Comparative Study on Rental Right of Copyright in the United States and European Community

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I. Relation Between Reproduction and Distribution Rights

Copyright confers exclusive rights to: (1) "reproduce the copyrighted work in copies or phonorecords"; and (2) "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." [FN1].

The reproduction and distribution rights are distinct. A person violates the reproduction right by copying a work without authority even if he does not sell it. [FN2]. A person violates the distribution right by selling a work without authority even if he did not make the copy.

Unlike the other rights of copyright, the distribution right is infringed merely by a transfer of copies of the work, whether those copies were unlawfully or lawfully made. One reason for the distribution right is to give a copyright infringement claim against a wholesale or retail seller of infringing copies where the actual copying manufacturer is difficult to find. For example, a cartoonist has copyright infringement claim against a retail store selling T-shirts imprinted with a infringing picture of a cartoon character protected by copyright. Without such a distribution right, the cartoonist would be without an effective claim, for the retail store would claim to be largely ignorant of where this particular item came from and the shirts may have been imprinted by a pirate manufacturer impossible to locate. [FN4].

The distribution right is subject to an important exception in the FIRST SALE DOCTRINE, under which the distribution right is exhausted as to a particular lawfully made copy once there has been an authorized sale of that copy.

II. First Sale Doctrine (Exhaustion Theory)

Section 109 of the '76 Act sets forth the doctrine of first sale, which provides that, at least in the absence of a contract

to the contrary, once the copyright owner consents to a transfer of title of a copy or phonorecord of the copyrighted work to a third party, the third party is entitled to sell or otherwise dispose of that copy or phonorecord without obtaining the copyright owner's consent. Thus, the copyright owner has the right to control the initial sale or distribution of the copy or phonorecord to the public or one of its members, but once title to that physical embodiment of the work changes hands, copyright law gives the copyright owner no right to control the embodiment owner's subsequent resale or other transfer of title. Nor may he prohibit the new owner from renting or lending the copy or phonorecord, to others, or from physically destroying it. The first authorized sale exhausts the copyright owner's exclusive right to control distribution of copies . However, if there is a transfer of possession but not ownership, as by rental, then there is no ownership and the first sale doctrine is not triggered. For example, if the owner of copyright in a computer program rents copies of the program to users, a user would infringe copyright if it resold that copy to another. This rule is codified in 17 U.S.C. section 109(d).

The monopoly right of distribution was qualified eventually by application of the common law principle against restraints on alienation of property. Limiting the copyright owner's ability to control a copy once it has been sold is consistent with the common law aversion to restraints on alienation. [FN5]. Courts have held that the copyrights owner's right to control distribution of a copy ends when title to that copy passes to another noting that ownership of the material copy of a work is distinct from ownership of the copyright in the work. [FN6]. This principle of limiting the reach of the former owner of the copy is known as the first sale doctrine and was first codified with the 1909 rewrite of the 1790 Act. [FN7]. This doctrine is the law today under the Copyright Act of 1976. [FN8]

The subsequent owner of the copy acquires distribution rights with title to that copy, as qualified by section 109(a).

However, the copy owner does not acquire reproduction rights beyond fair use with that copy. The effect of these provisions is that the lawful owner of a software copy has full distribution rights in that copy, including right of sale, gift, rental, lease, and lending. Nevertheless, the copyright owner may impose use or distribution conditions on the subsequent owner of the software. Breach of such conditions may be actionable under contract law. [FN9]. Violating such conditions constitutes infringements only if the restrictions are consistent with the exclusive rights granted under the Copyright Act. [FN10].

And it is important to note that the first authorized sale exhausts only the distribution right, not other rights of copyright. The purchaser of a lawfully made printed copy of the dialogue of a play does not have the right to reproduce it, adapt it to a movie version, or perform it in public. Similarly, the owner of a legal copy of a video tape of a copyrighted motion picture does not have the right to show that film in public - that would be an infringing public performance. These rights of reproduction, adaptation, and performance are not subject to the first sale doctrine. [FN11].

Early copyright acts contained no first sale provision. In Bobbs Merrill Co., [FN12] a publisher, Bobbs Merrill, sold the book "The Castaway" to wholesalers with the following notice printed on each copy:

"The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

The Bobbs-Merrill Company."

Defendant Macy bought copies from the wholesalers and resold them for less than $1. Bobbs Merrill sued Macy for copyright infringement, relying solely on copyright and asserting no contract claim. The Supreme Court found no violation of the copyright owner's exclusive rights to multiply copies and vend.

The 1976 Act's Section 109 - codifies the first sale doctrine.

> "(a) Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."

The first sale doctrine is triggered only by the authorized first sale of a lawfully made copy. Each sale in the chain of distribution of an unlawfully made, infringing, or pirated copy is itself an act of infringement of the distribution right.

The House Report approves Bobbs-Merrill: A copyright infringement remedy may not be used to enforce contractual restrictions on a copy's disposition after authorized sale, but "this does not mean that conditions on future disposition of copies or phonorecords, imposed by a contract between their buyer and seller, would be unenforceable between the parties as a breach of contract, but it does mean that they could not be enforced by an action for infringement of copyright." [FN13].

III. Exception of The First Sale Doctrine (Exhaustion Theory)

The distribution right is subject to an important exception in the first sale doctrine, under which the distribution right is exhausted as to particular lawfully made copy once there has been an authorized sale of that copy. However, there is an exception to this which imposes full copyright liability on the unlicensed commercial renting of phonorecords or computer programs.

Exception for record and computer program rentals: Subsection 109(b)(1) of the '84 Act and the '90 Act provides an exception to the doctrine of first sale in the case of record and computer program rentals. Owners of copyright in sound recordings of music, in musical compositions, and in computer programs, may prevent purchasers of copies or phonorecords of their works from renting the copies or records out commercially, or may charge a royalty for the privilege of their doing so. This exception to the doctrine of first sale is necessary because commercial rentals of records, tapes, compact disks and computer

disks, which enable renters to make home tapes or copies of copyrighted musical compositions, sound recordings, and computer programs, would seriously undermine the copyright owners' opportunity to profit through sales of authorized copies and phonorecords, and thus would undermine the law's ability to give an incentive to create musical compositions, sound recordings and computer programs. [FN14].

