of the Greek Copyright Act. Such a rule is an expression of the principle that the copyright law aims at the protection of the author as the allegedly weaker party. Another rule which operates in the favour of the original right holder is contained in Article 15(3) of the Act. According to this provision the geographical application of the contractual rights is deemed to apply to the country in which the contract was concluded, if it is not specified in the agreement.

Even if the distributor does not undertake an express obligation of exploitation, he is obligated by statute, Article 15(5) of the Greek Copyright Act, to ensure that within a reasonable period of time the audiovisual work is accessible to the public via an appropriate form of exploitation.

8.2.2. LITIGATION AGAINST INFRINGERS

Article 13(3) sentence 4 of the Greek Copyright Act gives the other party of the exploitation or licence contract the right to seek legal protection against illegal infringements by third parties of the rights which he exercises. Thus a distributor will be able to institute proceedings against an infringer. However, it may be difficult for him to establish his damages if he has a non-exclusive contract. In such a case he cannot count with protection

³¹³ See Article 13(2) of the Greek Copyright Act.

against competition by third persons. Accordingly, the value of a non-exclusive exploitation contract is doubtful, because even if a court may grant the non-exclusive distributor an injunction to stop a third person from marketing the film, it may be difficult to obtain damages. In the case of exclusive contracts, the distributor can establish the damages in application of the general principles. Since nobody else is authorised to distribute the film in Greek territory, the exclusive distributor may attempt to obtain damages on the basis of his loss of profits, the transfer of business gains of the infringer or on the basis of an analogy with the royalties which the infringer would have had to pay, had he asked for it. But even in the case of exclusive contracts, the distributor should attempt to obtain the original right holders support in any litigation.

8.3. DISTRIBUTION CONTRACTS: THE AMERICAN FILM MARKETING ASSOCIATION (AFMA)

The American Film Marketing Association (AFMA) is the trade association of film distributors for the marketing of films on a global basis. The AFMA offers international arbitration for its members which may include the relevant arbitration clauses into their distribution contracts. The AFMA has established a database which contains information about film, right holders with regard to possible uses and territories.

The AFMA Model International Licensing Agreements relates to the following material:

- The International Multiple Rights Distribution Agreement,
- The International Outright Distribution Agreement,
- The International Video Distribution Agreement,
- The International Pay-TV Licence Agreement,
- The International Free TV Licence Agreement.

8.3.1. AFMA INTERNATIONAL MULTIPLE RIGHTS DISTRIBUTION AGREEMENT

The basic licence terms provide for the title of the picture and its key elements, the territory and the licence period. With regard to the licence period the different methods of exploitation are indicated such as cinematic, ancillary, video, pay-television and free-television. Also the authorised languages are licensed according to the different types of use, in particular dubbed or subtitled. The release requirements relate to the time of the release and to minimum and maximum prints. The licensed rights term concerns cinematic rights (theatrical, non-theatrical and public video), ancillary rights (airline, ship and hotel) and video rights (home rental, home sellthru and commercial). In the form the parties may indicate whether they want to license the relevant rights or not. They may also indicate the holdback period, namely the number of months from the theatrical release. Similarly, the form provides for the grant of licences concerning pay-television and free-television rights.

Financial Terms

The financial terms of the form offer a multitude of possibilities for the financial engagement of the distributor. As relevant periods for the payment of guarantees are indicated the execution of the agreement, the start of principal photography, the end of principal photography, the notice of initial delivery, the initial delivery, the theatrical release and the video release. The distributor has to pay the guarantees at the envisaged instalments at the 'overages' (after the permissible recoupments). In the case where the sum of the recoupable distributor's distribution costs and the guarantee exceed the licensor's share of gross receipts for the grant of the licensed rights, the financial terms provide for a consideration of the 'shortfall' through cross-collateralisation.

The standard terms and conditions of the AFMA multiple rights distribution agreement contains 24 clauses. In the order of the clauses the important regulations consider the following facts:

Substitution

- the producer has the right to substitute 'key elements' as which are defined persons who render services or material on the film in a certain capacity as indicated in the Agreement. A person is deemed to have rendered the required services or materials if the person receives credit for doing so in the main or end titles of the film. If any key element is unable to render services or materials to the film, due to default, disability of death, the licensor (producer) has the right to substitute another person in such capacity who is acceptable to the US distributor (producer) has the right to substitute another person in such capacity who is acceptable to the US distributor scheduled first to release the film, and the distributor does not have the right to refuse to accept the delivery of the film or reduce the guarantee because of the substitution;³¹⁴

Distribution

- the distribution rights are granted on an exclusive basis, subject to the accepting of the initial delivery of the film by the distributor and the payment of the guarantee;³¹⁵

³¹⁴ Clause 2.2 of the AFMA International Multiple Rights Distribution Agreement.

³¹⁵ Clause 3 of the AFMA International Multiple Rights Distribution Agreement.

- the distributor is obligated to comply with screen credits, paid advertising, publicity and promotional requirements, videogram packaging credit requirements as supplied by the producer; dubbing and sub-titling may only be made according to requirements established by the licensor (producer); these allied rights are granted to the distributor on a non-exclusive basis;³¹⁶
- the territory to which the licence relates is defined by reference to the AFMA Standard Definitions of Territories and Regions; the term 'licensed station' is defined as meaning the terrestrial broadcaster, satellite broadcaster, cable system, pay television service or other transmitting service designated in the Agreement;³¹⁷
- concerning broadcast overspill the Agreement exempts the licensor from liability: the licensor does not warrant that he can grant protection against reception on the territory of a broadcast of the film originating outside the territory. But the licensor undertakes not to broadcast or authorise a broadcast of the film which broadcast originates in the region outside the licensed territory and which is intended for primary reception within the territory with the exception to broadcasts in the original non subtitled English language version;³¹⁸
- as 'recoupable distribution costs' are defined all direct, audible, out-of-pocket, reasonable and necessary costs, exclusive of salaries and overhead and less any discounts, credits, rebates or similar allowances, paid by the distributor for exploiting each licensed right in transactions with third parties, all of which are advanced by the distributor and recouped under the agreement for customs duties, notarisation, translation, sales, VAT, turnover taxed and related charges assessable against any gross receipts, remittance and withholding taxes, shipping and insurance charges, manufacture of interrogatives, costs of subtitling or dubbing, costs of allowed advertising, legal costs and charges, actual and normal expenses, costs of packaging for videograms, and censorship fees; costs which do not qualify as recoupable distribution costs are the distributors sole responsibility;³¹⁹

Payments

- the Agreement establishes payment requirements,³²⁰ accountings,³²¹ and the terms for the delivery of the film;³²²

Licensing and Exploitation

- according to the general exploitation obligations the distributor may not exploit the licensed rights before the end of the holdback period; he may not discriminate against the film in order to secure more advantageous terms for any other film and he shall inform the licensor concerning time and place of the anticipated and actual first exploitation of the licensed right. The distributor shall use all his diligent efforts and skill in the distribution and exploitation of the licensed rights to maximise gross receipts and minimise recoupable distribution costs;³²³
- the Agreement establishes special obligations concerning theatrical exploitation,³²⁴ video exploitation³²⁵ and television exploitation;³²⁶

Music

- concerning music the producer undertakes in the Agreement to supply the distributor with the music cue sheets listing the composer, lyricist and publisher of the music embodied in the film; the licensor (producer) warrants that he has the rights necessary to synchronise the music and to make mechanical reproductions of the music, and that the non-dramatic performing rights are controlled by the licensor respectively available by licence from a collecting society or performing rights society;³²⁷

Termination, Impossibility of Performance

- the Agreement establishes the right of suspension and withdrawal, for example if the licensor determines in good faith that the exploitation might infringe the rights of others or violate any law, or due to force majeure, he has the right to suspend the delivery of the film; in this case the distributor has no right to claim damages or lost profits, but the agreement time will be extended for the length of each suspension, however, if the suspension exceeds three months' time, either party may terminate the agreement;³²⁸ force majeure is defined as meaning any fire, flood, earthquake, or public disaster, strike, accident, breakdown of electrical or sound equipment,

³¹⁶ Clause 4 of the AFMA International Multiple Rights Distribution Agreement.

³¹⁷ Clause 5 of the AFMA International Multiple Rights Distribution Agreement.

³¹⁸ Clause 6.8 of the AFMA International Multiple Rights Distribution Agreement.

³¹⁹ Clause 8 of the AFMA International Multiple Rights Distribution Agreement.

³²⁰ Clause 9 of the AFMA International Multiple Rights Distribution Agreement.

³²¹ Clause 10 of the AFMA International Multiple Rights Distribution Agreement.

³²² Clause 11 of the AFMA International Multiple Rights Distribution Agreement.

³²³ Clause 12 of the AFMA International Multiple Rights Distribution Agreement.

³²⁴ Clause 13 of the AFMA International Multiple Rights Distribution Agreement.

³²⁵ Clause 14 of the AFMA International Multiple Rights Distribution Agreement.

³²⁶ Clause 15 of the AFMA International Multiple Rights Distribution Agreement.

³²⁷ Clause 16 of the AFMA International Multiple Rights Distribution Agreement.

³²⁸ Clause 17.1 and 17.2 of the AFMA International Multiple Rights Distribution Agreement.

failure to perform or delay by any laboratory or supplier, delay or lack of transportation, embargo, riot, war, insurrection or civil unrest, any Act of God including inclement weather, any act of legally constituted authority, or any other cause beyond the reasonable control of the licensor;³²⁹

Default

- the Agreement establishes that the distributor is in default if he fails to pay the instalment of the guarantee when due, if he becomes insolvent, if he or his affiliate breaches any material term, covenant or condition of the agreement or any other agreement with the licensor (producer), or if he makes any assignment, transfer, sublicense or appointment without first obtaining the licensor's approval; upon the licensor's notice of default, the distributor has 10 days to cure a monetary default and 20 days to cure a non-monetary default; if the distributor does not cure the default or if the default is incapable of cure, the licensor may ask for available relief, including the termination of the agreement retroactively to the date of default, suspending delivery of the film and declaring all unpaid amounts due to the licensor immediately due and payable; the licensor (producer) will be in default if he becomes insolvent, or if he breaches any material term, covenant, or condition of the agreement; the default is limited to the individual film, but not to other agreements between the licensor and the distributor; upon the distributor's notice of default the licensor has 10 respectively 20 days to cure a monetary or non-monetary default; if the licensor fails to do so, the distributor may ask for the available relief, however, the claim of 'lost profits' or consequential damages is excluded; the terms of the deal provide for arbitration according to the AFMA Rules in case of controversy;³³⁰

Anti-piracy

- the terms of the deal contain anti-piracy provisions which relate to protection by copyright and which obligate the distributor to attach warnings of copyright;³³¹

Warranties

- the licensor's warranties cover the representations that the licensor has full authority and capacity to execute the agreement and full legal and financial ability to perform the obligations; that there are no existing or threatened claims which would adversely affect or impair any of the licensed rights, that the licensor has and will not licence any rights during the term and in the relevant territory to another person, that the work is protected by the Berne Convention for the Protection of Literary and Artistic Works by Copyright or the Universal Copyright Convention or the Buenos Aires Convention, that the film will not defame or infringe any privacy of publicity or other personal right of any person or infringe any copyright, trademark, right of ideas, patent or any other property right of any person; the agent warrants that he has full power and authority from its principal designated on the cover page of the agreement to enter into the agreement on his behalf;³³²

- the distributor warrants that he has full authority and capacity to execute the agreement, that there are no existing or threatened claims which would adversely affect his ability to perform under the agreement,

- the distributor warrants that he will honour the restrictions on the exercise of the licensed rights; concerning an assignment the distributor warrants that the assignee can and will make the representations and warranties to the licensor which the distributor made and that a breach of the representations and warranties by the assignee entitles the licensor to proceed directly against the distributor;³³³

- the terms of the deal also provide for indemnities, in particular the scope of the indemnities is indicated;³³⁴ for assignment and sublicensing which is permissible for the distributor with the approval of the licensor whereas the licensor may freely assign the contract;³³⁵ and finally, it contains miscellaneous provisions, for example establishing the form of notices, the governing law which is the law of the state of California if no law is specified, and the forum which is Los Angeles County, if no place is specified.³³⁶

8.3.2. AFMA INTERNATIONAL VIDEO DISTRIBUTION AGREEMENT

With regard to the AFMA International Multiple Rights Distribution Agreement the International Video Distribution Agreement contains special provisions concerning the term of the agreement. Concerning parallel imports the licensor does not warrant that he has granted or can grant exclusivity protection against sale or rental in the territory of videograms embodying the film imported from outside the territory.³³⁷ The gross receipts are defined as the sum derived from the following sources: money received from the licence, sale, lease, rental,

³²⁹ Clause 17.4 of the AFMA International Multiple Rights Distribution Agreement.

³³⁰ Clause 18 of the AFMA International Multiple Rights Distribution Agreement.

³³¹ Clause 19 of the AFMA International Multiple Rights Distribution Agreement.

³³² Clause 20 of the AFMA International Multiple Rights Distribution Agreement.

³³³ Clause 21 of the AFMA International Multiple Rights Distribution Agreement.

³³⁴ Clause 22 of the AFMA International Multiple Rights Distribution Agreement.

³³⁵ Clause 23 of the AFMA International Multiple Rights Distribution Agreement.

³³⁶ Clause 24 of the AFMA International Multiple Rights Distribution Agreement.

³³⁷ Clause 6.7 of the AFMA International Video Distribution Agreement.

lending, barter, distribution, diffusion, exhibition, performance, exercise or other exploitation of the licensed right in the film without any deductions, moneys received as recovery for the infringement of the licensed right in the film and money received from authorised dealing in trailers, posters, copies, stills, excerpts, advertising accessories or other materials used in connection with the exploitation of licensed rights in the picture contained on videograms embodying the film.³³⁸ As the ‘wholesale level’ are included the level of videogram distribution from which videograms are shipped directly to retailers for ultimate sale or rental to the paying public. The wholesale level may include intermediate distribution levels between the manufacturer and the retail, such as rack jobbers and the like, if such distribution is performed by a distributor affiliate or if the distributor participates in the profits from such intermediate distribution, but then only to the extent of such participation.³³⁹ The ‘direct consumer level’ is defined as the level of videogram distribution at which videograms are sold or rented directly to the paying public.

The ‘delivery of the physical materials’ envisages that physical delivery can be made to the delivery location specified; if ‘laboratory access’ is indicated the licensor has to provide the distributor with access to the physical materials listed in the Agreement; if ‘loan of materials’ is indicated, the licensor has to deliver on loan to the delivery location; and where ‘satellite delivery’ is indicated, the licensor may deliver the physical materials which are listed in the Agreement to the distributor by satellite transmission commensurate with the available materials and distributor’s equipment. The Agreement envisages that the licensor provides, at the distributor’s request and expense, the specified support materials which have to be shipped to the distributor by air transport, unless otherwise specified; if the distributor does not use the support materials, the distributor has to obtain the prior notice of the licensor’s approval before using any of its own servicing, advertising, promotional or other support material.³⁴⁰

Special video exploitation obligations³⁴¹ impose upon the distributor to cause the video release of the picture throughout the territory by not later than the video release date; to only exploit videograms of the picture in the authorised types and formats; not to advertise or authorise advertising of the availability of videograms of the film to the public until two months before the end of the applicable video holdback; to use all diligent efforts and skill in the manufacture, distribution and exploitation of videograms of the film, to ensure that the videograms manufactured by the distributor will meet quality standards at least comparable to other videograms commercially available through legitimate outlets in the territory; to make videograms of the film available in the territory through a catalogue and not to allow them to leave normal channels of distribution for a commercially unreasonable period of time; the licensor has the right of prior approval of advertising and marketing campaigns concerning the exploitation of the video rights in the film and also packaging approval rights; the terms of the deal envisage the fixing of a minimum retail price and a minimum wholesale price if not prohibited by law, the limitation of free goods for promotional and similar activities, and the sell-off period which concerns the scope of production during the last six months before the termination of the licence and, finally, import/export restrictions of with regard to videograms.

