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Primary Law of Copyright Contracts

in the Member States of the European Community

Legislative Situation and Suggestions for Reforms

Study
carried out for the Commission of the
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STUDIES IN THE
CULTURAL SPHERE

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Foreword

In 1976, the author of this study was requested by the Commission of the European Communities to produce a comparative study of copyright law in the European Community, which was published in 1978 in German, English and French[1]. Section X of this study contained a synoptic and necessarily cursory account of the law of copyright contracts. It pointed out[2] that "an up-to-date and realistic presentation of the law of copyright contracts is not possible without reference to contracting practice", and that this "is a field which cannot be covered for all nine countries by a single analyst".

This is why the author had misgivings when he was asked by the Commission of the European Communities to supplement his previous study by a special study of the law of copyright contracts in the Member States - which now number ten[3] - of the European Community. After some hesitation, he considered himself able to accept this commission only because this supplementary study was not yet intended to be a comprehensive account of the law of copyright contracts as set out in legislation and practised by the courts. Although such an ambitious and encyclopaedic task may one day be undertaken by a Working Party of analysts from all or at least most Member States of the European Community,

the present study had from the very start a much more modest objective as regards the scope and depth of material to be analysed. The arrangement on which the study was based provided that it should contain (only) a description and analysis of the current state of legislation in the Member States of the European Community as regards the law of copyright contracts, an evaluation of these arrangements, and an indication of any loopholes existing in the arrangements, together with the possible reasons for such loopholes. This obviously starts from the assumption (which is also a value judgment) that all kinds of authors are more than ever dependent on special and effective protective legislation, also (and especially) in the field of the law of copyright contracts. Despite this assumption, of course, the basic question of possibilities and limits of a reasonable regulation of the law of copyright contracts will also have to be discussed. There thus arose, as a natural corrollary, the question of the extent to which it is advisable to cease to rely on legislation to protect authors, and to turn instead to other means such as collective and blanket agreements, which in turn require some form of legal backing. Considerable importance attaches to this question in the course of the study and in the suggestions for reforms that it contains.

The author has tried in the introductory part of the study to define first of all the relevant concepts and subject matter, and to examine in more detail the group of persons, i.e. the self-employed authors who can be compared to employed persons, to which the authors concerned belong, and which has recently attracted increasing interest both nationally and internationally.

This was to be followed by as comprehensive but concise as possible an analysis and evaluation (subdivided into "General Provisions" and "Special Provisions") of the state of legislation in the ten Member States of the European Community. The question of how to rectify the weaknesses or close the substantial loopholes in the legislation that came to light during the comparative analysis, was constantly borne in mind. Here, and especially in that part of the study which seeks an alternative to legal provisions, we quote examples of solutions, and especially of blanket-agreement arrangements, to be found in the various countries, and whose scope in some cases already goes far beyond that of the relevant national legislation on copyright contracts. This being the case, and in view of the remarks made earlier, there was no question of trying to produce anything like a complete picture, since even in the country that the author naturally knows best, important material on the very subject of the law of collective copyright contracts has not been published, or has been published only in obscure places which make it almost inaccessible[4]. This would offer great scope for systematic research into the legal position, on which as yet virtually no such work has been done.

The author was nevertheless able to refer to individual important collections of material in Schulze's "Urhebervertragsrecht"[5] for the Federal Republic of Germany, the appendix to

Plaisant's comprehensive account[6] for France, or Clark's Collection of Model Contracts[7], the Publishers Association "Guide"[8] or the "Verlagsvertrag" by Delp[9] as regards the sub-area of publishing contracts. Such collections of material were not however available for the majority of countries concerned, especially the smaller countries of the European Community.

To help him in the work of definition carried out in the study the author found useful suggestions in the various studies of the situation of the journalistic, publicity and artistic professions by Fohrbeck and Wiesand, and most recently also Wolterbeck[10]. The latter were in some cases carried out on behalf of the Federal German Government, and summarised in the impressive study "Arbeitnehmer oder Unternehmer? Zur Rechtssituation der Kulturberufe", which the authors named presented in 1976 and which contains numerous politico-legal observations[11]. The author also feels encouraged by the large degree to which its results and suggestions tally with those of the study by Polet (with the collaboration of van Lingen and Vreeken)[12] on the legal, economic and social position of the literary translator; the study by Duchemin[13] on the protection of photographers; and the study by Gotzen[14] dealing with related rights, especially with those of performing artists, which supplements that author's basic study entitled "Das Recht der Interpreten in der Europäischen Wirtschaftsgemeinschaft"[15]. All these studies which were also undertaken on behalf of the Commission of the European Communities provide important evidence in support of the contention of this study of the

need for greater "personalisation" and "professionalisation" of the problems of copyright law, at least insofar as they concern the sphere of the law of copyright contracts.

The comprehensive report on the law of copyright contracts and the law of broadcasting contracts in particular, submitted in 1977 on behalf of the Federal German Minister of Justice[16] by my respected teacher Prof. Dr. Dr.h.c. Eugen Ulmer has occupied and still occupies a special place in the discussion of questions of the law on copyright contracts in the Federal Republic of Germany. The observations made in the first part of that report are of particularly great interest for the fundamental problem of the possibilities and limits of a general reform of the law of copyright contracts with which this study deals. It is significant that another four years have elapsed without a single concrete step towards dealing with the law of broadcasting contracts having been taken by the Bonn Parliament, which expressed its support in principle for general arrangements covering the law of copyright contract even when passing the 1965 Copyright Law[17]. This renewed hesitation on the part of the Federal German Parliament seems difficult to understand, especially in view of Prof. Ulmers' comprehensive, detailed and balanced proposals, especially in Part Three of his report. However, it throws a significant light on the curious hesitation (not only in the Federal Republic of Germany) of the national legislatures in dealing with matters of the law of copyright contracts. A further case in point concerns the Dutch draft legislation, submitted almost 10 years ago in 1972,

for dealing with publishing contracts[18], which considerably enlivened discussion of the problems of the law of copyright contracts in the Netherlands[19], but which remains at the draft stage.

Not the least remarkable aspect of the hesitation of national legislatures is the fact that scarcely anyone seriously disputes the increasing need for the protection of authors in view of the rapid rate of technological progress. This discrepancy between perception and action, which applies to a much greater degree in those countries that have hardly started dealing with the law of copyright contracts (such as Belgium, the United Kingdom[20], the Republic of Ireland, and Luxembourg) was one of the main reasons why this study repeatedly raises the question whether modern legislators, apart from making the basic provisions in a "General Part" of the law on copyright contracts, really have the skill and capacity to legislate in detail on individual aspects of the law on copyright contracts.

We would also refer in this context to the important preliminary work done by ALAI, and its Dutch (Vereniging voor Auteursrecht) and German national groups. This preliminary work was reflected in the papers of the Amsterdam Symposium on Publishing Contracts of 26 April 1974[21] and the Berlin Symposium on Freedom of Copyright Contracts of 1/2 October 1975[22]. These papers, which throw light inter alia on the state of the law in a large part of the Member States of the European Community, considerably helped the author to

understand the relevant national laws, and in detecting any loopholes.

The tendency mentioned towards increased "personalisation" and "professionalisation" in the presentation and solution of problems of the law on copyright contracts is also apparent in the working documents of the Commission of the European Communities itself, especially in the communication submitted in 1977 to the Council on "Community Action in the Cultural Sector"[23]. Section 21 of that document states for example "If we deal with the complex field of copyright and related rights, we must not lose sight of the economic and social position of the cultural workers[24], and should be guided by the principle that every professional activity must provide a reasonable living for the person who exercises it". At international level, reference should also be made to the "Recommendation concerning the Status of the Artist"[25] recently approved at the XXI General Conference of UNESCO in Belgrade in 1980 and which place even greater emphasis on the personalisation/professionalisation aspect, which until then had not been very marked, than the Recommendations on the Legal Protection of Translators[26] approved by the XIX General Conference of UNESCO in Nairobi in 1976.

Valid assertions regarding the need and content of legislation on copyright contracts cannot in fact be made until one finds out who are the persons concerned and which are the interests to be protected. These considerations correspond to the definitions in the introduction to this study, which finally

led to the concept of "primary law of copyright contracts". Hence everything turns around the person of the author (writer, composer, painter) who lives by his manual or intellectual work, who is not an entrepreneur but a freelance (not a member of the liberal professions), and who is comparable to an employee. The reform proposals in this study are aimed at him and his primary contractual partners.

Althouth the category of authors so defined may be only a small part of those who create works protected by copyright otherwise than on a casual basis, they constitute a group whose existence does or may depend on the instruments of the laws of copyright and copyright contracts. The fact that the number of these freelance authors who clearly have difficulty in asserting their interests in a pluralistic society is probably only small[27] ought not to justify the lack of or the ever-waning interest and commitment on the part of legislators, if we consider the links between copyright and the promotion of culture. Riklin recently referred to this in a detailed study[28]. It is precisely when one considers the possible dangers and shortcomings of the direct promotion or financial maintenance by the State of authors of all kinds, and of the role of decentralised, indirect promotion of artistic creativity[29], largely assured by the play of market forces, that legislation on copyright contracts assumes an additional politico-cultural aspect over and above its primary socio-political purpose. Legislators who ignored this would accordingly

expose themselves not only to the charge of neglecting a possibly small but nevertheless significant fringe group in the Welfare State, but in the long term probably also to the more serious charge of neglecting their responsibilities in the cultural sector. Perhaps we shall be able in this study to suggest a way of overcoming this legislative impasse, by calling attention to a number of legislative or practical tentative solutions that already exist in some cases in individual countries.

We would say in conclusion that this study's recommendation that freelance authors (who do not engage in entrepreneurial activity, but are comparable to employees) be largely treated on a pair with true employees as regards, their need for social protection, may be relevant at European level. Our proposals ought to make it possible to get away from an unduly one-sided system under which copyright has been measured by the standard of free movement of goods (Art. 30 et seq., EEC Treaty)[30] and the competition regulations (Art. 85 et seq., EEC Treaty)[31]. This would in the final analysis involve deciding to what extent the provisions of the EEC Treaty relating to "labour" and "social policy"[32] can be applied directly or at least by analogy to this group of people. This would make the "social dimension"[35] relevant at European level.

Munich, September 1981 A.D.

Introduction

I. Definition of the subject matter

1. Concept of primary law of copyright contracts

a) Law of copyright contracts in the wider sense

(1) The law of copyright contracts in the wider sense can be considered to include all those contractual relations in which the object (or at least one of the objects) of a contract is concerned with rights in copyright works. Such contracts are drawn up (although not exclusively) in the sphere of the media and the "culture industry", e.g. in the sphere of newspaper, magazine and book publishing; of the theatre, radio and television; of the film industry and the production of phonograms and videograms. One of the main sectors concerned is the wide-ranging sector of the exploitation of music, involving uneasy relations between composers, music publishers, collecting societies and a very large variety of music users, which are once again broadcasting organisations and phonogram producers, concert organisers, dance halls, hotels and restaurants, etc. Nor can the fine art trade, which is mainly concerned with the sale of copyright articles (works of art) function in isolation from the law of copyright contracts. The role played by this law

becomes increasingly important the closer one gets to the sphere of the graphic arts, design and photography, in which as a rule the sale of the original is only of secondary importance.

(2) However, the authors of the works themselves are not always involved in deals regarding copyright works, i.e. when these are the subject of contracts. One need only think of the manifold forms of "publishing licences"[34] (translation, paperback and book-club licences, and preprint rights, etc.) which are of ever-increasing economic importance nowadays in the exploitation of "secondary rights", especially in the book publishing trade. The authors of the works concerned often, but by no means always, have a financial interest at least in these secondary-right transactions. One may nevertheless ask whether there is any sense at all in speaking of a "law of copyright contracts" in transactions which do not legally involve the author. However, we shall not discuss here this purely terminological question, since this study deals with a law of copyright contract in the narrower sense, i.e. the concept of the "primary law of copyright contract".

b) Law of copyright contracts in the narrower sense: primary law of copyright contracts

(3) The law of copyright contracts in the narrower sense may be defined as that sector of the law on copyright contracts in which the authors as creators of the works concerned

are themselves parties to the contracts concerned. This study will therefore not consider contracts in which both parties are enterprises of the media or culture industry. The study is thus concerned with the contracts concluded by all kinds of authors (writers, journalists and other authors of texts, composers, painters and other artists) with their primary contractual partners, the primary exploiters or intermediaries (such as book, newspaper and magazine publishers, music publishers, play publishers or play agencies, broadcasting organisations, film makers or gallery owners, etc.). The narrower sphere of the law of copyright contracts so described will be called "primary law of copyright contracts" in this paper, since all other contracts regarding rights in protected works derive as a rule[35] from this initial (primary) contractual and exploitation relationship.

(4) Insofar as the copyright legislation of the Member States of the European Community (in particular Denmark, Federal Republic of Germany, France, Greece and Italy) contains any more or less detailed provisions at all for one or more sectors of the law of copyright contracts[36], their wording shows quite clearly that they are concerned with the primary relationship between the author and his immediate contractual partner. This is apparent from the very fact that the relevant provisions speak mainly or almost exclusively of the "author" or of the "Verfasser" (author, writer, composer) in the German Law on Publishing Contracts[37] when designating the person who assigns or grants

the rights in protected works. This clearly shows the protective purpose of these provisions, even if at times[38] the law itself lays down that the provisions enacted primarily for relations between authors and their contractual partners in the culture industry also apply to contracts to which someone else is a party instead of the author. We shall not deal here with the fact that copyright can be inherited and that as a general rule authors' heirs can be party to the conclusion of exploitation contracts.

c) The protective purpose of the provisions of primary law on copyright contracts

(5) From a point of view of legal doctrine, it is widely agreed that, with the exception of a few instances of often spectacular success (e.g. authors of best sellers), authors are as a rule the financially weakest parties who rely on the law for special protection, and that this is the very reason for the protective purpose of the rules (some of them mandatory) of the law of copyright contracts, although these still do not exist in all countries by any means[39]. For the purposes of this study of primary law of copyright contracts in the Member States of the European Community we shall assume the existence of such a special need of protection for the average author against his partners who are as a rule much better organised and in a far stronger financial position and the protective purpose of legislation on copyright contracts.

2. Further definitions

a) The law on collecting societies

(6) In a certain sense, the collecting societies also form part of the primary contractual partners of authors. They are often of vital importance to authors, at least in the field of music. From a purely theoretical viewpoint, it may be noted that relations between authors and collecting societies involve a real assignment of rights[40], albeit not in all countries. These relations are however as a rule of a trusteeship nature. Moreover, the collecting societies generally have no interest themselves in exploiting the works, but are concerned with concentrating and channelling the common interests of authors (and other owners of rights). Theirs is rather the important function of intermediaries in those sectors of copyright exploitation in which individual safeguarding and individual conclusion of copyright contracts between the actual authors and users is quite impossible, does not make sense financially, is unpractical or simply not desired. The relationship between the authors and collecting societies (administration contract) is only a minor part of the law on collecting societies from an objective viewpoint, although the extent to which this has been dealt with in legislation varies in the individual Member States of the European Community[41]. Any

adjustments that may be necessary to the relations between authors and collecting societies can also be considered only in the general context of the law on collecting societies.

(7) This study is not however concerned either with this general structure or the sector (administration contract) of the law on collecting societies. This does not of course prevent the proposed reforms mentioned later from being based on models or formulations from the sector of the law on collecting societies, especially where there exist models for arrangements for blanket agreements, and procedures for arbitration or control of remuneration. Such references are also justified by the fact that the lines of demarcation between collecting societies and professional organisations of authors are often fluid, especially when all members of the relevant collecting society are authors. Examples of such fluidity of demarcation are the "Société des Gens de Lettres" and the "Société des Auteurs et Compositeurs Dramatiques"[42], collecting societies which operate in France; the former places most emphasis on the professional association aspect, whereas the latter is a true collecting society. There is however good reason why the subtle interplay between collecting societies, theatrical undertakings and playwrights, as developed by the latter society[43], will be analysed later in this study in view of its model character[44].

b) The law of contracts of employed authors

(8) The relations between employed authors and their private or official employers constitute a particular problem in the sector of the primary law of copyright contract, especially when the creation of copyright works is wholly or partly the private or official duty of the author. Because of the very wide range of copyright works involved (including those known as the "small change" of copyright), such relationships may be found (perhaps even to a greater extent than in the sector of freelance authors) in absolutely all spheres of industry, administration or education.

(9) It cannot be claimed that the special problems of employed authors have been solved satisfactorily everywhere. If possible, legislators are even more hesitant in this field than elsewhere. The legal aspect of the inclusion of an author's original creation in an official or other employment contract is however so cogent that this group of problems deserves special attention, as is also indicated by the studies that continue to be devoted to the subject[45]. The subject of the law of contracts of employed authors will therefore be largely excluded from this study.

(10) It must nevertheless be recognised that the harmonisation of primary law of copyright contracts and labour law recommended by this study also leads at least structurally to a harmonisation of the relations between

freelance authors and the primary exploiters of their work on the one hand, and employed authors and their employers on the other. Practice (especially in the case of broadcasting organisations) has also shown[46] that it is often very difficult to draw a line between employed and "freelance" authors. There is nevertheless an important difference between these two types of authors, in that the employed authors and their associations (trade unions) are legally entitled in principle to avail themselves of the provisions of labour law to solve a number of their problems. This does not alter the fact that too little use is probably made of this channel in actual fact. However, as far as freelance authors are concerned proof that such channels are open to them is still needed in theory and in practice. Although on the one hand it is necessary to deal separately with the two spheres, the reference to certain models from the field of collective labour law (also recommended by this study) undoubtedly provides a basis for harmonisation on the other.

II. The hesitance of legislators in regulating primary law of copyright contract

1. Arrangements to date

a) General review

(11) The study "Copyright Law in the European Community"[47] already contained a general

review of legislation on copyright contracts in the Member States of the European Communities. This showed that countries can be divided into two groups. Firstly there are the countries which regulate in greater or lesser detail not only the principles of primary law of copyright contract but also individual types of contracts (Denmark, Federal Republic of Germany, France, Greece and Italy), and secondly the countries whose arrangements are very rudimentary and contain no specific provisions for types of law of copyright contract (Belgium, Luxembourg, the Netherlands, the United Kingdom and the Republic of Ireland). The more detailed analysis of the relevant legislation effected in the course of the study shows that the situation varies. This also applies especially to the fundamental question of whether the contractual provisions of copyright laws should be purely of an optional nature, i.e. be capable of modification by contract, or whether they should be mandatory and incapable of being contractually modified, at least to the disadvantage of the author. The fact that purely optional provisions generally provide an ineffective degree of legal protection is shown most clearly in the case of entire (optional) sets of rules, e.g. in the 1901 German Publishing Law[48]. It can in fact be justifiably asserted that this law's picture of something like the normal situation between authors and publishers no longer applies even as regards publishing contracts for literary works, in view of the ever-increasing significance of the exploitation of secondary rights.

(12) In the case of works of music (or of "Tonkunst", as sec. 1

of the German law calls it), to which the German publishing law was also intended to apply, the gap between law and practice has become so great that not even the basic principles of the law now seem appropriate, least of all as regards "light music". The underlying reasons for this are not only the fact that when the law was promulgated the system of musical collecting societies (GEMA) was still in its infancy, but also that the supposed role of the music publisher at the beginning of this century as someone concerned mainly with distributing printed music (édition papier), has nothing in common with the present activities of music publishers. Insofar as the publication of musical scores still continues, it is no longer the main activity of music publishers, but only a means of achieving as comprehensive as possible a third-party exploitation of the piece of music by all kinds of public reproductions, including the particularly important means of broadcasting, and by means of the manufacture and distribution of phonograms. It is thus easy to understand that there are far-reaching differences of opinion regarding the true role of music publishers[49] in view of this outdated legislation.

b) Prevalence of book publishing contracts

(13) The result of developments in Germany has been that the German Publishing Law, the only special legislation devoted to a given type of copyright contract, can now (albeit only with serious reservations)

serve as model legislation for book publishing contracts. The situation is similar in the other countries of the European Community, insofar as they make any special legislative provisions at all regarding the law of copyright contract. It is true that Denmark, France and Italy have rudimentary provisions for performing contracts as well as legislation on publishing contracts. From a purely quantitative viewpoint, however, the main emphasis is placed in these countries on the law of publishing contracts, which despite its general nature is still based essentially on book publishing contracts. Thus in France the ill-considered application by the courts to contracts for music publishing of the largely mandatory provisions of the publishing contract has led to much controversy[50]. An attempt was however made in the French preliminary draft laws[51] to include besides book publishing contracts specific provisions for music publishing contracts, the making of films, and the publishing of works of fine and applied art, doubtless on the correct assumption that legislation based too closely on a given model would be difficult to apply to the other spheres. The fact that legislation on book publishing contracts prevails in those countries that have introduced any legal provisions at all regarding the law of copyright contract is further proof of the fact that legislators can obviously not be expected to produce systematic and balanced legislation dealing with all major types of primary copyright contracts.

2. Possible reasons why legislators hesitate

a) The complexity of the subject matter

(14) We have already mentioned the hesitance of legislators in tackling specific rules in the field of the law of copyright contracts, by calling attention to the unfulfilled promises of reform in the Federal Republic of Germany and the draft legislation on publishing contracts in the Netherlands[52]. Further proof is clearly supplied by the fact (already mentioned) that French legislators did not approve certain draft laws dealing with specific aspects of publishing contracts in the widest sense. Similarly, attempts made in Italy to revise legislation on publishing contracts have so far proved unsuccessful since they began in 1974[53].

(15) What is the reason for the hesitance of legislators, which is naturally most marked in those countries which still have no well-developed legislation on copyright contracts? The answer to this question probably lies in the first place in the great complexity and economic dynamism of the subject matter. ~~Since~~ Any legislation that goes beyond general principles very soon risks becoming outdated. This is a consequence of the internal structure of the law on copyright contracts, which one might, in the light of what Boytha[54] says, call the "dynamic part" of copyright law, as opposed to the "static part" that is basically concerned with granting copyright protection. Modern technological developments

give legislators sufficient headaches in this static area alone, as witness the numerous problems of such things as reprography, private taping and video-recording, cable and satellite television, etc. Any modern legislation that wishes to do more than lay down general principles and really wishes to achieve the necessary (minimum) protection of freelance authors, especially as regards the all-important question of remuneration, very soon encounters legal difficulties because of the diversity of social reality in the sphere of the media and culture industry.

b) Indecisiveness in evaluating interests, especially the question of remuneration

(16) The answer to the question of the hesistance of legislators probably lies largely in a kind of indecisiveness on their part. Legislators probably shrink from the basic decision as to the scope of protective provisions that should be included in legislation basically intended to protect authors in the sphere of primary copyright contract law, if the objective is really to be achieved. On the other hand, attempts at legislation to date show that purely optional rules can change little in actual circumstances in view of the actual economic conditions. It should not however be overlooked that even optional rules are quite capable of having a normative effect in monitoring the content of general conditions of contract and model contracts[55].

(17) The effects of the indecisiveness of legislators are however most clearly apparent in the matter of remuneration. The liberal professions (which do not include freelance authors, with the exception of the small group of entrepreneurs, and architects in particular) can at least as a rule take advantage of a scale of customary professional fees and charges laid down or approved by the State, which also serves to ensure a minimum remuneration[56]. Authors on the other hand are given no help at all by legislators in the matter of remuneration, at least as regards the absolute level of remuneration. It is however precisely remuneration that is in reality the central problem[57] in primary law of copyright contracts as far as freelance authors are concerned, even though authors' other interests, such as intellectual interests, should not be overlooked. There is however much to be said for the view that one cannot reasonably expect legislation to lay down such remuneration rules, with the result that the question of alternative types of solution becomes increasingly urgent.

c) Alternatives to legislative arrangements

(18) A number of countries of the European Community can already envisage solutions (unhampered by cartel law) capable of leading along the lines of "minimum terms agreements" to very concrete provisions in the field of collective contracts[58].

Although this avenue is already available, it will soon encounter its limits in those countries especially which lack help in law. Thus while it has been possible in the United Kingdom for authors' associations to conclude such minimum terms agreements with the broadcasting organisations, they have been unable to conclude really binding agreements with publishers[59]. It is thus apparent that the mere permissibility of such arrangements does not always imply a solution that would necessitate no action by the legislator. Hence the compensatory role of the legislator does not consist in seeking rules to regulate the content of types of contracts under the primary law of copyright contracts, but in providing through legislation opportunities and/or help in securing and bringing about agreements in the form of collective agreements and copyright remuneration contracts when it is established that such arrangements are not only permissible but also necessary.

III. Freelance authors compared with employees

1. The "personalisation" and "professionalisation" of the problems of the law of copyright contracts

(19) Modern answers to the problems raised by the primary law of copyright contracts cannot be given until the question of the conditions of the author's professional creation and its social

function has been clarified and answered. However, as the studies of Fohrbeck, Wiesand and Woltereck[60] have shown, this requires a better definition of the position of freelance authors in relation to employees. Since there is a danger of the conventional concept of copyright as intellectual property[61] or intangible property giving rise all too quickly to the natural idea of the negotiability of such property and hence to the abstract idea of the assignability of copyright, it is scarcely in a position to resolve the theoretical problems cited here. Such a solution calls instead for an approach which takes account of the person, the social role and the profession of the author.

(20) The obvious objection that an approach to the law of copyright contracts which is confined to the problems of freelance authors or those whose main profession is that of author is incompatible with the infinite scope and variety of the protected works, is not in keeping with social reality. The professionalisation of artistic creativity can be deduced from the names of the members of, or of those entitled to safeguarding by, the collecting societies, and even more from the names of the members of the professional associations of authors[62] which exist in almost all spheres and countries, albeit with different standards of organisation. It is after all only a matter of taking seriously this existing de facto "professionality" of artistic creativity and of providing appropriate solutions for the clearly identifiable groups needing protection. Such an

approach corresponds moreover to the international trend already apparent and already mentioned of making recommendations for improving the professional position of the authors themselves, rather than simply trying to improve copyright law, as in the (already mentioned) case of the 1976 UNESCO "Recommendations on the Legal Protection of Translators"[63], and the 1980 "Recommendation on the Status of the Artist"[64].