Chapter 2.: The Legal System of Rental Right in The Unit States

I. The 1984 Record Rental Amendments Act [FN15] and The 1990 Computer Software Rental Amendments Act [FN16]

In the Record Rental Amendment Act of 1984, Congress amended Section 109 to include a first sale doctrine exception for record and tape rental. Section 109(b)(1) provides:

> "Notwithstanding authorized by the owners of copyright in the sound recording and in the musical works embodied therein, the owner of a particular phonorecord may not, for purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending."

The provision adds:

> "Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution."

Clause(3) states that a person who distributes a phonorecord in violation of clause(1) is an infringer and is subject to the civil remedy provisions of the Copyright Act. Such a person is not liable for the criminal offense of willful copyright infringement.

In the Act of 1990, contrasting with the provisions concerned with the Record Rental Act, Congress extended section 109(b)(1) to computer program rental. Section 109(b)(1)(A) provides:

> "(b)(1)(A) Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording or the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program), and in the case of sound recording in the musical works embodied therein, neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program (including any tape, disk, or other medium embodying such program), may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program (including any tape, disk, or other medium embodying such program) by rental, lease, or lending, or by any other act or practice in the nature of

rental, lease, or lending. Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution. The transfer of possession of a lawfully made copy of a computer program by a nonprofit educational institution to another nonprofit educational institution or to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection."

The provision adds:

"(b)(1)(B) This subsection does not apply to-

(i) a computer program which is embodied in a machine or product and which cannot be copied during the ordinary operation or use of the machine or product; or

(ii) a computer program embodied in or used in conjunction with a limited purpose computer that is designed for playing video games and may be designed for other purposes."

"(b)(2)(A) Nothing in this subsection shall apply to the lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation."

And section 109 supplementarily adds:

"(e) Notwithstanding the provisions of sections 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game lawfully made under this title, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship."

II. The Necessity of The New Act

- Practical Background of Two Amendments -

This legislation modified the first sale doctrine codified in section 109(a) to prohibit not only record rental but also software of computer program rental without the express permission of the record and the software copyright owner. The

bill addresses the concern that both of the rentals lead directly to the creation of pirated copies.[FN17]

The creation of unauthorized copies has allegedly caused sufficient losses to record and software copyright owners that the U.S. record and software industries are threatened. The House Report forecasted that continued rentals of phonorecords would significantly contribute to an estimated $1 billion annual loss in record sales caused by home recording.[FN18] In the case of software, the personal computer industry allegedly lost an estimated $1.6 billion in 1989 from illegal copying of software.[FN19]

The House Report [FN20] comments:

> "Frequently, calls to amend the first sale doctrine are made in response to a new technology developed for reproduction of copyrighted works ... Technology has a habit of outstripping even the most flexible statutes. Copyright is, in large part, a response to new technology. Yet, technology has been both a boon and a bane to authors: a boon because it has fostered new methods of creation and distribution; a bane because it has also resulted in inexpensive, easy, and quick ways to reproduce copyrighted works, in many cases in private or semi-private environments that render detection all but impossible."
>
> "In 1984, Congress was presented with evidence demonstrating the nascent record rental business posed a genuine threat to the record industry. Copies of phonorecords were being rented at a fraction of their cost, in conjunction with advertisements exhorting customers to 'never buy another record.' Congress responded by prohibiting the rental of phonorecords for purposes of direct or indirect commercial advantage."
>
> "Congress has now been presented with similar evidence by the computer software industry. Indeed, in some respects, the evidence is even more compelling in the case of software. The price disparity between the sale and rental prices is greater than the case with phonorecords: software selling for $495 has been rented for $35. And, unlike phonorecords, which are an entertainment product, software is typically a utilitarian product. Short term rental of software is, under most circumstances, inconsistent with the purposes for which software is intended. Rental of software will, most likely, encourage unauthorized copying, deprive copyright owners of a return on investment, and thereby discourage creation of new products."

The amendment targets "record rental store," which rent records, tapes or compact discs and sell blank tapes, the evident intention being that customers will use recording equipment to make a copy. It makes unauthorized distribution by phonorecord rental an act of copyright infringement even though the renting party owns the copy. [FN21]

The rental of computer software is often for only an overnight term with insufficient time to become proficient with programs. Comparing with the record rental, the overwhelming rationale for renting a computer program is to make an unauthorized copy. [FN22] There is no reason to rent a software program other than to copy it. Rentals almost always displace sales with damage to the legitimate market for sales of copies of works.

III. Various Efforts for Prevention of Infringing Rentals and Limitations of The Efforts

Various efforts for prevention of infringing rentals which aimed at the reconciliation of copyright owner's interest and public interest were made before rental right was enacted in 1984 and 1990. However, those efforts didn't achieve their aims. Only the advent of the New Act could solve this difficulties.

A. Efforts for Application of Contributory and Vicarious Infringement

The U.S. Court of Appeals for the Second Circuit has described a contributory infringer as "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another." [FN23]. Thus, two elements must be demonstrated:(1) the defendant must know or have reason to know of someone else's directly infringing activity; and (2) the defendant must actively participate by inducing, materially contributing to or furthering the other person's directly infringing acts.

Therefore, where a record rental business rents records, tapes or compact discs, the lessor is liable for contributory infringement, if the lessor knew of the lessee's directly

infringing activity; and the lessor actively participated by inducing, materially contributing to or futhering the lessee's directly infringing acts.

In the case of Screen Gems Columbia Music, Inc., the Court held that the plaintiff(owner of copyright) has a cause of action against the defendant(retailer) who sold the lawfully made copies of phonorecords at a suspicious fraction of their cost. The decision of court was grounded in the tort concept that the defendant who knew of the unlawful actor's directly infringing activity and actively participated in that activity had to be jointly liable for the tort with the unlawful actor. [FN24].

Vicarious infringement liability is grounded in the tort concept of respondeat superior, although it is not limited to employer - employee settings, or even strict agent - principal settings. The Second Circuit has held that a finding of vicarious liability is justified "when the right and ability to supervise the infringer coalesce with an obvious and direct financial interest in the exploitation of copyrighted materials." [FN25]. A defendant who has control or supervision over the direct infringer and a direct financial interest in the infringement will be vicariously liable even if he has no actual knowledge that the infringement is taking place and did not directly participate in it.

In Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417(1984), the U.S. Supreme Court found that a manufacturer and seller of home video tape recorders was not liable for contributory infringement even though it had constructive knowledge that its recorders were likely to be used by some purchasers to make unauthorized tapes of copyrighted television programs and movies. By analogy to contributory infringement in patent law, the court reasoned that one could not be held liable simply for selling items that could be used in infringement but that also have substantial noninfringing uses. To hold otherwise would be to extend the copyright owner's monopoly beyond the copyrighted work to the items being sold by

the defendant. In the Sony case, the defendant's video tape recorders could be used for authorized as well as unauthorized taping and for simple "time shifting," which the Court found to be a fair use. Thus, since substantial noninfringing uses existed for the recorder, Sony could not be held liable for contributory infringement in merely selling the recorder.

However, all of the preceding contributory infringement, liability of the joint unlawful actor, and vicarious infringement liability were not sufficient to solve the problems caused by rentals of phonorecords. Consequently, in order to make compensation for their damages, the record industry attempted to enact the certain law through lobbyism against Congress. In the long run, Congress enacted The 1984 Record Rental Amendment and modified the doctrine of first sale in subsection 109(a). [FN26].

B. Other Efforts

In an attempt to circumvent the first sale doctrine, software developers distribute most software under a use license instead of an outright sale. These licenses often specify that the copyright owner retains title or ownership in the copy of the software. Many of the agreements expressly limit the subsequent use of the software, including its rental. Despite these attempts, the acquisition of the software copy is a traditional sale [FN27] and the enforceability of these license agreements is unlikely.[FN28]

State legislative means have been sought to address the concerns of the copyright owners.[FN29]. Unfortunately for the software copyright owners, the attempt to legitimize shrink -wrap license agreements under state law was quashed by the Fifth Circuit's decision in Vault Corp. v. Quaid Software, Ltd.[FN30]. Although, in this case, the Fifth Circuit arguably misapplied the Copyright Act in favor of the software user, Quaid. No subsequent cases have upheld state legislation favoring shrink-wrap agreements.[FN31].

Ultimately, Congress found that the traditional preference for freely alienable property [FN32] must be balanced against the

greater damage caused by record and software piracy.

IV. The Right Owner and Subject-Matter of Rental Right

In the Copyright Amendment Act of 1990, the Act grants the owner of copyright in the sound recording, in the case of sound recording the owner of copyright in the musical works embodied therein, and the owner of copyright in a computer program (including any tape, disk, or other medium embodying such program) the right to authorize or prohibit the rental of originals and copies of their sound recordings and computer programs. 17 U.S.C. section 109(b) Thus the rental rights will be granted not only to phonorecord producers and owners of copyright in the musical works embodied therein but also to owners of copyright in a computer program. However, in the United States, the rental right will not be granted not only to performing artists who played performances embodied in sound recordings, but also to videotape recording (VTR) producers, and film producers.

In the United States, the subject-matters of rental rights only comprise sound recordings, musical works embodied in the sound recordings, and computer programs.

Comparing the scope of this subject-matters in the United States with that in European Community, the latter's scope is by far broader than the former. The Article 2 of the EC Commission's proposal for a Council Directive on rental right, lending right, and certain rights related to copyright [FN33] extends its subject-matters to the broader scope comprising all kinds of protected works including computer programs with the exception of buildings and works of applied art, performances embodied in phonograms and films including videotape recordings (VTR).

As is generally known, the U.S. Copyright Act didn't provide neighbouring rights not just like continental law countries such as Germany, France, Korea, and Japan. Alternatively, the Article 101 of the U.S. Copyright Act protects sound recordings as works of authorships. And as above-mentioned, the section 109(b) does not grant performing artists rental rights. Furthermore, the

section 114(a) provides that the exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1), (2), and (3) of section 106, and do not include any right of performance under section 106(4). Therefore, the U.S. Copyright Act does not grant performing artists not only rights of performances embodied in sound recordings but also rental rights of related rights to copyrights (neighbouring rights) in performances embodied in sound recordings.

In connection with the scope of subject-matter of rental right, videotape recording was completely excluded from the subject-matter of rental right in the Record Rental Act. In 1983, pararell bills were introduced in the House and Senate to amend the Copyright Act to prohibit unauthorized rentals of video cassette movies. [FN34] However, the Senate bill passed, but the House version did not. Situations and interests of movie studios were far different from those of record sales shops. Movie studios were promoting the rental of their movies on videotapes as a source of revenue. Furthermore, legislators assumed that the lessees of movies on videotapes would not habitually try to illegally make home tapes so as to enjoy them repeatedly. This is the most important point in the exclusion of videotape recording from rental right.

It is a matter of common knowledge that The Rental Amendment was enacted complying with the request of the music record industry. If that is the case, may the rental act apply to what is called books-on-tape which newly enter into popularity of the public ? It is not unequivocal whether the wording of sound recordings in subsection 109(b)(1) is interpreted as containing all of sound recordings including books-on-tape or not. In nascency of the legislation, legislators assumed that the lessees of records would make home tapes or copies of copyrighted musical compositions and sound recordings, and this activities of lessees seriously undermine the copyright owners' opportunity to profit through sales of authorized copies and phonorecords. However,

although this assumption might be applicable to sound recordings of music, it is ambiguous in the case of books-on-tape. As usual, it does not happen that the lessees of fictitious stories embodied in sound recordings positively try to make home tapes so as to enjoy them repeatedly. If this reasoning can be justified, notwithstanding subsection 109(b)(1), the doctrine of first sale would be applicable to books-on-tape. [FN35]

V. Relation between Rental Right and Anti-Trust Law

In A & M Records v. A.L.W. Ltd., the defendant(records rental company) suggested the plaintiff(records manufacturing company) to license to rent its phonorecords several times. However, he received rejection every time. In spite of it, the defendant continued to rent its phonorecords. Subsequently to cope with the defendant's activity, the plaintiff sued the defendant for infringement of copyright. The Federal District Court rendered judgement for the plaintiff that he is entitled to permanent injunctive relief, an award of damages in an amount to be determined by this court, and, in addition, an award of attorney's fees and costs pursuant to 17 U.S.C. section 505, in an amount to be determined by this court. Consequently appealing to the appellate court, the defendant argued that prohibition of renting records by the plaintiff would correspond to not only violation of anti-trust laws, but also conspiracy in which he would be expelled from free market. Nevertheless, the Seventh Circuit affirmed the district court's decision and ruled that the provisions of the 1984 Rental Amendment which admitted of prohibition of renting records without permission of copyright owner in records was righteously legitimate. And the Court held that whether records manufacturing companies give permissions of rental to rental stores of records or not is at the complete discretion of them. [FN36].