8.3.3. AFMA INTERNATIONAL PAY-TELEVISION LICENCE AGREEMENT

The Agreement defines the ‘program’ as every film and television production defined in the deal terms; a program may be a single work or a set of related works each of which is called an ‘episode’; ‘versions’ are explained as a program licensed only in a linear form for continuous viewing from beginning to end; the licensor reserves all rights in all formats and versions of each program other than its original linear form as delivered to licensee and authorised dubbed, subtitled or edited version.³⁴²

The licensed rights in each program relate to the right to telecast the program on the licensed station in the authorised languages for reception within the territory during its licence period by the form of pay-television designated in the Agreement; the licence provides for exclusivity or non-exclusivity as designated in the Agreement; exclusivity for any program relates only to the telecasting by the form of pay-television licensed in the Agreement which originates within the territory in authorised languages during the licence period; reserved rights are all those rights which are not licensed.³⁴³ Allied rights are rights relating to advertising, dubbing, subtitling and editing; these rights are granted to the licensee on a non-exclusive basis.³⁴⁴

³³⁸ Clause 7.1 of the AFMA International Video Distribution Agreement.

³³⁹ Clause 7.3 of the AFMA International Video Distribution Agreement.

³⁴⁰ Clause 11.5 of the AFMA International Video Distribution Agreement.

³⁴¹ Clause 13 of the AFMA International Video Distribution Agreement.

³⁴² Clause 2 of the AFMA International Pay-Television Agreement.

³⁴³ Clause 3 of the AFMA International Video Distribution Agreement.

³⁴⁴ Clause 4 of the AFMA International Video Distribution Agreement.

The special telecast obligations of the Agreement provide that each program may only be telecast in the authorised language, for no more than the licensed telecast, to non-paying audiences, over the existing telecasting facilities of the licensed station and for reception on home television receivers in the territory; the licensee may not make a telecast intended for primary reception outside the territory or capable of reception by a more than insubstantial number of home television receivers outside the territory;³⁴⁵ the licensee is obligated to provide the licensor with usage reports containing information about the title of the program, the person who prepared a dubbed or subtitled version and the date of each licensed telecast.

Concerning default the Agreement establishes that the licensee will default if he fails to pay or to give reasonable assurances that he will pay any instalment of the licence fee when due, when he becomes insolvent, when he breaches any material provision of the Agreement or any other agreement with the licensor, or when he attempts to make an assignment without first obtaining the licensor's approval; the licensor will default if he fails to deliver a program in a timely manner after reasonable request from the licensee, if he makes an assignment for the benefit of creditors, or if he breaches any material provision of the agreement; the default is limited to the affected program, the licensee may not terminate the agreement unless the licensor is in default for more than half of the program.³⁴⁶

The Agreement contains the following stipulations concerning warranties: the licensor warrants that he has full authority to execute and perform the Agreement, that there are no existing or threatened claims which would impair the licensee's exploitation of any licensed right in any program during the licence period, that he has not encumbered the exclusive licensed right to another person in the licensed territory, that the program is protected as a work under the Berne Convention for the Protection of Literary and Artistic Works, the Universal Copyright Convention or the Buenos Aires Convention, that the licensee's exercise of the licensed rights in a program will not defame or infringe any privacy of publicity or other personal right of any person or infringe any copyright, trademark, right of ideas or any other property right of any person.³⁴⁷

The licensee warrants that he has full authority to execute and perform the Agreement, that there are no claims which would impair his ability to perform under the Agreement and that he will honour all restrictions on the exercise of the licensed rights and the allied rights in each program and will not exploit any licensed right outside the territory before its availability date or after the licence period.³⁴⁸

8.3.4. AFMA INTERNATIONAL FREE-TELEVISION LICENCE AGREEMENT

The licensed right is defined as the right to telecast the program on the licensed station in the authorised languages for reception within the territory during its licence period by the form of free television designated in the deal terms; the licence may be granted exclusively or non-exclusively; reserved rights are all rights not licensed to the licensee.³⁴⁹

Allied rights are defined similar to clause 4 of the AFMA International Video Distribution Agreement. The International Free Television Licence Agreement establishes as the licensed territory the countries or territories with reference to the deal terms as their political borders exist on the date of the Agreement; if an area separates from a country in the territory, the territory will still include each separating area which formed one political entity as of the date of the Agreement; if an area is annexed by a country in the territory, then the licensee will promptly give the licensor notice whether the licensee desires to exploit any licensed right in the new area; the licensor grants the licensee a first negotiation right to acquire the licensed right in the new area for the remainder of the licence period for each affected program subject to rights previously granted to others in the area.³⁵⁰ If the Agreement refers to licensed station it means the terrestrial broadcaster, cable system, satellite broadcaster or other transmitting service designated in the deal terms; if the deal terms indicate 'all broadcasters' this means all stations for the specific free television rights licensed; accordingly, if only free television terrestrial rights are granted, then 'all broadcasters' means all terrestrial broadcasters in the territory, but it does not include cable systems or satellite broadcasters.³⁵¹

³⁴⁵ Clause 9 of the AFMA International Video Distribution Agreement.

³⁴⁶ Clause 12 of the AFMA International Video Distribution Agreement.

³⁴⁷ Clause 14 of the AFMA International Video Distribution Agreement.

³⁴⁸ Clause 15 of the AFMA International Video Distribution Agreement.

³⁴⁹ Clause 3 of the AFMA International Free Television Licensing Agreement.

³⁵⁰ Clause 5 of the AFMA International Free Television Licensing Agreement.

³⁵¹ Clause 5 of the AFMA International Free Television Licensing Agreement.

The licensor's holdbacks are explained in the Agreement as follows:³⁵² The licensor holdbacks are the periods of time, if any, set forth in the deal terms during which the licensor will not exploit any reserved rights in a program as follows:

- where some but not all free television rights are licensed in a program, and if so indicated in the licensor's holdback section of the deal terms, then licensor will not telecast or authorise telecast in the authorised languages originating within the territory of the remaining free television rights in such program during its licence period; for example, if only free television terrestrial rights are license, then, if indicated in the deal terms, licensor will not telecast or authorise telecast in the authorised languages originating within the territory of the free television cable or free television satellite rights in the program during its licence period;
- if so indicated in the licensor's holdback section of the deal terms, licensor will not telecast or authorise telecast in the authorised languages originating within the territory of the pay television rights in each program during its licence period.

Concerning telecast obligations, the Agreement provides that each program may only be telecast:

- in the authorised languages,
- for no more than the licensed telecasts,
- to non-paying audiences,
- over the existing telecasting facilities of the licensed station,
- for reception on home television receivers in the territory;
- for each program the licensed telecasts are the total of all runs or playdates licensed to the licensee in the deal terms,
- on request the licensee will provide the title of each program in the authorised language, the identity of each person who prepared a dubbed or subtitled version and the date of each licensed telecast (usage reports),
- upon the designation of the licensor the licensee may insert a customary number of commercial announcements in each program during the licensed telecast; if none are designated, the insertion may not unreasonably interrupt the continuity of the program,
- the licensor reserves the right to authorise and collect royalties for any secondary broadcast of each program whether the primary broadcast originates inside or outside the territory; the licensor does not grant any exclusivity protection against secondary broadcasts.

8.4. THE FOREIGN LICENCE AGREEMENT OF THE EXPORT UNION OF THE GERMAN FILM

In comparison with the international distribution contracts of the AFMA the distribution contracts used in European countries are less intricate, in particular concerning the calculation of the remuneration. The draft model foreign licence agreement contains 19 clauses. According to clause 1 the licensor grants to the distributor the sole and exclusive right to distribute and exploit the film to the terms and conditions mentioned thereafter. In clause 2 the parties may define the licensed territory. Clause 3 concerns the rights granted. The model contract leaves it to the parties to enumerate the different rights to which the licence relates. As a principle, all rights are retained by the licensor unless the contract confers expressly an exploitation right on the licensee.³⁵³ Expressly, the model contract includes the licence to use the film for publicity purposes. The parties may regulate the duration of the licence in clause 4 and clause 5 concerns the language versions granted and dubbing.

Concerning the licence fee the model contract establishes in clause 6: 'In full payment for the rights granted by licensor to distributor hereunder and in consideration thereof, distributor agrees to pay to licensor:

- an outright licence fee ('Outright Licence Fee')
 - a non-refundable minimum guarantee ('Minimum Guarantee')
- in the amount of ...
- a percentage participation of ...

It is specifically agreed that the grant of rights to distributor hereunder is subject to and conditioned upon due payment in full of the Minimum Guarantee or the Outright Licence Fee. The Minimum Guarantee or Outright Licence Fee, as the case may be, shall be paid as follows:

- All payments to licensor shall be net of all bank charges or remittance fees, all of which are to be at the expense of distributor. Any taxes imposed on the Minimum Guarantee or the Outright Licence Fee as the case may be,

³⁵² Clause 6.5 of the AFMA International Free Television Licensing Agreement.

³⁵³ This principle is a consequence of Article 31(5) of the German Copyright Act according to which the scope of the exploitation right is determined in accordance with the purpose envisaged in making the grant if the types of use to which the exploitation right extends have not been specifically designated when the right was granted.

shall not be deducted from the amount payable to licensor hereunder unless such taxes are separately levied on licensor's share thereof pursuant to applicable governmental rules and regulations and subject to substantiation by official vouchers evidencing payment of the amount involved.

The Gross receipts are defined as meaning the aggregate amount of all money paid to the distributor, its subsidiaries, affiliates and permitted sub-distributors, from any and all exploitation of the film by any and all means and media and of any rights hereunder, without any deductions whatsoever therefrom.

The Distribution expenses are defined as meaning certain categories of expenses as may be necessary for release and exploitation of the film, which shall be borne and advanced by the distributor, for example, the cost of release prints and trailers, the costs for transportation, insurance, customs clearance and delivery of prints and/or negatives, interpositives, magnetic tapes and similar basic materials for the production of dubbed or subtitled versions and release prints. Distribution expenses relate also to the cost of inspection reports on incoming and outgoing material issued by licensor's and distributor's laboratories if negatives or interpositives are supplied to the distributor on loan. Distribution expenses are also the costs of advertising material supplied by the licensor and/or produced by the distributor, censorship fees, the costs of dubbed or subtitled versions, to the extent that such versions are permitted thereunder, the costs of advertising for initial release of the film, limited to the sum approved by the licensor and other costs expressly agreed upon by the parties. The model contract envisages

8.5. DISTRIBUTION BY SALES AGENTS

The sales agency approach is often an application of the pre-sales practice. The producer sells the distribution rights to a sales agent for a certain territory. The advantage of the producer to contract with a sales agent lies in the fact that the sales agent is acquainted with the conditions of the foreign market so that he can secure a larger income than the producer could obtain by direct sales. The sales agent will promise a certain minimum guarantee which may be credited by a bank, often at a rate of 50 to 70%. However, the presale guarantee may not easily be obtained before the production is started. In Europe, sales agency agreements are not very common, due to the fragmented national markets and due to the fact that package deals are not common with producers.

Sales agents contracts mitigate the risk of producers, but they may also reduce their possibility to obtain a larger share of the income if the film is an economic success. Thus the producer will have to show a convincing project in order to obtain a guarantee from a sales agent. For a European producer it may be more advantageous to cooperate with a broadcaster, because the mere theatrical exploitation of a film is very risky, taking into account that only 20% of the audiovisual products are economically successful. It may also be difficult to limit the foreign sale of the exploitation rights to the theatrical exploitation, because the sales agent needs to obtain also the television and video rights in order to minimise his economic risks. Whereas European producers will hardly be able to offer package deals, US producers or the products of the majors and independents will often be sold in package deals in order to minimise risks from the exploitation. Package deals are also concluded between US television broadcasters and producers whereas in Europe, due to the weaker structure of the audiovisual market in the European states, such contracts are not common.

In the case of the conclusion of contracts with agents it is essential that the parties are sure about the scope of the rights of which the agent avails himself with regard to the audiovisual product. The AFMA Model International Licensing Agreements³⁵⁴ provide for the licensing of rights through agents in the International Multiple Rights Distribution Agreement. Particularly concerned with agents is clause 20 ('Licensor's Warranties'). If the licensor acts as an agent, he undertakes the following representations and warranties with regard to the distributor, in particular that the following are true and correct and will remain so throughout the agreement term: - that the licensor has full authority from its principal designated on the cover page to enter into this agreement on behalf of its principal and licensor's principal will be bound by this agreement; that to the best of the licensor's knowledge there are no existing or threatened claims or litigation which would adversely affect or impair any of the licensed rights; that to the best of licensor's knowledge there are no other agreements licensing, encumbering or assigning any licensed right to any other person in the territory during its licence period; that the licensor's principal has made to the licensor each of the representations and warranties referred to above and has authorised the licensor to make those representations and warranties directly from the principal to the distributor on the principal's behalf. In the case of a breach of any representation or warranty referred to above the distributor agrees to look directly to the principal and not to the licensor for any remedies which the distributor might have.

³⁵⁴ American Film Marketing Association ('AFMA'), Model International Licensing Agreements, 1995.

9. CONTRACTS RELATING TO NEW FORMS OF WORKS AND NEW TYPES OF EXPLOITATION

New types of exploitation of audiovisual works are technically sound applications which have established an own market and which were unknown at the time of the conclusion of a former contract. New types of exploitation concern, for example, the new uses which may be made of films by means of multimedia or for purposes of online-communication.

9.1. MULTIMEDIA

The concept of 'multimedia' does not indicate a determined technology for the new use of audiovisual products. In the daily language it refers to all uses which can be made of audiovisual and other types of works by means of digitisation, whether online or offline.

Protection by Copyright.

The copyright protects the author regarding the intellectual and personal relation with his work and also with respect to the utilisation of his work. The personal rights are recognised as moral rights. The exploitation rights are in particular the rights of reproduction, distribution, exhibition and the right of communication to the public. Any such use of the protected work without the authorisation of the right holder constitutes an infringement of the copyright and renders the violator liable for damages and other remedies. The copyright arises in the author of the work, but the economic rights of exploitation may belong to the commissioner of the work or to the producer, for example in the case of audiovisual works, subject to the regulations contained in the national laws. In general, copyright has a duration of the author's life plus 50 or 70 years.

The integrated multimedia product is not mentioned as a separate category of those works protected by copyright in the Berne Convention³⁵⁵ and in national copyright laws.³⁵⁶ The catalogues of the categories of protected works differ in the national copyright laws.³⁵⁷ The Berne Convention for the Protection of Literary and Artistic Works refers to the categories of protected works in Article 2 which contains a broad definition of the term 'literary and artistic works'.³⁵⁸ Whether a work falls within the boundaries of any of the categories of protected works has

³⁵⁵ Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971).