2. Employee or entrepreneur?

a) The study by Fohrbeck, Wiesand and Woltereck

(21) As already variously mentioned, the German authors Fohrbeck, Wiesand and Woltereck presented in 1976 under the title "Arbeitnehmer oder Unternehmer?" a study of "The Legal Situation of the Cultural Professions"[65]. It makes extensive reference to the findings of earlier sociological studies of the legal position of writers (Autorenreport)[66] and artists (Künstlerreport)[67]. It contains a wealth of legal data on the professional and social position of almost all the relevant cultural professions, including all manner of authors. One of the main results of the study is the authors' express demand for the more precise classification of the actual professional position of authors by reference to a system which goes beyond the conventional one of employees and entrepreneurs.

(22) This more precise classification results[68] in the professional group (hitherto simply described as "freelance")

of composers/lyricists/music arrangers being broken down into 8% of truly independent artists (comparable to entrepreneurs); 50% of economically dependent (comparable to employees); 30% of "disguised" employees; and 12% of artists who are in "reduced" economic circumstances or in need of social security. The figures are similar for the visual arts (painters, sculptors, experimental artists, etc.) and for the group of graphic designers and illustrators, of whom there is naturally a higher percentage (22%) of truly independent persons. "Altogether, some 10% of the independent artists can be compared to entrepreneurs"[69].

(23) Fohrbeck, Wiesand and Woltereck conclude from this breakdown[70] that the vast majority of independent artists are not in the professional position of members of the "real" liberal professions (lawyers, doctors, etc.) or even of entrepreneurs. These differences become even more marked - in the opinion of the above authors - when one considers the economic position of artists and "freelance contributors". The vast majority of "freelance contributors", which also includes the majority of freelance journalists and writers, cannot be correctly classified as "self-employed" from a social security standpoint, nor as "entrepreneurs" from the standpoint of turnover tax. Such classification involves unnecessary risks and burdens: inadequate social security cover and lack of labour-law safeguards, few opportunities for co-determination, assessability to turnover tax and in some cases even to trade tax. To these

risks and burdens mentioned by Fohrbeck, Wiesand and Woltereck must be added the fact that in the sphere of primary law of copyright contract, in which the free play of market forces very largely persists, there is hardly any guarantee of minimum conditions, even though in practice certain "rules of thumb" are generally used[71]. A particularly flagrant example of this lack of minimum protection is the case of literary translators[72], who are grossly underpaid by the exploiters. We have already mentioned[73] that authors, unlike the "true" members of the liberal professions (with the exception of architects) cannot avail themselves of a system of fees and charges.

b) Developments in the field of social law

(24) There have nevertheless been some moves in the field of social security in recent years as regards the risks and burdens to which the above authors have shown that freelance authors are subject. It is noteworthy that at least two major countries of the European Community, i.e. France and the Federal Republic of Germany, have reached certain conclusions for legislation regarding the "similarity to employees" of the majority of freelance authors and the resultant need for social security; we shall deal briefly with these conclusions.

aa) The French system

(25) After various, sometimes very fragmented

efforts, France promulgated a comprehensive law[74] in 1975 whereby almost all authors of literary and dramatic, musical and choreographic, audio-visual and cinematographic works as well as works of graphic and plastic art were brought into the social security scheme. With certain restrictions, they were deliberately and expressis verbis equated with employed persons. This is shown inter alia by the fact that in addition to the contributions paid by the insured persons, the law provides for an "employer's contribution" which is payable in the form of a levy by all natural and legal persons who or which distribute and exploit works from the relevant spheres of art[75].

(26) French law has also assimilated the income of authors to that of employees in the case of certain special matters, not least in the Copyright Law of 1957. This was also done in another law of 1957[76] regarding the partial exemption from attachment of authors' remunerations, and in art. 58 of the French Copyright Law in the event of insolvency of the publisher (privilège des auteurs). The theorists consider[77] that although the wording of this privilege makes it applicable to publishing contracts, it can be applied by analogy to copyright contracts.

bb) The German system

(27) In the Federal Republic of Germany, the

recently passed "Law on the Social Security of Independent Artists and Journalists"[78] provides in a similar manner for bringing artists and journalists generally into the social security scheme. Although some of the solutions provided by this law[79] have been hotly contested, it is interesting from our point of view in that it shows the trend that we have mentioned towards making the social security position of freelance artists and journalists the same as that of employed persons. Like the French, the German law provides in addition to payment of contributions by the insured persons, for what is more or less an employer's contribution to be paid by the culture industry as a whole. The preamble of the Government draft law[80] states inter alia: "Hence artists and journalists will - like employed persons - pay only half the contribution; the other half of the contribution will be paid by a social levy for artists and by a Federal grant". It is moreover of interest that according to this preamble the proposed arrangements appear to be the result of the studies mentioned earlier of the social position of authors (Autorenreport and Künstlerreport)[82].

(28) The proposed definitions in sec. 2 of this German law of the groups of persons concerned are of particular importance for the attempt made by us in this study to justify the general principle of placing freelance authors in a similar position to employed persons. Artists or journalists within the meaning of the law are defined as those who, not being only temporarily self-employed,

create, carry on or teach in the fields of music, the graphic or plastic arts, or who are engaged in publicity as writers, journalists or otherwise. However, the arrangement excludes persons who permanently employ someone engaged in a journalistic, or artistic activity, or who are registered craftsmen and subject to the Workmen's Insurance Law. Hence the employment of someone engaged in artistic, journalistic or publicity activity is regarded as in indication of an entrepreneurial activity of the employer, who can no longer be treated in the same way as en employed person.

(29) By these definitions and general provisions in the field of social security, the German and French legislators have created a concept of freelance authors who are comparable to employed persons which is also applicable to other spheres of law. It should however be noted that German legislators had already taken an important step in this direction in 1974 when, with a view to improving the contractual position of "persons supplying artistic, literary or journalistic services" they amended the law on Collective Pay Agreements[83] by introducing the concept of persons comparable to employed persons in respect of certain (artistic) activities. This already expressly conferred on a large part of this category of persons who received not less than one third of their total professional remuneration from a single enterprise and were economically dependent and in need of social security in the same way as employed persons, the right to conclude binding collective pay agreements within the meaning of

the law on Collective Pay Agreements. These provisions had the dual advantage of removing in advance the possibility of any objections from the point of view of cartel law against the conclusion of such binding agreements, and of providing a basis for a code of law of copyright contracts or of collective copyright pay agreements. When approving this amendment to the Law on Collective Agreements, the Bundestag also approved a resolution[84] requesting the Federal Government to propose (in respect of those self-employed journalists not covered by sec. 12(a) of the Law on Collective Pay Agreements "regulations enabling these groups to negotiate with their clients or clients' associations directives etc. regarding fees and social payments" and "to introduce supporting measures which take account of the special social position of all self-employed journalists and artists".

cc) Other countries of the European Community

(30) The two social security measures taken in France and Germany are cited as exemplary solutions in the study by Schulte[85].
We cannot deal in detail here with the extent to which comparable insurance provisions of social security law of such a comprehensive nature exist in the other countries of the European Community[86].
It should however be noted that in 1979[87] the Council of Europe recommended that the benefits of social security be extended to all those working in the artistic sector (travailleurs du secteur artistique). It should also be borne in mind when dealing in more detail with this matter that the

specific objections from the standpoint of cartel law to the permitting of binding collective agreements in the case of freelance authors are largely a peculiarity of the (possibly over-perfectionist) German legal theory in this context[88], but that on the other hand (as in the case of section 12(a) of the Law on Collective Pay Agreements) they sometimes result in special efforts by the legislators to ease the situation. No such legal objections seem to exist in the other countries (particularly in the United Kingdom, which has practically no legislation in the field of copyright contracts) with the result that relatively frequent use is made there of collective agreements, and that the conclusion of "minimum terms agreements" is common practice[89].

c) Repercussions on the law of copyright contracts

(31) It goes without saying that the justification in social law of a general concept of comparability of freelance authors with employed persons also has repercussions on the appreciation of the problems of the law of copyright contracts. Insofar as this concept has not (as already mentioned, e.g. in the United Kingdom) already resulted in a contractual practice, it leads in the long run to the possibility of making use (without theoretical objections) of individual and collective labour law in the continued development of the law of copyright contracts. In the Federal Republic of Germany this would mean (over and above the sector defined in sec. 12(a) of the Law on Collective Pay Agreements)

that the relevant provisions of the Law on Collective Pay Agreements would be extended to the whole sphere of freelance authors classified in social security legislation as comparable to employed persons. We can thus pursue further the present author's reflexions[90] and say that the structural relationship between copyright and labour law is apparent in precisely this sphere, namely that of primary law of copyright contracts.

(32) Despite this structural relationship betwen labour law and primary law of copyright contracts, it is nevertheless necessary to stress the relative independence of both these spheres[91]. Paradoxically, the reason for this is that the freelance author has much greater need of protection than the employed person. In other words, simply allowing freelance authors to avail themselves of the law on collective agreements is a necessary but insufficient means of making a substantial improvement in their economic and contractual position. Unlike employed persons, they have only very limited scope (if any at all) for "taking industrial action"[92], so that in this particular case the concept of autonomy in negotiating rates of remuneration probably entails few consequences of major importance. This structural weakness that is apparent in freelance authors and their associations makes the compensatory intervention of the legislator inevitable in many cases, e.g. by introducing regulations on arbitration, etc. This is confirmed by the sometimes disenchanting experiences[93] of the opportunity created in the Federal Republic of Germany in 1974

of concluding collective copyright remuneration agreements[94] under sec. 12(a) of the Law on Collective Pay Agreements in quite an important area in which freelance authors who are comparable to employed persons are active. The fact that authors are generally left to their own devices in persuading national legislators to introduce reforms in this sphere because in this field - unlike that of the reform of substantive copyright law - they can expect opposition rather than support from the ranks of the primary exploiters, should not prevent legislators, in view of both their social and cultural responsibilities, from exercising their compensatory function as described here. What is required here is a "positive gesture" from national legislators which, in view of the remarks made at the end of this study on the relationship between copyright law and European Community law[95], is a gesture that the European institutions might also be asked to make.

A. The "General Part" of the primary law of copyright contracts

I. Distinction between the "General Part" and "Special Part" of the primary law of copyright contracts

(33) Ideas on an appropriate legislative structure of the primary law of copyright contracts that takes account of the protection requirements of freelance authors in the modern welfare and cultural state, must be based on what has already been achieved. Thus a list is needed of what has been done by way of the law of copyright contracts in the Member States of the European Community. A line can be drawn between the "general part" of the law of copyright contracts and the "special part", i.e. those provisions devoted to individual types of contracts. The "special part" of the legislation encountered consists essentially only of regulations governing publishing contracts and performing contracts, and a very few other provisions covering cinematographic film making and broadcasting contracts. On the other hand, the "general part" of the legislation on copyright contracts applies in principle to all copyright contracts, although in certain cases its provisions are obviously designed for types of contracts belonging to the "special part" of the law on copyright contracts[96].

(34) Of the Member States of the European Community, only Denmark, the Federal Republic of Germany, France, Greece and Italy have provisions which belong to the "special part" of the law on copyright contracts and relate to individual types of copyright contracts. In the case of the Netherlands, the only comparative material available is a 1972 draft law on publication contracts[97], which we have included in our comparison. Consequently, the attempts made by legislators in these countries to regulate publishing contracts, performing contracts, and aspects of cinematographic film making contracts and of broadcasting contracts, must also be examined to see whether any useful purpose would be served by legislating on these lines in view of current criteria for legislative efficiency in the sphere of primary law of copyright contracts, i.e. whether such arrangements really bring authors any closer to the objective of balanced relationships with an opposite party who is as a rule in a stronger financial position. This in turn is only the case if it is possible to guarantee a minimum standard of remuneration which, bearing in mind the market rules that also operate in this sphere[98], does not completely ignore the function of an author's remuneration to guarantee his pay and maintenance.

(35) A "general part" of the law on copyright contracts is to be found in the legislation of almost all Member States of the European Community, albeit sometimes in a very rudimentary form confined in extreme cases to the provision that copyright is assignable "because it is a chattel"[99]. Other

countries' legislation, especially that of Denmark, France and the Federal Republic of Germany contains a relatively well developed "general part" of the law of copyright contracts, which is also outstanding from a technical point of view and in some cases exhibits a strong tendency towards author-protection. This legislation devotes particular attention to questions of the limits of assignability of copyright, the form of copyright contracts, their formulation and interpretation, in particular the "principle of assignment for a (given) purpose" or the principle of specification[100]. The permissibility of secondary assignment and possibilities of terminating or subsequently correcting copyright contracts are also touched on. Not least, the extent to which national legislators have or have not promulgated direct or indirect rules in respect of the crucial matter of remuneration must also be considered.

II. The "general part" of the primary law of copyright contracts in the legislation of the individual countries

1. Belgium

(36) The 1886 Belgian Copyright Law (Belgian CL) which contains no special provision for the law of copyright contract, belongs as regards the general part of law on copyright contracts to the group of legislative provisions that are confined to a minimum[101]. The only provisions that can be said to be relevant here are secs. 3 and 19 of the Belgian CL. According to

sec. 3 copyright is a chattel and hence assignable or transferable wholly or in part in accordance with the Civil Code. Sec. 19 of the Belgian CL contains the rule (generally accepted nowadays for purely theoretical reasons) that the assignment of a work of art does not imply transfer of the right to copy the work (principle of separation of ownership of the work and copyright in the work as intangible property)[102].

(37) With these minimal provisions the Belgian CL is today scarcely in a position, despite its occasionally stressed flexibility[103], to guarantee adequate minimum protection for freelance authors in the context of copyright contracts. In particular, the permanent transfer of copyright, which the law does not preclude, but which has today been largely restrained in such other countries as the Federal Republic of Germany and France, is a danger in particular for young freelance authors just embarking upon a professional career, which is why van Isacker[104] recommends that the assignability (cessibiliteit) of exploitation rights should be abolished. It is true that even in Belgium authors are safeguarded from making unduly rash contractual concessions by the fact that Belgian legal theory and practice tend to follow closely the French model and where possible to interpret copyright contracts as favourably for the author and as restrictively as possible[105]. This applies for instance to the assumption in general civil law that copyright contracts are contracts intuitu personae[106], thus entailing certain restrictions on the

reassignment of rights[107].

2. Denmark

(38) Chapter III of the 1961 Danish Copyright Law (Danish CL) contains general provisions on "the transfer of copyright to others", followed by special provisions regarding performing contracts, publishing contracts and cinematographic film making contracts. It can easily be seen from the Danish law why we have divided primary law of copyrights contracts into a "general part" and a "special part". We shall not however discuss here the provisions of Danish law on the inheritance of copyright and its restricted attachability (secs.30 and 31, Danish CL). Hence secs. 27 to 29 of the Danish CL belong to the "general part" of the law of copyright contracts. It should be noted in this context that sec. 29 of the Danish CL was repealed in 1975 for formal reasons, and replaced without loss of content by sec. 36 of the general Law of Contract[108], which also applies inter alia to copyright contracts[109].

(39) Sec. 27 of the Danish CL also establishes in the first place the general principle that authors may assign wholly or in part their right of disposal of the work. The law nevertheless restricts this assignability in view of sec. 3 of the Danish CL, i.e. from the standpoint of droit moral. Mention should be made first of all of the author's right to be named

and to require that no alterations be made that would be prejudicial to his reputation. Sec. 3(2) of the Danish CL does not permit authors to relinquish these moral rights, except if "the nature and scope of the use of the work be limited". Sec. 28 of the Danish CL also provides that except if otherwise agreed, the assignment of copyright does not entitle the assignee to alter the work[110]. Thus the contractual protection of the author's moral right extends beyond the absolute protection granted by section 3.

(40) Like the Belgian CL, sec. 27(1), second sentence, of the Danish CL contains the principle (now taken for granted) of separation of property right and copyright, providing that the assignment of copies of works does not imply the assignment of copyright in the work. However, a more important and fundamental point for a modern solution of the "general part" of the law of copyright contracts is the interpretation rule in sec. 27(1), third sentence, of the Danish CL, that if the author has assigned to another the right to make the work available to the public in a specific manner or by specific means, such assignment does not entitle the assignee to do this in another manner or by another means. This principle is a special development of the "speciality principle"[111] which is also enshrined in the legislation of other countries and in its general form requires that every aspect of copyright that is to be assigned to the assignee must be specifically named in the contract.

(41) Sec. 28(2) of the Danish CL contains

another principle of importance to a modern regulation of the primary law of copyright contract, namely that the assignee of copyright cannot reassign the same without the author's consent, except where such copyright forms an integral part of a (business) undertaking or part thereof, and is assigned together with the same[112]. However, the original assignee of the right remains responsible for the performance of the contract with the author.

(42) Special importance attaches to one of the few provisions of Danish law on the "general part" of the law of copyright contract. This concept appeared initially in sec. 29 of the Danish CL, but now appears in the new version of sec. 36 of the general Law of Contract[113], and provides that a (copyright) contract may be set aside wholly or in part if it is inequitable or if it would be contrary to equitable commercial practice to treat it as valid. (The original wording of sec. 29 - repealed in 1975 - of the Danish CL provided on very similar lines that a contract for the assignment of the right to dispose of a work may be set aside wholly or in part if it proves that this will lead to manifestly inequitable results. The same was to apply if conditions were agreed for the right to dispose of the work which were contrary to good usage in the sphere of copyright.[114]) When reaching its decision on the "setting aside" of the contract, the court must take account pursuant to sec. 36(2) of the Law of Contract of the circumstances prevailing when the contract was concluded, its content, and circumstances occuring later[115]. Although there is as yet no case law on this

legislation[116], one must agree with Weincke[117] when he says that it has a certain preventive effect. One may however doubt whether this opportunity for no more than a subsequent correction of the conditions of contract really satisfies the current need of authors for balanced relationships which meet certain minimum criteria, inter alia in matters of remuneration. It must of course be borne in mind in this context that since the introduction in 1947 of the Scandinavian "standard form of contract" for publishing contracts for literary works in Denmark and the rest of Scandinavia[118], there can be said to be a minimum standard (also applicable to remuneration) in this sphere at least.

(43) Sec. 27(2) of the Danish CL should be mentioned as the latest provision of the "general part" of the Danish law of copyright contracts. The special feature of this provision is that it is not of a substantial nature. It provides on the contrary for contractual derogation from the provisions governing performing, publishing and cinematographic contracts, which are to be found only in the "special part" (secs. 32 - 42, Danish CL); this important ruling means that the relevant provisions are in fact optional. The only provision from which there can be no derogation to the disadvantage of the author is the duty placed on publishers by sec. 37 of the Danish CL to render accounts. Incidentally, it follows indirectly from sec. 27(2) of the Danish CL that, unless they specifically state otherwise, the few provisions of the "general part" are mandatory. Nevertheless, the specifically enacted non-mandatory nature of almost all requirements in the sphere of the

"special part" reveals a certain lack of decision on the part of Danish legislators, which (as already mentioned) is nevertheless offset in the sphere of publishing contracts by the use since 1947 of the standard Scandinavian contract.

3. Federal Republic of Germany

(44) Secs. 29 - 44 of the 1965 Federal German Copyright Law (German CL) contain relatively detailed provisions for the "general part" of the law of copyright contracts although, as already stated, the preamble of the Government bill of 1962[119] already declared the intention of "supplementing the new Copyright Law by a comprehensive Law of Copyright Contracts, which is intended to contain provisions in respect of all types of contract in the sphere of copyright". Meanwhile, the Publishing Law of 1901 (which is not covered by the German CL) still applies to publication contracts, which form the most important part of the primary law on copyright contracts.

(45) If one is to understand properly the relatively detailed overall German provisions as regards the "general part" of the law of copyright contracts, it must first of all be emphasised that the German CL has reached an important conclusion as regards the assignability of copyright from the monistic theory of copyright which prevails in the Federal Republic of Germany[120]. It proceeds on the assumption that (except in the case of the partition of an estate) copyright cannot be transferred inter vivos; this is expressly stated in sec. 29 of the German CL.

On this point, German legislation differs - at least structurally - from that in all other Member States of the European Community. It must however be borne in mind that the strong emphasis placed on droit moral and many other protective provisions in the "general part" of the law of copyright contracts in several Continental European countries (such as France and Italy, but also Denmark and the Netherlands) results in the practical effects of this structural difference being only slight, at any rate in relation to these countries. The position is however different in relation to the United Kingdom and the Republic of Ireland, where the principle of free assignability of copyright enshrined in the law is not curbed either by rules on droit moral or by special protective provisions of a contractual nature.

(46) The consequence of the fact that German copyright law does not permit the (total) transfer (assignment) of copyright is the rule on the granting (concession) of rights of utilisation in secs. 31 and 32 of the German CL. Only by granting utilisation rights can the author transfer the rights of exploitation deriving from copyright law to his contractual partners, the primary exploiters. The right of exploitation so granted can of course be transferred by the contractual partner to third parties, although as a rule this requires the author's consent pursuant to sec. 34 of the German CL. Grants by authors of utilisation rights may however be comprehensive in nature. For instance, the author may grant the right

to utilise the work in all possible ways; equally, he may restrict it to specific ways of utilisation. The utilisation right may be granted as a simple or an exclusive right (sec. 31(1) of the German CL). Moreover, this simple or exclusive utilisation right may or may not be subject to limitations of place, time or content (sec. 32, German CL); any desired combination of these limitations is permitted.

(47) If there were nothing more to the matter than these basic rules, authors would as a rule scarcely be protected from granting comprehensive utilisation rights, despite the structural form adopted by the German law. However, German legislation counters this possibility with a series of important provisions of copyright law. Sec. 44 lays down when interpreting the law the well-known presumption that in case of doubt the disposal of an original work shall not constitute the grant of rights of utilisation in the work.

(48) The most important provision of this nature, however, is undoubtedly the principle enshirened in sec. 31(5) of the German CL of the interpretation of contracts according to the basic purpose of the transfer or grant of the right (Zweckübertragungstheorie). According to this, the scope of the utilisation right is determined by the purpose for which its grant (in earlier law: transfer) was effected, if at the time of granting the utilisation right the types of utilisation to which the right was to extend were not stated in detail. This is in fact

a development of the principle of speciality set out in Danish law and also enshrined in particular in the law of France and Italy; in German law, this takes the form of an interpretative provision[121]. Its purpose is to encourage the contracting parties to clarify the modes of utilisation covered by the contract and to enshrine them in its text. If this is not done and the contract merely provides (e.g. by citing legal concepts) for the grant in a very general way of one or more utilisation rights, this interpretative provision determines the scope of the utilisation rights according to the purpose involved. This provision is also of importance for German law in that, with the exception of a certain type of contract relating to future works (sec. 40, German CL), it lays down no special form for copyright contracts, which need not even be in writing. Other laws (e.g. French, Italian, and in this instance British and Irish also) contain more stringent provisions on the form of copyright contracts, while only Danish law is similar to German law in this context.

(49) The important principle, designed to protect authors, of interpretation according to the purpose of the transfer (sec. 31(5), German CL) is a source of much uncertainty. In the first place, the fact that it is of an interpretative nature means that this provision cannot normally be brought to bear unless the contractual arrangements need to be interpreted. Hence this provision does not give authors complete protection against granting undue rights by means of prepared forms of contract placed before them for signature.

It can however be noted in the light of important decisions of the courts regarding in particular forms of audio-visual exploitation[122] that in some cases even very comprehensive forms of contract still say nothing about the actual scope of the rights granted. The question remains whether this still applies when numerous forms of utilisation are listed individually "just in case", when in fact the actual purpose of the contract concerns only some of them.

(50) Secs. 37 and 38 of the German CL contain more specific interpretative provisions, whereby in cases of doubt the author retains the right of adaptation when granting the right of utilisation, and the right of recording the work in the form of videograms or phonograms when granting the right of reproduction (sec. 37(1) and (2), German CL). On the other hand, sec. 38 of the German CL contains special provisions on contributions to collections, which strictly speaking no longer belong to the "general part" of copyright law. We shall return to this point later[123].

(51) Under sec. 40 of the German CL, contracts for future works which are either not specified at all or specified only by type, must be in writing; on the other hand (as already mentioned) German copyright law normally does not require copyright contracts to be in any specific form. Sec. 40 of the German CL shows moreover that apart from this requirement as to form, contracts for future works are indeed permitted, and need not even be in writing

if they relate to specific works that are described in detail. On the other hand, contracts required by sec. 40 to be in writing may be terminated by both contracting parties five years after conclusion of the contract; this right of termination may not be relinquished in advance. Unlike the granting of utilisation rights in future works, the granting of utilisation rights for forms of utilisation as yet unknown renders the contracts null and void under sec. 34(4) of the German CL.

(52) Like Danish legislation[124], sec. 34(1) of the German CL provides in the case of reassignment of utilisation rights that a utilisation right may be (re)assigned only with the author's consent, although the author may not withhold such consent contrary to good faith. Sec. 3 provides - as does the Danish law - for an exception in the case of assignment connected with the disposal of a business enterprise or part thereof. In this case, assignment does not require the author's consent. However, sec. 34(4) of the German CL specifically allows different arrangements with the author in both cases. In the event of lawful re-assignment (in one or the other way) of the utilisation right without the author's consent, the assignee of the right is also responsible under sec. 34(5) of the German CL for fulfilment of the obligations to the author.