Besides above-mentioned, subsection 109(b)(3) provides:

> "Nothing in this subsection shall affect any provision of the antitrust laws."

VI. Non-Application Area to Rental Prohibition

The Computer Software Rental Amendments Act amends section 109 of the Federal Copyright Act to impose copyright infringement liability on anyone who engages in commercial rental of a software copy without the permission of the software copyright owner. The new section 109 expands the prohibition against unauthorized rental of phonorecords by similarly conditioning rental of a copy of a computer program. This change is broader than the exemption provided by the Record Act to the first sale doctrine because it imposes infringement liability on anyone in possession of software who allows its rental without prior approval of the copyright owner. The prohibition of unauthorized rental is imposed on the owners of phonorecords and possessors of software copies.[FN37]. This difference reflects the practice of software copyright owners to distribute software under use licenses rather than through outright sales. Software producers distribute their programs under use licenses in an effort to circumvent the first sale doctrine. By licensing software instead of selling it, software owners allegedly retain ownership and therefore, can limit the buyer's right to lease or rent the software to a third party. Software producers characterize themselves as creators, lessors, licensors and vendors while addressing the lawful users of software as processors rather than owners of the copies. [FN38].

Subsection 109(b)(1)(A) does not prohibit nonprofit libraries or educational institutions from lending copies or phonorecords for nonprofit purposes.

Any software embodied in a machine and which cannot be copied during the ordinary operation of that machine is exempt from these provisions.17 U.S.C. subsection 109(b)(1)(B). This exemption avoid the problem of a software copyright owner having the authority to prohibit rental of any equipment that may utilize the copyrighted software. Without this provision, for example, the copyright owner of the fuel measuring computer program in an automobile could prohibit the rental of any car

utilizing the software. Software embodied in video games is also exempted because such software cannot be copied by their users. subsection 109(b)(1)(B). The Act inserts a new subsection in section 109, unrelated to the first sale doctrine, authorizing the owner of electronic games to publicly display and perform those games without the prior consent of the copyright owner. subsection 109(e)(1990). This section was intended to overturn the Fourth circuit Court of Appeals decision in Red Baron-Franklin Park, Inc. v. Taito Corp. by exempting such performances from infringement.[FN39]. In Red Baron,[FN40] the Fourth Circuit held that public arcade use of an authorized video game copy violated the game copyright owner's exclusive public performance right. That Red Baron used copies originally sold by the copyright owner did not excuse its unauthorized public performances: "the first sale doctrine does not apply to the performance right and has no application to the rights of the owner of a copyright guaranteed by section 106, except the right of distribution."

Analogous to the prohibitions regarding rental of phonorecords, libraries are allowed to lend copies of software without the prior consent of the copyright owner. subsection (b)(2)(A).

The 1984 Record Rental Act contained a sunset provision effective in 1989, but it was extended by Congress to last until 1997. [FN41]. The changes implemented by Act regarding rental of software will expire on October 1, 1997,[FN42], unless extended by Congress, as was done with the phonorecord provisions.

Chapter 3.: The Harmonization Activities of EC and Member States in The Field of Rental and Lending Right

I. Preamble

After almost and a half decades of virtual inactivity, the European Commission has, since the mid 80s, shown a growing number of harmonization activities in the field of copyright. The Commission only recently adopted a comprehensive approach to strengthen the protection of author's rights and of neighbouring rights. At the same time it has strengthened European culture and, likewise, has paved the way towards the completion of the Internal Market. [FN43]

In the mid 1980s, the Commission published its Green Paper "Television without Frontiers." However, the resulting Directive did not contain provisions on copyright. Broader harmonizing proposals were first contained in "the Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action" of Summer 1988. [FN44]

To provide an overview of current EC copyright issues, Part II of this article surveys the Green Paper and briefly analyzes its recommendations. Part III focuses on The EC Commission's Proposal for a Council Directive in rental right.

II. The Green Paper

A. The Goals of The Green Paper

The Green Paper does not pretend to be an exhaustive study of all copyright problems. Rather, it analyzes the effect of technological progress on copyrights issues from a Community viewpoint. It begins by acknowledging the difficulty of reconciling the economic interests of authors with the need for ready access to information. It also recognizes the difficulty of assuring free movement of goods while respecting the teritoriality principle of copyright protection. [FN45]. A major reason for Community action is the securing of a free movement of goods within the EC. However, in interpreting the provisions of the EEC-Treaty on the free movement of goods, the European Court

of Justice (ECJ) has already formulated the rule of Community-wide exhaustion of the national distribution rights. [FN46]. This means that once a material copy or a work protected by copyright has been put into circulation by the rightholder or with his consent in one of the Member States, its further distribution within the Community can no longer be prevented on the basis of a territorially segmented copyright. The European Court of Justice [FN47] has held that the exercise of rental right which only existed in one Member State, but not in another is valid. The reason is that although these differences amount to restrictive measures within the meaning of Article 30 EEC-Treaty, they are justified by virtue of Article 36 EEC-Treaty.

The Green Paper sets forth three general objectives for the EC. [FN48]. The first of these is to encourage the formation of the internal market. The attainment of this objective is problematic, however, because of the profound differences in the concept of copyright and in other types of intellectual property - Germanic legal tradition such as Germany, Belgium, Spain, France and Italy, and those whose legal system is based on the common law, such as the United States and the United Kingdom. For purposes of this discussion, it is sufficient to note that the essential difference between copyright and droit d'auteur (author's right) is primarily concerned with the personal rights of the author to exercise "moral rights" over the work. [FN49].

The Commission's second basic objective is to create policies to promote the improvement of the Community's economic competitiveness in cultural industries.

The third objective is to ensure a sufficient remuneration to those who invest in cultural industries.

B. Recommendations

The motivation for copyright issues requiring immediate action may be found in the political decision of 1985/86 to complete the Internal Market by December 31, 1992. [FN50]. The Green Paper limited the issues for harmonization to piracy, audio-visual home copying, rental right, computer programs and

data bases. [FN51].