³⁵⁶ The Report of the Australian Copyright Convergence Group of 1994, 'Highways to Change', states at 65: 'Concern has been expressed that multimedia works may not be the subject of copyright protection. The Copyright Convergence Group notes that some interested parties have suggested that a new category of copyright work, the 'multimedia work', should be created to address this situation. At this stage, the Copyright Convergence Group is not of the view that this is the appropriate solution to this problem. It is extremely difficult to define what a multimedia work is. More importantly, it is not immediately apparent why a new category is necessary rather than expanding an existing category to ensure multimedia products are the subject of copyright protection. In this regard the Copyright Convergence Group notes the views expressed (...) above concerning the expansion of the category of 'cinematograph film' to become 'audio-visual work'. It also notes that while protection of multimedia works themselves may be uncertain, underlying works controlled within multimedia works are of course protected.'

³⁵⁷ The French Intellectual Property Code lists up the categories of protected works under 14 numbers in Article L. 112-2, the Italian Copyright Act under 8 numbers in Article 2, the U.S. Copyright Act under 8 numbers in Article 102(a), the German Copyright Act under 7 numbers in Article 2(1) and the UK Copyright, Designs and Patents Act 1988 refers to eight categories of protected works in Article 1(1).

³⁵⁸ Article 2 of the Berne Convention states: (1) 'The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. (2) It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. (4) It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form. (3) Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work. (4) It shall be a matter for legislation in the countries of the Union to determine the protection to be granted to official texts of a legislative administrative and legal nature, and to official translations of such texts. (5) Collections of literary or artistic

been cleared by an abundant jurisprudence which may differ slightly from country to country. Since the basic features of protectable works are indicated by the Berne Convention, the national laws of the countries of the Union are harmonised to a substantial degree. In order to avoid doubts about the protectability by copyright of the integrated multimedia product, one may think of including expressly the category of the multimedia work into the catalogue of protected works of national copyright laws and the Berne Convention. However, concerning the amendment of national copyright laws, the countries of the Union are bound by Article 20 of the Berne Convention³⁵⁹ according to which the countries of the Union may have to enter into special agreements if they want to give more extensive rights than those granted by the Convention and by Article 27(3) of the Convention according to which amendments of the text require the unanimity of all countries of the Union. Concerning the amendment of the Berne Convention itself, two committees are examining the need of an adaptation with a view to the development of the technology. But in February 1996, during the sixth session of the Committee of Experts on a Possible Protocol to the Berne Convention and the fifth session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, the protectability of multimedia works was not discussed. Draft texts for both, the possible Protocol and the possible New Instrument will be issued in the autumn of 1996 by the World Intellectual Property Organisation, Geneva.

Protection by Neighbouring Rights.

Simplifying, it may be said that neighbouring rights are rights which are granted in order to protect the creators of works which fall outside the categories of works protected by copyright but which the legislators nevertheless considered worthy of protection. Subject matter of these rights may be images or sequences of images (which do not qualify as photographic works or cinematographic or audiovisual works) or the performance of an artist. Different from copyright, the national laws relating to neighbouring rights are less harmonised, because the international conventions relating to neighbouring rights did not meet with the degree of acceptance comparable to those relating to copyright. The relevance of the difference between protection under the Berne Convention and by neighbouring rights may be illustrated by Austrian jurisprudence which concerned the unauthorised importation of videograms containing the play 'Game boy' from Japan.³⁶⁰ Assuming that the electronic games constituted works of cinematographic art, the Court explained that the Berne Convention of which both Austria and Japan are member states and according to which Japanese film producers would be entitled to protection in Austria for their cinematographic works published abroad pursuant to the Austrian Copyright Act only serves to extend the scope of application of the provisions of the Copyright Act on the copyright protection of literary, scientific and artistic works to situations relating to foreigners according to the provisions of this Convention. But this Convention is not applicable to neighbouring rights. Thus on the basis of this Conventions, cassettes manufactured by foreigners which were not published in Austria would only be entitled to copyright protection in Austria if they contained works of cinematographic art.

Protection as a Database

Within the European Union Member States are obligated to provide protection for databases in compliance with the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.³⁶¹ The Directive obligates Member States to adopt legislation which protects the maker of a database against the unauthorised extraction and/or re-utilisation of a substantial part or the whole of the content of the database for a duration of 15 years after the completion of the database.³⁶² The database Directive answers

works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections. (6) The works mentioned in this article shall enjoy protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title. (7) Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works. (8) The protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.'

³⁵⁹ Article 20 of the Berne Convention states: 'The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, insofar as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provision of existing agreements which satisfy these conditions shall remain applicable.'

³⁶⁰ (Austria) Supreme Court of 17 December 1991, 'Game boy', IIC 1993/531.

³⁶¹ Official Journal of the European Communities No. L 77/20 of 27 March 1996.

³⁶² Articles 7 to 11 of the Directive establish the *sui generis* right protecting databases. Article 7 states:

the need for the protection of the makers of databases who have committed professional and financial investments against the risk, increased by the use of digital recording technology, that the contents of the databases may be copied and rearranged electronically, without authorisation, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of the databases. However, this category of protection will generally not be available to protect a multimedia work, taking into account that the characteristic element of a database is the comprehensive collection of data whereas selection and choice are essential for the production of a multimedia work.

9.1.1. MULTIMEDIA PRODUCTION CONTRACTS

Multimedia production contracts often contain elements of contracts relating to the creation of a software and to the production of a film.

PRODUCTION CONTRACTS, DIGITAL RIGHTS AND THE USE OF PRE-EXISTING WORKS³⁶³

Production contracts, also relating to pre-existing works will have to authorise the use of works and pre-existing works for the production of new products and for their exploitation. Taking into account of the fact that many national jurisprudences construe narrowly the scope of a rightholder's obligations so as to favour the allegedly weaker party, namely the author, it will be necessary to explain carefully the content of the rights which are transferred to the producer. This should be done:

First, by explaining:

- the project of the new product and
- the aim which the producer wants to achieve
- by the making of the product and
- by the incorporation of any pre-existing work.

Second, by indicating the rights which the producer needs to obtain from the rightholder for the purpose of the production of the new product and the relevant grant of rights by the rightholder, for example:

- the right of adaptation
 - modification
 - translation or
 - transformation of the pre-existing work
 - electronic rights
 - the right to make any other specified derivative works
- combined, where appropriate with the rightholder's
- waiver of moral rights, in particular the right of integrity with regard to the intended use.

Third, by explaining:

- the envisaged uses of the integrated multimedia product, such as, for example
- the sale of the integrated multimedia product on CD-ROMs, or on
- videograms
- television broadcasting by private and public broadcasters
- broadcasting by cable or satellite
- display in cinemas
- inclusion in electronic databases and related transmissions (pay-per-view, video-on-demand)

(1) 'Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilisation of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

(2) For the purposes of this Chapter:

(a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(b) 're-utilisation' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community; (...)

(3) The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence. (...)

(5) The repeated and systematic extraction and/or re-utilisation of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.'

³⁶³ Arnold Vahrenwald: 'Recht in Online und Multimedia', Luchterhand, Neuwied, 1996, 1st supplement 1997, No. 5.4.

- use for advertising purposes
- rental rights
- electronic rights (storage and transmission)
- the right to assign the rights and
- the right to grant sub-licences
- always in relation to the countries specially mentioned.

Fourth, by the express grant by the rightholder of the rights concerning the pre-existing work to the producer.

Fifth, in the case where the pre-existing work is a computer program, the contract should include, where appropriate

- the definition of the specification and possible specification changes
- acceptance tests
- warranties, respectively exclusion and limitation clauses.

Checklist for the Acquisition of Rights in Pre-existing Works

- In which year was the work made? (Scope of copyright protection)
- In which country was the work made (Are international copyright treaties applicable)
- Who are the authors of the work? (May be important in the case of a possible violation of moral rights or if parts of the exploitation rights still rest with the author)
- Who are the producers of the work? (According to many copyright legislations the exploitation rights of audiovisual works belong to the producer)
- Which national copyright law is applicable? (In principle the law of the state where protection is claimed)
- Who is the holder of the copyright? (The copyright may have been transferred, in whole or in part, it may have been separated according to countries, licences may have been granted which diminish the value of the right to be purchased, if the copyright has not been transferred or licensed the rights may rest with the author unless the law provides otherwise, which may be relevant in the case of producers of audiovisual works)
 - producer?
 - distributor?
 - others?
- Which rights are needed?
 - broadcasting (satellite, cable, terrestrial)
 - electronic transmission (an online communication, for example video-on-demand, may not be covered by the right of broadcasting to the public so that the acquisition of the electronic transmission right is necessary)
 - digital rights (the right to copy and reproduce and market the work in digital form), rights of modification, adaptation, translation
 - offline multimedia (CD-ROM, DVD)
 - advertising, use of images
 - video, sale or rental
 - merchandising
 - use for fiction, music, recording
- scope of rights in territory and time

Contracts Concerning the Production of Audiovisual Products

There are basically two possibilities for the creation of an integrated multimedia product, the product may either be created by the producer's company or as a commissioned product. In the latter case the contract will assume the nature of the contract of supply of software.

The Contract of the Development of the New Product

The contract of the development of the integrated multimedia product on the basis of underlying works has some affinities with the contract of the supply of software. The contract of the supply of software has to be differed from the licence contract relating to a software. In the former case the purchaser aims at the comprehensive acquisition of any rights in the software, in the latter case he obtains a mere right to use the software. With regard to the fact that the 'software' involved will not itself and separately be used for commercial purposes, the relevant contracts do not have to contain provisions on the maintenance of industrial secrets or training of personnel.

Taking into account that the contract relates to the development of a unique product, the contract may be analysed as a contract for work and not as a contract of sale. However, there is a tendency of common-law courts to treat contracts which concern the supply of software as contracts of sale.³⁶⁴

The delimitation between these contractual types is important, not at least because of the different scopes which the obligation of warranty assumes in the two cases. In order to avoid any ambiguities the contract should thus contain a detailed description of the obligations of the parties, in particular a specification of the requirements. Provided that the contract constitutes a contract for the supply of goods, the UK law provides for the implication of terms according to the Sale of Goods Act 1979 (Section 14(2) of the UK Sale of Goods Act 1979 states: 'Where the seller supplies goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality'... And Section 14(3) of the Act states: 'Where the seller sells goods in the course of a business and the buyer, expressly or by implication makes known (a) to the seller, or (b) ... any particular purpose for which the goods are being bought, there is an implied condition that the goods supplied under the contract are reasonably fit for that purpose'...)

However, these problems are not directly related to intellectual property issues. Yet one may think of cases in which the use of the supplied integrated multimedia product violates a third person's intellectual property rights. The purchaser should thus obtain an undertaking from the supplier according to which the supplier warrants that the use of the supplied product will not violate intellectual property rights of third persons. The contract may also contain a save harmless clause in which the supplier undertakes to hold the purchaser harmless in the case of claims by third persons whose intellectual property rights have been violated by the use of the supplied product. The parties may exempt from these undertakings any intellectual property rights which might exist with regard to pre-existing works or products which were provided by the purchaser or incorporated upon his express orders. Finally, the supplier should transfer the copyright or exploitation rights and all other intellectual property rights in the integrated multimedia product to the purchaser.

Warranty Concerning Intellectual Property Rights.

- (1) The supplier warrants that the use of the integrated multimedia product for the contractual purpose does not violate the intellectual property rights of third persons.
- (2) The supplier warrants to hold the purchaser harmless should the use of the integrated multimedia product render the purchaser liable for the violation of intellectual property rights of third persons.
- (3) The purchaser undertakes to inform the supplier of any claim made by a third person with respect to the alleged violation of intellectual property rights with regard to which the supplier may be liable.
- (4) The purchaser undertakes to settle any claims made under (3) with the supplier's approval.
- (5) In the case of a lawsuit concerning intellectual property rights with regard to which the supplier may be liable, the purchaser undertakes to inform the supplier immediately and to make him a party to the proceedings.
- (6) The supplier shall assist the purchaser in legal proceedings concerning the violation of intellectual property right for which the supplier may be liable.
- (7) The purchaser undertakes to inform the supplier of the violation of the supplier's moral rights of which he obtains information.

According to the US concept of the 'work for hire', the commissioner of a work protected by copyright acquires the copyright, even if the work was created by an independent contractor: Section 101 of the US Copyright Act defines a work made for hire as '(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation (...), if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.'... However, since computer programs are not likely to qualify as works made for hire, they would have to be considered as elements of the audiovisual work if they should qualify as works made for hire or be made by an employee within the scope of his employment, because in this case the copyright in any works so made belongs to the employer.

Some Typical Clauses

Contracts which concern the production of the integrated multimedia work may use different clauses, depending upon the purpose which the parties pursue by means of the contract. Thus the contract may have the object to create a work which shall be used for the integrated multimedia product, for example an audiovisual work or a musical work, or the contract may relate to the making of the product. For this reason, it is not useful to attempt a

³⁶⁴ See Australia, *Toby Construction Products v Computa Bar*, (1983) 2 NSWLR 48 (Supreme Court of New South Wales); Canada, *Public Utilities Commission of City of Waterloo v Burroughs Business Machines* (1974) 6 OR (2d) 257 (Court of Appeal of Ontario); US, *Chatlos Systems v National Cash Register*, 635 F.2d 1081 (3d Cir. 1980); US, *Hollingsworth v The Software House*, 513 N.E.2d 1372 (Oh.1986); US, *Harford Mutual Insurance v Seibels*, 579 F.Supp 135 (D.Md. 1984).

compilation of different clauses relating to intellectual property - it may suffice to indicate some typical clauses used in contracts, for example the Standard Book Publishing Contract 8 (1994) of the Macmillan Publishing Co.:

• [Electronic Reproduction Right](#)

'To license reproduction, inclusion or transmission of the Work or portions thereof by copying, recording or transmitting through electronic, magnetic, laser, optical, or other means now or hereafter known or devised, onto floppy disks, computer software media, compact disks, information storage and retrieval systems or databases or any other high technology medium, now or hereafter known or devised. In addition, Publisher may exercise any of the aforementioned rights and pay the Author a royalty of 10% of the net amount received from such exercise.'

It is contested whether a licence to use a work for purpose of the making of an audiovisual work comprises the use for purposes of television broadcasting. Where the contract provided for the grant of the right 'to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography or any process analogous thereto', the court, focusing on the broad language, held that the licence comprised the right to television broadcasts.³⁶⁵

• [The Publisher's Release Form Used by the US Film Industry](#)

The clause³⁶⁶ refers to electronic rights but within the context of electronic publishing, a right which is not transferred to the producer of the film:

'The undersigned, (...) hereby acknowledges and agrees for the express benefit of STUDIO/PRODUCER, and its successors and assigns forever, that the undersigned has no claim to or interest in the world-wide motion picture rights, television rights, radio broadcasting rights or any other rights other than publication rights in or to that certain literary work written by ..., published by the undersigned, entitled ... (the 'Property'). As used herein, publication rights means [(i) the right to publish (other than by means of electronic transmission) print editions of the Property in book form, whether hardcover or softcover and in magazines or other periodicals, whether in instalments or otherwise, it being acknowledged that unless the Property has theretofore been published in comic book or comic strip form, the right to publish comic books and/or comic strips shall be deemed included within the merchandising rights granted to STUDIO/PRODUCER by said author [; and, (ii) the right to publish (other than by means of electronic transmission) recorded readings by a single narrator of the text of published print editions of the Property in the form of audiocassettes, audiodisks or similar audio-only devices individually purchased by the end-user [;and (iii) the right to publish (other than by means of electronic transmission) the text of published print editions of the Property in the form of CD-ROM, videocassette tape or similar electronically read devices individually purchased by the end-user. Such electronically read editions may not contain visual images (other than the text) or audio tracks of any kind. [Such electronically read editions may contain non-moving visual illustrations which are reproductions of the illustrations contained in the applicable print edition of the Property but may not contain audio tracks of any kind]].