(53) Probably one of the most important provisions for protecting authors is the granting to authors by sec. 41 of the German CL in the event

of the grant of an exclusive utilisation right, of a general right of revocation in the event of its non-utilisation. It is intended that authors who have granted the exclusive utilisation right for the whole of the relevant area should be able to revoke that right if it is not, or not sufficiently, exploited by the holder of the utilisation right[125]. This applies whether or not the author's contractual partner has contractually assumed (pursuant to the provisions of the Law on Publishing Contracts[126]) the duty to exercise the right. However, sec. 41 of the German CL lays down as a condition precedent for exercise of the right of revocation that the author's legitimate interests must be seriously prejudiced by such non-exercise, for which the author must not be to blame. The right of revocation may not be asserted until two years after the grant (or after delivery of the work); shorter periods apply to contributions to newspapers or magazines. In order to declare the contract revoked, the author must also as a general rule grant the holder of the utilisation right (who need not incidentally be his immediate contractual partner[127]) a suitable period of grace for the adequate exercise of the utilisation right. The right of revocation may not be relinquished in advance, nor may its exercise be precluded in advance for more than five years. On the other hand, the author is obliged to compensate the holder of the right, if and when equity so requires.

(54) We shall mention only briefly here the

right granted by sec. 42 of the German CL, as a consequence of the moral rights of authors, of the right of revocation by reason of change of opinion, which also may not be relinquished in advance. In this case however the author is required to compensate reasonably the holder of the utilisation right in every case[128]. No great practical importance has hitherto attached to this ruling. Sec. 39 of the German CL should also be regarded as an application of the moral right of authors which (like sec. 28(1) of the Danish CL) is supplementary to the basic principle of prohibition of distortion laid down in sec. 14 of the German CL. This provision prohibits the holder of a utilisation right (except if otherwise agreed) from making alterations to the work, except for alteration in respect of which the author cannot in good faith withhold his consent.

(55) A parallel to the provision now to be found in sec. 36 of the Danish Law of Contract (originally contained in sec. 29 of the Danish CL) in respect of the subsequent correction of inequitable conditions of contract[129] is to be found in sec. 36 of the German CL. Structurally, this provision takes the form of a right of alteration of contract that may if need be asserted in the courts[130]. It is intended to enable the author to have the contract amended if he has granted to another a utilisation right on such conditions that the agreed valuable consideration - taking into account all the relations existing between the author and his contractual partner - is grossly disproportionate to the true revenue resulting from utilisation of the work. Nor may this right to participation be relinquished in advance. The theoretical significance of this provision lies in

its being the only provision of the "general part" of the German law of copyright contracts that is directly relevant to the remuneration of authors. Although, like the principle enshrined in French and Italian copyright law of an author's proportional share in the proceeds of the exploitation of the work, it aims at giving the author a reasonable share in these proceeds, it differs from the latter provisions in that it achieves its aim only by the modification a posteriori of inequitable conditions of contract. The provision may be said to have a certain preventive effect, but it has been of little practical significance hitherto[131]. This is doubtless because it calls for action a posteriori by the author, who will in many cases find it difficult to produce proof. Hence this provision does not seem a very suitable means of helping authors to enforce reasonable conditions as regards remuneration in particular.

4. France

(56) Like the Danish CL, the 1957 French Copyright Law (French CL) is a complete Copyright Law inasmuch as besides the usual provisions of such legislation in the substantive part (granting of rights) it contains a section of the law of copyright contracts which is complete from a conceptual viewpoint at least. In particular, the French law has not only a "general part" dealing with the law of copyright contracts (chapter II of the law) but also a well-developed "special

part" (chapter III) on the law of copyright contracts. The "special part" confines itself in fact to dealing with performing contracts in the wider sense (including some rules on broadcasting contracts) and with publishing contracts in the wider sense. The first chapter of the law also contains some provisions on relations between authors and producers of cinematographic films[132]. Compared with the Danish legislation, the French is fuller and more detailed; it is more systematic and detailed than the structurally similar Italian legislation, at least as regards the "general part" of the law on copyright contracts.

(57) The key concepts of the French law on copyright contracts are the "droit de reproduction" and the "droit de représentation". These may be placed in the two main groups of exploitation rights described in sec. 15 of the German CL, namely the right to exploit the work in corporeal form on the one hand, and the right of public performance of the work in incorporeal form[133]. Unlike German law, which divides these types of exploitation of works into sub-categories and then defines them in secs. 16 et seq. of the German CL, secs. 26 - 29 of the French CL give only illustrative explanations of the two main groups of rights. However, these two key concepts form the link between the "general part" of the law of copyright contracts dealt with in secs. 26 to 42 of the French CL and the special provisions on the performing contract (contrat de représentation) in secs. 43 -

47 and on the publishing contract (contrat d'édition) in secs. 48 - 63 of the French CL. Despite the wide concept of the publishing contract underlying French legislation, the two parts are not fully covered[134]. Hence the provisions of the "general part" are of significance over and above the two types of contract covered by the "special part" of the French CL.

(58) The "general part" of the French law on copyright contracts is distinguished by the large number of mandatory provisions that have been promulgated in the public interest for the protection of authors, as stressed by Huguet[135] in particular. This does not however alter the fact that the law - as French legal theory also stresses[136] - exhibits drafting weaknesses and obvious inconsistencies, which can be dealt with only if interpretation of the law is harmonised. This is apparent, for instance, as regards the question of the limits of assignability of copyright and also as regards remuneration.

(59) As regards assignability, it must be stated first of all that French law, which is based on the dualistic view of copyright that prevails in France[137], starts in principle from the assumption of the assignability of copyright, or more precisely of its property rights; it differs in this way from the German law, but not from legislation in other countries. The law itself makes no mention of the assignment of copyright itself, but refers in various formulations

only to the assignment of authors' individual rights or powers, e.g. of the assignment of the "droit de représentation" and the "droit de reproduction" (sec. 30), of the "droit d'exploitation" (sec. 32), the "droits de l'auteur" (sec. 31) or the "droits sur son oeuvre" (sec. 35). In this way, the French provisions come relatively close to those of the German structure, which provides only for the granting of utilisation rights.

(60) There is however inconsistency regarding the question of assignability if one compares the provisions of sec. 35(1), first sentence, with those of sec. 30(2)-(4) and sec. 31(3) of the French CL[138]. According to sec. 35(1), first sentence, of that law, the assignment (cession) by the author of the rights in his work may be total or partial, from which one might be led to conclude that the author may assign all the exploitation rights in a work in a single deed. It is however difficult to reconcile the interpretation rules in sec. 30(2)-(4) with the rules of proof in sec. 31(3) of the French CL. This is easiest to do in the case of sec. 30(2)-(3) of the French CL, which provides that assignment of the "droit de représentation" does not include assignment of the "droit de reproduction" and vice versa. This presumably does not preclude the express simultaneous assignment (and hence in practice the total assignment) of copyright[139]. On the other hand, sec. 31(3) of the French CL makes the validity of the assignment of copyright dependent upon each of the assigned rights being specially

mentioned in the deed of assignment, and on the sphere of exploitation of the assigned rights being limited as regards scope, purpose, place and time. Moreover, sec. 30(4) of the French CL provides that in a contract for the total assignment of one of the two main rights (droit de représentation or droit de reproduction) the scope thereof is limited to the forms of exploitation set out in the contract. The two last-named provisions involve the "principle of speciality" which, as already mentioned[140], is akin as regards its protective aim, to the principle of assignment for a given purpose in German law (sec. 31(5), German CL).

(61) It should also be remembered that French law requires performing and publishing contracts and gratuitous permits for performances to be set out in writing pursuant to sec. 31(1) of the French CL, although according to French legal doctrine[141] failure to fulfil this requirement can be asserted only for the benefit of the author. In accordance with sec. 31(2) of the French CL, all other forms of copyright contracts are subject to the rules of evidence of secs. 1341 - 1348 of the Civil Code[142]. Mention should also be made of sec. 38 of the French CL, which provides that assignment of the right to exploit a work in a form that is not foreseeable or foreseen at the time of conclusion of the contract must be expressly formulated and provide for participation in the profits from such exploitation.

(62) The sometimes inconsistent interaction

of all these provisions probably means that a stereotyped, undetailed total assignment of all copyright in a work is hard to conceive, despite the very general provisions of sec. 35(1), first sentence, of the French CL. Finally, the "total assignment of future works" is expressly rendered null and void by sec. 33 of the French CL. It is true that French legal doctrine[143] considers the drafting of this provision defective because of its misleading wording - it speaks inter alia of "future works" rather than of rights in future works; it consequently gives rise to numerous questions of interpretation[144]. It must in fact be interpreted in the light of secs. 34 and 43(2) of the French CL, both of which restrict the prohibition in principle of the assignment of rights in future works. Sec. 34 contemplates the possibility of publishers being granted an optional right limited to five works or five years, in works of a clearly specified nature; sec. 43(2) of the French CL concerns the "general performing contract" (contrat général de représentation). Technically, neither of these provisions still belongs to the "general part" of the law on copyright contracts, although this is apparent only in respect of sec. 43(2) by reason of its position in the law. When one considers that the principle (generally accepted nowadays) of the separation of ownership of the work and copyright as incorporeal property is also enshrined in sec. 29 of the French CL, one sees just how unfortunate is the wording of sec. 33 of the French CL, which declares null and void the total assignment of "future works".

(63) Another marked inconsistency in the French legislation concerns the question of remuneration. On the one hand it provides that the "droit de représentation" and the "droit de reproduction" may be assigned with or without valuable consideration (sec. 30(1), French CL) and that permission for performances may even be granted without valuable consideration (sec. 31(1), second setence, French CL). There is thus no doubt that the legislator also wished to provide for the assignment of copyright without valuable consideration. On the other hand, however, sec. 35(1) of the French CL says that in the case of - total or partial - assignment of copyright, provision must be made for the author to participate proportionally in the proceeds of the sale or exploitation. The inconsistency between the posibility of the assignment of rights without valuable consideration and the principle of the proportional participation may probably be removed by stating that although there can be no doubt about the fundamental possibility of assignment without valuable consideration[145], this should nevertheless be regarded as an exception and be clearly established in every case. In all other cases the principle that applies is that of the valuable consideration in the form of a proportional share, albeit with the possibility of a lump-sum arrangement in the exceptional cases covered by secs. 35 and 36 of the French CL.

(64) Unlike that of most other countries (with the possible exception of Greece[146]), French legislation has made the question of remuneration one of its keystones by enshrining this principle - albeit not without exceptions - of a proportional share in a

positive form that applies in principle to all copyright contracts, although it goes well beyond the opportunities granted by Danish and German law[147] for inequitable contracts to be amended only a posteriori. (Incidentally, sec. 37 of the French CL also makes provision for such an opportunity of amendment a posteriori, but confines this to cases of lump-sum remuneration as exceptions to the principle of proportional shares.) The aim of this prescribed basic principle of the author's proportional sharing is undoubtedly to ensure that the remuneration of authors is better safeguarded than is normally the case in copyright laws.

(65) It must however be admitted that however important this French ruling may be in theory, it also has shortcomings. First of all, the law does not settle the question of minimum remuneration any more than do the other legislative provisions[148], with the result that - with the possible exception of flagrant cases of abuse[149] - even small proportional shares by authors (which result in the long run in equally small total remunerations) are sufficient to satisfy the letter of the law. It should also be noted that section 37 of the French CL, which provides for the modification a posteriori of the contract in the event of laesio enormis involving a loss of more than 7/12ths, is not in fact applicable to the proportional shares of authors.

(66) A further shortcoming of this ruling in principle lies in the many far-reaching exceptions

detailed in secs. 35 and 36 of the French CL. These exceptions provide for the possibility (not the obligation) of a system of lump-sum remuneration if it is impossible to detemine in practice the author's proportional remuneration; if there is no means of verification; if the method of calculation would be unduly costly; if the manner and terms of the exploitation make application of the rule of proportional shares impossible (if for instance the author's contribution is not a major element of the work concerned or is only of an accessory nature in respect of the object exploited). One consequence of the exceptions listed in sec. 35 of the Fench CL is that French legal doctrine[150] excludes the wide field of broadcasting contracts from the rule of proportional sharing.

(67) In addition to these general exceptions, sec. 36 of the French CL sets out other specific exceptions, particularly in the field of publishing, including - at least in the case of first editions and subject to the author's express consent - scientific and technical works, anthologies and encyclopaedias, forewords, introductions and the like, illustrations of works, luxury editions printed in limited numbers, prayer books, translations (at the translator's request), cheap popular editions and cheap children's books. It is difficult, particularly in the last-mentioned examples, to find justification for the exceptions[151], especially since the authors of such books (unlike scientific authors)

are as a rule freelance writers and depend for a living on reasonable earnings from the exploitation of the work. Lastly, sec. 36 of the French CL makes exceptions in cases of grants of rights to or from foreign countries and for authors (journalists) employed by newspapers and periodicals.

(68) Unlike the German legislation[152] the "general part" of the French law contains no general provisions on the question of reassignment of copyright by the contractual partner. This question is instead dealt with in connection with performing contracts in sec. 44(4) and with publishing contracts in sec. 62 of the French CL. As regards revocation by the author of rights granted, French legislation contemplates in its "general part" only the question of revocation by reason of change of opinion by the author. The structure of this formal concept in sec. 32 of the French CL is similar to the corresponding provision in sec. 42 of the German CL and is interpreted as part of the droit moral of authors[153]. Its effective exercise is dependent on the prior indemnification of the contractual partner. Other provisions regarding the droit moral of authors in respect of contracts are to be found only in the "special part", namely in sec. 47 (performing contracts) and sec. 56 of the French CL (publishing contracts). In such cases one can manage[154] by interpreting as general principles of law the provisions relating to performing contracts and to broadcasting contracts,

and applying them to all copyright contracts. Technically, one would expect to find them in the "general part".

5. Greece

(69) Copyright in Greece is regulated essentially by law No. 2387/1920 "on intellectual property". However, this contains only a few very rudimentary provisions on the "general part" of the law of copyright contracts. Thus it is provided at the end of sec. 1 of this law that authors may assign to third parties their exclusive rights for publication, reproduction and public performance. Sec. 8 of the law also enshrines the principle (nowadays taken for granted) of the separation of ownership of a work of plastic art (or an original manuscript) and copyright in the work as intellectual property.

(70) The law also contains - though in less systematic fashion, with some degree of confusion with the provisions regarding limitations of copyright for the benefit of the public - a number of provisions which refer to the law of copyright contracts; but it is hard to decide whether these belong to the "general part" or the "special part" of the law on copyright contracts. This is true of sec. 9(1) of the law, which requires the author's written permission for the transfer of extracts from

works, pictures or drawings of others, and for the public reproduction of works (in particular of theatrical, musical and cinematographic works). Consequently, the law calls for written contracts in a wide sphere of performing contracts in the widest sense (contracts for the public reproduction of works)[155]. Sec. 9(4)-(6) of this law provides for the possibility of prosecution in the event of non-compliance with these provisions. Sec. 15 of the law, which applies to all copyright contracts, deals with the droit moral of authors insofar as it provides that the assignee of copyright may not alter the work without the author's consent.

(71) The provisions of secs. 11 and 12 of the law regarding publishing contracts clearly belong to the "special part" of the law of copyright contracts, but are of little general interest[156]. Like the main law, Law No. 3483/1909 on the rights of authors of dramatic works also belongs to the "special part". Remarkably, this law contains very specific provisions for minimum rates in the case of theatrical performance contracts; it is supplemented by Law No. 988/1943. We shall return to these provisions later[157]. Reference should also be made to regulation No. 619/1941, which contains a system of copyright royalties for the performance of musical works in cinemas, and to Law No. 3188/1955, which contains a number of provisions on broadcasting contracts, including several provisions for royalties for repeat broadcasts. We can thus state here and now that Greece is to date the only one of the ten Member States of the European Community not

to shrink from laying down in the "special part" of its law of copyright contracts compulsory rates of remuneration, expressed as percentages, which are directly applicable to theatrical, cinematographic and broadcasting contracts. The effects of these provisions certainly extend beyond the general principle of authors' proportional shares that is enshrined in French law.

6. United Kingdom and Republic of Ireland

(72) The general study on "Copyright Law in the European Community"[158] has already shown that the copyright laws of the United Kingdom and the Republic of Ireland which are more or less identical and can therefore be dealt with together, contain no special provisions for individual types of copyright contracts. Hence the "special part" of the law on copyright contracts is entirely lacking in these countries. There are however certain provisions that may be said to belong to a "general part" of the law of copyright contracts. Thus the two copyright laws contain a series of provisions on copyright assignment and licensing. The distinction between copyright assignment and licensing plays an important role in this context. Under the provisions for exclusive licences, for instance, exclusive licensees require the special permission of the courts to take legal proceedings for copyright infringements (sec. 19(3), British CL; sec. 25(1) Irish CL), although in principle the same rights are vested in exclusive licensees as in assignees of copyright in the event

of infringement of copyright in the area covered by the licence (sec. 19(2), British CL; sec. 25(2), Irish CL). This must however be open to a number of objections by reason of the possibility that both the licensor and the exclusive licensee may simultaneously have claims for infringement. Both the British and Irish legislators have exercised particular care in dealing with the questions that arise in this context (sec. 19(4)-(8) British, sec. 25(5)-(9) Irish CL). According to English legal doctrine[159] this provision already gives privileged treatment to exclusive licensees, which presupposes that the requirements as to form were complied with when the exclusive licence was granted. There also exists the possibility of the informal granting of simple or exclusive licences[160], which does not entail these privileges as regards prosecutions.

(73) The grant of a provileged exclusive licence in writing amounts to much the same as the restricted assignment of the right in the relevant sphere, as is also apparent from the fact that this requirement of written form is also prescribed for the assignment of copyright (secs. 19(9) and 36 British, secs. 25(10) and 47(3) Irish CL). This requirement of written form both for the assignment of copyright and the grant of a privileged exclusive licence is probably the most important of the protective provisions forming the "general part" of the law of copyright contracts. Such

a protective provision may also be seen in the fact that copyright may be assigned totally or partially, a possibility which exists alongside that already described of the grant of simple or exclusive licences (sec. 36 British, sec. 47 Irish CL). The legislators devote particular attention to the partial assignment of copyright (sec. 36(2) British, sec. 47(2) Irish CL) in terms of content, place (territory) and time, while permitting any desired combinations of such restricted assignements[161]. The British/Irish system is closely related to that laid down in sec. 32 of the German CL[162], although it should be noted that German law contemplates only the grant of utilisation rights and does not differentiate between (partial) assignments and (simple or exclusive) licences.

(74) Other provisions of British/Irish law are less concerned with protecting the interests of authors than with upholding those of legal transactions generally. These include provisions about the possibility of good faith on the part of a copyright assignee in respect of licences previously granted by a copyright owner (sec. 36(4) British, sec. 47(4) Irish CL) which does not exist in the other countries; the possibility of copyright assignees (even several at a time) taking proceedings in their own right (sec. 49(5) British, 3(5) Irish CL); and the protection from complaints of infringement for persons whose title derives from licensees (sec. 49(7) British, sec. 3(7)

Irish CL). The provisions of sec. 37 English/sec. 49 Irish CL show that it is perfectly possible in British/Irish law for rights in future works or in future legal possibilities of utilisation to be assigned; the rules governing the time of acquisistion of the future copyright are however more favourable to assignees than to authors[163].

(75) Despite the great freedom we have mentioned as regards the formulation of contracts for the assignment of rights and the grant of licences, which make it possible in theory to tailor such contracts exactly to the required purpose, it should be stressed that, unlike that of most of the other countries, British/Irish law does indeed permit the unrestricted total assignment of copyright, without protecting the author in any way by provisions of droit moral of authors or special interpretation clauses. In recent years however, the courts[164] have indicated that unduly one-sided arrangements which favour the author's contractual partner only and contain copyright arrangements which place only the author under an obligation - specifically in the field of music publishing - are "muzzling" contracts which are unfair and may be null and void.

(76) It should moreover be mentioned that when the British Copyright Act 1956 was passed, the transitional provisions (Seventh Schedule, para. 28(3)) respecting contracts concluded before the effective date of this Act maintained the provisions of the old Copyright Act 1911 regarding the automatic

reversion of assigned copyright to the author's heirs[165]. According to sec. 5(2) of the 1911 Act, this reversion occurs (as provided in para. 6 of the Eighth Schedule to the 1956 Act) 25 years after the author's death: in other words, the assignment of copyright cannot be extended in respect of cases covered by the 1956 Act for more than 25 years after the author's death, despite a protection period of 50 years post mortem auctoris. This provision was intended to benefit the next-of-kin of the author, who were often left without means[166]. Although rarely applied for a long time, this provision has recently (and surprisingly) been the source of renewed interest[167], but it must be borne in mind that in view of the lengthy protection periods in copyright law, many thousands of copyright assignments continue to be affected by this provision, despite its transitional character[168]. The unilateral preference given to the heirs is undoubtedly a shortcoming of this provision, since it would seem nowadays that it is rather the author himself who needs to be protected against unduly lengthy assignments. Nevertheless, this basic concept of a statutory time limit on copyright assignments deserves to be considered in the context of the discussion of modern solutions of the primary law of copyright contracts. It can be compared with the limits placed by Italian legislation, which we shall discuss later[169], on publishing contracts, which may not be concluded for more than 20 years. This Italian arrangement, which has a far-reaching protective effect for authors, has scarcely

any counterpart in the copyright law of any other Member State of the European Community, if we ignore the British transitional provisions just discussed. Much more lenient provisions on the subject are to be found in laws already discussed (sec. 29 Danish, sec. 36 German and sec. 37 French CL), which permit copyright contracts to be amended only a posteriori in certain conditions. The possibility generally granted by sec. 41 of the German CL of revoking exclusive utilisation rights in the event of non-utilisation by the contractual partner[170] may also be mentioned by way of comparison. Although this provision sets relatively short time limits, it does not work automatically at all and moreover exposes the author to a claim for compensation. This is why the possibility of the law providing for the automatic revocation of copyright grants after a reasonable period (e.g. 20 years as in Italian law) might well be considered as a basis for modern provisions of primary law of copyright contract.

(77) The "general part" of the British and Irish law of copyright contracts does not seem to be very well developed as regards the protection of authors. To complete this picture, however, mention must be made at least in outline of the fact that authors' associations and unions in the United Kingdom have been able, despite the fact that the law does not favour them unduly, in some cases to conclude surprisingly far-reaching collective "minimum terms" agreements[171]. This is the case, for instance, in fields that British/Irish copyright

law has hitherto hardly covered, e.g. the law of droit moral[172]. The sometimes extremely detailed contracts concluded between the authors of cinematographic films (script writers) and film producers regarding names to be included in "credits" (Screen-writing Credits Agreement) show very clearly the comprehensive manner in which statutory provisions can be supplemented or even replaced by collective agreements even in respect of very difficult matters. The problem then boils down in the last resort to the question of what legislators propose to do if authors are unable to conclude such collective agreements in certain spheres. Incidentally, the British example cited also shows that the results of a purely affirmative comparison of the solutions contained in the laws themselves cannot be regarded as entirely authoritative. This is also the reason for the limitations inherent in this comparative study, as stressed in the foreword.

7. Italy

(78) Italian legislation on copyright contracts shows on the one hand that it is closely related to Danish and French law. The 1941 Italian Copyright Law (Italian CL) can also be described as a complete solution, since its Chapter III contains provisions belonging both to a "general part" and to a "special part" of the law of copyright contracts. Like the French, the Italian legislation confines itself to publishing

and performing contracts in the wider sense. Nevertheless, the Italian (like French and German legislation) contains, in addition to provisions on the law of contracts, a series of provisions on the relationship of the authors of films to the makers of cinematographic films (sec. 44 et seq., Italian CL). It also contains elsewhere provisions on broadcasting contracts (sec. 51 et seq., Italian CL), several special provisions on newspapers and other compilations of works (sec. 38 et seq., Italian CL) and several provisions of contract law concerning authors' rights in respect of mechanical recordings of their works. Despite the (partial) recapitulation of the law of copyright contracts in Chapter III, the law suffers from some degree of fragmentation and lack of system.

(79) Sec. 107 of the Italian CL contains the basic provision of the "general part" of the law of copyright contracts. It provides that the author's exploitation rights in intellectual works may be acquired, disposed of and assigned in all the forms and manners provided for by law, subject to the special provisions of the law on copyright contracts. Apart from this basic provision, and contrary to the relatively detailed provisions of German and French legislation, the "general part" of the Italian law on copyright contracts is not very well developed. Mention should be made firstly of the principle, now taken for granted, of separation of ownership of the work and copyright in the work as intellectual property, which is also enshrined in sec. 109 of the Italian law. However, Italian law provides

for a restriction of this principle of separation in the case of printing plates and other means of reproduction, because in this case the right of reproduction passes (except if otherwise provided) to the person acquiring the plates and suchlike. Mention should also be made of sec. 110 of the Italian CL, which is of importance because of its objective of protecting authors and which requires proof of assignment of exploitation rights to be set out in writing. The remaining provisions of the law (secs. 111 - 114, Italian CL) are however of no significance for our study. They concern matters of the capacity of young authors to contract, the attachability of exploitation rights and the possibility of expropriation of copyright in the public interest.

(80) Another important provision which for our purposes also belongs to the "general part" of the law of copyright contracts appears in sec. 19 of the Italian CL in connection with the content of exclusive exploitation rights. These are declared independent of one another. The exercise of one does not preclude the exclusive exercise of another. In this manner Italian legislation establishes the principle of partial assignment of copyright and lays the foundations (albeit only in relation to publishing contracts) for the principle of speciality (sec. 119(4)-(5), Italian CL). It provides that, except if expressly otherwise agreed, assignment of the main right does not include adaptation or other secondary rights, even if they belong to the same category of utilisation rights,

except if they are "necessarily dependent upon the right assigned".