The Green paper notes that rentals and public lending of books pose no great copyright problem given the small amount of money involved and the obsolescence of book rental practices. This benign situation contrasts with that in the audiovisual sector, where rentals may threaten to destroy the market for sales of products. The Green Paper also notes that this practice of renting phonograms and videograms is a new form of exploitation of intellectual property and that it has grown to troubling dimensions. [FN52]. This pressure has led authors and producers of phonograms and videograms, as well as performing artists, to demand with growing insistence some protection against the commercial renting of their works such as that which would be provided by a distribution right.

A good example of the Community-wide dimension of the problem is provided by the ECJ's decision in Warner Brothers and Metronome Video, Aps v. Erick Viuff Metronome Christiansen. [FN53]. Warner held a film's copyright and gave Metronome Video the right to rent it for use in video cassette players in Denmark. The defendant, a Danish rental agent, had bought a cassette in the United Kingdom at a time when that country's law did not give a right of rental, and attempted to rent the film in Denmark on the theory that the copyright had been "extinguished" in the United Kingdom. The Court rejected this reasoning, pointing out that it would seriously compromise the marketing of the film. This ECJ precedent has allowed the Commission to state clearly a position in favor of a general recognition of right of commercial rental. It is within this context that the Green Paper set the stage for the proposal of a copyright directive.

C. Criticisms to the Green Paper

The Green Paper's philosophy has provoked negative reactions because, essentially, it perceives copyright exclusively in economic terms. It has often been criticized for being fragmentary and also one-sidedly industry-oriented, not only by the selection of issues to be dealt with, but also by the

proposals themselves, which often focussed on the protection of industry rather than of authors. This provoked, inter alia, the saying that the Green Paper showed an "authors' right without authors." [FN54]. The Green Paper systematically prefers the Common Law copyright approach. Such a preference is problematic because the common law copyright model is not easily adaptable in Europe. Despite its flexibility, the Common Law system cannot possibly embody the diversity of Europe's many legal traditions. This is especially true because of copyrights' strong cultural implications.

III. The EC Commission's Proposal for a Council Directive Concerning Rental and Lending Right

On December 5, 1990, the EC Commission adopted a proposal for a Council Directive on rental right, lending right, and certain rights related to copyright. [FN55]. It represents the second proposal based on the Green Paper on Copyright. It combines two fields of activity: rental and lending on the one hand, based on the proposals of Chapter IV of the Green Paper (distribution right, exhaustion and rental right) which have been partially extended, and, on the other hand, certain rights related to copyright base on Chapter II (piracy). The Commission considers this combination to be appropriate because the harmonization of rental or lending right for certain owners of neighbouring rights does not seem reasonable, as long as there are still some Member States which do not provide any neighbouring rights protection at all, not even a simple reproduction right. [FN56].

According to a principle of the Commission, harmonization measures should not create contradictions and inconsistencies within the national laws of the Member States and they should not affect existing particularities of national copyright laws. Therefore, the Commission does not define specifically the right owners and subject matter, since the international law of the Conventions has already indirectly produced a certain degree of harmonization. [FN57]. The proposed Directive defines the rental

and lending rights and distribution right (Article 7) in a way which allows for the possibility of implementing the rights in Member States which employ the concept either of droit de destination or of the distribution right together with its exhaustion. Thereby, the Commission avoids creating unnecessary obstacles in the way of an agreement between the Member States. [FN58].

A. Right Owner and Subject-Matter of Rental and Lending Right

The proposal grants to authors, performing artists, phonogram and film producers the right to authorize or prohibit the rental and lending of originals and copies of their works, of the fixations of their performances, of their phonograms and their visual recordings, whether or not accompanied by sound. Thus, the rights will not only be granted to producers - a concept, which would never be acceptable in continental law systems, which seemed to be intended by the Green Paper [FN59] - but at the same time to authors and performing artists who have contributed to a film or a sound recording. [FN60].

With respect to Article 2 of the proposal, the annotations concerning issues in the filed of films deserve particular mention. [FN61]. The application of Article 2 to Member States with a Continental law system means that the natural persons called 'film authors', such as the film director, as well as the film producers (normally by way of a specific neighbouring right) are both first owners of the rental and lending rights. For Member States with an Anglo-American copyright system, Article 2 means that the first owner of the rental and lending rights is the film producer only, who is, in these states, normally deemed to be the 'author'. [FN62]. Moreover, rather than being limited to the rental or lending of sound or video recordings, the proposal extends to all kinds of protected objects with the exception of buildings and works of applied art. Likewise, the proposal purports to be without prejudice to the computer program Directive. Since the final version of the computer program

Directive only regulates the rental and not the lending of computer programs, it remains to be seen whether lending of computer programs will now be included in the Directive on rental and lending, or whether the lending to the public of computer programs by public libraries will be left to national legislation. [FN63].

B. Lending right

The terms 'rental' and 'lending' are defined according to whether the activity is for profit-making purposes. [FN64]. The most important cases are rental by video-and CD- rental shops and lending by public libraries.

The Commission makes it clear that rental and lending always refer to material objects only. Accordingly, the making available for use of a film by way of electronic data transmission (downloading) is not covered because this form of use is considered to be a public performance. [FN65]. Paragraph 4 of the Proposal makes clear that the exhaustion of an exclusive distribution right according to the law of a particular Member State does not affect the existence of the rental and lending rights. These rights accordingly subsist even after the act of first putting into circulation a copy of a work.

The Commission decided, contrary to the proposal of the Green Paper, to include a lending right in its Proposal for a Directive. On the one hand, this was due to the outcome of the Hearing [FN66] and, on the other hand, to a number of valuable arguments such as, for example, the economic connections between rental and lending [FN67] and the fact that fundamental copyright arguments (in particular the principle, according to which the author has to participate economically in every use of his work of a certain importance) are valid for lending right as well as for rental right. [FN68]. This shows that the Commission intends to achieve, as a first step, at least fundamental harmonization which will strengthen the protection, instead of not providing any harmonization at all. [FN69].

C. Relations between the Right Owners

The proposal also contains a particular article which intends to secure that the initial owners of rights will effectively benefit from their rights. [FN70]. without specific legislation, this would often not be case because the weaker parties of exploitation contracts, usually authors and performing artists, as opposed to producers of sound recordings and films, normally assign their rights to the producers for exploitation of the work without, however, obtaining separate remuneration for every right (or more than remuneration on a flat-rate basis and at very low percentages). The Commission states that, having regard to the existing situation and to the underlying purpose of copyright, total contractual freedom is not acceptable. It has to be added that legislators in Europe have since long recognized the concept according to which copyright laws should provide a minimum protection of the usually weaker parties (authors, performing artists) of exploitation contracts against usually stronger parties (publishers, producers of sound recordings and films). [FN71]. The awareness for the need of improving such legislation has grown recently, as the example of the French Copyright Act of July 3, 1985 (in particular sec. 13/63-1 to 63-7) shows. The Article 3 of the proposal is a combination of exclusive rights and remuneration rights.