The rights relating to the creation of an integrated multimedia product are not expressly contained in the form and whether they are included in the grant of audiovisual rights to the producer may be controversial. Thus the producer of the integrated multimedia product who wants to integrate material based on a novel which has been used for a film may have difficulties in finding out whether the rightholder of the multimedia rights is the author of the novel, the publisher of the novel or the producer of the film.

[9.1.2. NEW TECHNOLOGIES AND OLD CONTRACTS](#)³⁶⁷

New technological uses can be made of old works, but who has the power to grant the authorisation when the contracts between authors, producers and distributors or publishers do not contain a reference to the new uses? Clauses concerning the grant of electronic or multimedia rights are employed only in recent years and each new technical method of exploitation of works gives rise to the question: who is the person with the power to grant a licence for this type of use with respect to existing or older works. The identification of the relevant person has become cumbersome that it may effectively form a barrier for the use of pre-existing works for new types of use. In a

³⁶⁵ US, *Bartsch v Metro Goldwyn Mayer*, 270 F. Supp. 896, 897 (S.D.N.Y. 1967).

³⁶⁶ See *Columbia-VLA Journal of Law & the Arts* (1996) at 459.

³⁶⁷ The observations are based on the author's contribution to the conference 'Copyright: Fundamentals from an Advanced Perspective, the Los Angeles County Bar Association Intellectual Property and Entertainment Law Section Symposium 1996', and the article, Arnold VAHRENWALD: 'From Copyright Licences to Risk Bargains', *Entertainment Law Review* 8 (1996) 332-334.

report related to French copyright law Professor Sirinelli suggested instead the creation of new productions.³⁶⁸ Additional complications arise from the differences between national regulations which have to be observed in the case of a global exploitation and which may render importers of disturbing material liable without fault according to the judgement 'VUS' of the German Federal Supreme Court.³⁶⁹

The Contractual Practice with Regard to New Uses of Works

In the US film industry it is common to include into contracts clauses by means of which an author grants to the producer all right for the use of all new technological uses whether now known or unknown and without stated rights to any remuneration therefrom.³⁷⁰ Time and space are unlimited: the grant is often in perpetuity and throughout the universe. Also publishing contracts contain comprehensive grants of rights for new uses and electronic publishing rights.³⁷¹ Windfall profits deriving from the exploitation by the use of new technologies which were not known at the time of the conclusion of the contract will not benefit the author and not even the producer of a work if he has transferred the exploitation rights. It has been suggested that in order to achieve a fair participation of the authors in windfall profits a contractual or legislative correction should occur.³⁷² But also countries which provide for the participation of the author in the windfall profits have discovered disadvantages of such a system. In Germany the uncertainties which are connected with the establishment whether there is a new type of use may prevent the commercial exploitation of works.

The Right to Exploit an Audiovisual Work for New Types of Use

In the United States the question to whom the rights for the exploitation of new types of use belong will be answered by the terms of the licence contract. As Louise Nemschoff³⁷³ observed the results which the US-jurisdiction achieved, have been very specific to the facts of each case, relying heavily on the exact language used in the pre-existing contracts with regard to the generality of the grant of rights, the inclusion of a reference to rights in later-developed media, the reservation of rights not expressly granted, the intent of the contracting parties and the extent of their experience and sophistication in dealing with such business matters.

New Uses for Works and Old Contracts: the Greek and the German Solutions

Article 13(5) of the Greek Copyright Act states:

"The contract or licence may in no circumstances confer any total right over the future works of the author, and shall never be deemed to refer also to forms of exploitation which were unknown on the date of the contract."

In a similar manner the matter is regulated by the mandatory provision of Article 31(4) of the German Copyright Act which states:

'The grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect.'

However, whereas the Greek provision contains a mere assumption which may be overruled by an express clause in the contract according to which the contract or licence may also grant rights with regard to forms of exploitation which were not known on the date of the contract, the German law does not permit such express clauses and renders them without effect. But the statutory regulation of Article 31(4) of the German Act is qualified in the case of cinematographic works where Article 89(1) of the Act provides that a person who undertakes to participate in the production of a film shall be deemed, in doubt, to have granted to the producer of the film the exclusive right to utilise the cinematographic work as also adaptations or transformations of the cinematographic work in any known manner. It should be observed that before the German Copyright Act of 1965 entered into force on 01 January 1966 it was possible to stipulate contractually the acquisition of rights of use which were yet unknown.³⁷⁴

³⁶⁸ Pierre SIRINELLI: 'Le Régime Juridique et la Gestion des Oeuvres Multimédias', 1966, reported by Frédérique GENTON, GRUR Int. 1996/693.

³⁶⁹ German Federal Supreme Court of 03 February 1976, 'VUS', GRUR 1977/114.

³⁷⁰ John M. Kernochan: 'Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects', Columbia VLA Journal of Law & the Arts, Vol 20 No. 3, Spring 1966, 379-459 at 447.

³⁷¹ John M. Kernochan: 'Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects', Columbia VLA Journal of Law & the Arts, Vol 20 No. 3, Spring 1966, 379-459 at 448.

³⁷² John M. Kernochan: 'Ownership and Control of Intellectual Property Rights in Motion Pictures and Audiovisual Works: Contractual and Practical Aspects', Columbia VLA Journal of Law & the Arts, Vol 20 No. 3, Spring 1966, 379-459 at 447.

³⁷³ Louise Nemschoff: 'Multimedia and the Experience of a US-Lawyer: Critical Issues', Seminar paper of the Frankfurt Electronic Media Conference 1995, 1-27 at 7.

³⁷⁴ District Court of Munich of 25.01.1991, 'Veit Harlan Video Rights', GRUR 1991/377.

Which Are New Types of Use of a Work?

The new uses which can be made of works by means of the digital technology are referred to as multimedia uses.³⁷⁵ However, the individual type of a new use has to be identified and compared with the uses which were known at the time of the conclusion of the contract. Since it is the purpose of Article 31(4) of the German Copyright Act that the author shall be protected against the conclusion of agreements the economic importance of which he does not understand, a 'type of use' means, with regard to economic facts, any concrete technical and economic independent possibility of use of a work.³⁷⁶ Courts are not easily prepared to accept that a new technique constitutes also a new type of use. Thus it has been held that cable television or satellite television did not constitute independent types of use but mere new technical means for broadcasting services.³⁷⁷ Therefore the mere use of the digital technology will not lead to a new type of use in the sense of Article 31(4) of the Act.

Which individual new techniques based upon the digital technology will qualify as independent technical and economic methods for the use of works is not yet clear³⁷⁸ and German courts did not have the occasion to establish useful guidelines.

The Judgement 'Klimbim'³⁷⁹

In the judgement 'Klimbim' the German Federal Supreme Court held:

'A type of use in the sense of Article 31(4) of the German Copyright Act is a concrete technically and economic autonomous kind of use of a work. With this respect it does not suffice that the type of use as a sufficiently separable kind of use according to Article 31 of the Act may be the subject matter of an independent grant of a right of use. The provision of Article 31(4) of the Act has the purpose to prevent that the author is deprived of windfall profits ('Mehrerträge') which result from new technical developments.

However, taking into account the severe consequence of this rule of law which causes the ineffectiveness, it shall not - also in the author's interest - form an obstacle to the establishment of new and independent possibilities for uses which can be licensed. In general, the interests of the author in the relation with the users which concern the development of new kinds of use of the work will be taken into consideration through the law of contract (in particular the principles of the interpretation of the contract, the supplementary interpretation of the contract and the doctrine of the lapse of the basis of the business) as well as in application of the principle that the author does not part with more rights than necessary according to the contract (see Article 31(5) of the Act) and the right in a participation in the profits according to Article 36 of the Act.

The particular additional protection according to Article 31(4) of the Act thus requires that it concerns a newly created type of use which differs from the hitherto existing ones so much that an exploitation in this kind should only be admitted upon the basis of a new decision of the author, knowing about the new possibilities for the new exploitation, if the principle of the copyright shall be observed that the author has to participate appropriately in the economic use of his work. This is not the case where a kind of use which was hitherto common is extended and strengthened by the technical progress without that it would be modified decisively in the view of the final consumers, whose use of the work shall, in the end, be covered by the system of the rights of exploitation.'

The Court does not suggest the application of simple guidelines, however, when assessing whether there is a new type of use, the following factors may have to be taken into consideration:

- Is there a technically autonomous use?
- Is there an economic autonomous use?
- Is the difference between the new use and known uses characterised not only by an extension or strengthening of a known use as a result of the technical progress?

³⁷⁵ Thomas DREIER: 'Perspektiven einer Entwicklung des Urheberrechts', in: *Urheberrecht und digitale Technologie*, Nomos, Baden-Baden 1994/123-153 at 147.

³⁷⁶ Federal Supreme Court of 11.10.1990, 'Video exploitation', GRUR 1991/133,136; of 05.06.1985, 'GEMA-Vermutung I', GRUR 1986/62,65.

³⁷⁷ Provincial Court of Hamburg of 11.05.1989, 'Cable television', GRUR 1989/590; District Court of Munich 'Satellite television', ZUM 1986/484.

³⁷⁸ See for example Otto-Friedrich Freiherr von Gamm: 'Urheber- und urhebervertragsrechtliche Probleme des digitalen Fernsehens', ZUM 1994/591-596; Thomas Hoeren: 'Multimedia als noch nicht bekannte Nutzungsart', CR 1995/710-714; Wolfgang Maassen: 'Urheberrechtliche Probleme der elektronischen Bildverarbeitung', ZUM 1992/338-352.

³⁷⁹ German Federal Supreme Court of 04 July 1996, 'Klimbim'.

• Is there a difference between the new use known uses which is characterised by a decisive modification in the view of the final consumer?

Only if any of these questions can be answered positively, a new type of use in the sense of Article 31(4) of the Act can be assumed. Accordingly, it seems that CD disks represent a type of the new use with regard to traditional record, taking into account of the special equipment which they need. Also the video CD appears to qualify for a new type of use. By reason of the interactivity pay-television-on-demand is likely to constitute a new type of use. With regard to communication by means of computers, databases, data networks and the Internet, the process of crystallisation of new services has not yet over so that it may be premature to verify new types of use.

Article 31(4) of the German Copyright Act states: 'The grant of an exploitation right for as yet unknown types of use and any obligations in that respect shall have no legal effect.' Accordingly, the producer of the multimedia product will have to negotiate with the author of the pre-existing work, even if the author granted an exclusive right of exploitation to another person, if the use of the pre-existing work for multimedia purposes will be considered as a use which was unknown at the time of the grant of the exclusive right of exploitation. With this respect it should also be observed that contracts relating to copyright may have to be interpreted narrowly to the benefit of the author.³⁸⁰ This principle is also applicable according to Greek law, since Article 15(4) of the Greek Copyright Act states that if the extent and the means of exploitation which the transfer concerns or for which the exploitation licence is agreed are unspecified, it shall be deemed that the said acts refer to the extent and the means which are necessary for the fulfilment of the purpose of the contract or licence.

In case of doubt it is likely that a licence will be construed narrowly for the benefit of the author. The Provincial Court of Munich was concerned with a granting clause in a contract concerning the production of a television film.³⁸¹ The clause ran: "The party transfers (...) any rights which will arise in him or which arose concerning copyright protection and the protection of neighbouring rights and any other rights for the broadcasting by cable, satellite (of whatever kind) and/or for terrestrial and/or broadcasting without wire including the distribution by cable systems without temporary or territorial limitations." The Court held that in the case of doubt such a clause relating to the general transfer of the economic rights of the copyright concerns only the right for broadcasting. The Court rejected the view that the clause established also the right for the reproduction and distribution of the television film by video, unless the broadcaster could prove that at the time of the conclusion of the contract the parties pursued the joint purpose to enable the broadcaster to exploit the film by video.

When is a New Type of Use of a Work Established?

Before a court, the date when a new type of use of a work in the sense of Article 31(4) of the German Copyright Act is established may have to be proved by expert evidence. Concerning new types of use with regard to existing practices of the use of works German courts referred to the following dates:

- The use of works by television broadcasting is considered known since 1936.³⁸²
- Films were sold on video cassettes in economic scale since 1978/1979.³⁸³
- The video technique for use in hotels and videobox is practised in Germany since the early 1980s.
- The use of works of music by means of a CD disk became known in Germany after 1982.
- The sampling of music was an unknown production technique until the mid 1980s.
- The digitisation of photographs was not known until 1987.

Risk Bargains

In the case 'Audiovisual methods'³⁸⁴ it was held that the parties may agree on the grant of rights with regard to a technically known but not yet economically practised type of use. According to the case 'Video exploitation III'³⁸⁵ the parties conclude a risk bargain when they agree upon the grant a licence for a new type of use when the economic

³⁸⁰ Article 31(5) of the German Copyright Act states: 'If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant'.

³⁸¹ Provincial Court of Munich, OLG Report Munich, Bamberg Nürnberg 9/1998/155.

³⁸² Federal Supreme Court, 'Old Contracts' GRUR 1982/727,729; however, the District Court of Berlin, GRUR 1983/438,440, criticised that at that time the economic importance of the exploitation of works by television broadcasting was not a reality.

³⁸³ Provincial Court of Munich, ZUM 1989/146,148; the fact that the making of a multitude of copies of films was possible many years before does not play a role with this respect, because what matters is the mass media secondary type of use of films through the sale or rental of video cassettes; Federal Supreme Court of 11.10.1990, 'Video exploitation', GRUR 1991/133,136.

³⁸⁴ Provincial Court of Munich of 10.12.1992, 'Audiovisual methods', GRUR 1994/115.

³⁸⁵ Federal Supreme Court of 26.01.1995, 'Video exploitation III', GRUR 1995/212.

feasibility of the use is not yet proved. Risk bargains concerning a technically known but economically yet unimportant manner of use are permissible insofar as the new type of use is precisely identified in the contract and discussed by the partners and thus recognisably made to a subject matter of the bargain. The Federal Supreme Court held that Article 31(4) of the German Copyright Act is not applicable in this case. The decision may erode the otherwise firm position of German courts supporting the weaker party in licence contracts.

With regard to the purpose of protection which Article 31(4) of the Act affords the Court briefly observed that this purpose is not incompatible with the lawfulness of risk bargains during the preliminary phase of a first development of a technology towards an economic independent type of use. The Court pointed out that according to Article 36 of the Copyright Act an author may claim a participation in windfall profits in the case of a gross disparity between the performances of the parties. Article 90(2) of the Act contains a non-mandatory rule which excludes this possibility for film authors. But a participation in windfall profits may also be claimed upon the doctrine of the lapse of the basis of the contract which is founded upon the principle that contracts must be executed in good faith.

The Court accepted that risk bargains may be concluded by individual contracts or by using forms. It established, as a condition for the effectiveness of the risk bargain, that the new and economically as yet insignificant type of use is individually named, expressly stipulated and discussed by the parties and thus recognisably made the subject of the performance and counter-performance. If forms are used it may have to be examined whether the clauses contained in forms of contracts are compatible with the standards established by the German Act concerning General Terms and Conditions. According to Art. 3 of this Act surprising clauses are without effect. But the Federal Supreme Court doubted that similar clauses may be surprising. It argued that 'it is known in the field of business that film producers, by reason of the economic risks insist upon an as comprehensive grant of rights as possible so that they demand the transfer of any possible types of use'.