(81) According to Italian legal doctrine[173], not only the provisions of sec. 119 of the Italian CL, but also a series of other provisions in the section on publishing contracts may also be applied to other copyright contracts, so supplementing the rather summary "general part" of the law of copyright contracts. These include for example the provisions on the inadmissibility of assignment of exploitation rights deriving from legislation not yet in force (sec. 119(3), Italian CL), and the widely differing provisions of sec. 120 of the Italian CL regarding future works. This section provides that in any event the assignment of rights in all works or categories of works without limit of time is null and void; it sets a maximum term of 10 years for the assignment of rights in works that have not yet been created.

(82) Another provision that might be generalised is that of sec. 130 of the Italian CL, which lays down the principle of participation by the author. Like French law[174], it certainly does not propose to exclude the assignment without valuable consideration of copyright, especially since sec. 126 of the Italian CL mentions "the agreed remuneration" in the context of publishing contracts. Logically, the exceptions, which tally largely with those dealt with in sec. 35 of the French CL[175], ought to be generalised. Sec. 132 of the Italian CL,

which permits the reassignment of utilisation rights without the author's consent only in cases where businesses are sold, is also capable of generalisation; this would also be in keeping with the provisions of sec. 28(2) of the Danish and sec. 34 of the German CL[176], which belong to the "general part" of the law on copyright contracts. Italian legislation in fact takes a further step in favour of authors, in that it forbids reassignment even on the sale of a business enterprise if this is prejudicial to the reputation of the author or to the dissemination of the work. This takes some account at least of a major interest of authors in ensuring that as a result of a business transaction by their contractual partner, they do not find themselves against their will to be "house authors" of completely different publishing houses or exploitation firms.

(83) Secs. 142 and 143 of the Italian CL deal with the right of revocation because of change of opinion (as a part of the droit moral of authors); this corresponds to sec. 42 of the German and sec. 32 of the French CL. Here, too, one of the conditions for the effective exercise of the right of revocation is that the author should compensate his contractual partners. Italian CL does not, however, include a general right of revocation such as that to be found in sec. 41 of the German CL because of non-exploitation of assigned exclusive utilisation rights. It is doubtful whether the provisions of secs. 127 and 128 of the Italian CL regarding publishing contracts can be generalised as they stand. Thus the "general part" of the Italian

primary law of copyright contracts contains many doubtful points, and is to this extent unsatisfactory.

8. Luxembourg

(84) The 1972 Luxembourg Copyright Law (Luxembourg CL) contains, like the Belgian, British and Irish laws, no provisions which belong to the "special part" of the law of copyright contracts; even the provisions that belong to the "general part" of the law of copyright contracts are minimal. Mention should first be made of sec. 3(2) of the Luxembourg CL (almost identical with sec. 3 of the Belgian CL), which refers to the Civil Code as regards the assignment of copyright. It limits itself to noting that the author's right of exploitation may be assigned wholly or in part. It is of course in this context that we must see the droit moral of authors granted in sec. 9 of the Luxembourg CL as being "by reason of being attached to the author" incapable of assignment. Otherwise, the Luxembourg law contains only the obvious principle that the assignment of property in a work of the visual arts (sec. 18, Luxembourg CL) does not imply the assignment of copyright. These few provisions do not give a very convincing picture of the quality of protection of authors given by what is nevertheless relatively recent legislation.

9. The Netherlands

(85) In two respects the Dutch copyright law adopts an intermediate position. Firstly, it also contains de lege lata no provisions belonging to the "special part" of the law of copyright contracts. De lege ferenda, however, the legislator has already taken a first step in this direction by presenting in 1972 a bill on publishing contracts[177]. Incidentally, its provisions belonging to the "general part" of the law of copyright contracts take a substantial step further forward than those of the other two Benelux countries, and indeed the United Kingdom and the Republic of Ireland. The Dutch Copyright Law (Dutch CL) contains at least some important provisions for protecting authors on the question of the assignment of copyright. Sec. 2(1) of the Dutch CL expressly provides that both total and partial assignment proper are possible. However, sec. 2(2), second sentence, of the Dutch CL requires contracts for both total and partial assignment to be in writing. Dutch legal theory[178] nevertheless proceeds here on the assumption that in addition to these various forms of assignment (proper) of copyright, there is also such a thing as the simple grant of permission (licence) to use a work, to which the formal requirements of sec. 2 are not intended to apply[179].

(86) Like the abovementioned sec. 119(5) of the Italian CL[180] and in line with other abovementioned provisions of Danish, German and French law, sec. 2(2), third sentence, of the Dutch CL contains provisions specifying the principle of speciality.

or of assignment for a given purpose[181]. According to these provisions, the assignment of copyright covers only such of the author's rights as are specifically mentioned in the written contract or necessarily follow from its nature and purpose. Under sec. 25(1) of the Dutch CL however, the author still retains his powers of droit moral. These few but important provisions of the Dutch law on copyright contracts should not be underestimated, if only because of their relatively early date[182]. However, these provisions can hardly be regarded nowadays as an adequate guarantee for authors' protection requirements[183].

10. Summary and appreciation

(87) A synopsis of the provisions described of the "general part" of the primary law of copyright contracts of the ten Member States of the European Community indicates in the first place that a number of copyright laws contain only a minimum standard of provisions for compensating for the weakness of the authors' position vis-à-vis the primary exploiters. For instance, British/Irish legislation confines itself in the main to establishing that copyright may be assigned or its use licensed, so as to render it marketable and thereby to give authors a wide range of possible types of contracts by means of these different forms. In view of the authors' position of weakness in the market, however, they cannot take full advantage

of these possibilities[184]. Nevertheless, the mandatory requirement in these countries of written contracts[185] for the assignment and granting of privileged exclusive licences has a warning effect. Belgian and Luxembourg legislations also recognise the free assignability of copyright; they nevertheless at least try by means of statutory provisions or (in Belgium) by case law in respect of the law of copyright contracts and droit moral[186] to ensure that authors are not completely parted from their works by legal transactions and that they retain a minimum of rights of intervention and supervision by virtue of their intellectual paternity.

(88) Other countries try to increase the protective power by restricting the possibility of assignment of copyright itself by a number of qualifying provisions. This includes firstly the German arrangement which, as a result of the monistic interpretation of copyright entirely precludes the assignability of copyright and permits only grants (concessions) of exploitation rights, albeit in a whole series of contractual forms[187]. Mention should however also be made here of legislation in Oenmark, France, Italy and the Netherlands, which whilst permitting in principle, from a dualistic viewpoint, the total assignment of components of proprietary rights (powers) of copyright nevertheless by means of a number of restrictions do not go so far as to allow authors to transfer completely all their possibilities of exploitation. These restrictions - also present, incidentally, in German law - include rules of interpretation and proof, and in particular the various

forms of the principles of speciality and assignment for a specific purpose. France, Italy, the Netherlands and to some extent Greece, like the United Kingdom and the Republic of Ireland, require in principle that copyright assignment contracts be in writing.

(89) All these various, more or less elaborate forms of legislation aimed at protecting authors do not of course prevent the possibility of authors being led by the wording of contracts to assign a more than reasonable amount of their rights, and not always in return for an adequate remuneration. It thus seems very difficult to provide sufficient minimum protection in the question of remuneration. Attempts to protect authors in this sphere also are made in French and (generalised) Italian legislation, as well as in the "general part" of the Greek law of copyright contracts, using the system of royalties designed as a tax for the minimum proportional remuneration of authors. On the other hand, as we have pointed out, French and Italian legislation on the subject works on the principle, described earlier[188] and restricted by numerous exceptions, of (proportional) shares by authors in the proceeds of exploitation. Since however they do not affect the rate of this share, even such provisions cannot guarantee a minimum income. The provisions of Danish, German and French law for amendment a posteriori of conditions of contract that are or have become inequitable may, in view of the procedural complexity (as witness the absence of any

exercise of this right in practice), be said to be largely theoretical, although they may well have a certain preventive effect. Similarly the right of revocation for non-exercise of an exclusive right of utilisation (German law) or because of the author's changed opinion (German, French and Italian law) constitute scant progress in this respect, even if - like many other of the protective provisions mentioned - they probably must be regarded as part of the essential minimum of provisions needed for a modern "general part" of a primary law of copyright contracts. With this minimum in mind, all these provisions, once they have been coordinated and reconciled, can very well form the starting point for appropriate reforms[189]. In view of the group of persons contemplated here, however, modern legislation will of necessity have to find a fundamental solution to the problem of remuneration.

(90) The author of this study considers positive provisions on this fundamental question to be essential in a modern formulation of the "general part" of the primary law of copyright contracts. Such a general protective provision might be worded on the following lines: "In the event of the assignment (concession) of a right of exploitation in a protected work, its author is entitled to a remuneration that is to be regarded as reasonable compensation for the work performed and, in the light of the proceeds of its exploitation, as a reasonable share for the author in such proceeds." A more detailed definition of the remuneration principle

would probably be impracticable in the "general part". Whether, as the Greek legislators at least think, any useful purpose would be served by doing this for individual copyright contracts, or whether it is preferable to establish this principle by means other than legislation (e.g. by collective agreements) is a question that should not be tackled until a survey of the "special part" of the primary law of copyright contracts in the ten Member States of the European Community has also been carried out.

B. The "special part" of the primary law of copyright contracts

I. General review

(91) As already stated, the Danish, French and Italian copyright laws may be regarded as "complete" solutions, because in addition to the material (right-granting) part they contain a part on the law of copyright contracts that is complete in principle and which, besides a more or less detailed "general part", also includes a "special part" (albeit confined mainly to publishing and performing contracts) of the primary law of copyright contracts. German and Greek legislators on the other hand have chosen a different approach, in that they have laid down outside the law of copyrighy contracts itself the provisions which belong to the "special part" of the law on copyright contracts. This is true on the one hand of the 1901 German Publishing Law, and of the Greek Law No. 3483/1909 (supplemented by Law No. 988/1943) on theatrical performing contracts, of Greek regulation No. 619/1941 on musical performing contracts in respect of cinemas and of Greek Law No. 3188/1955 on broadcasting contracts. It should however be noted that the Greek Copyright Law also contains (somewhat improperly) special provisions on performing contracts and on the publishing of newspapers and other compilations[190]. Similarly, the German Copyright Law also contains, in the section devoted to cinematographic works,

provisions relating to cinematographic contracts applicable to films intended for broadcasting. If the abovementioned Dutch bill on publishing contracts[191], which forms part of the draft of book 7, chapter 8 of the Civil Code, were to become law, the consequent separation of the law on publishing contracts from the law on copyright would mean that the Netherlands would have to be included in the same group as Germany and Greece.

(92) Besides these two groups of countries, that is on the one hand Denmark, France and Italy with their "complete" copyright laws, and on the other Germany and Greece and (de lege ferenda) the Netherlands with their separate law of copyright contracts, there is a third group comprising Belgium, Luxembourg, the United Kingdom and Ireland. These countries have in fact no special provisions for different types of copyright contracts either within or outside their copyright law. The formulation of such contracts is left entirely to the practice of the law, the courts and legal doctrine.

(93) As already mentioned in the introduction to this study[192], event those countries which have in one way or another a "special part" of the law of copyright contracts i.e. Denmark, Germany, France, Greece, Italy and, de lege ferenda, the Netherlands are, with the exception of Greece[193] mainly concerned with legislating on publishing contracts. This is already apparent from the number

of provisions devoted to this type of contract[194]. There are provisions on performing contracts in four countries only: Denmark, France, Greece and Italy. Only Greece devotes a special law to this subject, which in other countries receives only very cursory treatment in comparison with publishing contracts. Lastly, no country can be said to have systematic and coherent legislation on contracts for making motion pictures and for broadcasting; as a rule, only a few isolated provisions are to be found[195]. As regards broadcasting contracts however, one might quote Ulmer's detailed proposals[196] as provisions de lege ferenda. Moreover, no special provisions in the sphere of visual and applied arts are to be found in any country[197], apart from the provisions for the pinciple of separation of (material) property and copyright normally encountered in the "general part" of the law of copyright contracts.

(94) The basic problem faced by legislators precisely in the "special part" of the law of copyright contracts whether and to what extent relations between authors and primary exploiters should be governed only by optional provisions which can be set aside by contract, or be governed by mandatory provisions applicable to all contracts irrespective of the agreements between the parties or which can in any case be contractually amended only for the benefit of the author[198]. Mandatory provisions

often have the disadvantage of being inflexible in view of the wide range of different formulations that can occur even within a given type of contract. By way of example one may quote the situations in the book-publishing sector, which often differ widely from a financial aspect: belles lettres; books for children and young people; non-fiction books; scientific and technical books, paperbacks, etc.[199]. In these sub-sectors of publishing law alone one finds in practice, in particular as regards copyright fees, situations and usages that differ according to distribution channels, number of copies and rates of sales, but also according to the position of the author (freelance, or professional status). This results in each sector having a well-determined type of publishing contract. Differences also occur in the case of collective agreements, where such exist. Thus for instance the standard publication contract agreed in Germany in 1978 between the Börsenverein des Deutschen Buchhandels and the Verband Deutscher Schriftsteller[200] was initially confined to belles lettres and comparable works in the spehre of non-fiction. Futher negotiations[201] were necessary to extend the standard contract to books for children and young persons, insofar as their character was not determined mainly by illustrations. Agreements of this kind based on previous models, have existed since 1980 for scientific works, in the form of "contractual

conditions for publishing scientific works", negotiated on this occasion between the Börsenverein des Deutschen Buchhandels and the Hochschulverband[202]. Similar differences also exist in other countries[203].

(95) One usually looks in vain for such differentiations in legal provisions regarding publishing contracts, although generally there are certain special provisions for publishing newspapers and periodicals or other compilations (e.g. secs. 41-46 of the German Publishing Law; sec. 36(2) of the French CL; sec. 38 et seq. of the Italian CL), or the provisions regarding publishing contracts are declared wholly or partly inapplicable (sec. 41, Dainish CL). German legislation on publication contracts, on the contrary, applies equally to the publishing of literary works and musical works, whose current economic situation is entirely different[204]. French law is based on an even wider concept of publishing contracts and in principle covers all contracts for the production of copies of works[205]. This means however that these provisions would necessarily have to remain at a somewhat abstract level, unless despite their wide-ranging scope they were adapted to a certain type of contract, namely that for publishing books. Any legislator attempting to draft a modern, effective form of law of copyright contracts that would protect the author (as the weaker contracting party) would therefore be faced with an enormous legislative and regulatory task, for which models would largely be lacking.

(96) In the case of performing contracts, special account must also be taken of the important function of the collecting societies. The true content of contracts for the assignment (granting) of performing rights in musical works, and also in dramatic or musico-dramatic works in many countries, is not apparent until one considers the intermediary role played by the collecting societies. All these practical considerations doubtless show that the improvement of the position of authors in the law of contract by inserting as many mandatory provisions as possible in the "special part" of the law of copyright contracts can be only a limited objective. For instance, the 1972 Dutch bill on publishing contracts[206] is extremely reticent in this connection[207]. Ulmer's proposed legislation on broadcasting contracts[208] also shows that even in the case of this clearly-defined type of contract it is necessary to proceed with relative cuation in the use of mandatory provisions when drafting modern legislation on copyright contracts. In particular, Ulmer's proposal contains no direct provisions as to the absolute amount or percentage of broadcasting fees. Hitherto, Greece has been the only country to attempt such a statutory arrangement as regards performing contracts[209]. In view of the obvious reserve of legislators the question forced upon us is whether other means, such as collective agreements, as already used - albeit fragmentarily - in several countries, might not

indeed be preferable, inasmuch as they make the legislator the corner stone of his own legislation. The legislator's own solution would have to be confined to the compensatory provisions clearly necessary to permit or facilitate the negotiation, conclusion and enforcement of such collective agreements.

II. Publishing contracts

1. Denmark

(97) Secs. 33 - 40 of the Danish CL do not on the whole contain very detailed provisions on publishing contracts, although they cover the most important conditions of publishing contracts. It should again be stressed that pursuant to sec. 27(2) of the Danish CL nearly all the provisions of the "special part" of the law of copyright contracts, and especially those regarding publishing contracts, are optional (if we exclude the provisions of sec. 37 of that law regarding the duty placed on publishers to render accounts). They can thus be replaced, modified or supplemented by agreement between the parties.

(98) The definition in sec. 33 of the Danish CL of a publishing contract is based on the reproduction and publishing of literary or artistic works by printing or a similar procedure. This definition is

on the one hand wider than the German definition of a puslishing contract[210], because it also covers "art publishing" insofar as it is a matter of publishing artistic works in printed form (as opposed to the production and marketing of original artistic works[211]; on the other hand however, the definition is narrower than the French definition[212] of a publication contract since it covers only the "édition papier", i.e. - to use a modern expression - the "print media". This naturally includes sheet music printed by music publishers. As stated, the provisions on publishing contracts do not, by virtue of the express restriction in sec. 40 of the Danish CL, apply to contributions to newspapers and magazines, and they apply only in part to contributions to other compilations. These restrictions and other provisions show clearly that the Danish legislation is designed for the publication of works in book form.

(99) As indirectly indicated by the author's duty of abstention laid down in sec. 39 of the Danish CL, Danish legislation, like German and French, proceeds on the assumption that publishing contracts must necessarily assign (grant) the exclusive right of reproduction and distribution to the publisher. Thus secs. 34 and 35 of the Danish CL provide that on conclusion of a publishing contract the publisher has not only the right but also the duty to publish the work. If not otherwise agreed, sec. 34 of the Danish CL limits this right to maximum of 2,000 copies of literary works, 1,000

copies of musical works, and 200 copies of artistic works. No fixed period is laid down for the duty to publish the work, as sec. 35 of the Danish CL provides for this to be done within a reasonable period. The publisher's duty as regards distribution is dependent on what market and other conditions permit. Sec. 36 of the Danish CL does however set a certain time limit for the exercise of the publishing right in that it entitles authors to terminate the contract after two years (or four, in the case of musical works) have elapsed without result from the date of delivery of the complete manuscript or other basis of reproduction. The author has the same right if the publisher entitled to publish a new edition has not done so more than one year after being so required by the author.

(100) Danish law places no direct duty on the publiser to remunerate the author. However, pursuant to sec. 37 of the Danish CL (which by virtue of sec. 27(2) thereof is the only mandatory provision regarding publishing contracts) the publisher is obliged, if the author is entitled to a fee based on turnover, to render to the author not later than nine months after the end of the relevant year an account of the copies sold and the number still in stock. Independently of sales, however, the publisher is required by sec. 37(1) of the Danish CL to inform the author, or cause him to be informed by the printer, in writing of the number of copies produced.

Hence there is a presumption that the author is normally entitled to remuneration. Moreover, sec. 36(2) of the Danish CL provides that in the event of termination of the contract by reason of non-fulfilment or incomplete fulfilment of the publisher's duty to publish, the author may retain at least the fee already received, without prejudice to any claim he might have for damages. On the whole, however, the Danish provisions on publishing contracts do not by any means take as much account as they might of the importance attached by freelance writers to the question of remuneration.

(101) As apparent from sec. 36(1) of the Danish CL, the author's duties include delivery of a complete manuscript. Sec. 33 of that law then expressly provides, in accordance with the repeatedly mentioned principle of separation, that ownership of the manuscript or other "copy" remains vested in the author. Sec. 39(1) of the same law deals with the already mentioned duty of abstention placed on the author, who may not himself publish or cause to be published the work to the extent or in the form described in the contract. However, sec. 39(2) of the Danish CL permits the author, after expiration of 15 years from the commencement of publication of a literary work, to publish an edition of his collected or selected works. The only other provision (in sec. 38 of the Danish CL) relates to the author's right to amend the work in the case of new editions published more than one year after the previous one. Such amendments must not however entail disproportionate expense or

change the character of the work.

(102) The Danish law of publishing contracts, which is largely optional, not very detailed and extremely reticent on the question of remuneration, must however be seen in the context of the "standard contract"[213] which has been in existence in the Scandinavian countries since 1947 - i.e. a long time before the 1961 Danish CL. Even then, this agreement between associations of publishers and authors in all the Scandinavian countries gave authors a much stronger position vis-à-vis publishers than does the law. This is apparent for instance as regards remuneration, in respect of which the standard contract lays down minimum percentages for authors' fees. The standard contract is however mainly confined to works of belles lettres, and thus does not apply to dramatic works, picture books, books for young people and non-fiction books[214]. In Denmark as in Germany there are independent arrangements for scientific works[215]. The situation in Denmark shows very clearly that there can be a great divergence between legislative provisions and the actual circumstances of contracts. On the other hand, the standard contract, which already existed and was in use when the law was passed, certainly facilitated the work of the legislators who, knowing that this contract was respected in practice, without contravening cartel law, wished to confine themselves to a few brief, basic provisions in the law of publishing contracts.

2. Federal Republic of Germany

(103) The German Publishing Law of 19 June 1901 is probably the most comprehensive legislation on publishing contracts in the ten Member States of the European Community. It must be described as a modern, balanced piece of legislation for its time, although it is generally considered[216] to contain only optional provisions and has therefore been largely overtaken by the realities of present-day contracts. This is apparent for example in a comparison of the abovementioned 1978 blanket agreement between the Verband Deutscher Schriftsteller and the Börsenverein des Deutschen Buchhandels[217] which, e.g. as regards the important points of the grant of "secondary rights" or the permitted editions, takes precisely the opposite line to that taken by the 1901 law[218]. The now largely historical concept of the music publishing contract on which the law is based, and in which interest is centred on the reproduction and distribution of the score, has been almost completely overtaken by developments. Nevertheless, in 1956 the legislators obviously considered that the German Publishing Law (German PL) still served a useful purpose and therefore deliberately did not repeal it in its entirety[219]. Only a few of its provisions were repealed when the 1965 CL - containing more general provisions - was passed[220].

(104) As already mentioned in connection with Danish law[221],

sec. 1 of the German PL contains a relatively restriced definition of a publishing contract, covering only works of literature or music (Tonkunst); the general view[222] is that it covers only musical scores (sheet music). According to this definition, the publisher's duty to reproduce and distribute the work at his own expense, and the author's/composer's duty to deliver the work to the publisher for this purpose, constitute the main duties of the parties to a publishing contract. German law distinguishes in this context between the publishing contract proper and the publisher's "publishing right", i.e. the exclusive right of reproduction and distribution (sec. 8, German PL), which according to the law commences only upon delivery of the work to the publisher and not upon conclusion of the publishing contract (sec. 9(1), German PL).

(105) German legislation, which is similar to but somewhat clearer than Danish law, provides that publishing contracts are normally based on the grant of the exclusive right of reproduction and distribution. In a manner that is not too successful from a technical standpoint, the scope of this exclusive right granted to the publisher is determined by the author's "duty of abstention" (Enthaltungspflicht), which is dealt with in more detail in secs. 2 - 7 of the German PL. These sections show which uses the author may not make during the life of the publication contract, and what rights are still vested in him.

The provisions of these sections regarding rights reserved to the author, especially as regards the exploitation of "secondary rights" and the publication of complete works or special editions, and the provisions regarding the number and size of editions that the publisher may publish, seem extremely favourable to the author in the light of current practice. It is however here that the non-mandatory nature of the publishing law is apparent, for it is precisely in this context that there is the greatest gulf between law and practice. This is why comprehensive grants of all secondary rights at various rates of participation for the author and the grant of right of publication "for all editions and reprints irrespective of the number of copies" form the basis of the abovementioned 1978 blanket agreement[223].

(106) Whereas publishers nowadays undertake in respect of secondary rights only "to make intensive efforts to exploit" (sec. 5 of the standard agreement), the essence of the publishing contract is the publisher's duty to exercise the right of reproduction and distribution granted to him. However, the German PL specifies no definite period for fulfilment of this duty. Sec. 14 of the German PL however places on him the duty to reproduce and distribute the work in the appropriate and usual manner. The form and presentation of the work are determined by the publisher in the light of the prevailing practice of the trade and the purpose and content of the work. The publisher also fixes the retail price. He may not however increase the

price without the author's consent. He may however reduce the price without the author's consent, provided he does not by so doing prejudice the author's legitimate interests (sec. 21, German PL). The law contains no detailed provisions on selling off the work cheap, i.e. getting rid of remaining stocks at much reduced prices, or even its pulping, i.e. the destruction of publisher's unsaleable copies, although great importance attaches to these questions in current publishing practice[224]. This is shown in particular by the precise provisions of art. 10 of the 1978 blanket agreement. Moreover, the publisher must, under sec. 15, German PL, commence reproduction as soon as he receives the complete work. The law considers in this respect that the publisher is obliged to produce the number of copies that he is entitled to make and must see that the work does not go out of print (sec. 16, German PL).

(107) As already mentioned, sec. 5 of the German CL provides, contrary to the current practice of granting the right of publication for an unlimited period and any number of editions, that the publisher is entitled to print only one edition. Of course, the law itself provides for the possibility of the right to print several editions being granted. In the event of doubt in such cases, the same terms as agreed for the previous edition apply to each new edition (sec. 5(1), second sentence, German PL). If the number of copies is not specified, the publisher is entitled to produce one thousand copies pursuant to sec. 5(2) of the German PL. The permitted number of copies does not include the usual waste,

free and lost copies (secs. 6 and 7, German PL).

(108) If the publisher does not fulfil his duty to exercise the right of publication, the author may firstly avail himself of all the remedies of civil law to assert his contractual claims. He also has the special right of rescission under sec. 32 of the German PL. German legislation, unlike Danish[225], specifies no definite time after which the author is entitled to exercise the right of rescission. If the reproduction and distribution have not taken place in the appropriate and customary manner prescribed in general terms in sec. 14 of the German PL, the author may set the publisher a reasonable time limit pursuant to sec. 32 in conjunction with sec. 30 of the German PL, and if this should elapse without result he may withdraw from the contract. In principle moreover, the general provision already mentioned[226] of revocation of an exclusive utilisation right because of failure to exercise or to exercise it adequately (sec. 41, German CL) may be applied to the publishing contract. However, since the publishing contract in any case places on the publisher a duty to exercise his right, this provision loses some of its importance[227]. If however the publisher is granted the right to publish new editions, he is not obliged under sec. 17 of the German PL to make use of this right. In this case also the author may however set the publisher a reasonable time limit to exercise this right, and here too he may withdraw from the contract if this period elapses without result. From the point of view of content, this provision

is closely allied to sec. 41 of the German CL just mentioned.