An exclusive right enables the right owner to exploit the right according to his economic needs and market developments. It provides him with a strong bargaining position vis-a-vis the user and thereby with the possibility of obtaining a more adequate remuneration than in the case of remuneration right. remuneration rights, however, are normally administered collectively by collecting societies or similar institutions such as the British Public Lending Right (PLR) Office. These advantages are combined by way of granting an assignable exclusive right. The remuneration right cannot be waived and may be assigned only for administration. The term 'adequate' refers to the contribution which the right owner has made to the rented

or lent object. In this context, the Commission stresses the fact that authors such as composers, together with performing artists, generally create the consumer demand for, for example, a sound recording or video cassette, as well as the fact that these two groups make the creative contributions to the finished product. The Article 36 of the French Law of 3 July 1985 indicates this conception of adequacy. [FN72].

D. Derogation from Exclusive Lending Right

Article 4 gives to Member States the possibility of derogating from the copyright-based exclusive nature of lending right under Article 1 paragraph 1.

It is argued that the availability and accessibility of material in public libraries must be guaranteed for cultural reasons, and this would not be possible in the case of an exclusive lending right. According to the experience of most countries in the world, national legislators are mostly prepared to provide a lending right only in the form of right to remuneration and only outside the framework of copyright laws; only in Germany is the public lending right based on the Copyright Act (section 27). The existing Dutch public lending right system is actually intended, in an amended version, to be included in the Copyright Act. However, as an exception, the United Kingdom has extended its exclusive rental right in relation to computer programs, sound recordings and films to cover public library lending. [FN73]. This situation has been taken into account. In order not to upset Member States' legislation all too much, the proposal allows a derogation - in total or only for some categories of objects - from the copyright - based exclusive nature of the lending right. Thus, member states would remain free not to grant an exclusive right but to keep their remuneration system known as public lending right. They may also keep or introduce a mixed system of, for example, a public lending right for books and an exclusive lending right for other objects, as it exists in the United Kingdom. This approach taken by the Commission show that it intends to achieve, as a

first step, at least a minimum harmonization which will strengthen the protection, instead of not providing any harmonization at all. [FN74].

E. Protection in Neighbouring Right

The proposal's Part II on neighbouring rights protection follows the respective provisions of the Rome Convention. However, the proposal is restricted to forms of material exploitation, because it is based on Chapter 2 of the Green Paper (Piracy). Moreover, the main form of immaterial exploitation, broadcasting, is covered by the proposed cable and satellite Directive. At the same time, the proposal is broader than the Rome Convention in so far as it provides proper exclusive rights for performing artists and grants a separate distribution right for the purpose of intensifying the combat against piracy. Moreover, it provides a separate protection for film producers, who in some Member States with a continental law system, so far only exercise the rights which the film authors have assigned to them. This separate protection shall be additional to the exercise of assigned rights in these member States. [FN75].

Chapter 4.: Rental Right in International Multilateral Agreements; URUGUAY ROUND and NAFTA

I. Agreement on Trade-Related Aspects of Intellectual Property Rights; TRIPs [FN76]

In its structure, section 1 on copyright and related rights follows a so-called 'Berne-plus' approach. According to Article 9 of the draft, Parties have to comply with the substantive provisions of the Berne Convention.

The draft also goes beyond the Berne Convention in providing for a rental right. According to Article 11 and Article 14, 1 at least in respect of films, phonograms and computer programs, authors (or the right holders in phonograms) shall enjoy an exclusive right which means the right to authorize or prohibit rental. Alternatively, the right to obtain an equitable remuneration corresponds to the economic value of the use. However, the provision only establishes an obligation to introduce a rental right at all if rental has led to widespread copying which materially impairs the right of reproduction. When evaluating this provision, it should be kept in mind that here for the first time ever in an international agreement, a rental right is being introduced. [FN77].

II. North American Free Trade Agreement; NAFTA [FN78]

In its structure, Article 1701 on nature and scope of obligations also follows a so-called 'Berne-plus' approach just like TRIPs.

The draft also goes beyond the Berne Convention in providing for a rental right. According to Article 1705, 2(d) and 5 and Article 1706, 1(d) and 3, at least in respect of computer programs and sound recordings authors (or the right holders in sound recordings) shall enjoy an exclusive right which means the right to authorize or prohibit rental. With respect to the first sale doctrine, the draft specifies that putting the original or a copy of a sound recording and a computer program on the market with the right holder's consent shall not exhaust the rental

right. In addition, the draft provides exemption that where the copy of computer program is not itself an essential object of the rental, rental prohibition shall not apply just like U.S. Copyright Act subsection 109(b)(1)(B).

Chapter 5.: Conclusion; Comparison between the U.S. and EC and a Future Prospect

The rental right is not a right that is necessarily included in the exclusive rights of copyright. It is a derivative right from the distribution right of copyright. The necessity of the introduction of the rental right was originally suggested as high technologies of copying works were more rapidly making progresses. The patterns and types of pirating works are diversified by not only copying objects such as sound recordings, videotape recordings, films, computer program, and books, but also social practices of utilizing works. Accordingly, the subject-matters of the rental right and non-application area of rental prohibition cannot be globally uniform. This is especially true because of copyright's strong cultural implications.

The U.S. Copyright Act completely excludes lending right conception which is for nonprofit purposes regardless of books, phonograms, computer programs, and films contrary to European Communities. Rather than introducing lending right, nonprofitable lending activities are exemptions from rental prohibition. According to the U.S. Copyright Act, books, videotape recordings, and films are precluded from the subject-matters of rental right. However, in EC, all of the above-mentioned subject-matters are included in rental right system. And as is generally known, in the U.S., neighbouring rights are not protected as related rights to copyright. As the result of it, the U.S. Copyright Act does not grant performing artists not only rights of performance embodied in sound recordings but also rental rights of related rights to copyrights (neighbouring rights) in performances embodied in sound recordings.