[US Law of Copyright Licences and New Technologies](#)

US law focuses essentially on the language of the contract by means of which the right of use has been granted. But often new technologies are not even referred to.

• [Electronic Rights](#)

In the Tasini case³⁸⁶ the authors of literary works which had been published traditionally on paper asserted copyright violations through the re-publication and distribution of their works on electronic media such as CD-ROM. Since the authors did not grant electronic rights to publishers they considered that their rights had been violated through the publication in electronic databases. The lawsuit was brought by the president of the US National Writers Union after he had received complaints from freelance authors that their contributions had been re-published and distributed on electronic media without their knowledge and permission. The publishers argued that the practice of distributing works on electronic media does not constitute a new type of use. However, freelance authors believe that they should receive a compensation for the exploitation of their work by electronic publishers, computerised database providers, commercial online services, CD-ROM producers, or other information retrieval services. For the decision of the case it will be decisive whether the often mere implied licence which freelance authors grant to publishers for publication extends to electronic publishing. This means that, first, the Court will have to analyse whether the electronic publishing is covered by the licence which relates to publishing or whether it constitutes a new type of use for which the publishers should have been granted a special licence. Taking into consideration the remuneration which the author receives for writing legal articles, the whole uproar which the Tasini case caused seems inexplicable. But it appears that in the future a plain cooperation between authors and publishers will have to be replaced by the signing of carefully drafted legal instruments which define the scope of use including rights in future technologies.

The Court held that the issue had to be solved by interpreting Section 201(c) of the US Copyright Act. The law states: "Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." In application of this provision the Court held that the copyright had in part been transferred, namely the privilege, to the publishers. The publishers acquired the full authority over the 'subdivision of rights', including the authority to transfer them to the electronic publishers. However, with regard to the limitation of the bearing of the case to collective works, its implications for audiovisual products remain of restricted importance.

• [Broad Language of Licence May Include Rights in Future Technological Uses](#)

³⁸⁶ US, Tasini v New York Times, 972 F.Supp. 804 (S.D.N.Y.), reh'g denied, 981 F.Supp. 841 (S.D.N.Y. 1997).

In the case *Bartsch v Metro-Goldwyn-Mayer*³⁸⁷ the Court had to consider whether television rights were included in a the grant of the right 'to project, transmit and otherwise reproduce the said musical play or any adaptation or version thereof visually and audibly by the art of cinematography or any process analogous thereto'. Further the licensor granted the right 'to copyright, vend, license and exhibit such motion pictures'. The Court preferred a broad definition of the grant, relying on the general language used by the parties so that the term 'exhibit' could well mean to include the right to television broadcasts. However, the Court refused to consider that the television broadcasting could be conceived of as a process analogous to cinematography: ...'The first step in a telecast of a film, namely, the projection of the motion picture to an electronic pickup, is 'analogous' to throwing the picture on a theatre screen. But to characterise the to us nigh miraculous processes whereby these images actuate airwaves so as to cause electronic changes in sets in millions of homes which are then 'unscrambled' or 'descanned' and thus produce pictures on television screens - along with the simultaneous electronic transmission of sound - as 'analogous' to cinematography pushes the analogy beyond the breaking point.'

In the cases *Rooney v Columbia Pictures Industries*³⁸⁸ and *Platinum Record v Lucasfilm*³⁸⁹ the Courts also relied upon the broad language of the grant of rights used by the parties. In the first case it was held that the language included not only the right to exhibit films in movie theatres but also on commercial television and videocassettes. The Court found that the very broad language included references to other rights in future technologies, so that the scope of the licence 'would be without limitation unless otherwise specified'. Also in the second case the Court admitted the possibility to grant rights in future types of uses. The clause granted the right 'to record, dub and synchronise the above mentioned master recording, or portions thereof, into and with our motion picture and trailers therefore, and to exhibit, distribute, exploit, market and perform said motion picture, its air, screen and television trailers, perpetually throughout the world by any means or methods now or hereafter known'. By reason of the extremely broad language the Court held that the licensor could not assert to be bound if the agreement had included 'an exhaustive list of specific potential uses of the film'.

• [Licence to Distribute Copies or Phonorecords not to Include Right to Distribute Videocassettes](#)

In *Cohen v Paramount Pictures*³⁹⁰ the Court had to decide upon the scope of a licence which was granted by the composer of a film music. The licence included the right to use the musical composition for the exhibition of the motion picture by means of pay television, subscription television and closed circuit television, however, the licensor retained 'all rights and uses in and to said musical composition, except those herein granted to the licensee'. Upon the narrow language of the licence the Court held that the licence did not grant the right to distribute videocassettes of the movie. In ascertaining the different types of uses the Court relied upon the exclusive rights mentioned in Section 106 of the US Copyright Act. The Court focused on the different methods of exploitation, since television signals are transmitted by broadcasting and video technology depends on the equipment operated by the viewer himself. The viewer thus can control the content and even replay the material. Accordingly, it considered that the right 'to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending' had to be considered as a different right. The Court, taking into account the narrow language of the licence, considered that it was essential that at the time of the conclusion of the contract the exploitation of films by means of videocassettes had not been invented, and it held that 'the original licensee could not have bargained for, or paid for, the rights associated with videocassette distribution.'

• [Mere Licence to Broadcast not to Include Use of Future Technologies](#)

In the case *Rey v Lafferty*³⁹¹ it was contentious whether the licence included videocassette rights which were not known at the time of the conclusion of the contract. The licence granted the right to broadcast for television. Other rights were not mentioned. The Court held that the wording of the licence was not general. It did not contain references to future technologies. Thus the Court found that the 'fact that we are most often dealing with a later developed technological process (even if it were known in some form at the time of execution) suggests that the parties' ambiguous phraseology masks an absence of intent rather than a hidden intent which the court simply must find'.

• [When assessing a new type of use US jurisprudence thus focuses in particular on the fact whether the new technical means constitute an independent method of exploitation which has created an own economic market.](#)

• [When evaluating whether a new use is included by the terms of the licence it seems that US courts focus on the answer to the questions:](#)

³⁸⁷ US, *Bartsch v Metro-Goldwyn-Mayer*, 391 F.2d 150 (2d Cir.), cert. denied, 393 US 826 (1968).

³⁸⁸ US, *Rooney v Columbia Pictures Industries*, 539 F. Supp. 211 (S.D.N.Y.), aff'd, 714 F.2d 114 (2d Cir. 1982), cert. denied, 460 US 1084 (1983).

³⁸⁹ US, *Platinum Record v Lucasfilm*, 566 F. Supp. 226 (D.N.J. 1983).

³⁹⁰ US, *Cohen v Paramount Pictures*, 845 F.2d 851 (9th Cir. 1988).

³⁹¹ US, *Rey v Lafferty*, 990 F.2d 1379 (1st Cir.), cert. denied, 114 S Ct. 94 (1993).

- [could the parties have foreseen the new use?](#)
- [did the licensor retain the right of the new use?](#)
- [is the contractual clause broad enough to include the new type of use?](#)

• [Technologies 'Now Known or Hereafter Developed'](#)

US courts also had to deal with clauses which referred to future uses of works. In *Tele-Pac v Grainger*³⁹² the licensor had granted the right to distribute movies 'for broadcasting by television or any other similar device now known or hereafter to be made known'. The Court held that the licence did not include the use for videocassettes. Since the grant 'was limited by its own terms', the Court considered that broadcasting by television and the showing by videocassettes were entirely different uses. In *Subafilms v MGM-UA Home Video*³⁹³ the Court arrived at a similar conclusion when the clause granted rights 'by television and by any other technological, mechanical or electronic means, method or device now known or hereafter conceived or created'.

In the case *SBK Catalogue v CBS/Fox*³⁹⁴ the Court held, *obiter dictum*, that a clause granting the rights to use a work for future technologies yet unknown at the time of the conclusion of the contract would be upheld. The case concerned the use of music on videocassettes, a use which was unknown when the contract was signed. However, the clause in question did not grant a right concerning uses by future technologies so that the Court read the clause narrowly. By means of such a clause all rights in the work, 'now existing or which may hereafter come into existence,' may be transferred, *Platinum Record v Lucasfilm*.³⁹⁵ The clause asserted to grant the right 'to record, dub and synchronise the above mentioned master recordings, or portions thereof, into and with our motion picture and trailers therefor, and to exhibit, distribute, exploit, market and perform said motion picture, its air, screen and television trailers, perpetually throughout the world by any means or methods now or hereafter known'.

[Conclusions](#)

The increase in new types of use of works protected by copyright by the development of the technology and the broadening of the scope of the exclusive right of communication as envisaged by Article 8 of the WCT will augment an author's bundle of rights which are available for transfer or licensing. Ordinary contractual forms will grow to an impressive size if all possible uses are dealt with. The resort to general terms like 'multimedia uses' or 'electronic rights' does not permit a precise identification of the content or the contractual obligations. The art of drafting copyright contracts may thus excel in subtlety the object of its endeavours, the work protected by copyright. Are there some plain rules of law by means of which this development could be reversed? Interestingly, it seems that the contractual practice in both countries, the United States and Germany, gives rise to tendencies which open up new possibilities for the solution of the conflicting interests of the parties. One possible solution may be the facilitation of the transfer of rights and the recognition of the principle that the author participates in the economic life not only as a creative personality which merits protection but also as a commercially-minded person. Thus it should be permissible that he passes with his copyright if he considers it appropriate.

Taking into account of the considerable investments which a producer or publisher must undertake in order to market and distribute the work, it may be conceivable that he retains the windfall profits deriving from new types of use of the work which were unforeseen at the time of the conclusion of the contract. Also the German law accepts these premises, taking into account of the recent jurisdiction concerning the risk bargain in the presence of which the mandatory rule of Article 31(4) of the German Copyright Act which declares as without effect the grant of exploitation rights for as yet unknown types of use, is not applicable. At the same time US contract law seems to look for a corrective which would avoid excessive disproportions between the remuneration of the authors and the income of the right holder. It cannot be assessed which means will be available as remedies, but the globalisation of the techniques for new types of uses of works protected by copyright may facilitate the distribution of legal tools correspondingly.

[10. CYBERCINEMA](#)

The Internet is not yet available for the successful online communication of films, taking into account that the technology requires the digitisation of each image of a film so that a huge amount of data would have to be transmitted. But even if the technological and economic use of this technology is presently not viable, film authors, producers, distributors, broadcasters and other right holders are concerned about the future possibilities of the online communication of audiovisual content. They want to know to whom belong these exploitation rights, and, how are they protected, and, how can they be sold, transferred or licensed. New technological

³⁹² US, *Tele-Pac v Grainger*, 570 N.Y.S.2d 521 (App.Div.), appeal dismissed, 588 N.E.2d 99 (N.Y. 1991).

³⁹³ US, *Subafilms v MGM-UA Home Video*, 988 F.2d 122 (9th Cir. 1993).

³⁹⁴ US, *SBK Catalogue v CBS/Fox*, No. 86 Civ. 1149, 1990, US Dist. LEXIS 7986 (S.D.N.Y. 05 June 1990).

³⁹⁵ US, *Platinum Record v Lucasfilm*, 566 F. Supp. 226 (D.N.J. 1983).

applications such as video telephony, digital broadcast tv, multimedia databases will influence the development of the communication of audiovisual works and products in the next years.

10.1. NEW TECHNOLOGIES FOR THE EXPLOITATION OF FILMS

New digital technologies offer broad variety of uses for films. Even if these technologies are only in its infancy, the contractual practice must be aware of developing markets.

10.1.1. WEBCASTING, INTERNET-BROADCASTING, WEB-TV AND PUSH-TECHNOLOGY

New technologies permit new types of exploitation. By webcasting or Internet-broadcasting which is also called "Push-technology" the user selects 'channels' which surf for him the Internet. The user no longer seeks information by using a web-browser and search engine, this activity is replaced by push technology. Whereas the conventional surfing in the Web can be imagined as 'pulling' the 'pushing' thus facilitates the work for the user. The elements of Webcasting are:³⁹⁶

- 'packet' – which contains information on a topic. It may contain a title, text messages, images and often a pointer to an Internet location. 'Packets' currently exist in several different formats, but attempts are being made to standardise the format under the title Channel Definition Format (CDF);
- the client – which is the software which receives packets. Internet clients include Web browsers, PC operating systems, desktop applications, and email programs;
- the server – which is the software which does the pushing. It 'broadcasts' the packets to the client, based upon topics which are stored by the client. One server may have many clients.

The parties involved in push-technology are:

- publishers – which create content, store it in a packet and send it to a server. The content put into the packet is always topic sensitive. Content may be news items, advertisements, or any information which publishers wish to convey to subscribers;
- subscribers – use clients and are the end-users of push-technology. Subscribers obtain client software, tell the client software what interests them and then receive related packets of information from a server;
- vendors – operate servers and create the client and server tools for subscribers and publishers to use.

Also Web-TV uses the Internet, however the receiver is not a PC but a TV set combined with a set top box. There are two major projects of Web-TV in the US, one by Microsoft/Sony/Magnavox which uses the telephone network and also TV-networks for 'streaming multimedia'. The other project, Navio/NCI, is operated by Netscape/Oracle/Network Computer/Mitsubishi/Hitachi, and it uses cable/satellite/terrestrial distribution with a set top box including a RAM.

Web-TV is hardly offered elsewhere than in the US. Microsoft's Web-TV is an online service for television. The user has to acquire a set top box which must be connected to the television set and the telephone. Generally at night the equipment automatically accesses the Internet via a modem and downloads data from a special provider on the RAM. The user who switches on the set top box the next day may choose from the downloaded Internet sites or computer and video games and audio files. Web-TV thus facilitates the Internet access for those persons who do not want to use a PC. The user may switch from Web-TV to pay-tv or free-tv. However, on his screen the graphical quality of Web sites is still lower than those of traditional tv. Presently, Microsoft has some 300,000 subscribers for its Web-TV who pay some US\$ 30 per month. The future chances of Web-TV in Europe may suffer from higher telephone fees than in the US where local calls are generally free so that the use of the Internet can be made at irrelevant costs.

10.1.2. NEW STANDARDS FOR CYBERCINEMA

An important element for the online communication of audiovisual material over global telecommunications infrastructures is the lack of compatibility between data from different sources with different characteristics. The harmonisation of telecommunication and data compression standards will improve the situation. Within the video coding group MPEG-4 a wide range of different applications with different communications bandwidths are harmonised. Standards which are used for compression are JPEG³⁹⁷ and MPEG³⁹⁸. However, when applied to

³⁹⁶ John HOBDAV and Chris WHITEHEAD: 'Multimedia and New IT, Including Standardisation Activities, Section 4, Evolving Standards,' No. 2.6.2, ERA Report for Eurostat, March 1998.

³⁹⁷ JPEG is the acronym for Joint Photographic Experts Group.

³⁹⁸ MPEG is the acronym for Moving Picture Experts Group.

a very low bit rate transmission, the quality of the decoded image is inadequate for many applications.³⁹⁹ Works aim at the achievement of the MPEG-4 standard by 1998. One possibility for such technology is the transmission of the decoding algorithm in the bit-stream so that the receiving system receives a set of rules on how to decode the image or sequence as part of the message.