(109) On the other hand, the general provisions in sec. 42 of the German CL regarding the right of revocation because of a change of opinion are more important to publishing contracts. They go further than a similar provision in sec. 35 of the German PL, in that the latter grants a similar right of revocation based on a change in objective circumstances only until the time reproduction begins, or before a new edition is produced. The author is then obliged to compensate the publisher for his expenditure, whereas the claim to compensation contemplated by sec. 42 of the German CL is granted only if and insofar as equity requires.

(110) The publisher's duty to remunerate the author is not one of the characteristic elements of the publishing contract under the German PL either, and hence it is not one of the publisher's main duties[228]. Sec. 22(1), second sentence, of the German PL nevertheless provides that a remuneration is deemed to have been tacitly agreed when having regard to the circumstances, assignment of the work cannot be expected except against remuneration. If the amount of remuneration is not specified, an appropriate cash remuneration is to be deemed to have been agreed. The due date of the remuneration is determined under sec. 23 of the German PL according to its type (non-recurring payment, royalty based on the number of pages or copies sold). This provision also shows that when this law was promulgated, there was no general enshrinement of the principle of remuneration in proportion to sales, which has now become the rule in many contexts. In such cases, sec. 24 of the German PL requires

the publisher to render accounts annually. Thus the author lacks this right of information with other forms of remuneration, although he may have a non-pecuniary interest in being informed about sales and hence the success of his work. The publisher is nevertheless required by sec. 29(2) of the German PL to inform the author on request whether the individual edition or the specified number of copies is out of print. According to Ulmer[229], publishers are generally also required to provide regular information about the number of copies they still have in stock.

(111) The author's main duty is by definition to deliver the work, and sec. 10 of the German PL requires him to do so in a form suitable for reproduction. If the work has already been completed, it must be delivered forthwith (sec. 11(1), German PL). However, sec. 11(2) of that law envisages a relatively flexible arrangement if the work is not to be completed until after the publishing contract has been concluded. In this case the delivery period depends on the purpose of the work or what the author can do in normal working conditions. Sec. 12 of the German PL provides that the author may amend the work up to the time of completion of reprodution; before a new edition is published, the publisher must give the author the opportunity to introduce amendments, sec. 38 of the Danish CL makes similar provision. However, sec. 12(3) of the German PL restricts this right of the author; if he makes more amendments than usual after reproduction has begun, he must pay the resultant costs, unless circumstances occuring in the meantime

justify the amendments. The publisher may not alter the work without the author's consent, in accordance originally with sec. 13 of the German PL, since replaced in general terms by the provisions of sec. 39 of the 1965 German CL.

(112) Sec. 28 of the German CL contains special provisions on the assignability of the publisher's rights. This section served as a basis for the general provisions of sec. 34 of the German CL, although it is not identical with the latter in all respects[230]. The essence of the publishing law provisions is the principle of the assignability of the publisher's rights, except if otherwise agreed with the author. This principle is however restricted in the case of contracts for single works in that such assignment requires the author's consent, which he may not withhold without good and sufficient reason.

(113) Under sec. 29 of the German PL, a publishing contract is terminated in the first place if it requires a certain number of editions or copies to be produced and such editions and copies have been produced but the relevant edition is out of print. When a specified period has been agreed, the publication contract naturally terminates upon expiration thereof, and sec. 29(3) of the German PL expressly provides that after expiration of the time the publisher is no longer entitled to distribute the remaining copies. In view of the fact that in modern practice publishing rights are generally granted for the whole period of copyright protection[231],

this point is not of major importance in the context of the pirmary law of copyright contracts. We have already discussed the author's right of rescission if the publisher does not fulfil, or does not fulfil satisfactorily his duty to reproduce and distribute (sec. 32, German PL) and if circumstances change (sec. 35, German PL); on the other hand, the law also grants the publisher a special right of rescission if the author does not deliver the work at the right time (sec. 30, German PL). In such cases, the publisher is also generally required to set the author a reasonable time limit for delivery. There is however no right of rescission if the delay in delivery causes only trivial inconvenience to the publisher. Under sec. 31 of the German PL, these provisions also apply if the work is not in the form laid down by the contract. In this case however the publisher may, instead of terminating the contract, claim damages for non-performance. Sec. 33 of the Geramn PL deals with the accidental destruction of the work after its delivery to the publisher, but little practical importance attaches to this provision in view of modern photocopying techniques. Other provisions of the law cover the author's premature death (sec. 34) and the publisher's bankruptcy (sec. 36, German PL).

(114) The law lastly contains several special provisions for publication contracts in respect of contributions to newspapers, magazines or other periodical compilations (secs. 41 - 46, German PL). Sec. 42 of the German PL, which granted the author

certain rights in such articles whether or not an exclusive publishing right was granted, has now been replaced by sec. 38 of the 1965 German CL, which generalises this legal concept. It provides that in the case of newspaper articles (except if otherwise agreed) the publisher acquires only a simple right of utilisation; whereas in the case of contributions to other periodical compilations, the editor or publisher acquires in case of doubt an exclusive right of utilisation to reproduce and circulate. After one year has elapsed since publication of the article, the author may, except if otherwise agreed, nevertheless have his article reproduced and circulated by another. If he has however, contrary to the general practice, also granted an exclusive utilisation right to newspapers, the author may, except if otherwise agreed exploit his contribution through other channels immediately after it has appeared.

(115) The remaining provisions in respect of periodical compilations of secs. 43 - 46 of the German PL concern the opportunity granted to the publisher to print an unlimited number of copies (sec. 43), facilities for amending articles published anonymously (sec. 44) and a special right of termination by the author if the article is not published within one year of delivery, without prejudice to the author's claim to remuneration (sec. 45(1), German PL). On the other hand, the author has no entitlement to reproduction and circulation unless the publisher has advised him of the date on which the article is to appear (sec. 45(2), German PL). Moreover, in the case of newspaper articles, the author

may not demand free copies (sec. 46(1), German PL). Nor is the publisher's duty to sell copies to the author at trade price, as laid down by sec. 26 of the German PL in respect of normal publishing contracts, applicable to newspaper articles (sec. 46, German PL). Sec. 47 contains supplementary provisions concerning production of the work for a third party according to a clearly specified scheme, collaboration in encyclopaedic works, assistance given to another publisher and collaboration in a compilation. It is once more obvious that these few specific provisions in the law cannot take account of the wide range of practical circumstances in the sphere of book, newspaper and periodical publishing[232]. This is doubtless the main obstacle encountered by legislators when, as in the case of the 1901 German PL, they attempt to legislate exhaustively without reference to other laws on one of the main aspects of the primary law of copyright contracts.

3. France

(116) Chapter II, title III of the 1957 French Copyright Law (French CL) contains a series of provisions on publishing contracts (secs. 48 - 63, French CL). Unlike the definitions of publishing contracts given in the Danish and German laws[233], not to mention the Italian law, that set out in sec. 48 of the French CL goes far beyond the field of

"print media". The definition embraces all contracts whereby the author of an intellectual work assigns to a publisher on specified conditions the right to produce or have produced a number of copies of the work, subject to an undertaking to be responsible for their publication and distribution. The unanimous view of French legal doctrine[234] is that this definition covers not only the "print media" (édition papier) but also the édition sonore (production of phonograms), the production of cinematographic films and even the production of works of plastic and applied art, when there is a reference to an "edition". Despite this wide definition of publishing contracts, the French provisions are also clearly designed for book publishing contracts[235]. The fact that these provisions are mandatory to a much greater extent than their counterparts in Danish and German law can lead to serious problems[236] if they do not respond to practical needs in view of the far-reaching definition of publishing contracts. This is shown especially strikingly by the controversy aroused by the decisions of the relevant courts regarding the question of the extent to which the publisher's duty to publish and circulate can still be a crucial factor in the sphere of music publishing[237].

(117) As in German and Danish law, the very definition of publishing contracts in sec. 48 of the French CL indicates that the publisher's duty to

publish and circulate the work at his own expense is a constitutive element of publishing contracts. Secs. 49 and 50 of the French CL specify the distinction to be made in this context between publishing contracts and two related contracts, viz. the contrat à compte d'auteur (contract at author's expense) and the contrat de compte à demi (joint account contract). Moreover, sec. 54 of the French CL generally assumes that the author has to grant the publisher an exclusive utilisation right. The author is also required to guarantee the publisher undisturbed exercise of the assigned right to ensure that this right is respected and to protect him from encroachment by third parties.

(118) The publisher's duty to reproduce and distribute the work is dealt with in more detail in secs. 52(2), 56 and 57 of the French CL. Secs. 52(2) and 56(1) provide that the publisher must produce the edition or cause it to be produced in accordance with the agreed conditions, in the agreed form and by the agreed time limit. If the contract sets no time limit, this is determined according to the usages of the trade (sec. 56(4), French CL). Sec. 57 of the French CL requires the publisher to ensure a continuous and uninterrupted exploitation and commercial distribution of the work according to the usages of the trade. As already stated, this mandatory provision has led to some extensive case law in connection with music publishing contracts, as well as to fierce controversy in specialist literature. The real question

of importance was whether, despite its claim to general applicability, the law on publishing contracts was really fully applicable to music publishing in view of rapidly changing circumstances in that sphere.

(119) The publisher's duty to pay remuneration is more clearly set out in French than in Danish legislation, and at a more central point than in German; it may be described as the publisher's second main duty. In keeping with the generally applicable principle - which is however restricted by exceptions - of the author's proportional share in exploitation of the work (secs. 35 and 36), sec. 52(1) of the French CL repeats that publishing contracts may provide for porportional remuneration, or a lump-sum remuneration in the cases contemplated by secs. 35 and 36 of the French CL. As already indicated[238], sec. 36 of the French CL is in any case designed to apply to particular circumstances in the publishing sphere. Sec. 51 of the French CL indicates that the publisher may lay down a guaranteed minimum remuneration, in which case the prescribed minimum of copies for the first edition of the work is unnecessary. The two alternative provisions of this law - either a minimum number of copies of the work or a guaranteed minimum remuneration - show that the legislators wished to secure at least a minimum remuneration for the author. However, unlike the Danish, German and Italian laws, the French provide no guiding figure for cases in which the contract does not specify the numbers to be published. The duty to produce an appropriate number of copies

according to trade practice may doubtless be inferred from sec. 57 of the French CL.

(120) The publisher's duty to render accounts is enshrined in sec. 59 of the French CL. It differs from German legislation[239] in that this duty is not made dependent upon remuneration being proportional to sales. The publisher is required at least once a year to give the author a general account of the number of copies produced and held in stock by him and information about the number of copies printed in the individual editions. In principle, this return must also state the number of copies sold, damaged and destroyed, and the amount of the remuneration paid or outstanding to the author (sec. 59(3), French CL). However, this provision applies only if no other arrangements are customary or have been agreed. Moreover, the publisher is responsible under sec. 60 of the French CL for the accuracy of his figures.

(121) As a corollary of the droit moral of authors, sec. 56(2)-(3) of the French CL places on publishers the duty not to alter the work without the author's written consent and (except if otherwise agreed) to show the author's pseudonym or mark on each copy of the work. The corresponding provisions in Danish and German law are the generally applicable requirements of sec. 28 of the Danish and sec. 39 of the German CL.

(122) In addition to those of guarantee and abstention mentioned above[240] (sec. 57, French CL), the author's duties include primarily the requirement to deliver within an agreed period a reproducible manuscript or other means of reproduction (sec. 55, French CL). Like sec. 33(2) of the Danish CL, sec. 55(3) of the French CL provides, in application of the general principle of separation enshrined in sec. 29 of the French CL, that the author continues to own the object of the publication, and it places certain duties of care upon the publisher. Sec. 27 of the German PL provides on the other hand that the publisher is not required to return the object of the publication unless so agreed before reproduction begins.

(123) Although sec. 33 of the French CL provides generally that dispositions in respect of future works are null and void, sec. 34 thereof lays down special provisions on option agreements in publishing contracts[241]. Such contracts for future works are however permitted only if the works belong to a clearly defined category. The option may not cover more than five works in each category or more than the author's output within a period of five years. If the publisher consecutively rejects two new works, the author is released from the bargain but must refund any advances of remuneration he may have received.

(124) On the question of the reassignment by the publisher of the right to utilise the work, French law contains

the provision - somewhat stricter than that of sec. 28 of the German PL - that except in the case of the sale of a business undertaking the publisher requires the author's prior consent for this (sec. 62(1), French CL). Even in the case of sale of a business, where the author's consent is not in principle obligatory, French law takes a further step towards protecting the author's interests: if the resale of the business seriously prejudices the author's material or moral interests, the latter may demand restitution, and if necessary even annulment of the contract (sec. 62(2), French CL).

(125) Under sec. 56(5) of the French CL, a contract concluded for a specified period of time lapses automatically upon expiration thereof, without need of notice. The publisher has however the right under sec. 56(6) to sell any remaining copies at the normal price for a period of three years after the contract expires. Although the comparable German provision (sec. 29(3), German PL)[242] is stricter, it is - unlike its French counterpart in sec. 56(6) - non-mandatory. French law also provides however that the author may prevent continued sales by the publisher by purchasing these copies from him at an agreed price or a price to be determined by experts. Despite the expiry period of three years granted to the first publisher, the author may moreover produce a new edition of the work after 30 months have elapsed.

(126) Sec. 63(1) of the French CL envisages the total destruction by the publisher of the copies as a special ground for terminating the publishing contract. Like the German and Danish laws, the French law makes no detailed provision as to the permissibility of selling off and pulping unsuccessful works.

(127) The contract is also automatically rescinded if the publisher, having been given a reasonable period of notice by the author, does not publish or republish, when the work has gone out of print (sec. 63(2), French CL). If the work has not been completed, the author's death is as a rule another reason for rescission of the publishing contract (sec. 63(4), French CL).

(128) Sec. 36 of the French CL (which incidentally appears incorrectly in the "general part" of the law on copyright contracts) contains in almost concealed form several more special provisions on publication contracts for contributions to newspapers and periodical compilations. It is provided on the one hand that, except if mutually agreed otherwise, the author retains the right to exploit the article in any form, provided this does not constitute competition with the relevant newspaper or compilation (sec. 36(2), second sentence, French CL). On the other hand only the author has the right to publish or have published his articles and speeches in the form of a collection (sec. 36(4), French CL).

(129) The method used in French law

of setting out a definition of publishing contracts that applies in principle to all cases of reproduction and distribution of corporeal copies of works by publishers of all kinds, and of doing this by provisions based largely on book publishing contracts, means that problems are bound to arise because publishing contracts are defined much more comprehensively than in Danish and German legislation. Hence it is to be regretted that the final text of the law does not include the special provisions applicable to certain sub-categories of publishing contracts (i.e. those for the édition de librairie, édition musicale, édition phonographique, édition cinématographique and cinéphonique, and édition en matière d'arts graphiques, plastiques et appliqués), some of which were to be found in the preliminary drafts of the 1957 law[243]. Incidentally, this development clearly illustrates the difficulties faced by legislators who try to introduce differential laws to take account of the variety of contracts that really exist.

4. Italy

(130) Within the meaning of this study the Italian Copyright Law (Italian CL) is also a "complete copyright law". Besides the "general part" (secs. 107 - 114, Italian CL) it contains a "special part" of the law on copyright contracts (secs. 118 - 141, Italian CL), and in Title III, Chapter II, Section III (secs. 118 - 135, Italian CL) relatively detailed

provisions of the law on copyright contracts which, like the French law, are largely mandatory. The definition of publishing contracts in sec. 118 is very similar to that in sec. 33 of the Danish CL, since it is on the one hand also based on the publication of a work by printing, i.e. it concerns only the "print media", and on the other - unlike the German publishing law - it is not limited to works of literature and music. Contrary to French, but like both Danish and German law, it does not include procedures other than printing in the publication of copies of works, and in particular does not include the production of phonograms and cinematographic films. Moreover Italian (like Danish, German and French law) is based, in the words of sec. 119 (2), Italian CL, on the presumption that publishing contracts normally imply the grant of exclusive rights.

(131) Italian law contains alternative provisions for dealing with the question whether upon conclusion of a publishing contract the "secondary rights" are also assigned to the publisher - something that the (albeit non-mandatory) German legislation wished to avoid in sec. 2(2) of the German PL. Sec. 119(1) of the Italian CL provides that publishing contracts may relate to all or only some of the author's exploitation rights in the publishing sector[244]. Sec. 119(4 and 5) of the Italian CL does however contain certain interpretation rules in this context. These state that unless expressly so agreed, the assignment of rights does not extend to the exploitation of the work in adapted form, nor in particular to filming,

broadcasting and mechanical recording. It is further provided that the assignment of one or more exploitation rights does not include such utilisation rights as do not necessarily depend on the assigned right, even though they are by definition covered by the general concept of utilisation rights.

(132) Sec. 122 of the Italian CL differentiates between publishing "edition" contracts (per edizione) and "time" contracts (a termine). In the case of contracts "per edizione" the publisher is assigned the right to produce one or more editions within 20 years of receipt of the complete manuscript. The number of editions and of copies in each edition must be mentioned in the contract. A number of types are however possible. In the absence of such details, it is to be assumed that a contract relates only to one edition with a maximum of 2,000 copies. Contracts "a termine" assign to the publisher the right to produce any desired number of editions during the agreed period, which must also not exceed 20 years. The minimum number of copies per edition must be specified in the contract, which is otherwise null and void. Sec. 122(5), second sentence, provides that the period of 20 years does not apply to publishing contracts for encyclopaedias and dictionaires; drawings, illustrations, patterns, photographs and similar items for industrial use; cartographic, musico-dramatic and symphonic works. Sec. 122(6) of the Italian CL allows publishers in both types of publishing contract described

to spread the edition over a number of part-prints (unaltered reprints).

(133) A feature of particular importance in the general provisions of sec. 122 of the Italian CL is undoubtedly the mandatory[245] maximum period of 20 years for both types of publishing contracts. In the legislation of the other countries studied, there is no immediate counterpart for its far-reaching provisions[246] for protecting authors. At best, this provision may be compared with the mandatory limitation of assignments of rights to a maximum of 25 years after the author's death, contained in the transitional provisions of the 1956 British Copyright Act (a similar provision also existed in the 1911 Act) in respect of contracts concluded before the new Act came into force[247]. Although the underlying idea of the British transitional provisions might deserve re-examination, it operates (unlike the Italian law) unilaterally to the sole advantage of the author's heirs. On the other hand, the Italian mandatory limitation of publishing contracts to 20 years favours the author himself in many cases. In fact, it enables the author or his heirs to profit personally from the increased prestige resulting from the success of this or other works by him and from the improved sales possibilities, or at least to obtain a reasonable share of the resultant profits.

(134) Another feature of Italian law on publishing contracts is the way in which it clearly contrasts the main duties of authors and publishers. In the spirit of publishing contracts,

sec. 126(1) of the Italian CL provides firstly that the main duty of publishers is to publish and distribute the work under the author's name, or if so agreed, anonymously or under a pseudonym, in accordance with the manuscript and "in accordance with good publishing practice". Sec. 127 of the Italian CL further provides in respect of this duty that reproduction and distribution must take place within the contractually agreed period. This agreed period may not however exceed two years from receipt by the publisher of the complete and final copy of the work. If no period is agreed, publication and distribution must take place not later than two years from the date of a written request made by the author to the publisher in this respect. The courts may also fix a shorter period in the light of the circumstances of the case. Any agreement which waives the setting of a time limit or specifies a time limit longer than the legal maximum, is null and void. The two-year time limit does not however apply to collective works. Like the maximum period of 20 years specified for the publishing contract itself, this mandatory maximum time limit of two years for performance of the publisher's duty of reproduction and distribution is designed to confer considerable protection on the author. It again has no strict counterpart in the law of the other countries. It is at best comparable with the provisions of sec. 36 of the Danish CL[248] which, although not mandatory, empower the author to rescind the contract if the publisher has not performed his duty

to publish two years after delivery of the manuscript in most cases, or four years thereafter in the case of musical works. Sec. 41 of the German CL contains a comparable provision, albeit of more limited effect, when it grants a right of revocation after not less than two years because of failure to exercise an exclusive utilisation right.

(135) Nor in Italian law does failure to comply with the time limit automatically cause a publishing contract to be rescinded. Like the Danish and German laws, it merely gives the author the right to demand annulment of the contract (sec. 128(1), Italian CL). Sec. 128(2) of that law empowers the courts to mitigate this provision by extending the relevant time limit by not more than half; they may also declare the contract annulled in part only. Sec. 128(3) of this law moreover requires the publisher in the event of annulment to return the original work and to pay damages, unless he can prove that he has not failed in his duty to exercise diligence in reproduction and distribution of the work.

(136) Sec. 126(2) of the Italian CL lays down even more clearly than French law that the second main duty of the publisher is to pay the author the agreed remuneration. This provision is supplemented by the principle of the author's share in the proceeds of exploitation (sec. 130(1), first sentence, Italian CL). As is apparent from the exception (ditto, second sentence) permitting lump-sum payments, what the legislator has in mind, in exactly the same way as the French legislator, is a proportional share which may be calculated not only on the retail price but also by other methods

specified in the contract[249]. This exception, which tallies almost word for word with French legislation[250] covers dictionaries, encyclopaedias, anthologies and other collective works, translations, magazine and newspaper articles, speeches and lectures, scientific works, cartographic, musical and musico-dramatic works and works of fine art (sec. 130(1), second sentence, Italian CL). It is interesting to note that the categories of works listed in this section include almost all those to which the 20-year maximum term for publishing contracts under sec. 122(5) of the Italian CL does not apply. Since the provisions of sec. 130 on remuneration include musical works in general as well as musico-dramatic and symphonic works, we have the remarkable case of music publishers being doubly privileged. However, the exclusion of proportional shares in favour of lump-sum payments seems realistic, especially in view of the technical and economic developments in music publishing. Proceeds from the sale of sheet music are in fact of very little importance compared with the current sums paid to authors, composers and publishers by the collecting societies in respect of performing, phonogram and broadcasting rights[251].

(137) Sec. 130(2) of the Italian CL does not really oblige publishers to render accounts except in the event of proportional remuneration of the author; to this

extent the Italian legislation is in line with the provisions of sec. 24 of the German PL; whereas, as already mentioned[252], French law establishes a general requirement for publishers to render accounts. Deserving of special note, however, is the important peculiarity of the provision in sec. 123 of the Italian CL for monitoring editions, which has no counterpart in this form in the other countries. This concerns the author's right to "countersign" the copies of the work which the publisher is to market pursuant to sec. 12 of the implementing regulations for the Italian CL. It lays down firstly that it is the publisher's duty to arrange for the counter-signature. Copies may either be signed by the author himself, or by a professional association through the intermediary of the collecting society SIAE. If the author himself countersigns the copies, he or his publisher must inform the professional association. Under this legislation, the detailed arrangements for countersigning may be laid down expressly by collective agreements between the professional groups concerned. In practice, this formality is carried out by means of an embossing stamp at one of the agencies of the collecting society SIAE[253]. This unique procedure enables Italian authors to know exactly how many copies the publisher proposes to sell. When scrupulously applied, this is no doubt one of the most reliable forms of monitoring editions.

(138) Sec. 131 of the Italian CL however gives the publisher the sole right to fix the retail price of the work,

in the same way as sec. 21 of the German PL. Again like the German law, however, Italian legislation places certain restrictions on the publisher's freedom of decision. For instance, the publisher must give the author due notice before fixing the price. The author may oppose prices fixed or modified by the publisher if such price fixing would seriously prejudice his interests or the circulation of the work.

(139) Sec. 25 of the Italian CL also provides that the author has two main duties. He must firstly deliver the work in accordance with the contractual conditions, in such form as not to make printing of the work unduly difficult and expensive. His second duty is to guarantee the unimpeded use of the assigned rights throughout the contractual term. If the work has still to be produced, the restrictive provisions of sec. 120 of the Italian CL must be complied with. Like secs. 33 and 34 of the French CL, these restrict the author's capacity to contract obligations to produce future works. It provides that a contract is null and void if it relates without limit of time to all categories of works that the author is capable of creating. Moreover, the term of contracts granting exclusive rights in works yet to be created may not exceed 10 years. In the case of clearly-specified future works for which no delivery date has been fixed, the publisher may have this date fixed by the courts,

although it may in turn be extended for the author's benefit.

(140) Pursuant to sec. 125(2) of the Italian CL, the author has the duty, and at the same time the right, to read the proofs in the customary manner. This dual aspect of proof reading - author's right and duty - is not so clearly set out in the equivalent sec. 20 of the German PL, which places the duty of proof reading only on the publisher, while granting the author only the right of perusal and objection. Similarly to sec. 12 of the German PL however, sec. 129 of the Italian CL grants the author the right to amend the work up to time of publication. Such amendments must not however alter the character and purpose of the work. The author is also required to pay the extra costs caused by the amendments. Art. 129(2) of the Italian CL makes the same requirement in the event of a new edition. If the author declines to perform such revision, the publisher may employ third parties to revise works which need revision before a new edition is published. In the latter case, however, the publisher must ensure that reference is made to the revision and that appropriate mention is made of the adaptor's contributions.

(141) Sec. 124 of the Italian CL provides that before publishing a new edition as agreed in the publishing contract, the publisher must inform the author reasonably in advance of the time when the current edition is expected to go out of print. He must also inform the author whether or not he proposes to

publish a new edition. If the publisher renounces publication of a new edition, or if despite declaring his intention to publish he does not publish the new edition within two years of so declaring, the contract is deemed to be annulled. The author is entitled to damages by reason of the failure to publish the new edition, except if the publisher can cite valid reasons therefor.