It is sensitively debatable whether the legal character of the rental right has to be provided as a exclusive right or as a remuneration right. The former right provides a rental right owner with a strong bargain position. remuneration right, however, are normally administered collectively by collecting

societies or similar institutions. These advantages are combined by way of granting an assignable exclusive right just like the Article 3 of the Commissions's proposal. The provision is a combination of exclusive rights and remuneration rights.

Rentals and public lending of books pose no great copyright problem given the small amount of money involved and obsolescence of book rental practices. However, this benign situation contrasts with that in the audiovisual sector, where rentals may threaten to destroy the market for sales of products. Videograms are the most popular form of exploitation of intellectual property especially in developing countries and it has grown to troubling dimensions. As the general trends of social utility practices of works by copying videotape recordings varies, within a considerable period, the pressing necessities for protection against pirating videotape recordings may proliferate.

Although EC's Directives and international multilateral Agreements including TRIPs, NAFTA, and others, have achieved considerable harmonizations in the field of copyright problems, the partial inconsistency of the rest remains as ever among country groups. However, it is not always appropriate and rational to the extent that it does not impede the principle of free trade, because a few unharmonizations in the domestic copyright law provisions reflects the cultural diversities of its countries. The copyright model of Common Law is not easily adaptable in Europe. Despite its flexibility, the system of Common Law cannot possibly embody the diversity of Europe's many legal traditions.

[Footnotes]

FN1. 17 U.S.C. section 106(1) and (3).

FN2. H.R.REP. No.94-1476, 94th Cong., 2d Sess. 61(1976)

FN3. The major limitation on the distribution right is the first sale doctrine; one who purchases an authorized copy may use and resell that particular copy free of any restraint by the copyright owner. See Donald S. Chisum and Michael A. Jacobs, Understanding Intellectual Property Law, Matthew Bender & Co., Inc., 4E[3][c](1992).

FN4. J. Thomas McCarthy, Desk Encyclopedia of Intellectual Property, BNA Books, Inc., at 104(1991).

FN5. Sebastion Int'l, Inc. v. Consumer Contracts (PTY) Ltd., 847 F.2d 1093, 1096 (3d Cir.1988). See Richard Colby, The First Sale Doctrine --The Defense That Never Was ?, 32 J. COPYRIGHT SOC'Y at 88(1984) (pointing out that "the first sale doctrine has its roots in the English common law rule against restraints on alienation of property".)

FN6. See, e.g., Columbia Pictures Indus. v. Redd Horne, 749 F.2d 154, 159(3d Cir.1984).

FN7. Section 27 of the Copyright Act of 1909 provides in relevant part: ..."nothing in the title shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained." 17 U.S.C. s 27(1977).

FN8. H.R.REP. No.1476, 94th Cong., 2d Sess. 79(1976).

FN9. American Int'l Pictures, Inc., 576F.2d at 664 & n.3 (holding that a copy owner who breaches a copyright owner's restrictions on use of the copy may be liable at contract but not for infringement).

FN10. Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 447(1977).

FN11. J. Thomas McCarthy, Desk Encyclopedia of Intellectual Property, supra note 4, at 131.

FN12. Bobbs Merrill Co. v. Straus, 210 U.S. 339(1908).

FN13. H.R.REP. No.94-1476, 94th Cong., 2d Sess.79(1976).

FN14. Margreth Barrett, Intellectual property, Emanuel Law Outlines, Inc., at 175-176 (1991).

FN15. Pub.L.No.980450 (Oct.4, 1984), codified at 17 U.S.C. s 109, See H.R.REP.No.987, 98th Cong. 2d Sess. 1, 4 (1984).

FN16. Pub.L. No.101-650, 104 Stat. 5089(1990). See 136 CONG.REC. H13, 297-H13, 316 (daily ed. Oct. 27, 1990).

FN17. U.S. Congress, Office of Technology Assessment, Computer Software and Intellectual Property-Background Paper at 25 n.1.

FN18. H.R.REP. No.980987, supra note 15, at 1, 2, 3.

FN19. S.REP. No.265, 101st Cong., 2d Sess. 3(1990).

FN20. H.R.REP. No.101-735, 101st Cong., 2d Sess(1990).

FN21. Donald S. Chisum and Michael A. Jacobs, Understanding Intellectual Property Law, supra note 3, at 4-123(1992).

FN22. 136 CONG.REC. 916, 310 (daily ed. Oct. 19, 1990).

FN23. Gershwin Publishing Corp. v. Columbia Artists Mgt., Inc., 443 F.2d 1159(2d Cir.1971).

FN24. Screen Gems Columbia Music, Inc. v. Mark-Fi Records, Inc., 256 F. Supp.399(S.D.N.Y.1966).

FN25. Shapiro, Bernstein & Co. v. H.L.Green Co., 316 F.2d 304, 307 (2d Cir.1963).

FN26. Melville B. Nimmer & David Nimmer, Nimmer on Copyright, Vol.2, Matthew & Bender Co., 8.12B, at 8-147(1991).

FN27. Michael Schwarz, Software License Agreements: A Uniform Commercial Code Perspective on an Innovative Contract of Adhesion, 7 Computer/L.J. at 265-73 (applying section 2 of the Uniform Commercial Code to software license agreements and finding a close analogy to the sale of goods. and noting that the circumstances of shrink-wrap agreements are more like a sale than a license. and construing an agreement to use a movie print as a sale with a restraint on use rather than as a license to use).

FN28. Computer Software Rental Amendments Act of 1989: Hearing on S. 198 Before the Subcomm. On Pat., Copyrights and Trademarks of the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. at 26 (hereinafter S. Hrg. No.101-456). (pointing out that the ability of these "licenses to withstand judicial scrutiny is debatable, particularly with respect to the consumer, since they are unilateral agreements and adhesional in nature. and concluding that restraining terms such as those in software licenses are unenforceable as overstatements of the rights under copyright).

FN29. Deborah Kemp, Mass Marketed Software: The Legality of the Form License Agreement, 48LA. L. REV. at 87-88, 127-28 (noting that Louisiana and Illinois have enacted legislation declaring that shrink-wrap software license agreements are binding, notwithstanding their adhesional nature); Maher, Shrink-Wrap License, at 293 (noting that Arizona, California, and Hawaii had legislation pending in 1987 in support of shrink-wrap agreements).