The MPEG-7 standard is of particular interest to the search of archived audiovisual material. It will assist the implementation of systems which search for audiovisual content, including moving video. The standard may be used for applications by digital libraries, multimedia directory services, broadcast media selection or multimedia editing. The MHEG-5⁴⁰⁰ standard will be used for the coded representation of multimedia and hypermedia information in applications for the interactive tv-set. The material envisaged include video-on-demand, near-video-on-demand, news-on-demand and interactive home shopping. VRML97⁴⁰¹ is a standard format for displaying interactive three-dimensional multimedia on the WWW.

10.1.3. AUDIOVISUAL CONTENT, NEW TECHNOLOGIES AND NEW POLICIES

In order to promote the film industry states developed different policies, ranging from direct subsidies of film production to the grant of tax relieves for film theatres. The EU Directive 'Television without frontiers' of 1989 provided for a time lapse after the first theatrical release of a film before its release on television screens and home video. The amended Directive of 1997 leaves the establishment of delays concerning secondary exploitation to the parties. The parties will establish the delay with regard to the principle of the elasticity of demand. The elasticity differs according to the success of the individual film. The more successful a film will sell in the theatres, the more it may be recommendable to delay his television and home video release.

The vast amount of audiovisual content which was produced in the past may be made accessible in the future by digital archiving, documentation, and communication. At present, the large broadcasting organisations attempt to store the audiovisual content which they keep in their archives in digital formats. They are experiencing in documentation technologies in order to make the vast amount of material accessible for searchers. Subsequently, they will market the material first offline, subsequently online. The Italian public broadcasting organisation RAI will sell 250,000 hours of its audiovisual archives on videos within the next five years.⁴⁰² In November 1998 the UN discussed the future of the audiovisual heritage during the third World TV Forum. Particularly the rights issue is controversial,⁴⁰³ because the 'digital' or 'electronic' rights were not regulated in old contracts. Thus the necessity to establish the right holders respectively their heirs and to negotiate the terms for the use might frighten off any investment in new electronic services. Possible right holders with regard to audiovisual content are, for example, the film producer, the producer of videograms, the broadcasting organisation, audiovisual performers such as, but not limited to, actors, singers, dancers or stunt persons, authors of the audiovisual work such as directors, major actors, writers of the script, the screenplay or dialogues, the composer of the film music and the cutter.

10.1.4. CONVERGENCE OF TECHNOLOGIES

The convergence of the technologies relating to telecommunications, information technology and broadcasting creates new possibilities for the exploitation of films. Taking into account of the essential difference between the transmission of content in the analogue mode, the communication of content via compressed digital data is referred to as digital exploitation. Again, one differs between the electronic online exploitation which is made via an electronic communication online and offline exploitation where the work is communicated from a material support from which it may be copied. The legal framework for the organisation of the online and offline exploitations of films consists in a variety of laws and regulations which appertain to different sectors of the economy. Such regulations concern, with regard to the theatrical film distribution the delay between theatrical and electronic releases and tax advantages for distribution of specific films in certain sectors of the economy. With regard to telecommunications they concern licensing requirements, interconnection of services and frequency allocation. With regard to broadcasting they concern the regulation of terrestrial, satellite, cable and digital television, whether for free-tv or pay-tv. With regard to new digital services they concern, for example, Internet pull-technology (search machines), Internet push-technology (web-casting), electronic publishing, media services and data services. With regard to the communications sector they concern, in particular, issues of censorship, advertising and unfair competition. With regard to antitrust they concern, inter alia, cross-media ownership and cross-subsidisation, agreements in restraint of competition, abuses of a dominant market position, state subsidies and price fixing.

³⁹⁹ John HOBDAV and Chris WHITEHEAD: 'Multimedia and New IT, Including Standardisation Activities, Section 4, Evolving Standards,' No. 2.1, ERA Report for Eurostat, March 1998.

⁴⁰⁰ MHEG is the acronym for Multimedia and Hypermedia Experts Group.

⁴⁰¹ VRML is the acronym for Virtual Reality Modelling Language, see <http://vrml.org>

⁴⁰² See <http://www.rai.teche.it>

⁴⁰³ See 'Die Zukunft des audiovisuellen Erbes, 3rd UN World TV Forum', Professional Production 1999/03 at 36.

10.2. GLOBALISATION OF EXPLOITATION

A new global structure for the exploitation of films may develop in the online sector of the economy. Whereas the traditional system of the exploitation of films was essentially based on territories, national borders are no longer 'natural' limitations for the exploitation of films. The copyright system which provides the exclusive exploitation rights operates with regard to national territories: the copyright is effective as an exclusive right within a national territory. The copyright is granted to the author/producer in return for the contribution to the national culture. The world-wide marketing of films together with the digital revolution renders the value of national copyright systems questionable so that a unitary global structure for protection may develop. Since films may be protected for a duration up to 70 years after the death of the longest surviving main author, most of the films will still be protected against unauthorised exploitation for many years. The exploitation of films via new digital uses generally requires the authorisation by the relevant right holders.

10.2.1. LICENCES FOR NEW TYPES OF USE

Exclusive rights relating to the exploitation of films may last up to 50 years after the making of the film⁴⁰⁴ respectively such rights may expire 70 years after the death of the last of the main authors.⁴⁰⁵ In the EU Member States the producer's right in the first fixation of the film has a duration of 50 years after the fixation is made or 50 years after the first publication of the film,⁴⁰⁶ and the broadcaster's right in the exploitation of the broadcast expires 50 years after the first transmission of the broadcast.⁴⁰⁷ This means that the use of films by means of new technological means may need the authorisation of the relevant right holders for a long period after their production and that any such use without the authorisation risks to expose the user to liability for infringement. The necessary authorisations may be contained in existing contracts, for example if the interpretation of the terms of the contract permits such a use, whether expressly or implicitly. They may be obtained by law, for example if the national law provides for compulsory licensing of the re-broadcasting of programs by cable or satellite services⁴⁰⁸ or for compulsory licensing by webcasting.⁴⁰⁹ They may also be obtained by means of an express contractual agreement between the right holder and the person needing the authorisation.

In order to optimise the return, it may be recommendable to licence individual uses. However, this can be difficult to negotiate when, as in the case of digital online and offline exploitations, the economic viability of these uses is not yet clearly established. Accordingly, the establishment of terms relating to conditions for the payment of royalties and the calculation of profits may be difficult. In the case of licences for use of films by DVD the agreements may be oriented on licences relating to use by home video. Concerning online uses the agreements may focus on the actual use of the individual film. Such data are easily to establish by electronic means. Their control by independent consultants will not be more complicated than the examination of data relating to the gross income from theatrical exploitation.

An additional complication derives from the fact that the online exploitation of audiovisual content can be made without regard of national territories so that a service which wants to offer content may have to obtain global licences or at least licences for as many countries as possible. Concerning infringement, it may be difficult for right holders to establish the relevant facts if a service operates abroad. In such a case the right holder would have to establish that the service communicated the work to recipients in the state where he holds relevant rights. But even in such a case the facts may not suffice for the assumption of an infringement of the right of the communication to the public in the sense of Article 8 of the WCT if the service 'communicated' the work from a state where the service was licensed. Thus again one may have to think about the acquisition of global electronic exploitation rights in a 'one stop shop' procedure, possibly through collecting societies which are established in the European countries or through clearing centres which have a tradition in the US or Japan. A precondition would be, however, that by reason of international agreements, these institutions would obtain the possibility to

⁴⁰⁴ According to Article 7(1) of the Berne Convention the term of protection extends to the authors life and fifty years after his death, however, according to subsection 2 of this Article countries of the Union may provide that the term of protection expires fifty years after the cinematographic work has been made available to the public or, failing such an event, 50 years after the making.

⁴⁰⁵ Article 2(2) of the EU Term of Copyright Protection Directive, Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, referring to the death of the principal director, the author of the screenplay, the author of the dialogue and the composer of the film music - independent of the fact whether these persons are recognised by national law as film authors.

⁴⁰⁶ Article 3(3) of the EU Term of Copyright Protection Directive.

⁴⁰⁷ Article 3(4) of the EU Term of Copyright Protection Directive.

⁴⁰⁸ Sections 111 and 119 of the US Copyright Act.

⁴⁰⁹ See Section 406 of the US Digital Millennium Copyright Act of 1998, H.R. 2281 which, however, is limited to audio content.

grant electronic exploitation rights on a global basis. Such a grant would, inevitably, evoke the question for the collection and distribution of the remuneration for the exploitation in the different countries which would have to be made, taking into account of the different national systems for copyright management, through national institutions.

Compulsory Licences for Web-Casting

The US Digital Millennium Copyright Act of 1998 provides for statutory licensing in the case of web-casting, however, limited to audio content. This means that services which provide web-casting may, under the conditions stated by the law, use audio content which is protected by copyright without a contractual licence.⁴¹⁰

10.2.3. THE PROBLEM OF THE DEFINITION OF THE SCOPE OF RIGHTS CONCERNING NEW TYPES OF EXPLOITATION

The scope of grant of rights has to be carefully defined since the technology is only in its infancy and the markets have not yet developed.

Different possibilities may be used to define the scope of rights:

- definition focusing on use of technology (electronic rights, digital rights, online rights)
- definition focusing on product or service markets (rights for DVD, VOD, web-casting)
- definition focusing on consumption (right to transmit for the reception on home television sets)

Broad Definition of the Right of Communication to the Public in WCT

The WIPO Copyright Treaty of 1996 provides for a broad exploitation right, the 'right of communication to the public'.⁴¹¹ Accordingly, authors have the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Option Agreements and the Duty to Negotiate in Good Faith

In the case where the parties do not want to stipulate an 'all rights' clause, but limit their bargain to certain specific rights, it may be recommendable to agree on an option for the grant of other rights. It may be difficult to establish the terms of an option when neither the technical means of exploitation nor the financial return or possible investments needed are known. With regard to those jurisdictions where the grant of rights for unknown types of use is without effect it may recommendable to include a clause according to which the parties undertake to negotiate in good faith the grant of a licence concerning the type of use which will be established after the conclusion of the contract.

10.3. TERMS AND CONDITIONS FOR THE EXPLOITATION OF FILMS BY NEW TECHNOLOGIES

The exploitation of a film has to be considered even before its production. Film financing is increasingly a matter of pre-sales, accordingly, new types of exploitation will augment the producer's chances to recover his investments. But the technical procedure for the digitisation of films is still very costly.⁴¹²

The Market of Cybercinema

Uncertainties about the technological development make it difficult to establish guidelines for the grant of rights and remuneration schemes. Until now the return from the exploitation of electronic or digital rights will constitute a negligible share of the gross receipts for the exploitation of a film. However, if within the next years the electronic communication of films becomes a real competitor to the traditional markets of television and home video, this will change. Producers and distributors should be prepared for the change in market structures. The situation may be relatively easy to clear in the case of films produced by the major US studios where standardised contracts are in use. However, the situation is different in Europe where markets of producers and distributors are smaller and often limited to the national boundaries of Member States of the Community.

Limitation of the Grant to Territory and Network

Since 'Cybercinema' depends on the existence of networks, national borders are, in principle, irrelevant for its markets. But since copyright focuses on national territories, the grant of the exploitation licence may have to take national territories into consideration. But if the royalty payable by the licensee is dependent on the scope of actual uses made of the film by viewers, national territories should not matter. Instead, the grant could be limited with regard to the type of the network by means of which the film is communicated.

⁴¹⁰ Section 405 of the Digital Millennium Copyright Act of 1998, amending Section 114 of the US Copyright Act.

⁴¹¹ Article 8 of the WIPO Copyright Treaty of 1996.

⁴¹² FT of 23/24 May 1998: 'Cinema Paradiso Lost'.

Does a Broadcasting Licence Include the Right to Use the Film Online?

The broadcaster who has acquired the right to broadcast a film by all technological means may attempt to assert the right to use the film online. Whether such a use is covered by his contract will depend upon the construction of the contract and the interpretation of the relevant contractual clauses. What matters is whether the online use is covered by the broadcasting licence or whether it falls out of the grant. If the new method of exploitation constitutes a mere improvement of an existing technology which fell within the grant of the licence, it is very likely covered by the grant. The mere verification that there is a new technological means of exploitation does not mean that such a use constitutes an independent type of use which needs to be specially licensed - it may well be covered by an existing licence. Concerning the exploitation of films it is not sufficient for the establishment of a new type of use if a technical possibility has been created - what matters is that the new use has created its own market. Thus Pay-TV was established as an independent use, different from Free-TV, but both uses may be covered by a general broadcasting licence.

Does the grant of television rights also include Pay-per-View, Near-Video-on-Demand and Service-on-Demand? Whereas the transmission of a film via Pay-TV will generally constitute a 'broadcasting' in the sense of the exclusive rights granted by copyright, this may be questionable in the case of Pay-per-View and Near-Video-on-Demand. Very unlikely it will be held by a court that the right of communication of a film by broadcasting will cover its online communication by a Service-on-Demand. Thus whether online rights have been granted contractually with a general broadcasting licence appears questionable. If one adheres to the view according to which copyright contracts have to be interpreted in the favour of the assignor, because the law aims at the protection of his interests, a narrow interpretation of the grant clause may lead to the conclusion that the grant, even if it will be considered to transfer of Pay-TV, Pay-per-View, Near-Video-on-Demand rights, does not include online rights.

Which Rights Are Needed for Cybercinema?

Which rights are needed for the online communication of films? Whereas it is controversial whether the right to communicate a work to the public under the Berne Convention will cover online uses, the broad definition of this right in the WIPO Copyright Treaty makes it clear that online uses fall within the scope of this exclusive right. If a contractual grant contains the right to communicate the film to the public it may be controversial whether this right includes the use online. Accordingly, a careful approach seems to be recommendable. The contractual grant may have to be construed and interpreted on the basis of the whole agreement, taking into account the intention of the parties at the time when the agreement was made.

Concerning new contracts it is recommendable to specify the technology by means the film will be exploited as precise as possible.

Cybercinema and Compulsory Licensing as Cable Re-Broadcast

Some states provide for the compulsory licensing of the re-broadcasting programs by cable. The EU Satellite and Cable Copyright Directive envisages the involvement of collecting societies in the grant of such rights. Whether these regulations may be applicable in the case of online communications of films is not clear. If the communication network qualifies as a 'cable service' and the film as a broadcast program, the provider of the online communication may be able to benefit from the compulsory licensing provisions.

Home Video Licences and Digital Video Discs

The grant of the right to exploit a film by home video may include the right to exploit it by DVD. However, since DVD is likely to be recognised as an independent type of use with its independent method of exploitation which has created an own market, a mere home video licence may not necessarily be held to include the right of exploitation by video discs.

To Whom Belong New Exploitation Rights?

The verification of right owners may particularly create problems in the case of European films. Whereas in the US a large share of the right holders in films is concentrated in the hand of influential enterprises which employ standardised forms for contracts, European producers are smaller, their production contracts are likely to show a greater variety of clauses and their national laws concerning the ownership of the copyright in films and laws of contract differ. Accordingly, it may be more cumbersome to establish the owners of new exploitation rights in the case of European films than, for example, in the case of US films. Copyright laws may provide that film authors are deemed to have been granted the exploitation rights to the producer.⁴¹³ Film authors are, occasionally, accorded a statutory right in the share in the profits deriving from the exploitation of films, for example according to French law.⁴¹⁴

⁴¹³ Article 14-bis(2)(b) and (c) of the Berne Convention.

⁴¹⁴ Article L. 132-25 of the French Intellectual Property Code.