(142) Sec. 132 of the Italian CL also contains a provision on the reassignment of the publisher's rights. Reassignment is dependent upon the author's consent, except if otherwise provided in the contract or in the case of the sale of the publishing firm. Even in the case of the sale of the publishing firm, however, sec. 132 (2nd sentence) of the Italian CL, like sec. 62(2) of its French counterpart, prohibits the reassignment if the reputation or distribution of the work would be adversely affected thereby.

(143) Sec. 134 of the Italian CL contains precise provisions on the termination of publishing contracts. Contracts are terminated in the following circumstances: upon expiration of the contractual term; upon inability to perform the contract because the work is unsuccessful; upon the author's death before completion of the work, except if the special provisions of sec. 121 of the Italian CL and the publisher's option enshrined therein apply; upon publication being banned by the courts or by law; or upon

the author requesting rescission of the contract under sec. 128 of the Italian CL in the event of failure to publish at the right time and in the event of the work being sold off or pulped. Unlike the other laws studied, sec. 133 of the Italian CL at least setlles the last-mentioned circumstance in principle. If the publisher wishes to sell off or pulp the remainder of the edition, he is required to notify the author of this fact and to ask him whether he wishes to buy the remaining copies of the work at the price that would probably be obtained by selling off or pulping them. Sec. 134 cites as the last case in which a contract may be rescinded, the exercise of the right of revocation because of changed opinion, which - as already mentioned[254)] - is dealt with in secs. 142 and 143 of the Italian CL.

(144) Like the German PL, the Italian CL contains some further provisons of a copyright contract nature for compilations, in particularly newspapers and magazines. These provisions are not however directly connected with the legislation on publishing contracts, but appear in title I, chapter IV, section II of the law. Its basis is the provision of sec. 38(1) of the Italian CL that in the case of compilations (collective works) the right of economic exploitation is, except if otherwise agreed, vested in the editor (publisher) of the work. Sec. 38(2) of the Italian CL provides however that the individual contributors to the compilation retain their right, unless otherwise agreed, to exploit their own contributions separately. Sec. 42 of the Italian CL provides further in this context that the author of a contribution to a

compilation is entitled to publish it as a reprint by itself or in book form with other contributions, provided he names the title and date of publication of the collective work. Sec. 42(2) of the Italian CL provides in respect of published newspaper and magazine contributions that the author may have them published in other newspapers, likewise except if otherwise agreed.

(145) Of the other special provisions regarding contracts between authors of contributions to compilations and the publishers thereof, mention should first be made of the provision of sec. 39(1) for the case in which a third party not belonging to the editorial staff sends an (uninvited) contribution to a newspaper or magazine. The third party concerned may freely dispose of his rights if he has received no acknowledgment of receipt within one month of sending his contribution, or if the contribution is not published within six months of receipt of an acknowledgment of receipt. Moreover, sec. 43 of the Italian CL provides that publishers are not obliged to preserve or return uninvited newspaper and magazine contributions. If on the other hand the article is supplied by a member of the editorial staff, sec. 39(2) of the Italian CL permits the above time-limits to be exceeded. Six months after delivery of the manuscript, however, even a member of the editorial staff may have the article published in book form or as a reprint, if the contribution is to a newspaper, and in other periodicals if a magazine is involved. Moreover, sec. 40(1) of the Italian CL provides that contributors to compilations

other than newspapers or magazines are entitled (again except if otherwise agreed) to have their name mentioned as a customary procedure, whereas sec. 40(2) of the Italian CL provides that members of a newspaper's editorial staff have no such right except if otherwise agreed. For practical reasons, the law here expressly limits the author's droit moral.

(146) Sec. 41 of the Italian CL contains a further provision, adapted to practical needs, to facilitate the work of newspaper publishers. It permits the newspaper publisher (the chief editor), again except if otherwise agreed, to make such formal alterations to the newspaper article as the nature and purpose of the newspaper make necessary. In the case of articles published without the author's name, parts of the contribution may be omitted or abridged. This also undoubtedly constitutes a restriction of the author's droit moral, despite the fact that sec. 41 of the Italian CL expressly provides for observation of the provisions of sec. 20 of the Italian CL on droit moral. If one considers these two sections jointly, one must conclude that these powers of alteration must in no circumstances affect the author's honour and reputation[255].

(147) The efforts of Italian legislators to produce reasonable special provisions for newspaper, magazine and other periodical publishers go to show how difficult it is to produce legislation applicable generally to all sectors of publishing.

This is also apparent firstly from comparable special provisions in sec. 38 of the German CL and secs. 41 - 46 of the German PL and from the few relevant provisions of French law (sec. 13, and in particular sec. 36(3) of the French CL), and secondly from sec. 40 of the Danish CL, which contains no specific provisions for this sector, but by virtue of which the provisions on publishing contracts do not apply at all in respect of newspapers and periodicals and apply only in part to other compilations. This differential treatment is doubtless designed to meet practical needs, but cannot be considered adequate by reason of its cursory and selective nature.

5. The Netherlands

(148) We have already mentioned[256] that apart from a few (albeit important) provisions of the "general part" of the law on copyright contracts, Dutch law, like that of Belgium, Luxembourg, the United Kingdom and the Republic of Ireland, contains no special provisions on individual types of copyright contracts. Since 1972 however, there has existed, in connection with the revision of the Dutch Civil Code[257], a preliminary draft of Book 7 thereof, whose Title 8 contains a draft publishing contract as well as other types of contracts. In view of the relatively recent date of this draft and the renewed interest in the law on copyright contracts[258], we propose to examine this draft in some detail.

(149) According to the definition of publication contracts

in sec. 1(1), this draft seems at first sight to be more like Danish and Italian legislation and closer to the German, which is restricted to literary and musical works, than to the French, since it is based on reproduction and distribution by printing, and thus appears to confine itself to the "print media". This definition is however watered down in sec. 12(2) of this draft, whereby the provisions relating to publication contracts apply accordingly to reproduction by means other than printing or similar processes. The final outcome is the concept of publishing contracts in the wider sense, as found in French law. One is entitled to doubt whether the complete lack of differentiation in the legislation is practicable in view of the needs which must nowadays be satisfied by legislation on the primary law of copyright contracts[259].

(150) From this point of view, the fact that the Dutch draft fails in the definition and other provisions to call the author by his name as the contractual partner of the publisher, may give rise to difficulty; the draft tends to speak always of the publisher's "opposite party". This was obviously done in view of the fact that the publisher's contractual partner may sometimes be someone other than the author himself. The snag of such an arrangement is however that in the sense of the concept used here of the "primary law of copyright contracts", the special need for protection of freelance authors will not be so clearly apparent[260]. A more modern impression is made however by sec. 13 of the draft, in which legislation on publishing contracts

is stated to be mandatory in principle, except where the law says specifically that its provisions may be contractually varied[261]. The Dutch draft is thus doubtless a clear expression of the basic idea of protecting the author.

(151) This idea of protecting the author is also unmistakable in the provisions of sec. 1 of the draft, which set out the publisher's main duties. As in Italian law, sec. 1(2) of the draft includes in the publisher's main duties not only the duty to reproduce and distribute the work, but also the duty to pay remuneration, albeit only if not otherwise agreed or customary. Thus in principle the Dutch draft takes at least some account of the importance currently attached to the question of remuneration[262]. Sec. 12(1) of the draft provides on the other hand that secondary rights (rights of translation, musical adaptation, dramatisation, filming and other adaptations, as well as reproduction rights relating to processes other than printing) are assigned to the publisher only if expressly so agreed. Since however the latter applies in almost all cases and publishing contracts are becoming ever increasingly parts of agency contracts, this wording is somewhat unsatisfactory for a modern draft unless more detailed attention is to be given to this aspect, especially as regards remuneration.

(152) As regards the publisher's other main duty of reproducing and distributing the work,

the Dutch draft, unlike the provisions of Italian law[263] and the comparatively less strict provisions of Danish law, contains no mandatory period for publication of the work. In the absence of contractual agreement however, sec. 5(1) of the draft requires the publisher to market the work within a reasonable period. This more or less corresponds to the provisions of sec. 56(4) of the French CL. Unlike sec. 5 of the German PL and sec. 122(4) of the Italian CL, the Dutch draft also refrains from quoting a guiding figure as regards the number of copies, if this is not specified in the contract. Its sec. 7(1) tends to leave this to the publisher. The publisher is however required to determine the number of copies before the appearance of each edition and to inform the author thereof at the latter's request.

(153) Under sec. 6(1)-(2) of the draft the publisher also determines the price and form of the copies of the work, except if otherwise agreed. He is however required to safeguard the author's interests in this respect, and to inform him of the price fixed before the first edition appears, or to inform him of the form of the work at the author's request. The provisions regarding price fixing are very similar to those of sec. 131 of the Italian CL; the provisions of sec. 21 of the German PL may also be compared with it.

(154) Sec. 8(1) of the draft expressly provides as regards new editions that the publisher is not entitled to increase the size of the edition or to publish a new impression or edition of the work

unless this has been agreed. In this respect an impression that differs noticeably in form from the previous one is regarded as a new edition of the work. Sec. 8(2) of the draft provides however that the publisher loses his right to publish a new edition if, despite a reminder to this effect form the author, he fails to make use thereof within a reasonable period. In the latter case, the author may have the work published by another. These provisions are again related to sec. 17 of the German PL and sec. 36(1), second sentence, of the Danish CL. The latter ruling however lays down a specific time limit of one year after delivery of a relevant request by the author. Sec. 124 of the Italian CL on the other hand leaves the initiative to the publisher who, as explained, must draw the author's attention to the fact that the current edition is exhausted and state his intentions regarding a new edition. If he declares his intention to publish a new edition, he must do this within two years. The Italian law has the undoubted advantage that it is based on the fact that the publisher has better information, provided always that he fulfils his duty to inform the author.

(155) Sec. 9 of the Dutch draft deals in the author's interest with the question of modification and adaptation of the work before publication of a new edition, in a similar way to sec. 38 of the Danish CL and sec. 12 of the German PL. It requires the publisher to grant the author an opportunity to amend the work within a reasonable period, before increasing the number of copies published or publishing a new edition. The publisher is not however required to make modifications

which he cannot in good faith be asked to make; in such cases, he may instead refrain from increasing the number of copies published or publishing the new edition. In this case however the author is free to approach another publisher.

(156) Sec. 7(2) of the Dutch draft provides that the publisher's duty to render information and accounts does not apply solely to cases of proportional remuneration; this is similar to the requirements of French, but not those of Italian and German law. The author has the right in all cases to appoint an expert to examine the publisher's books to verify the number of copies published and, where there is a bona fide interest in so doing (which will generally be the case with proportional remuneration) to verify the number of copies marketed. The expert is required to maintain professional secrecy and may not inform the author of more than the result of his inspection. The author is required to give the publisher an undertaking to this effect.

(157) In the provisions of the Dutch draft on the publisher's main duties under a publishing contract we encounter the principle (also enshrined in sec. 54 of the French and sec. 125 of the Italian CL) that the author must guarantee the publisher undisturbed exercise of the right of publication and release him from the claims of third parties to publish the work concerned. Hence as a rule the (partial) assignment of copyright or the exclusive grant of a right of utilisation (licence)[264] is linked with this, although sec. 11(2)

of the draft shows that the assignment of an exclusive right is clearly not necessarily to be linked with the conclusion of a publishing contract.

(158) On the other hand however, the Dutch draft does not expressly enshrine the author's obvious duty to deliver the work to the publisher. However, sec. 10 of the draft contains a series of special provisions for cases in which the object of the contract is a work that has not yet been produced; these provisions are closely related to those on the publisher's option in sec. 34 of the French CL. Whereas however the French law contemplates 5 works or 5 years, the Dutch draft provides that an agreement for publishing works not yet produced is not valid if it covers more than three works in the agreed category or a period of more than three years. If it is not a case of the advance conclusion of a genuine publishing contract but only of the grant of an option to the publisher, sec. 10(2) of the draft provides for the publisher's option to lapse if within three months of the finished work being tendered to him for that purpose, he does not undertake to publish it.

(159) The Dutch draft contains an interesting provision which has no counterpart in the law of the other countries. It concerns the question of when the publisher should have the right to reject because of its poor quality a manuscript that has yet to be produced. This applies

to cases of genuine publishing contracts which are not simply option agreements. Sec. 10(3) of the draft provides that after receipt of the manuscript the publisher would be entitled to terminate the publishing contract and to return the manuscript, stating his reasons for so doing, only if the content of the mansucript appears to differ so greatly from his legitimate expectations that he cannot in good faith be asked to publish the work[265]. In this case however the publisher must pay the author equitable damages.

(160) Sec. 11 of the Dutch draft contains provisions on the author's "duty of abstention", which in come cases may assume the character of a prohibition of competition[266]. The draft attempts in this context also to prevent the author from being unduly restricted in respect of comparable new works. Sec. 11(1) provides that an undertaking to the original publisher not to have any other work published by another publisher without the original publisher's consent may be given only in writing and is in any case permissible only in respect of works that may prejudice sales of the original work. Sec. 11(1), second sentence, of the draft further restricts prohibitions of competition, and provides that contracts of this nature become invalid two years after publication of the last impression or edition, or five years after the first appearance of the work.

(161) Sec. 11(2) of the draft also contains a special provision in favour of the author if one of his works is included in the author's "collected works": in the event of the exclusive assignment to the publisher of the right of circulation, the author may after 10 years have elapsed since its first appearance have the work published by another publisher as part of his collected works. Sec. 39(2) of the Danish CL lays down a period of 15 years in such cases, and sec. 2(3) of the German PL even prescribes a period of 20 years from publication of the work. We have already mentioned that this provision of the Dutch draft with its reference to the stipulation of an exclusive right of circulation of the work shows that despite the provisions of sec. 2 of the draft regarding successors in title and guarantees, the assignment of an exclusive right is not required in publishing contracts in all cases.

(162) As regards the reassignment of the publisher's powers, the provisions of sec. 3 of the Dutch draft correspond in principle with the relevant provisions of sec. 28(2) of the Danish, sec. 34(1) and (3) of the German, sec. 62(1) and (2) of the French, and sec. 132 of the Italian CL. The publisher would not be able to assign his power to another except together with his business or a part thereof, or otherwise only with the author's written consent. Both these rules may however be replaced by other written agreements upon conclusion of the publishing contract (sec. 3(4) of the draft). A peculiarity of the Dutch draft is that it distinguishes

between the right enshrined in sec. 2(1) to exercise the copyright in relation to third parties, and the legal relationship between author and publisher. Without the author's consent the latter, too, may be assigned to a third party only together with the business or a part thereof; otherwise only if differently agreed with the author in writing. These provisions are supplemented by sec. 4 of the draft, which can in turn be compared with sec. 62(2) of the French and sec. 132, second sentence, of the Italian CL. The author would be empowered, in cases where a valid assignment takes place without his consent, to terminate the agreement if it is prejudicial to his interests. The Dutch draft goes a considerable way towards meeting the author's wish not to find that he has suddenly become without his knowledge and against his will the "house author" of a publishing house with which he has no connections.

(163) On the whole, the draft Dutch legislation on publishing contracts shows the considerable difficulties that now face legislators who attempt to solve the problems of the law of copyright contracts. The draft has also been the subject of criticism in Dutch legal doctrine[267]. Although it attempts in many ways to protect the author - as already apparent from the fact that it opts in principle for mandatory requirements (sec. 13) and generally provides for a duty of remuneration in favour of the author - the impression remains that Dutch authors will be unlikely to succeed on the basis of this draft

in greatly strengthening their contractual position vis-à-vis the publishers, particularly as regards remuneration. An attempt was made in the Netherlands a year later (1973) to take a further step towards a blanket agreement by the conclusion of a "standard copyright contract" between the Dutch Publishers' Association and the authors' association (Vereniging van Letterkundigen)[268].

6. Summary and appreciation

(164) The above comparative account of provisions on publishing contracts in Danish, German, French and Italian law and the Dutch draft has probably made it clear that despite the sometimes fairly wide definition of publishing contracts, the laws concerned are undeniably biased towards book publishing. Some countries (Germany, Italy and to some extent France) make special provisions for newspaper and magazine publishing, whereas Denmark does not deal with this sector at all. Certain important provisions, e.g. those concerning proportional remuneration of authors in French and Italian law, had to be made inapplicable to important groups of works (scientific works, translations, or - in Italy - musical works). In view of the diversity of forms of publishing nowadays, which is also reflected in the external and internal organisation of the publishers' associations[269], it is doubtless very difficult to lay down general or even mandatory provisions in law for all

publishing contracts which satisfy all the practical requirements.

(165) Legislators seem to face a difficult choice in this respect, which may explain why the 1972 Dutch draft has not yet become law. No less symptomatic is the failure we have already mentioned of the attempt made in the reform of French copyright law to supplement the general provisions on publishing contracts by a series of special provisions for individual sectors (book publishing, music publishing, phonogram publishing, film publishing, art publishing, etc.)[270]. Even in the case of publishing contracts, which are still the most important type of contract in the primary law of copyright contracts, in respect of which there is most historical experience regarding the subject matter and the technique of legislation and for which most comparative law material is available, it seems extremely difficult for legislators themselves to specify directly what they should contain. This makes it all the more urgent to seek other ways of legislating on the content of publishing contracts and other copyright contracts.

(166) One should not however call in question the sense and importance of existing law in the field of publishing contracts, and in particular of certain important provisions which protect authors and to which we have drawn attention earlier. This applies for instance to the following points: the strengthening of the droit moral of authors even in connection with publishing contracts (prohibition of alterations by the publisher; opportunity for the author to make alterations before

publication of a new edition; naming of the author; the publisher's duty of remuneration, in principle in reasonable proportion to sales; the publisher's duty to give information and render account whenever possible, and not only in the case of proportional remuneration; the publisher's duty to exercise within reasonable periods the right of reproduction and circulation assigned to him; the limitation of the duration of the assigned right itself, as laid down most notably in Italy - but not currently in any other countries - where the author enjoys very far-reaching protection (limitation of publishing contracts to 20 years); provisions designed to prevent the author from entering into undue commitments as regards the grant of options and publishing contracts for future works (e.g. limitation to three works or three years in the Dutch draft); provisions regarding the permissibility of selling off and pulping by the publisher, as attempted by Italian law. None of the laws examined deals even partly with the question of secondary rights, and in particular with the associated questions of remuneration. This is however probably the beginning of the aspects that cannot be satisfactorily dealt with by legislation.

III. Performing contracts

1. Denmark

(167) Special provisions regarding performing contracts

are to be found only in France, Greece, Italy and Denmark. Judging by the number of relevant provisions alone[271], such legislation is not generally very well developed or detailed. In the case of Denmark, there is only one provision made by law i.e. sec. 32 of the Danish CL. It should be noted that even this minimum provision is non-mandatory under sec. 27(2) of the Danish CL and may thus be replaced, modified or supplemented by contract. Sec. 32(1), first sentence, of the Danish CL does indeed indicate that in the legislator's view the assignment of a right to perform a work (unlike the assignment in a publishing contract of the right to publish) should not generally involve the assignment of an exclusive right to the author's contractual partner. This possibility is not however precluded. That is why sec. 32(1), second sentence, of the Danish CL provides further that in the case of contractual assignment of the exclusive performing right, the author may nevertheless perform his work himself or have it performed by others, if the performing right is not exercised within three consecutive years. These minimum provisions are all that Denmark can show by way of legislation on performing contracts; they leave a lot of questions unanswered, especially that of remuneration. It should of course be remembered that in Denmark as in all the other countries may aspects of performing contracts, especially as regards musical performances, are nowadays in the hands of the collecting societies and are no longer dealt with individually[272]. This certainly reduces greatly the need for legislation on the subject. In clarification,

moreover, sec. 32(2) of the Danish CL states that these provisions do not apply to cinematographic film contracts. These are governed in part by secs. 41 and 42 of the Danish CL, which we shall discuss later.

2. France

(168) French law deals with the performing contract (contrat de représentation) before dealing with the publishing contract. However, the number of provisions alone (secs. 43 - 47, French CL) shows that the law is much less detailed and exhaustive than that on the publishing contract (secs. 48 - 63, French CL). Sec. 43(1) of the French CL defines the performing contract as a contract whereby the author of an intellectual work authorises a natural person or legal entity to perform (à représenter) this work on the agreed terms. This definition must be seen against the background of the examples of forms of "représentation" set out in sec. 27 of the French CL, which is generally defined as a "direct communication of the work to the public" (communication directe de l'oeuvre au public). The individual forms mentioned are: public recitation; musical performance; theatrical performance; public recital; diffusion by whatever process of words, sounds or pictures; public projection (projection publique); transmission of a broadcast work by means of loudspeaker or television screen erected in a public place[273].

(169) The combination of the two definitions of the "droit de représentation" in sec. 27 and of the "contrat de représentation" in sec. 43 shows that in French law, the performing contract in the general sense of the "direct communication of the work to the public" is based on a very comprehensive concept of a performance (représentation). (From the point of view of the organisation of sec. 15(2) of the German CL, one ought in fact to speak of a contract for the public reproduction of a work[274]. Under the German scheme, this contract would be further subdivided into contracts for the right of recital, the right of performance (in the narrower sense), the right of projection, the right of broadcasting and the right of reproduction by phonogram or videogram or the reproduction of radio broadcasts.) Moreover, Danish law too is based on a similarly wide concept of the performing contract in the sense of all forms of public reproduction. We shall therefore keep, not only for linguistic reasons, to the concept of the performing contract (contrat de représentation) in the wider sense used in French law. It should however be noted that broadcasting contracts will be discussed separately later in the study[275], even though they appear as a special type of contrat de représentation in French law.

(170) Like his Danish counterpart, the French legislator provides in sec. 44(2) of the French CL that unlike publishing contracts (sec. 54, French CL), performing contracts do not, except if expressly otherwise agreed, generally confer on the organiser (entrepeneur de spectacles) an exclusive

right of utilisation. Moreover, pursuant to sec. 44(1) of the French CL, performing contracts are concluded for a specified period or a specified number of performances. This mandatory requirement[276] is set out in sec. 44(3) of the French CL and provides that in the case of the grant of exclusive rights by a dramatic author, which the law still permits, the term of such a contract may not exceed 5 years. Moreover, the contract lapses as of right if there is a break of two consecutive years in performances.

(171) French legislation on performing contracts does not, any more than its Danish counterpart, contain detailed provisions on remuneration of authors in the case of performing contracts. However, the general principle of proportional remuneration also applies in this respect[277], unless one of the exceptions of secs. 35 and 36, French CL, applies. (We are not concerned here with the exceptions of sec. 36(1) and (3), which are designed for book and newspaper publishing.) Nor does French law answer the question which has recently attracted increased attention[278], namely whether "proceeds from the exploitation" (recettes provenant .... de l'exploitation: sec. 35(1), French CL) include public subsidies, from which State and municipal theatres in all countries, and increasingly also in France, nowadays benefit[279]. These subsidies play an important and often decisive part in covering the performing costs of such theatres. Authors do not seem in practice (apart from a changeover in the method of computation in

Germany[280]) to have yet succeeded in having subsidies taken into account when computing performing fees.

(172) Sec. 46 of the French CL nevertheless places certain subsidiary duties on the organiser as regards the remuneration of the author. The organiser is required to declare to the author or his agents (a reference to the collecting societies, who frequently act as intermediaries in this field[281]) the precise programme of performances and to deliver to him a statement, with supporting evidence, of his earnings. Equivalent provisions are to be found, for example, in sec. 16 of the 1965 German Law on Collecting Societies[282]. Sec. 46(1), second sentence, of the French CL also provides, somewhat superfluously, that the organiser must pay the agreed remuneration to the author or his agents on the scheduled due dates.

(173) Sec. 47 of the French CL sets out the basic assumptions of French law on the author's droit moral in the case of performing contracts. It provides that the organiser must ensure the performance under suitable technical conditions which guarantee that the author's intellectual and moral rights are respected. Sec. 44(4) limits, as in the case of publishing contracts, the organiser's power to dispose of his rights, in that he may not assign his rights under the

performing contract except with the formal consent in writing of the author or his agent. Unlike publishing contracts, no provision is made here for the case of assignment in connection with the sale of a business[283].

(174) In France, the use of collecting societies as intermediaries not only for musical performances (minor rights) but also for the theatrical performance of dramatic works (major rights) has a long tradition and great practical significance[284]. This is at least indirectly apparent in the provision of sec. 43(2) on the "general performing contract" (contrat général de représentation). By this contract, an authors' professional organisation assigns to an organiser the right to perform during the term of the contract the present or future works which constitute the repertoire of that organisation, on the conditions laid down by the author or his successors in title. For the performance of music, the authorisation is granted directly by the relevant collecting society - in France SACEM (Société des Auteurs, Compositeurs et Editeurs de Musique), which also lays down the conditions[285]. In the case of theatrical performances (major rights) on the other hand, the scheme used by the French authors' society SACD (Société des Auteurs et Compositeurs Dramatiques) is complicated[286], the actual performing permit - on the minimum terms negotiated by SACD - being granted to the theatrical organisers by the author himself[287]. We cannot

deal in detail with this system here. However, the underlying idea of a collective agreement, on which this system has been based for decades, deserves mention, since SACD is purely and simply a society of authors. It secures for its members minimum conditions for the conclusion of individual utilisation contracts, without thereby excluding the possibility of more favourable terms being negotiated in individual cases involving, for example, particularly well known theatrical authors[288]. Hence a payment "above the agreed rate" is possible, as in the case of collective agreements under labour law.