FN30. 847 F.2d 255(5th Cir.1988) (holding that the clauses of a Louisiana statute that purported to support adhesional shrink-wrap agreements were unenforceable because they conflicted with the Copyright Act). The Court ruled that the portions of Louisiana's License Act which conflicted with the fair use rights provided under section 117 of the Copyright Act were unenforceable as preempted. Id. at 269-70.

FN31. S. Hrg. No.101-456, supra note 28, at 26.

FN32. See supra note 5. (discussing the first sale doctrine evolving from a policy favoring the free alienation of property).

FN33. Doc. COM(90) 586 final.

FN34. Consumer Video Sales - Rental Agreement of 1983: Hearings on H.R. 1029 Before the Subcomm. on Cts, Civ. Liberties, and the Admin. of Just. of the House Comm. on the Judiciary, 98th Cong., 1st and 2d Sess. 1-2, 729-30(1984). The Senate version proposed was known as the Consumer Video Sales/Rental Agreement of 1983.

FN35. Melville B. Nimmer & David Nimmer, Nimmer on Copyright, supra note 26, 8.12[B][c].

FN36. A & M Records v. A.L.W. Ltd., 7 U.S.P.Q. 2d 1475 (7th Cir.,1988).

FN37. 104 Stat. 5134-35(1990).

FN38. S.Hrg. No.101-456, supra note 28, at 26.

FN39. 136 CONG.REC. H13, 314 (daily ed. Oct. 27, 1990).

FN40. Red Baron-Franklin Park Inc. v. Taito Corp., 883 F.2d 275, 11 U.S.P.Q. 2d. 1548 (4th Cir. 1989), cert.denied, 110 S.Ct.869(1990).

FN41. Pub. L. No.100-617(1989). See H.R.REP. No.98-987, supra note 15, at 6 (noting the Record Act would expire five years after passage for the purpose of "enabling the Committee to review and reconsider the appropriateness and justification for this legislation at a later time").

FN42. 104 Stat. 5136(1990), 136 CONG.REC. H13, 311(daily ed. Oct.27, 1990).

FN43. Thomas Dreier and Silke von Lewinski, The European Commission's Activities in the Field of Copyright, Journal, Copyright Society of the U.S.A., vol.39 No.2. at 96 (winter, 1987).

FN44. Doc. COM(88) 172 final, of June 7, 1988.

FN45. The Green Paper, supra note 44, para. 1.1.1-2. See also Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 30, 298 U.N.T.S.11 (hereinafter EEC Treaty) (entered into force Jan. 1, 1958).

FN46. Thomas Dreier and Silke von Lewinski, The European Commission's Activities in the Field of Copyright, supra note 43, at 99. See Art. 30 EEC Treaty: "Quantitative restrictions of imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." and Art. 36 EEC Treaty: "The provisions of article 30 to 34 shall not preclude ... the protection of industrial and commercial property." See the first decision of the meanwhile established jurisprudence, decision of June 8, 1971, Case No. 78/70, Deutsche Grammophon Gesellschaft v Metro-SB-Grossmatke, [1971]ECR 487.

FN47. Case No. 341/87, EMI Electrola GmbH v. patrica Im & Exportrerwaltungs gesellschaft mgH u.a. of January 24, 1989,[1989]ECR 79. See Case No. 158/86, Warner Bros Inc. et al. v. E.V. Chritiansen of May 17, 1988,[1988]ECR 2604. See supra note 46, related articles of EEC Treaty.

FN48. The Green Paper, supra note 44, para. 1.3.

FN49. See Andre Lucas, Copyright in the European Community: The Green Paper and the Proposal for a Directive Concerning Legal protection of Computer Programs, the Columbia Journal of Transnational Law Association, Inc., note 8.

FN50. Thomas Dreier, supra note 43, at 98. See The Commission's White Paper on the "Completion of the Internal Market," COM(85)310 final of June 14, 1985.

FN51. Id. at 98.

FN52. The Green Paper, supra note 44, para. 4.10.1.

FN53. See supra note 47.

FN54. Thomas Dreier, supra note 43, at 98. See Moller, "Author's right or Copyright," in Gootzen(ed.), "Copyright and European Community", Brussels 1989, at 11 and at 23 onward, in particular para 1.2.

FN55. Doc. COM(90) 586 final.

FN56. Silke von Lewinski, Rental Right, Lending Right and Certain Neighbouring Rights: The EC Commission's Proposal for a Council Directive,[1991] 4 EIPR 117.

FN57. Id. at 118.

FN58. Id. at 119.

FN59. Id. at 118, note 12.

FN60. Id. at 122, See The Article 2 of the Commission's proposal.

FN61. the Commission's proposal, supra note 55, para.2.1.2, at 37 onward.

FN62. UK Copyright Act 1988 section 9(2)(a).

FN63. Thomas Dreier, supra note 43, at 108.

FN64. Silke von Lewinski, supra note 56, at 119. See The Article 1 of the Commission's proposal.

FN65. Id. at 119.

FN66. The Commission held a Hearing for interested circles on all of those issues on 18 and 19 September 1989 in Brussels.

FN67. the Commission's proposal, supra note 55,para.6 at 5: to a certain extent, commercial rental shops and public libraries compete with each other. The rental shops might suffer from the same development which took place at the beginning of this century, when, in the field of books, when, in the field of books, rental books shops disappeared because of the more competitive public libraries emerging at the time. Nowadays, public libraries offer, to an increasing extent, like rental outlets, videograms and compact discs.

FN68. Id. para 9, at 17.

FN69. Silke von Lewinski, supra note 56, at 118.

FN70. Thomas Dreier, supra note 43, at 109. See the Article 3 of the Commission's proposal.

FN71. Id. at 109-110.

FN72. Silke von Lewinski, supra note 56, at 120, note 33. The Article 36 of the French Law of 3 July 1985 provides in relation to private reproduction of sound recordings and visual and sound recordings that the respective remuneration, in the case of sound recordings, is due to authors, performing artists and producers in the ratio of 50:25:25, and in the case of visual and sound recordings in equal shares.

FN73. Id. at 120, note 34.

FN74. Thomas Dreier, supra note 43, at 109.

FN75. Id. at 110.

FN76. Agreement Establishing The World Trade Organization, Annex/C:Agreement on Trade-Related Aspects of Intellectual Property Rights.

FN77. Jorg Reinbothe and Anthony Howard, Negotiations on TRIPs(GATT/Uruguay Round,[1991] 5 EIPR161.

FN78. Part 6, Chapter 17 of NAFTA.