What Are New Exploitation Rights?

New types of exploitation rights are not necessarily identical with rights which have not been licensed. Whether a certain technological use established a different and new technological type of use may not be easy to answer. Thus is controversial whether cable or satellite broadcasting constitute new technological types of use with regard to broadcasting and whether such uses were covered by a general broadcasting licence. Only those uses can qualify as technologically new if they establish a new market for the exploitation of films:⁴¹⁵ television since the 1930s, home video since the 1970s, hotel video since the 1980s, digitisation since the 1990s, online uses since the 1990s such as Pay-TV (controversial) and Near-Video-on-Demand, Service-on-Demand, Online databases, Online Internet, VCD and DVD since mid 1990s. The establishment of the date from which onwards a new technological use will generally have to be established with regard to the relevant national market.

New Exploitation Rights Arise in Initial Copyright Owners unless They Were Transferred

Basically, the rights in new types of exploitation will belong to the initial copyright owner or the producer if the distribution contract contained a retention clause according to which the copyright owner retained any rights which were not transferred or licensed. The rights will also belong to the initial copyright owner or the producer if the national law provides that transactions concerning rights in unknown types of use are without effect.⁴¹⁶ If transfers of rights concerning new technological uses which were unknown at the time of the conclusion of the contract are effective according to national law, such transactions may lawfully be performed by film authors or producers for the benefit of distributors, broadcasters or other persons. Accordingly, the right in the electronic communication of the film will belong to the person to whom rights in the use of future technologies were transferred. In this case film authors or film producers will no longer be able to claim a share in the profits made by the purchaser of the rights. Accordingly, windfall profits may arise in persons who were not involved in the creation of the film. This may be different, for example, if the contract between the film authors and the producer had obligated the producer to make additional payments to the film authors in the case of a successful exploitation and if the purchaser bought subject to such an undertaking. However, such clauses generally refer to known uses such as additional broadcasting transmissions, and it is unlikely that they may concern unknown types of use.

Who Are the Initial Owners of Rights?

If the rights to exploit a film by means of new technological uses were not transferred, the copyright owner retained these rights. Who is the copyright owner? The Berne Convention does not regulate the question of the initial ownership which is a matter of national law. This means that the initial owners of the copyright have to be identified with regard to the individual film. These may be the film authors according to the laws of those countries which apply the principle of creatorship. According to Italian law, for example, authors of the film are the authors of the script, of the screenplay, of the composer of the film music and the film director.⁴¹⁷ However, it is also envisaged by statute that the exploitation rights are deemed to belong to the producer or, like in Italy, to the person who has organised the production.⁴¹⁸ In other countries the initial owner of the copyright in the film may be the producer or the employer in application of the 'work for hire' doctrine.⁴¹⁹

The Effectiveness of the Transfer of Rights concerning New Types of Use Unknown at the Time of the Conclusion of the Contract Creates Legal Security but Permits Windfall Profits

The transfer of rights concerning new types of use unknown at the time of the conclusion of the contract facilitates transactions in rights in films and pre-sales. Film authors and distributors may pass with their rights in application of the principle of freedom of contract and such transactions permit a clear identification of right holders if the exploitation rights have been transferred comprehensively. The admission of the lawfulness of such transactions creates legal security, it facilitates the allocation of exploitation rights according to the principle of cost efficiency and, accordingly, serves the avoidance of the misallocation of resources. A disadvantage is, however, that it permits the arising of windfall profits in the hand of persons which are not concerned with the creation of the film. Since pre-sales are increasingly important for the financing of films, the parties who want to transfer exploitation rights before the film is made need security about the scope of the rights which are granted. The broadcaster who acquires the broadcasting rights in a film wants to be sure whether he has acquired the Pay-TV rights and the right to transmit the broadcasting via satellite and cable. A distributor who purchases theatrical and video rights needs to know who may communicate the film on-demand or sell

⁴¹⁵ Arnold VAHRENWALD: 'Recht in Online und Multimedia', Luchterhand, Kriftel 1996, 3rd supplement 1998, No. 5.4.2.

⁴¹⁶ See the German or Spanish Copyright Acts.

⁴¹⁷ Article 44 of the Italian Copyright Act.

⁴¹⁸ Article 45 of the Italian Copyright Act.

⁴¹⁹ US Copyright Law of 1976, Section 101, 'work made for hire'.

copies of digital version stored on a material support. But also film authors such as the director, scriptwriter, composer or major artists have an interest to know whether they retain any rights in new exploitations. The possibility to pass comprehensively with exploitation rights thus may permit windfall profits and disfavour to a certain degree film authors and producers, but it has the advantage of permitting legal security about the ownership of exploitation rights.

[The Regulation by Statute that Transactions in New Exploitation Rights Unknown at the Time of the Conclusion of the Contract Are Without Effect Serves the Interests of Authors and Producers](#)

The regulation of German or Spanish laws according to which transactions concerning new technological uses for the exploitation of the protected work which were unknown at the time of the conclusion of the contract remain without effect is directed towards the protection of authors and producers. Even if the exploitation rights in a film have been transferred comprehensively by contract, cybercinema rights will belong to the film authors respectively to the producer if such rights were not known at the time when the contract was made. All new rights have to be negotiated with the producer of the film if the film authors are deemed to have been granted the exploitation right to him.⁴²⁰ But the practical application of this rule of law may be difficult. Prior to any cybercinema use the authors respectively producers have to be addressed in order to obtain the authorisation, even if they are, since a long time, no more concerned with the exploitation of the film. In order to permit an efficient exploitation of films it may be more effective if distributors or broadcasters who possess the necessary marketing experience would be allowed to acquire also rights to use a film for future technologies which are unknown at the time of the making of the contract.

[Conflicts between Doctrines of 'Work for Hire' and Creatorship](#)

If the initial ownership of cybercinema rights has to be decided in application of the principle of the state of protection, the owners of the cybercinema rights in a film may belong to different persons according to the relevant national laws. Thus if the initial copyright in the film belongs in the US to a broadcaster in application of the work for hire doctrine, he will also be the owner of the cybercinema rights. Within those European countries which do not apply the 'work for hire' doctrine and where the transfer of unknown types of use is without effect the new cybercinema exploitation rights will appertain to the producer.

[10.4. INFRINGEMENT OF RIGHTS IN CYBERSPACE](#)

According to the principle of the state of protection the question whether there has been an infringement of copyright has to be decided in application of the laws of this state where protection is claimed. Thus each national law has to be examined with regard to which the infringement of rights in a film is alleged.

[The 'Cyber-Copying' of a Film](#)

The relevant activities relating to the communication of films via Online Services and the Internet are:

- The 'digitisation' of the film
- The placing of a film in the memory of a computer or any other device
- The uploading of a digitised film containing the film in a computer or online database so that it may be accessed by users
- The downloading of a digitised film so that it may be reproduced
- The transfer of a digitised film so that it is viewed on the computer or television screen
- The transfer of a digitised film to a computer network

In principle, all such uses constitute the 'copying' of a film. Such use may constitute a copyright infringement, unless a minimal portion is taken or the use is fair, for example in the case of private copying.

[The Uses Reprehensible by Copyright as Infringements](#)

It is controversial under which concept of the infringing use the 'cyber-copying' of a film may fall. The rights of reproduction and distribution are generally applicable only in the case where corporeal copies are made. Whether the broadcasting right covers online communications of films which are not directed at a general public simultaneously may differ from country to country, depending on the interpretation of the concept of 'broadcasting'. For the same reasons there is no unanimity concerning the problem whether the online communication of a film constitutes a communication to the public.

[10.4.1. WHERE DOES 'CYBER-INFRINGEMENT' OCCUR \(ARTICLE 8 OF THE WCT\)?](#)

In the case of global online activities it may not be easy to identify the place where the infringing activity occurs. Copyright is closely related to the principle of territoriality. In application of the principle of the state of protection, it has to be decided in application of the relevant national law whether an infringement is alleged to have taken place. Article 8 of the WCT which covers online communications of works, does not contain a rule

⁴²⁰ See Article 14-bis(2)(b) and (c) of the Berne Convention.

which could be used for the establishment of the location of the infringing act in the case of cross-border communications. It seems that the infringing activity of the communication to the public must be located there where the work is made accessible. This will be in the state where the operations necessary for the online-communication are undertaken, because Article 8 of the WCT focuses on the making available to the public. If this state is not a contracting party to the WCT and does not reprimand the online communication of works as copyright infringement, the right holder in those states where the online-communication can be received will not be able to stop the service from communicating such works to those states where he holds exclusive rights.

Principle of State of Protection vs. Principle of State of Origin

In the case of satellite television EU law applies the principle of the state of origin according to the Cable and Satellite Copyright Directive. This means that, no matter in which Member States the signals are receivable, the broadcaster needs only the copyright licence for the territory of the state from which the signals are transmitted to the satellite. But in the absence of a regulation to this content, the infringement issues of online communications of films which do not qualify as EU-satellite broadcasts will have to be analysed in application of the principle of the state of protection.⁴²¹

The uploading of a digitised film may constitute copyright infringement in the state where the server is situated. In the case of the downloading of a film the laws of both states, the state where the server is located and the state where the receiver is placed may be applicable. In the case of online services the provider may be liable according to the law of the state where his server is placed. Whether he may also be liable according to the laws of the states where the films are downloaded may depend on the application of the principles concerning contributory or vicarious liability. There is contributory copyright infringement where one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.⁴²² The concept of vicarious infringement is based on a connection to the direct infringer, not necessarily to the direct infringement.⁴²³ However, courts refrained from an extensive application of these concepts in relation to services.

10.4.2. THE IDENTIFICATION OF THE INFRINGER

In the anonymity of the Internet or other networks it may be difficult to identify the infringing person. It may be assumed that it will be possible to follow the traces of electronic data by means of appropriate software, however, such attempts to establish evidence may have to pass the test before a court which may not easily be prepared to follow the plaintiff's views. An infringer may also attempt to rely on data protection laws so that the victim of the infringement might have to resort to criminal proceedings in order to get the support by the public prosecution.

Liability of Content, Service and Access Providers

The assessment whether there is liability of the copyright infringer depends upon national law in application of the doctrine of the state of protection. There seems to be a tendency in national laws according to which providers assume liability according to the general principles for their own content. If they offer content such as films of other persons for use, they may be liable if they know the content and if it is technically possible and reasonable for them to prevent the use. Services are not liable for the consent of other persons if they merely provide access for use. The brief and automatic presentation of the content of other persons on demand is deemed to constitute the providing of access.

11. INTELLECTUAL PROPERTY AND ANTITRUST LAW

The relationship between intellectual property and antitrust law should be understood as complementary, not as in contrast. Intellectual property is a tool in order to improve the economic performances within the audiovisual industry and accordingly it achieves an important aim within the competitive organisation of society.

⁴²¹ Stephen FRASER: 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure', *Journal of Computer & Information Law* Vol. XV (1997) 759-818 at 784 et seq. suggests the application of the country of origin principle, relying on the EU Commission's Green Paper on Copyright and Related Rights in the Information Society.

⁴²² *Gershwin Publishing Corp. v. Columbia Artists Management*, 433 F.2d 1159, 1162 (2d Cir. 1971).

⁴²³ US Information Infrastructure Task Force, Working Group on Intellectual Property Rights, Report of Sept. 1995 at 110, 111.

11.1. COPYRIGHT AND ANTITRUST LAW

Copyright gives the rightholder the exclusivity in the exploitation of the work whereas antitrust law is directed towards the free competition including the free use of thoughts and ideas. Since the legal order appreciates the copyright as a reward to the creator of a work the free entrepreneurial activity is limited with this respect, however not only in the individual's interest but also in that of society which will benefit from the protection of authors and those who produce audiovisual works and films.

11.1.1. THE EXPLOITATION OF FILMS IN THE ANALYSIS OF THE ITALIAN COMPETITION AUTHORITY

The theatrical exploitation of movie films has been analysed by the Italian Competition Authority. In the Report concerning the Sector of the Cinema⁴²⁴ the Authority observed the following facts: Between 1955 and 1992 the number of cinema tickets sold in Italy decreased from 819 mio. to 84 mio., although the general income of the spectators rose considerably during those years. Whereas the number of ticket sales between 1960 and 1990 decreased 9 times in Italy, it decreased only 2.7 times in the other countries of the EU. As reasons for the decline of the cinema theatres the Competition Authority indicated the consumers' preference for television broadcasting, home video and pay-television. The decrease of spectators was also due to the fact that the national television chains which specialise in the broadcasting of films are accessible to everyone and can be seen everywhere.

Changes in the Production, Distribution and Exploitation

The report observed considerable changes in the production, distribution and exploitation of films within the recent years. There was a strong tendency in the market to integrate the operations between the production, distribution and exploitation stages, in particular with regard to broadcasting. RAI which acquires broadcasting rights of movie films concluded an agreement with Istituto Luce which programs some film theatres so that RAI films will also be shown in the cinema. RCS Video SpA which produces television programs and home videos would like to enter the broadcasting sector if this were not impossible by reason of the Law 'Mammi' Law No. 223/1990. Companies like the Walt Disney Group have begun to distribute their films and videos through subsidiaries like Buena Vista International Italia Srl. The Cecchi Gori Group and Fininvest SpA established joint affiliates which are involved in the production, theatre distribution and the commercialisation of videos. Both groups manage and program certain film theatres. Thus smaller producers and distributors of films may have problems of placing their films in the cinema theatres. Also smaller operators of cinema theatres may have difficulties in obtaining attractive movie films for programming. This situation was considered particularly serious for Rome where there is a considerable concentration of theatre operators, taking into account that a success in the Roman market in general determines the success of a film at the national level.

11.1.2. THE REPORT 'CECCHI GORI/CINEMA ROME AND FLORENCE'

In its Report 'Cecchi Gori/Cinema Rome and Florence'⁴²⁵ the Italian Competition Authority recalled that the producer Sacher Film Srl had voiced the concern that in its view the fact that the production of films or the financing of their production by broadcasting companies had an increasing influence on the choice of products which obtain market access in the cinema theatres. This means that the programs of cinema theatres may be influenced by television broadcasters.

11.1.3. THE FACT-FINDING REPORT CONCERNING THE SECTOR OF THE CINEMA

In its Fact-Finding Report concerning the Sector of the Cinema⁴²⁶ the Competition Authority verified three cycles in the film market: the production, distribution and programming phases. The Commission recalled that within the production phase the producer assumes the responsibility for the making of the film, for procuring human resources, financial and technological support for the realisation of the product. The producer sustains the costs of the initial phase of the film and is its owner.

During the distribution phase the film is marketed with the aim to make it accessible to the public. The producer transfers the rights to the distributor, in general for a certain defined geographical area and for a certain time. The geographical area will often coincide with the national territory. The distributor makes the necessary copies of the film and also the dubbing, the publicity and the negotiations required for the programming. Sometimes the distributor is related to the producer through the financing of the film. The programming of the film is the final phase of the marketing, and traditionally, this means the showing of the film in the theatres. Recent forms of

⁴²⁴ Italian Competition Authority, Report concerning the Sector of the Cinema, order of 05 October 1994, Competition Authority, O.J. 40/1994.

⁴²⁵ Italian Competition Authority, Report 'Cecchi Gori/Cinema Rome and Florence', order No. 2911 (C1737B) of 30 March 1995.

⁴²⁶ Italian Competition Authority, Fact-Finding Report concerning the Sector of the Cinema, order of 05 October 1994, O.J. 40/1994.

exploitation concern the broadcasting by television which by now accounts for more than 50% of the income generated by films and the home video whether by direct sale or renting.