(175) In order to facilitate conclusion of the "general performing contract", sec. 43(3) of the French CL provides for a specific exception from the prohibition in sec. 33 of that law on the total assignment of future works. According to French legal doctrine[289], this exception applies even to relations between the author and the collecting society, since otherwise this provision would make no sense as regards the relations between the collecting society and the organiser. The collecting societies may in fact assign only those rights that have previously been assigned to them by the author himself. The provisions relating to the "general performing contract" are in fact part of the law on the collecting societies, which we have already excluded from this study. In France, contrary to the other countries, this sector has not yet been the subject of codified legislation[290]. Sec. 46(2) of the French CL

also concerns the law on collecting societies. It provides for a reduction in authors' fees payable by local authorities when organising their local festivities, and by national education societies recognised by the Minister of Education when organising their functions. The only practical effect of this provision is on the fees charged by the collecting societies. There is a corresponding provision in sec. 13(3) of the German Law on Collecting Societies. This provision requires the collecting societies to take reasonable account when fixing and collecting their fees of the religious, cultural and social interests of those required to pay the fees, including the interests of the youth services. Sec. 46(2) of the French CL shows however that legislation on performing contracts cannot fail to take account of the situation that exists in practice, especially in view of the widespread use of collecting societies. There is a considerable interdependence between legislation on (individual) performing contracts and that on collecting societies. It is thus not surprising that in Germany, where there is a special detailed law dealing with collecting societies, the copyright law does not as yet contain any special provisions on performing contracts. The reverse is the case in France.

3. Greece

(176) The Greek Law No. 3483/1909 "on the rights of authors of dramatic works" deals with performing contracts. It has been confirmed and partly supplemented by sec. 9 of the general Law No. 2387/1920 "on intellectual property". The peculiarity and uniqueness of the Greek legislation lie in the fact that its attention is concentrated on the author's entitlement to remuneration, including statutory minimum rates of remuneration. By virtue of the basic provision of sec. 1 of Law No. 3483/1909, the author of an original dramatic work and the translator or adaptor of a dramatic work have the sole right to permit its performance in a theatre or place accessible to the public. Moreover, sec. 9(1) of Law No. 2387/1920 requires inter alia the permission in writing of the author or his legal representative for the public recital of poetry or prose works, and for the performance of dramatic or musical stage works or musical compositions in theatres, cinemas, dance halls and places of entertainment, in restaurants, hotels or cafés. Sec. 9(4) of this law requires the written permission to be obtained by the organiser before the performance begins. Sec. 2 of Law No. 988/1943 places even greater emphasis on the need for performing contracts to be in writing and describes the written form of the contract between author and theatrical organiser as a constitutive element thereof.

(177) As regards remuneration, sec. 7 of Law No. 3483/1909 establishes first of all the principle of freedom of negotiation of the remuneration between authors and organisers, subject always to such remuneration not being less than the statutory minimum rates set out in subsequent paragraphs. The special nature of the provisions on minimum remuneration is expressly reemphasised in sec. 3 of the supplementary Law No. 988/1943. This provides that any agreement between authors and theatrical organisers is null and void if the copyright remuneration therein specified is less than the minimum rates. The author is entitled in each and every case to demand the scheduled minimum copyright remuneration. Sec. 7 of Law No. 3483/1909 provides inter alia for the following minimum rates: 10% of gross receipts after deduction of rates and taxes for dramatic works which occupy a whole evening; 7% for two-act plays not occupying the whole evening, and 4% for one-act plays also included in the programme; 10% for translations of ancient or modern classical works and for adaptations of ancient or modern works; 5% for translations of the modern international repertoire. These rates are increased by 2% in each case for unauthorised performances. Remuneration is payable immediately after the performance, and a written receipt must be given therefor.

(178) Further provisions of these various Greek laws show the importance attached by Greek legislators also to the intervention of collecting societies, not least in the field of theatrical performances.

Sec. 9(5) of Law No. 2387/1920 authorises the "agents of the authors, composers and music publishers" to apply for the prohibition of performances not authorised in writing of musical works to the relevant police authority, which must immediately prohibit the performance. Sec. 7(5) of Law No. 3483/1909 further provides that "the owner of the right or the society, association or group that legally represents him" is entitled to apply to the relevant authorities to prohibit the performance if the copyright fee has not been paid within two days of the first performance, even if the statutory permission for public performance has already been granted. These provisions also apply specifically to composers of musical works and to translators and adaptors of foreign dramatic works, without prejudice to existing rights of the authors of the original works (sec. 7(7) of the law). Sec. 11 of the law provides moreover that even the announcement of the performance of a dramatic work without the author's written consent may be prohibited by the competent local court or police authorities on application by the entitled party or "the representative of the society of dramatic authors".

(179) According to sec. 4 of Law No. 988/1943, collection of the remunerations must be effected "by the Society of Greek Dramatic Authors at all times", even if the author is not a member of that Society. In the latter case, the Society may retain 3% of the sum collected. In the case of members of the Society, the percentage of the remuneration to be retained is

determined by its constitution. The privileged position of authors' societies and associations apparent here and elsewhere in Greek legislation (especially in sec. 5 of Law No. 4303/1929) must be considered an important characteristic of Greek legislation, which is distinctly modern from the viewpoint of this study. The weakness of the Greek legislation obviously lies in its fragmentation and lack of organisation, which result in the individual provisions not always being fully harmonised with one another[291]. On the whole, however, thanks to the provisions on statutory minimum performing fees, which date in principle from 1909, Greek authors no doubt enjoy a degree of protection which is still lacking in many countries. The need for protection of authors is of course not so great where there are efficient authors' societies, as is often the case with performing contracts. Even in Greece however it has clearly not yet been possible to extend this principle, which favours authors, to other copyright contracts, and in particular to the important sphere of publishing contracts. Since contracts in this sphere continue to be concluded individually rather than through the intermediary of collecting societies, it would seem especially urgent to extend to it the principle of minimum remuneration rates, unless other legal formulations can achieve the same result.

4. Italy

(180) Besides legislation on publishing contracts, Italy, like France, has statutory provisions (albeit much less complete) on performing contracts (secs. 136 - 141, Italian CL). Contrary to French law, however, Italian law has no general concept of a performing contract but speaks of "rappresentazione" in respect of theatrical, and of "esercizio" in respect of musical performances. Even the very wide definition of performing rights, in sec. 15 of the Italian CL (which does not include broadcasting rights, covered by sec. 16 of that law) uses no general concept, but speaks rather of "esecuzione", "rappresentazione" and even "recitazione" (public address/speech). It covers not only musical and dramatic works, but also cinematographic works, other scenic works (opera di pubblico spettacolo) and oral works. For reasons of uniformity, we shall continue to use the general concept of "performing contracts" here. Secs. 136 - 140 of the Italian CL deal first with the "contratto di rappresentazione"; sec. 141, dealing with the "contratto di esercizio", which relates to the performance of musical works, refers to the preceding provisions, which are primarily designed for contracts for performing theatrical works. This reference is however subject to the proviso that the provisions relating to contracts for theatrical performances apply only insofar as they are appropriate to the nature and content of the performing contract for music.

(181) In line with Danish and French law, sec. 136 (2) of the Italian CL provides that in normal cases (except if otherwise agreed) a performing contract assigns no exclusive right. Secs. 137 - 138 of the Italian CL then lay down the rights and duties of the contracting parties. They require the author to deliver the text of the work to be performed, if it has not already appeared in print. In line with the corresponding provisions of sec. 125 (1)(2) of the Italian Law on publishing contracts, he must also guarantee the unimpeded utilisation of the assigned rights throughout the term of the contract. Sec. 138, dealing with the organiser's duties, is remarkable in that - like the provisions on publishing contracts[292] - it lists firstly his duty to perform the work. He is required to organise the performance without any additions, omissions or modifications not approved by the author. He must inform the public in the usual manner of the name of the work, the name of the author and of any translator or adaptor before the performance takes place. He must moreover permit the author to supervise the performance and may not without due and proper reason make changes in the main performers of the work, the chorus master or the conductor of the orchestra if they have been appointed in consultation with the author.

(182) The organiser's duty to execute the performance, which is enshrined in sec. 138 (1) of the Italian CL, is reinforced by sec. 139 of that law, which refers to

the time limits laid down for exercise in secs. 127 and 128 of the same law in respect of publishing contracts. In this context, it is necessary to stress once more the relatively strict and specific time limits laid down in the latter provisions[293]. As a rule, they allow the author's contractual partner a period of only two years to exercise the utilisation right, failing which the author may demand that the contract be rescinded. These important provisions of secs. 127 and 128 of the Italian CL are modified in only one point by sec. 139 of that law, namely that in the case of musico-dramatic works only the period of two years laid down in sec. 127 (2) is extended to five years. Thus the law reflects the special technical, organisational and financial effort involved in producing operas, operettas, etc.

(183) Sec. 140 of the Italian CL widens the sphere of application of sec. 128 thereof, which sets out the legal consequences of non-exercise of the utilisation right. Non-exercise of this right is treated in the same way as if the organiser were, despite appropriate representations by the author, to fail to continue performances of the work after its first performance or the initial run of performances. The provision of sec. 128 (3) of the Italian CL, whereby the contract may be rescinded and the organiser is liable for damages, is specifically subject to proof that this is the fault of the organiser. In practice, it is a good defence for the organiser to claim that despite all due efforts the piece was not a success[294].

(184) It should also be mentioned that like French law (sec. 44 (4), French CL),and in a similar absolute manner,

Italian law (sec. 136 (2), Italian CL) precludes any reassignment by the organiser of the performing rights [295], except if otherwise agreed with the author. Italian law thereafter takes no further account of performing contracts. Apart from the two alternatives provided for in the basic clause (sec. 15, Italian CL) of performances with or without payment, no further mention is made in Italian law of the question of remuneration. The Italian law must of course also be seen against the background of the activity of the collecting society SIAE, which is regulated in detail in secs. 180 - 184 of the Italian CL and secs. 57 - 63 of the relevant regulations [296]. The question remains whether the principle of the author's proportional remuneration laid down in respect of publishing contracts also applies as a general principle to performing contracts, despite the fact that the law does not mention the theatrical organiser's duty to pay remuneration [297]. It should however be noted that sec. 130 (1), second sentence, of the Italian CL includes (publishing) contracts for musical works and musico-dramatic works among the exceptions for which payment of a lump sum to the author/composer is permissible. If an application mutatis mutandis of these remuneration provisions were also to include the provisions for exceptions, this would probably not greatly benefit performing contracts, at any rate in the musical sphere. This means that the authors/composers still have to rely on contracts which, having regard to the important role played by SIAE, even in the sphere of dramatic works, virtually preclude the granting of rights without valuable consideration [298].

5. Summary and appreciation

(185) The comparative material available from Denmark, France, Greece and Italy in respect of performing contracts generally shows, even purely quantitatively, that legislators have less interest in this type of contract than in publishing contracts. Only Greek legislation, contained mostly in a separate law "on the rights of authors of dramatic works" (Law No. 3483/1909, supplemented by Law No. 988/1943) is of a very independent nature [299]. It is worthy of special note because of its direct provisions on the subject of remuneration, which have no counterpart in the other countries, even as regards publishing contracts. The remaining countries whose legislation contains no provisions on performing contracts have not progressed beyond the often meagre provisions of the "general part" of the law of copyright contracts.

(186) Legislation in none of the countries examined provides an answer to the question of how to deal fairly with the remuneration of authors in view of the increasing practice in all countries of subsidising publicly owned and even private theatres. The system of authors' proportional shares in the gross receipts of theatres (sale of ordinary and season tickets) which has been introduced in most countries even without the need for legislation will, in view of this subsidy system, lead in the long run to a situation that authors will find difficult to accept. When the revenue from ticket sales represents an ever declining part of the theatre's overall budget, the authors

are the only ones to whom the fiction of the theatre financing itself from its own receipts is maintained. This is all the more intolerable since the theatre's expenditure on artistic and technical staff is entirely dependent on the availability and growth of the overall budget, which is determined by subsidies. Efforts should therefore be made to give authors a share in one form or another in the theatres' receipts from subsidies and in their more dynamic growth in comparison with receipts from tickets [300]. In France and Italy, where the principle of the authors' proportional share in receipts is the general rule, such an interpretation of existing rules would be possible in theory, but no case is yet known in practice. The same might be said of Greek law, which is based on the concept of gross receipts after deduction of tax and State expenditure. Polet [301] proposes that the fees should be calculated on receipts from the sale of tickets as paid for at the full rather than the subsidised price.

(187) Until the courts settle this question, and until legislators can decide to introduce specific legislation on the subject, the possibility of introducing a new system for calculating theatrical remunerations will continue to depend on the skill of the negotiator as well as on the negotiating power of the associations of authors and of theatrical publishers. The

very fact that the interests of authors and primary exploiters coincide in this field may strengthen the position of the authors and their associations vis-à-vis the theatrical firms. This is shown by the situation, at least in Germany, where since the 1976/77 season a new system for calculating the fees of dramatic authors has been introduced on the basis of agreements between the parties involved [302]. Some idea of the sums involved may be gained from the press report [303] that public subsidies for the theatre in the Federal Republic of Germany now amount to some 1,800 million DM. We cannot deal at length with this new calculation system, which Schulz [304] has dealt with in detail. However, the main idea is that in the case of publicly-owned theatres, the author's fee is calculated by means of a capitation levy on audiences instead of the previous percentage of receipts from ticket sales. If this levy is to fulfil its true function, it will have to be "index-linked", since unlike percentages (e.g. in Greece), levies of fixed amounts will soon be overtaken by inflation. This agreement was initially intended to produce an overall increase of some 50% in authors' fees. The agreement forms in fact part of the "Collection of Rules" agreed between theatres and stage publishers, but not yet published [305]. Because of the law on cartels, the rules in the "Collection" have the status of recommendations only.

(188) Although this agreement was not signed by the

authors themselves as the owners of copyright but by the theatrical publishers, the new rates will directly benefit the dramatic authors, since the publishers receive only a commission on the theatrical performing rights with whose administration they have been charged [306]. This agreement cannot however simply be regarded as forming part of the primary law of copyright contracts within the meaning of this study. There are no special provisions either in the Federal Republic of Germany or in the other countries for relations between authors and theatrical publishers, which are to be considered individual administration contracts [307]. The weakness of the authors' position is apparent in two ways: firstly, the precarious earnings from the administration of the performing rights by the theatrical publishers fully and directly affect the authors, as we have seen from the very problem of theatre subsidies; secondly, the authors have no help from the law in determining the proportional rates (commission) to be paid to the theatrical publishers from income from performing fees. This does not apply to the same extent in those countries - such as Belgium, France and Italy - where the "major" performing rights are also administered by the collecting societies. We must conclude as a result that the primary law of copyright contracts has major shortcomings in most of the countries. Even where there is legislation on performing contracts, it gives no answer whatever to the question of what is to be done when there is interposed between the theatrical organiser and the author another claimant (the theatrical publisher), who is charged by the author to administer his performing rights vis-à-vis

the organisers [308].

IV. Broadcasting contracts

1. General

(189) Broadcasting contracts, that is to say contracts for the assignment (grant) of a utilisation right to broadcast a work by radio or television is dealt with in national copyright laws in an even more fragmentary manner than performing contracts. Hence we look in vain in almost all the laws of the countries examined for provisions which deal specifically with this type of contract, if we ignore the fact that in principle, as already mentioned, the provisions relating to performing contracts also apply in Denmark and France to broadcasting contracts. Of course, the rights in a large part of the works transmitted by radio and television are not based on individual broadcasting contracts between authors and broadcasting organisations, but on blanket agreements covering a repertoire and negotiated between broadcasting organisations and collecting societies. This applies primarily of course to"minor rights", but also to "major rights" in some countries [309]. This applies especially to musical works, to a lesser extent to musico-dramatic works, but recently also increasingly to the unaltered broadcasting of literary works, insofar as this involves reproduction of the

actual text, and not an adaptation for broadcasting [310].

(190) The fact remains that great practical and economic importance attaches to the relations of the primary law of copyright contracts between broadcasting organisations and freelance authors (called "freelance collaborators" of the broadcasting organisations), who often work more or less permanently for the broadcasting organisations [311]. It should be noted on the other hand that in this very sphere binding collective agreements between authors' associations and broadcasting organisations have been drafted for some time now in individual countries (the United Kingdom in particular [312]), and because their main aim is to guarantee minimum protection (minimum terms agreements), they are altogether comparable with collective wage agreements in labour law. However, they cover not only the important question of broadcasting fees, but also a whole series of other problems of copyright contracts, including - in great detail - questions of the droit moral of authors, and the mentioning of names in particular. Such detailed provisions would scarcely be conceivable in the context of general legislation on the subject. This development is remarkable because in the United Kingdom especially, legislation on the droit moral of authors is very much in its infancy. We are thus faced with the paradox as regards relations between freelance authors and broadcasting organisations whereby the contractual duties of the broadcasting organisations are in some cases dealt with in less detail in countries with well-developed legislation on the droit moral of authors than in countries such as the United Kingdom which lack adequate legislation on the subject. This shows

that a satisfactory solution of the problems of broadcasting contracts is not necessarily achieved by legislating directly on the content of such contracts.

2. Denmark

(191) The few, non-mandatory provisions of sec. 32 of the Danish CL on performing contracts in the wider sense also apply in principle to broadcasting contracts [313]. We may therefore refer readers to the comments in the section on performing contracts [314]. The applicability of these provisions to broadcasting contracts thus means that the law also takes as its basis here the grant of a non-exclusive right for three years. Even in the case of the specific grant of an exclusive right the author may, except if otherwise agreed, himself exercise the right or permit it to be exercised if it has not been utilised within three consecutive years.

(192) Sec. 22 of the Danish CL contains a provision that affects broadcasting contracts but whose functional importance is much greater. The original nature of this provision was restrictive, i.e. it forms part of those provisions which limit copyright in the public interest [315], either by authorising free utilisation of the work in all respects, or by means of compulsory or statutory licences. However, the fact that the provisions of sec. 22 of the Danish CL are concerned with the law of copyright contracts has been increasingly recognised of late. These provisions

are often recommended as a model for dealing with other spheres, such as reprography [316]. Sec. 22 (1), first sentence, of the Danish CL reads as follows: "If the Danish Radio (Danmarks Radio) has, ... by virtue of a contract with an organisation which comprises a substantial number of the Danish authors of a given type of works, acquired the right to broadcast the works represented by that organisation, the Radio may against payment of a fee also broadcast in the same way published works of a corresponding type by authors not represented by the organisation" [317].

(193) This provision is based on a combination of a collective agreement and a statutory licence. Such legal formulations are generally known in Scandinavia nowadays as "contractual licences" (Danish: "aftalelicens") [318]; it would however be preferable to use a more accurate term such as "statutory collective agreement licences" to distinguish them from licences granted by contract. The legislator refrains from laying down detailed provisions for broadcasting contracts, and leaves this to the organisations concerned. Hence no rules for the content of broadcasting contracts are laid down unless agreement is reached between these organisations. However, if such agreement is reached and the relevant organisation which contracts with the Danish Radio "comprises a substantial number of the Danish authors of a given type of works", the blanket or collective agreement so concluded becomes to some extent mandatory erga omnes under the law.

(194) Danish law does however contain a series of safeguards to prevent authors who are not members of organisations being simply "steamrollered". Sec. 22(1), second sentence, of the Danish CL specifies that the "contractual licences" provision does not apply on the one hand to theatrical works, which are in practice normally the subject of individual agreements. On the other hand, it does not apply either to other works whose broadcasting has been prohibited by the author; according to Danish legal doctrine [319] a simple notification to Danish Radio suffices for this purpose. A dubious aspect of the Danish legislation on "contractual licences" is however its extension to foreign authors. For technical reasons alone, these authors will not generally issue a prohibition. They will therefore have to be satisfied with the terms negotiated, without being able to influence (even indirectly) the outcome of the negotiations, e.g. by becoming members of the negotiating professional organisation.

(195) Pursuant to sec. 22 (2) of the Danish CL these provisions on the broadcasting organisations' "contractual licence" also apply mutatis mutandis to works of visual art. Here the assumption is that the author has assigned one or more copies of an artistic work to others, clearly with original works in mind. Sec. 22 (1) of the Danish CL in any case directly includes works of visual art published by fine art publishers. Works of visual art can naturally be broadcast only by television.

(196) Sec. 22 (3) and (4) of the Danish CL deals with the

right of the Danish Radio and Television Organisations to make "ephemeral recordings". These provisions permit works to be recorded on tape, film, etc. for broadcasting purposes, on the assumption that the radio organisation has the right to broadcast them. These provisions are also of a somewhat dual character. They are usually regarded as a sub-division of the restrictions of the copyright law [320], but may also be regarded as isolated provisions of the law on broadcasting contracts. Danish law contains no further provisions on broadcasting contracts.

3. Federal Republic of Germany

(197) The German Copyright Law contains no systematic provisions for either performing or broadcasting contracts. First of all, sec. 55 of the German CL contains an isolated provision which, like sec. 22(3) and (4) of the Danish CL, deals with the permissibility of "ephemeral recordings" by broadcasting organisations. It provides that a broadcasting organisation entitled to broadcast a work may by its own means make videograms or phonograms thereof for broadcasting once by each of its transmitters. These videograms or phonograms must be erased not later than one month after the first broadcast of the work, unless because of their exceptional documentary value they are placed in official archives and the author is informed accordingly.

(198) The provisions on "ephemeral recordings" are however less important than the special provisions of secs. 88 et seq. of the German CL on

cinematographic works, which by their nature are largely provisions of the law of copyright contracts. They are also applicable to broadcasting contracts relating to cinematographic films intended for broadcasting. The provisions are however primarily designed for films intended for public screening and are thus hardly appropriate to broadcasting contracts [321]. The assumption is that cinematographic and television works are regarded as identical in copyright law (even if different technical processes are used), so that the grant of rights to film a work for broadcasting by television or the grant of broadcasting rights in television works may be subject to the provisions of the law on cinematographic films.

(199) Ulmer has pointed out in his report on broadcasting contracts, which contains a series of general reflexions on the law of copyright contracts, that this equal treatment from the point of view of the law of copyright contracts needs to be re-examined [322]. He does not in fact consider the application of legislation on cinematographic films to the broadcasting of television films a good solution. He illustrates this by the example of the assumption of the grant of the exclusive right to the producer. Whereas it is logical that cinema films may be screened in cinemas as often as desired, agreements on television films really need to specify whether the producer (the radio organisation) is also to be granted the right of repeat broadcasts or even the right to permit its broadcasting by other

broadcasting organisations. This is particularly important from the point of view of extra fees. Ulmer [324] also criticises the even more far-reaching assumption of sec. 89 of the German CL [323], considering it inappropriate that, at least as regards the director of television films, according to the presumption of the law the producer (the television organistion) is also granted the rights of utilisation as a cinema film. Ultimately, Ulmer's proposals are that there should be separate copyright contract legislation for broadcasting contracts (including contracts for the production of television films) on the one hand, and for contracts for films intended to be screened in cinemas on the other.

(200) In the third part of his report [325], Ulmer has considered the possible form of such separate but comprehensive legislation on broadcasting contracts and worked out detailed proposals for future legislation on the subject. In view of the fact that none of the countries examined has similar proposals for detailed legislation or codes for broadcasting contracts, we shall discuss Ulmer's proposals at least briefly. With certain limitations, Ulmer proposes that broadcasting contracts should in principle be in writing [326]. For greater clarity, he proposes that the main conditions of the contracts should be set out in the main body of the contracts, and not just in the general conditions of contract (the "fee conditions") appended to the actual contract. Ulmer distinguishes [327] between the essential main conditions of the contract, whose absence would render it null and void, and the less essential

main conditions, which the parties would not need to agree separately unless they wished to depart from the non-mandatory requirements of the law. The first group of provisions covers the object of the grant of the broadcasting right (radio or television), its duration and territorial scope, and the remuneration. The second group includes provisions governing the grant of an exclusive right, repeat and takeover broadcasts, and the grant of translation rights.

(201) According to Ulmer, then, a specific agreement should be necessary for the grant by freelance authors of exclusive broadcasting rights. It should moreover be limited to 2 years after the first broadcast, subject to a maximum of 5 years from conclusion of the contract. The broadcasting organisation should however retain a simple broadcasting right after expiration of its position of exclusivity, except if the author wishes to avail himself of his right of revocation for non-exercise, if the broadcasting right is not exercised. Ulmer considers that there should be an express right of revocation despite the time limit on the grant of exclusive rights, because the broadcasting organisation cannot as a rule give an undertaking to exercise the right (duty to broadcast) [328]. Again according to Ulmer, this right of revocation for non-exercise should be available, after a period not exceeding 3 years, only to the "principal authors" (authors of original works and adaptors of existing works). The author ought not however be required to pay damages

when exercising his right of revocation.

(202) Ulmer makes further detailed proposals regarding the permissibility of repeat and takeover broadcasts. He devotes special attention to the question of remuneration not only in this case, but also generally [329]. While Ulmer believes that legislation should establish the duty to pay remuneration, it should not specify the rate of remuneration in the form of minimum fees; he refers in this context to the conclusion of collective pay agreements under sec. 12(a) of the German Law on Collective Pay Agreements [330]. His report also examines in detail [331] the question of limiting the right granted to exploitation for broadcasting purposes and the (exceptional) permissibility of re-exploitation of the broadcasting material against payment of a special fee, especially with regard to audio-visual exploitation by means of contracts with (private) producers of videograms, phonograms and cinema films. He also examines the question of the permissibility of the reassignment by the broadcasting organisation of the broadcasting right [332]. Other questions are also touched upon, namely delivery and acceptance of the work, the upshot of which is that Ulmer calls for clear specification of the reasons for refusal [333]; the author's duty of guarantee and abstention [334]; important questions concerned with the droit moral of authors (alterations, adaptations, mention of names) [335]; and lastly problems of joint productions and the production of broadcasting programmes by organisations other than broadcasting organisations [336].