In the Fact-Finding Report the Competition Authority indicated that with regard to the distribution phase the Law No. 153/1994 solved the problem which arose from the new means of exploitations, namely the television broadcasting, home video and pay-television. According to Article 12 of the Law, a film may be broadcast by television only 24 months after its first showing in the cinema. The period is reduced to 12 months in the case of pay-television and coproduction with television broadcasters provided that their share is not more than 20%, and it is 8 months in the case of videos. The Authority considered that the Law protects the film industry adequately, even if it leads to a segmentation of the market, that is to say to the markets for the exploitation of films in cinema theatres, television, pay-television and home video.

11.2. EU ANTITRUST LAW CONCERNING AUDIOVISUAL WORKS AND PRODUCTS

Community antitrust law is basically contained in Articles 81 and 82 of the EU Treaty (Amsterdam, in the Maastricht version of the Treaty these were Articles 85 and 86). Whereas Article 81 of the Treaty concerns agreements in restraint of competition, Article 82 of the Treaty relates to abuses of dominant positions.

11.2.1. AGREEMENTS IN RESTRAINT OF COMPETITION

Article 81(1) of the EU Treaty⁴²⁷ prohibits agreements between undertakings which restrict competition within the common market and affect trade between Member States. In principle, exclusivity agreements which concern the distribution of products can affect the interstate competition within the European Union in the sense of this provision.

Restriction of Competition by Exclusivity Agreements of Major Artists

Also major artists qualify as ‘undertakings’ in the sense of the law. The Commission considered in the decision RAI/UNITEL⁴²⁸ that an exclusivity agreement between popular opera singers and UNITEL, a producer of television films, which restricted the singers from participating in a RAI broadcasting, could have violated Article 81(1) of the EU Treaty. In the Commission’s view the contract prevented the opera singers from exploiting their artistic achievements in other ways in other Member States. After UNITEL had lifted the exclusivity with regard to direct broadcasts of major events in the cultural interest and agreed to produce the film within a short period so that the exclusivity agreement would not bind the singers for a long time but only during a reasonable period, the Commission considered that the agreement did not come within the scope of application of Article 81(1) of the EU Treaty. In the case of major film actors the restriction of competition may be viewed differently than in the case of opera singers, taking into account of the fact that the typical performances of opera singers are not limited to the making of audiovisual products but to live performances in opera houses whereas major film actors appear exclusively in films, and not on stages. Accordingly, the exclusivity agreements

⁴²⁷ ARTICLE 81 (ex Article 85) of the EU Treaty states:

‘1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
 - any decision or category of decisions by associations of undertakings;
 - any concerted practice or category of concerted practices,
- which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

⁴²⁸ EU Commission, decision of 26 May 1978, EU O.J. L 1978 157/39. ‘RAI/UNITEL’.

between major actors and movie film producers may have a duration of a longer time,⁴²⁹ possibly extending to the production of several films in succession.

Exclusive Distribution Agreements

However, in the case of certain market structures an exclusive distribution agreement will not fall within the scope of Article 81(1) of the EU Treaty. In its judgement ‘Coditel II’ the European Court of Justice⁴³⁰ held that an exclusive film licence is not susceptible to affect competition, taking into account of the peculiarity of the film industry, the film markets and the conditions of the financing of films. In principle, exclusive distribution agreements concerning films do not violate antitrust law, if they are covered by intellectual property rights. Thus contractual clauses which are based on the exclusive rights which the copyright affords are lawful and are compatible with antitrust laws. But even if the copyright has not expired, the Commission examines the individual circumstances of the case which may lead to the conclusion that the licence contract has an unreasonable long duration or that it may constitute an artificial barrier for other competitors. In the case ‘Degeto’⁴³¹ a block licensing agreement the German Public Broadcasters had negotiated a licence with the US copyright owner of a large number of films. The licence had a basic duration of 15 years. However, some films were licensed only after the expiry of the basic licence, and, also beyond the expiry of the basic licence the licensee should obtain an option for the grant of licences in new films during which competitors were excluded. The Commission granted an exemption according to Article 81(3) of the Treaty,⁴³² after the agreement had been modified, inter alia by including ‘windows’ which permitted competitors of the licensee to broadcast licensed films during the term of the exclusive licence agreement for certain determined periods.

11.2.2. ABUSE OF A DOMINANT POSITION

Article 82 of the EU Treaty⁴³³ prohibits abuses of a dominant market position in the Internal Market or a substantial part of it insofar as the abuse affects trade between Member States. The mere possession of the copyright in a work does not give the owner of the copyright a dominant position - it is essential whether such a position exists with regard to a clearly defined market. The relevant market has to be established with regard to the relevant products or services and with regard to the territory.

Merger Control

The rules applicable to merger control are contained in the Regulation 4064/89.⁴³⁴ According to Article 1(2) of the Regulation a concentration has a community dimension which makes it subject to the application of the Regulation, if the aggregate world-wide turnover of the undertakings concerned exceeds ECU 5,000 million and the aggregate Community-wide turnover of each of at least two of the undertakings concerned exceeds ECU 250

⁴²⁹ See the module ‘Entertainment Law’ where reference is made to considerations of labour law are applicable to the contractual relation between major US actors and studios.

⁴³⁰ European Court of Justice ‘Coditel II’, 1982/3381 et seq. (3401, No. 16).

⁴³¹ EU Commission, decision of 15 September 1989, ‘Degeto’, O.J. L 284/36,42.

⁴³² Article 81(3) of the EU Treaty states:

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.’

⁴³³ ARTICLE 82 (ex Article 86) of the EU Treaty states:

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

⁴³⁴ Merger Control Regulation 4064/89, EU O.J. L 1990 257/13.

million. Article 22, paragraphs 3-5, allows a Member State to request the Commission to apply the Merger Regulation to operations below the thresholds creating or strengthening dominance within that Member State's territory. Article 21, paragraph 3, allows Member States to take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation, including the media.

In the concentration Kirch/Bertelsmann concerning the marketing strategy of the digital broadcasting of Premiere (Bertelsmann) and DF1 (Kirch group) the European Commission issued a press release on 18 December 1997⁴³⁵ in which it announced that Premiere would refrain from joint marketing actions with DF1. Both undertakings had notified the concentration to the Commission on 01 December 1997. Premiere had already stopped the sale of its own decoder boxes ('Media-Box') and begun the marketing of Premiere Digital with the sale of decoder boxes which were developed by the Kirch group for its digital broadcasting service DF1 ('d-box'). The Commission had asked the companies to refrain preliminarily from executing the concentration. In its view the joint use of the 'd-box' by Premiere would threaten to establish facts, since Premiere's 1,5 million subscribers of the analogue pay-television service are offered Premiere Digital at a relatively low pay increase. If Premiere continued the marketing activity, within the few months during the assessment of the concentration a substantial part of the German market for digital pay-television could have been installed so that at the time of the Commission's final decision, the factual acceptance by the German public of the 'd-box' standard might hardly be undone. For the Commission's prohibition concerning the mergers of Bertelsmann/Kirch/Premiere and Deutsche Telekom/Betaresearch see the press release of 27 May 1998.

The Commission decision in the case Kirch/Bertelsmann/Premiere of 27/05/98⁴³⁶ focused on a market analysis of pay-tv and related services as a relevant product or services market. The Commission established that this market was separate from that for free-access television. Concerning the geographical area of this market the Commission considered the German speaking territories in Europe as relevant. In the analysis of the concentration the Commission observed that the organisation of pay-tv after the concentration and the market for pay-tv. Establishing that Premiere would have a near monopoly as pay-tv supplier, that Premiere would be the only programme platform for digital pay-tv, that it would have access to the most attractive and most comprehensive programme resources, that Premiere's scope for competition action will not be controlled to any considerable extent by public television suppliers, and, additionally, taking into account of the duration of the dominance and the interrelation between pay-tv and free-tv, the Commission arrived at the conclusion that "it must be anticipated on the basis of the information currently available that the intended concentration will give Premiere a dominant position on a lasting basis of the information currently available that the intended concentration will give Premiere a dominant position on a lasting basis on the market of pay-tv in Germany. The combined acquisition of pay-tv and free-tv rights and the complementary programming which are foreseeable will lead to a further strengthening of Premiere's dominant position on the market in pay-tv." Concerning the market in technical services for pay-tv the Commission observed that the concentration would "give BetaDigital a monopoly on a lasting basis in technical services for satellites. As a result of the parallel concentration of Telekom and BetaResearch Telekom will secure a monopoly in the operation of conditional access for cable." In the conclusions the Commission considered that the proposed concentration would create or strengthen a dominant position as a result of which effective competition would be impeded in a substantial part of the Community. Consequently the Commission declared the concentration incompatible with the common market under Article 8(3) of the Merger Regulation.

11.2.3. PUBLIC UNDERTAKINGS AND PUBLIC BROADCASTING ORGANISATIONS

In the case of public undertakings Article 86 of the EU Treaty⁴³⁷ establishes that the rules concerning competition remain applicable. In the case Sacchi⁴³⁸ the Italian government had, on the basis of legal provisions, granted to a company exclusive rights to broadcast radio and television programmes. The European Court of

⁴³⁵ See <http://europa.eu.int/en/comm/dg10/avpolicy/pressrel.html>

⁴³⁶ EU Commission decision Bertelsmann/Kirch/Premiere of 27/05/98, O.J. L 53/1 of 27/02/99.

⁴³⁷ ARTICLE 86 (ex Article 90) of the EU Treaty states:

'1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 12 and Articles 81 to 89.

2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

3. The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States.'

⁴³⁸ European Court of Justice, case 155/73, ECR 1974/409, 'Sacchi'.

Justice held that nothing in the EU Treaty prevented a Member State to confer on one or more organisations the exclusive right to conduct radio and television broadcastings, thus removing these services from competition if this is considered to lie in the public interest. However, neither the structure of the ‘monopoly’ nor the manner in which it operates may violate the provisions of the EU Treaty, in particular the rules concerning competition.

Public broadcasting organisations which abuse their dominant market position may attempt to rely on Article 86(2) of the EU Treaty in defence of their conduct. In the case ‘RTE’⁴³⁹ the Irish national broadcasting organisation argued that its service was entrusted with the operation of services of general economic interests, taking into account, inter alia, the special cultural aims so that it could retain the right to communicate its programme listings. However, the Court of First Instance held that the prohibition of the abuse of a dominant market position in Article 82 of the EU Treaty, which could have demanded that RTE did not retain the exclusive right to publish the weekly programme listings, did not affect its performance of its tasks as a broadcaster in the public interest. Article 86(2) of the Treaty thus could not be relied upon by RTE, since the retention of the exclusive rights concerned commercial reasons, but not the ‘particular tasks’ assigned to it in the educational or cultural interest. With regard to public broadcasting organisation the Directive ‘Television without frontiers’ of 1997 establishes expressly that the objective of supporting audiovisual production in Europe can be pursued within the Member States in the framework of the organisation of their broadcasting services, inter alia through the definition of a public interest mission for certain broadcasting organisations, including the obligation to contribute substantially to investment in European production.⁴⁴⁰

11.2.4. NATIONAL AIDS AND SUBSIDIES OF THE FILM INDUSTRY

Many Member States of the EU support their national film industries with subsidies. National aids are regulated in Article 87 (ex Article 92 of the Maastricht Treaty) of the EU Treaty.⁴⁴¹ According to this provision State aids are prohibited which distort or threaten to distort competition by favouring certain undertakings or the production of certain goods insofar as this affects the trade between Member States. According to this provision state aids are incompatible with the EU Treaty if they favour certain undertakings or the production of certain goods, if the grant of the aid distorts or threatens to distort competition and if there is an effect on trade between Member States. The promotion of national film industries by Member States is generally based upon the film as a cultural medium and a means of disseminating information, also in order to protect languages. According to the practice established by the Commission, the following principles may be established: Tax relief concerning national audiovisual production must not only be given to nationals and companies of a Member State, but it must also be available to nationals of other Member States, since otherwise the essential freedoms of the EU

⁴³⁹ Court of First Instance of 10 July 1991, cases T-69/89, ‘Radio Telefis Eireann vs. Commission’; T70/89, ‘The British Broadcasting Corporation & BBC Enterprises Ltd. vs. Commission.’

⁴⁴⁰ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997, ‘Television without frontiers’, EU O.J. 1997 L 202/60, Recital 45.

⁴⁴¹ Article 87 (ex Article 92) of the EU Treaty states:

‘1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

- (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;
- (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
- (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;
- (e) such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.’

Treaty, the free movement of workers, Article 39, the freedom of establishment, Article 43, and the freedom to provide services, Article 49, will be affected.⁴⁴²

EU Directives Concerning Film

There are also some Directives concerning film.⁴⁴³ Article 3 of the Directive 63/607 indicates under which circumstances a film is deemed 'to have the nationality of a Member State'. Article 4 of Directive 70/451 prohibits that Member States grant to their nationals which take up film business in another Member State aids liable to distort the conditions of establishment in that Member State. Restrictions based on nationality are viewed negatively by the Commission. Thus provisions according to which national subsidies are made dependent upon a minimum number of national employees employed by film producers are impermissible, because this would discriminate companies and nationals from other Member States.⁴⁴⁴ Accordingly, national subsidies should be made available for national audiovisual production made whether by nationals of the Member State or those from other Member States. As will be shown below, the Italian regulation of state aids for the national audiovisual industry has adopted a broad concept of 'nationality' which includes also the nationals of other Member States. An exemption under Article 87 of the EU Treaty can only be accepted if the measures satisfy all the requirements of the EU Treaty.⁴⁴⁵ This means that national aid must not discriminate against nationals of other Member States,⁴⁴⁶ respect the principles of the free movement of persons⁴⁴⁷ and the freedom to provide services.⁴⁴⁸ The schemes adopted by Member States in recent years for the grant of state aids to national audiovisual industries were generally approved of by the Commission.⁴⁴⁹

⁴⁴² EU Commission: 16th Annual Report of the Commission on Competition Policy, 1986, at 170,171.

⁴⁴³ Directive 63/607 of 15 October 1963 implementing in respect of the film industry the provisions of the General Programme for the abolition of restrictions on freedom to provide services, EU O.J. 1963-1964/52; Second Council Directive 65/264 of 13 May 1965 implementing in respect of the film industry the provisions of the General Programme for the abolition of restrictions on freedom of establishment and freedom to provide services, EU O.J. 1964-1965/62; Council Directive 68/369 of 15 October 1968 concerning the attainment of freedom of establishment in respect of activities of self-employed persons in film distribution, EU O.J. 1968/520; Council Directive 70/451 of 29 September 1970 concerning the attainment of establishment and freedom to provide services in respect of activities of self-employed persons in film production, EU O.J. 1970/620.

⁴⁴⁴ EU Commission: 19th Annual Report of the Commission on Competition Policy, 1989, 185,186.

⁴⁴⁵ EU Commission Decision 89/441 of 21 December 1988, EU O.J. L 1989 208/38.

⁴⁴⁶ ARTICLE 12 (ex Article 6) of the EU Treaty states:

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.'

⁴⁴⁷ ARTICLE 39 (ex Article 48) of the EU Treaty states:

1. Freedom of movement for workers shall be secured within the Community.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.'

⁴⁴⁸ ARTICLE 49 (ex Article 59) of the EU Treaty states:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Community.'

⁴⁴⁹ See above, No. 2.1.1.