(203) There are signs that Ulmer's suggestions are already having a beneficial

effect on the conclusion of contracts in practice [337]. On the other hand, it has not yet been possible to ascertain whether German legislators are really willing to take up these balanced proposals in one form or another, or even to use them as a starting point for legislation on broadcasting contracts. It would however seem more urgent to settle the problems of blanket agreements from the standpoint of legislation on cartels, as also suggested by Ulmer in the first part of his study [338]. If this question were to be settled from the point of view of cartel legislation to the extent of permitting binding authors' collective agreements [339], the need for further legislation might even become largely superfluous, although this would not detract from the value of Ulmer's suggestions. They could be largely incorporated in such agreements. When carrying out such a study from the point of view of the law on cartels, however, it would certainly also have to be considered whether the mere approval of collective agreements would ensure that authors' interests were fully safeguarded in the long term, or whether they ought not also be able to rely on the compensatory function of the legislator in helping to draw up and enforce such agreements [340].

4. France

(204) As already mentioned [341], the provisions of the French law on performing contracts also apply to broadcasting contracts. One of these provisions (sec. 45, French CL) is even devoted entirely to broadcasting contracts. This legislation is however very rudimentary and does not seem at all adequate. Sec. 45 (1)

is initially confined to a definition of the content of the permission to broadcast. Unless otherwise agreed, it covers the whole of the communications to be made by the radio organisation which is authorised to broadcast. Subsection (2) provides (negatively) that permission to broadcast does not include permission to record the broadcast work by means of audio- or visual recording equipment. Sec. 45 (3) of the French CL makes an exception only in respect of recordings of particular national interest or of a documentary nature. Since there is no question here of "ephemeral", i.e. temporary, fixations for facilitating the broadcasting process, this provision can hardly be compared with the provisions on "ephemeral recordings" in sec. 22 (3) and (4) of the Danish, and sec. 55 of the German CL. Sec. 45 (4) of the French CL provides lastly that the permission to broadcast does not include permission for public reproduction of the broadcast work by loudspeaker or similar means.

(205) The application of the other provisions on performing contracts to broadcasting contracts implies a presumption of the assignment of a non-exclusive right (sec. 44 (2), French CL), and that in the event of exclusive rights being granted by a dramatic author these are limited to 5 years (sec. 44 (3), French CL). The duties of the organiser (broadcasting organisation) to declare the programme, to render accounts pursuant to sec. 46 of the French CL and to respect the author's intellectual and moral rights pursuant

to sec. 47 of the French CL apply in this case.

(206) Sec. 18 of the French CL contains several other provisions of the law of copyright contracts. On similar lines to the provisions of secs. 14-17 of the French CL, which cover cinematographic works, it deals with the question of the authorship of "broadcasting works" (radio or television works) [342]. Sec. 18 (1) of the French CL provides firstly that the authors of a broadcasting work are the natural persons responsible for the intellectual creation of the work. By reference to secs. 14 (3) and 15 of the French CL, sec. 18 (2) thereof states that part of the statutory provisions regarding cinematographic works also apply to broadcasting works. Sec. 14 (3) of the French CL thus equates the authors of existing works with the actual authors of broadcasting works. Sec. 15 limits the opportunity for one of the joint authors to withdraw an incomplete contribution to the production of a broadcasting work. While he may not oppose the use of such a contribution for completion of the work, he is nevertheless deemed to be an author in respect of this contribution, with all the resultant rights. Each author of the broadcasting work may moreover, except if otherwise agreed, dispose freely of his personal contribution to the work with a view to its exploitation in another context. The provisions on joint authorship of sec. 10 of the French CL must however be complied with. Sec. 18 of the French CL and the provisions applicable to cinematographic works which are also declared applicable belong undeniably to the law of copyright contracts, and in the event of comprehensive legislation on broadcasting contracts being introduced should really

be incorporated in it. As matters now stand, they only emphasise the fragmentary nature of French legislation in this sphere.

5. Greece

(207) Greek legislation on broadcasting contracts, like that on performing contracts [343], occupies a special position as compared with that of the other countries. Sec. 12 of Law No. 3188/1955 in fact directly prescribes a rate of fees payable to authors for broadcasts, albeit only for re-broadcasts. Sec. 12 (1) provides firstly that the assignment of copyright to the national broadcasting organisation enables the work to be broadcast once by the Athens transmitter - independently of its links with another or all Greek transmitters - and once by all other transmitters located on Greek territory. Sec. 2 contains the actual provisions for the fees payable for repeat broadcasts. The fee for the first repeat broadcast over and above the broadcasts contemplated by sec. 1 is 10%, and for each further repeat broadcast 5%, of the fee originally paid. These rates of fees for repeat broadcasts may of course be considered modest [344]; moreover, they seem to be fixed rates and not, as in the case of performing contracts, minimum rates. It should however be stressed that Greek legislators are making an effort to establish at least some statutory basis for repeat broadcasting fees. Nevertheless,

the fact that Greek legislation says nothing about fees for initial broadcasts and makes no provision for other important aspects of broadcasting contracts means that it too must be considered minimal and very fragmentary.

6. Italy

(208) As already mentioned [345], the broadcasting right is not, according to the definitions of the various exploitation rights in secs. 15 and 16 of the Italian CL, part of the performing right, so that in Italy too broadcasting contracts are not dealt with in secs. 136-141 of the Italian CL, which apply to performing contracts. There is however no separate legislation on broadcasting contracts [346]. Nevertheless, secs. 51-60 of the Italian CL and associated secs. 5, 6 and 18-20 of the implementing regulations contain special provisions on broadcasts, which to some extent at least form part of the law of copyright contracts. These provisions are significant mainly for the restrictions they place on copyright [347]. Here we find firstly in sec. 55 of the Italian CL (in the same way as in sec. 22 (3) and (4) of the Danish, and sec. 55 of the German CL) provisions for the permissibility of "ephemeral recordings", designed to enable broadcasting organisations to postpone broadcasts for technical or time reasons and to make the necessary temporary recordings. Unlike the laws of the other two countries, sec. 55 of the Italian CL at least provides that the author is entitled to remuneration. The relevant implementing instructions are contained

in secs. 5 and 6 of the regulations.

(209) Italian legislation (secs. 51 et seq. of the Italian CL) grants some degree of privilege to the broadcasting organisations as regards the broadcasting of theatrical, concert and other public performances. It provides for a statutory licence in that certain such broadcasts do not require permission, although a fee must be paid. The author's permission is however required for broadcasting new works and for the first performance of the season of works that are no longer new (sec. 52 (3) and (4), Italian CL). Nor does the statutory licence include broadcasts from the broadcasting organisation's own studios. Sec. 59 of the Italian CL, which refers to the general provisions on exploitation rights (secs. 12 et seq., Italian CL) expressly makes such broadcasts subject to the author's consent. Secs. 53 and 54 of the Italian CL contain further detailed provisions on the number of broadcasts and the technical systems authorised by law in respect of statutorily permitted radio broadcasts.

(210) Since an entitlement to a fee is granted both for "ephemeral recordings" and broadcasts permitted by law, secs. 56 and 57 of the Italian CL contain more provisions on the subject. Sec. 57 provides that the fee is to be based on the number of broadcasts, and sec. 5 of the implementing regulations lays down criteria for the number and procedures for the postponed or repeat broadcasts. Sec. 56 of the same law provides in case of disputes

for the amount of the fee to be fixed by the courts, but requires any reference to the courts to be preceded mandatorily by an attempt at conciliation. Sec. 18 of the regulations provides for the involvement in this conciliation attempt of the professional associations of the parties concerned. Here we have at least the basis, capable of improvement, of a model of how collective agreements on remuneration can be reached by involving the associations concerned in the context of broadcasting contracts as such, for which there is as yet no specific provision in Italian law.

7. Summary and appreciation

(211) In none of the countries examined have broadcasting contracts been the subject of legislation which corresponds even remotely to their present importance. Despite the fact that they are treated in Danish and French law as sub-sections of performing contracts (in the wider sense) and are subject to the law on contracts of that type, the provisions governing broadcasting contracts are at best fragmentary and isolated. In some cases these provisions - like those on "ephemeral recordings" by broadcasting organisations - do not technically belong to the law of copyright contracts at all, but to that on "limitations of copyright". (Mention should be made as regards provisions on "ephemeral recordings" of those already discussed of sec. 22 (3) and (4) of the Danish, sec. 55 of the German, sec. 45 (3) of the French CL and also of sec. 6 (7) of the United Kingdom Copyright Act, secs. 12 (7) and (8) and 14 (11) and (12) of the Irish Copyright Act, and

of sec. 25 of the Luxembourg and sec. 17(b) of the Dutch CL.) It is on the other hand undeniable that in this very context, as shown by the example of the United Kingdom, recourse has already been had to collective agreements, often without any backing at all from the law. Thanks to the structure of broadcasting organisations in the European countries it may be possible to arrive at this system without help from the law, but this solution cannot form the basis for a general recommendation. By no means all the countries of the European Community have achieved such positive results as the United Kingdom.

(212) In 1977, Ulmer presented a modern study of the problems of broadcasting contracts, including detailed proposals de lege ferenda [348]. Since this is as yet the only comprehensive discussion of this type of contract, we were bound to take note of Ulmer's proposals in our study. The fact that Ulmer's clear and balanced proposals have not yet led even to a ministerial draft of legislation on broadcasting contracts in the Federal Republic of Germany clearly illustrates the difficulties facing legislators in the field of the law of copyright contracts. The search for alternative legislative approaches thus becomes all the more urgent.

V. Filming and film-production contracts

1. General

(213) Despite the considerable economic importance of such contracts, the copyright laws of the Member States of the European Community still make no adequate provision for contracts for the assignment of the right to film a completed work (filming contracts) and contracts for making and exploiting a cinematographic work (film production contracts), any more than they do for broadcasting contracts, although in some countries (Denmark, Federal Republic of Germany, France, Greece and Italy) some provisions of the law on filming contracts are to be found. Danish legislation on this subject is alone in systematically grouping the few relevant provisions in their proper place, i.e. in the "special part" of the law of copyright contracts, which also deals with the other copyright contracts. In the other countries, the relevant legislation is virtually inseparable from the question of who should own, and in what form, the copyright or the exploitation rights in the cinematographic work. The fact that these provisions form part of the law of copyright contracts is not clearly apparent in all cases. These methodological objections do not however apply to those countries which vest the copyright in the cinematographic work a priori in the producer (United Kingdom, Republic of Ireland, Luxembourg, probably also the Netherlands) [349], or which have no relevant provisions (Belgium). Although the United Kingdom lacks adequate

legislation on the subject, considerable progress has nevertheless been made as regards filming contracts, as in the case of broadcasting contracts, by means of collective agreements [350]. This shows that here and in general the existence of legislation by no means reflects the actual state of contracts or indicates the degree of effective protection of authors achieved. It would however be wrong to reach the opposite conclusion, namely that the effective protection of authors is inversely proportional to the amount of legislation on the subject.

2. Denmark

(214) Sec. 41 of the Danish CL provides that when a contract is concluded for the use of a literary or musical work for producing a film intended for public showing, the assignee of the utilisation right must produce the cinematographic work within a reasonable period of time and ensure that it is made available to the public. In order to define "a reasonable period of time", sec. 41 (2) of the Danish CL provides that the author may terminate the contract if he has performed his own contractual duties and the cinematographic work has not been produced within 5 years of that time. Without prejudice to any claim he may have for damages, he may in any case retain any fee already received (sec. 41 (3) in conjunction with sec. 36 (2), Danish CL). It should however be noted that Danish legal doctrine [351] considers that sec. 41 - unlike sec. 42 - relates only to already existing works. These should however be taken to include works directly created with a view

to making the film (e.g. scripts), but not the contributions of the actual authors of the film in the stricter sense, i.e. the director in particular.

(215) Hence an essential feature of the Danish legislation is the film producer's duty to exercise his right, and the author's corresponding right to terminate the contract if this duty is not performed. These provisions on film-production contracts, which are very favourable to authors, are however, according to sec. 27 (2) of the Danish CL, non-mandatory, like all other provisions of the "special part" of the Danish law on copyright contracts. The duty to exercise the right may thus at any time be contractually restricted or excluded. On the other hand the provisions of the "general part" of copyright contract law naturally apply also to such contracts (secs. 27-31, Danish CL), and in particular sec. 29 (now replaced by sec. 36) of the Danish CL, which contains balancing provisions in the event of disproportion between the author's work and the valuable consideration [352].

(216) On the other hand, the presumption of sec. 42 of the Danish CL reflects the wish - as in the corresponding legislation of the other countries - to facilitate exploitation of the cinematographic work by the producer. It therefore provides that the assignment of a right to film a literary or an artistic (but not a musical) work includes the right to make the work "accessible to the public" with the help of the film, and to dub or sub-title the film in other languages.

Where this presumption is concerned, Danish law does not differentiate between filming and film production contracts. It corresponds in this respect to sec. 17(3) of the French CL, whereas in secs. 88 and 89 of the German CL the extent of the presumptions differs. According to Danish legal doctrine [353], sec. 42 (unlike sec. 41) of the Danish CL applies not only to the authors of existing works, but also to contributions by the actual authors of films, i.e. in particular directors. On the other hand, the expression "to make the film available to the public" clearly [354] includes exploitation by broadcasting, and possibly even audio-visual exploitation as well. In so doing, and precisely because it fails to differentiate between filming and film-production contracts, Danish law establishes a fairly comprehensive presumption of assignment in favour of the film producer, which nowadays cannot fail to appear a possible source of problems [355]. The privileged treatment of musical works [356], explained by the historical role played by the collecting societies, can scarcely continue nowadays to withstand the demand for equal treatment of all authors.

3. Federal Republic of Germany

(217) Unlike those of the Danish law, the provisions of German legislation on cinematographic works are quite definitely concerned (as indeed are those of French and Italian law) with facilitating the exploitation of the cinematographic work by the producer.

The relevant provisions (secs. 88-95, German CL) do not appear as part of the provisions of the law of copyright contracts, but in Part Three of the law under the title "Special provisions for films". Since these special provisions for films also apply to television films, we have already referred to them in the section on broadcasting contracts. As already mentioned, the peculiarity of German, as opposed to Danish and French, law is that it differentiates between the case of the filming of an existing work that is used in "the original or adapted version in order to create a cinematographic work" (sec. 88, German CL), and that in which someone "undertakes to collaborate in the production of a film", in which that person may acquire "a copyright in the cinematographic work" (sec. 89, German CL). Thus sec. 89 of the German CL has in mind the actual authors of the film, primarily the director, but possibly also the cameraman, cutter and other staff.

(218) As regards the actual law of copyright contracts [357], the merit of these provisions lies in the fact that they contain both for the first category (namely the authors of the works used for creating the cinematographic work, in the case of filming contracts) and for the second category (namely the actual authors of the film, in the case of contracts for producing films) statutory presumptions of varying extent regarding the scope of the utilisation rights granted. As regards the first category (filming contracts), the grant of the right to film the work includes in case of doubt

the following exclusive rights: the right to use the work unaltered, adapted or recast for the production of a cinematographic work; to reproduce and circulate the cinematographic work; to screen the cinematographic work publicly; and to exploit to the same extent as the latter, translations and other adaptations or versions of the cinematographic work. In case of doubt the producer is not entitled to a "remake". Conversely, the author is in case of doubt entitled to exploit a work cinematographically through other channels upon expiration of 10 years after conclusion of the contract.

(219) As regards the second category (film-production contracts), sec. 89 of the German CL contains a presumption that goes even further, in respect of the actual authors of the film. In case of doubt, the latter grant the film producer the exclusive right to use the film, including translations and other cinematographic adaptations, by all known means of utilisation. Contrary to the situation created by sec. 88 of the German CL, the film authors do not benefit from any rights they may have granted in advance - to protect them from themselves, so to speak - to collecting societies, for instance. Pursuant to sec. 89 (2) of the German CL they retain even in the case of such advance assignments to third parties the right (which they may also be called upon by the film producer to exercise) to grant to the film producer all or part of the utilisation rights mentioned in sec. 89 (1) of the German CL. For the sake of clarity, sec. 89 (3) again points out that copyright in the works used to produce the cinematographic work, such as novels, scripts

or film music, are not affected. This is to be taken to mean that the presumption provisions of sec. 88 of the German CL apply to them (only) if, as in the case of film music, there has been no advance grant of all or part of the exploitation rights to collecting societies - a practice that is quite permissible and effective in this sphere and is used by authors to some extent for their own protection.

(220) It should also be noted that sec. 90 of the German CL provides for a considerable restriction in the case of both filming and film-production contracts of the rights of consent and creation normally vested in authors. Thus the requirement of the author's consent to the (re-)assignment by his contractual partner of utilisation rights that have been granted (sec. 34, German CL) or to the (further) grant of simple utilisation rights (sec. 35, German CL) and the right of revocation by reason of non-exercise (sec. 41, German CL) and of change of opinion (sec. 42, German CL) does not apply at all to the actual authors of a film (sec. 89 (1), German CL), and applies to the authors of works used (in the context of the filming contract) only in respect of the filming right per se (sec. 88 (1), sub-section 1, German CL) and not in respect of the remaining powers set out in sec. 88 (2)-(5) of the German CL. Moreover, the authors of the cinematographic work (sec. 89, German CL) have no claims under sec. 36 thereof ("best-seller" section) to a share of subsequent receipts in the event of gross disproportion between remuneration and the proceeds of the work's exploitation. Sec. 93 of the German CL moreover places restrictions as regards the droit moral of authors on both groups of authors.

As far as the production and exploitation of the cinematographic work are concerned, they may in effect, insofar as it is a question of the prohibition of alterations contemplated by sec. 14 of the German CL, prohibit only gross corruptions of and other gross interferences with their works, and must even then have due consideration for one another and for the film producer.

(221) It was already pointed out when discussing broadcasting contracts [358] that these presumptive provisions are considered too far-reaching in many spheres. One cannot in fact see why, merely in the interest of facilitating the exploitation of the cinematographic works, the participant interests of the actual film authors, and the director especially, should be ignored by the law of copyright. This is particularly relevant in view of the increasing opportunities for audio-visual exploitation which, by virtue of the legal presumption in sec. 89 of the German CL, in any event, largely benefit the film producer. The important thing as regards the German legislation would thus be to review the special provisions for cinematographic works, especially from the standpoint of the law of copyright contracts, and to determine their adequacy from this standpoint also, and not only from what was previously the main objective of facilitating exploitation of the work [359].

4. France

(222) It should be noted first of all as regards French law that the comprehensive definition of publishing contracts in sec. 48 of the French CL (in conjunction with the definition of "reproduction" in sec. 28 thereof)

also includes in principle, according to French legal doctrine [360], the production of cinematographic works. To this extent the provisions on publishing contracts, which were obviously designed mainly with book publishing in mind, also apply to filming and film-production contracts. This applies of course even more to the general provisions of the law of copyright contracts, including the important principle of the author's proportional share in the proceeds of exploitation of the work, as sec. 17 (3) of the French CL indeed expressly states. However, French law (like that of the other countries) is modified to facilitate exploitation of films by film producers, by a series of special provisions for cinematographic works in secs. 14-17 of the French CL. The initial purpose of these provisions is to determine who is considered to be the author of the film (sec. 14, French CL)[361], but otherwise, for the reason stated, they form part of the law of copyright contracts. They considerably weaken the position of the film authors, including the authors of existing works, vis-à-vis the film producers. A characteristic of the French law is that the actual authors of the previously existing filmed works are accorded parity of treatment (sec. 14 (3), French CL), with the actual authors of the cinematographic work, who include primarily the authors of the script, the adaptation and the dialogue, the composer of music specially written for the film, and the director (sec. 14 (2), French CL). This precludes a priori any differentiation of the kind to be found in German law [362].

(223) Sec. 17 (3) of the French CL contains the basic provisions that actually favour the film producer, whereas sec. 17 (1) and (2) deals with the question of who is the film producer. By virtue of a legal presumption which expressly authorises agreements to the contrary, the authors of the cinematographic work (with the exception of the composer of music, with or without words) are bound to the film producer by a contract which entails assignment of the exclusive right for his benefit of cinematographic exploitation. As already stated however, the second half of the sentence forming sec. 17 (3) states expressly that this presumption is without prejudice to the provisions of the "general part" of the law of copyright contracts in Chapter II of the Law, and in particular of secs. 26 and 35 of the French CL. The fact remains that the comprehensive presumption of assignment of the exclusive right of cinematographic exploitation in sec. 17 (3) of the French CL amounts to a modification of the interpretative provisions of secs. 30 et seq. of the French CL, since otherwise the special provisions for cinematographic works, and especially the presumption of assignment, would make little sense [363]. Moreover, the specific mention in sec. 26 of the French CL does not seem to help much, since the definition it contains, whereby the exploitation right belonging to the author includes the rights of performance and reproduction, contributes little to settling the question of the specific extent to which the rights of cinematographic exploitation are by virtue of the presumption of sec. 17 (3) of the French CL transferred to the producer of the cinematographic work. Sec. 15 (2) of the French CL nevertheless provides that - except if otherwise agreed - all film authors may freely dispose of their personal contribution, insofar as it is to be exploited

otherwise than by the medium of films. They are required to comply only with the provisions on joint authorship in this context (sec. 10, French CL).

(224) Thus according to French legal doctrine [364] particular importance attaches to the mention of sec. 35 of the French CL, which enshrines the principle of authors' proportional shares. This means that all the authors of cinematographic works within the meaning of sec. 14 of the French CL, e.g. including the film director, have a statutory claim in French law to a proportional share in the proceeds of the exploitation of the film, i.e. of the box-office returns. However, in the case of composers, to whom the principle of sec. 35 of the French CL still applies despite their exclusion from the presumption of sec. 17 thereof, French legal doctrine [365] works on the assumption that the proportional share will be secured directly. In France as in other countries, of course, composers receive their film fees through their collecting societies direct from source, i.e. from the cinemas. In the light of modern considerations of equity and parity, this manifestly privileged treatment of composers can hardly be justified [366]. Why should other authors fare worse than composers in the matter of current revenue from the exploitation of a cinematographic work?

(225) The further provisions of secs. 15 (1) and 16 of the French CL contain certain restrictions on the droit moral of authors of cinematographic works. On the one hand,

they may not, pursuant to sec. 15 (1) of that law, oppose the use for completion of the work of their contribution to the cinematographic work which has for any reason whatever (refusal or force majeure) not been completed. They nevertheless retain the associated copyright. On the other hand, sec. 16 (1) of the French CL provides that the cinematographic work is deemed complete when a "standard copy" has been produced by mutual agreement between the director and the joint-authors, if appropriate) and the producer. Lastly, sec. 16 (2) of the French CL contains the actual restriction of the author's droit moral. It provides that the moral rights granted in sec. 6 of the French CL may in principle be exercised by the film authors only in respect of the completed film. This provision, in conjunction with sec. 15 (1), benefits the producer considerably during the production phase. Actions for infringement of the droit moral of the authors of the cinematographic work can be entered only on the basis of the agreed completed film, i.e. at the exploitation stage. Many aspects of this legislation - e.g. the exclusion of moral rights during the production stage, and the need for agreement on completion of the standard copy - give rise to certain reservations, which are also reflected in French legal doctrine [367]. The fact remains that, by virtue of being tied up with the "general part" of the law of copyright contracts and of the restriction to rights of cinematographic exploitation of the presumption of assignment, the special provisions on cinematographic works in French law, when compared with German law, lay down important restrictions on the right of exploitation of cinematographic works, which are designed to

protect authors [368].

5. Greece

(226) Whereas like the rest of Greek copyright law legislation on cinematographic works is very unsystematically arranged and dispersed, it nevertheless contains, as in the case of performing and broadcasting contracts, special provisions as regards remuneration in particular, which are intended to protect authors. Of the provisions governing film rights, mention should first be made of sec. 14 of Law No. 2387/1920 on Intellectual Property, whereby "the authors of the individual artistic contributions of a literary, musical and photographic nature which go to make up the cinematographic works, that is to say the writers, musicians, composers, directors and actors" are accorded parity of treatment with authors generally, as mentioned in sec. 1 of the law. This provision also contains a definition of the author of a cinematographic work. Sec. 9 (1) of this law moreover requires contracts for the performance of musical compositions in cinemas to be in writing, and its sec. 9 (3)-(6) contains general provisions requiring that the written consent be duly produced before performances begin; these also apply to the performance of musical works in cinemas.

(227) Regulation 619/1941 contains the special provisions on remuneration, at least as regards the performance of musical works in cinemas. According to sec.

2 of this regulation, the authors' royalties for the performance of musical works in sound and talking films screened in cinemas may not be less than 0.98% of gross takings after deduction of tax in the case of first-run cinemas, and 0.71% in the case of re-run cinemas. We cannot decide here whether these rates are reasonable in the light of those payable in other countries, especially since as a general rule these will be scales of payments fixed by the musical collecting societies. It should nevertheless be noted that Greek legislators have not hesitated to pass legislation, like that in respect of performing and broadcasting contracts, directly fixing minimum percentages of remuneration, at least as regards the performance of film music in cinemas. It is of course very difficult to understand nowadays why other authors are, as in this case, placed in a less favourable position than composers, who, having for decades now enjoyed the assistance of their powerful collecting societies, have less need of help from the law than all other groups of authors.

6. Italy

(228) Italian, like German and French, law contains, in a section apart from that devoted to copyright contracts, a series of special provisions (secs. 44-50, Italian CL) on cinematographic works, which are equally concerned with copyright contracts. Sec. 44 of that law lists firstly

those persons who may be regarded as the authors of cinematographic works, namely the authors of the film story and the script, the composer of the music, and the director. The result of this definition of the persons considered to be the authors of a cinematographic work is that Italian law takes an intermediate position between the wide concept of authors of a cinematographic work (including the authors of existing works that have been filmed) under sec. 14 of the French CL and the very narrow concept of the actual author of a cinematographic work (excluding the author of the script and the composer of the film music) in sec. 89 of the German CL. Italian (unlike French) law does not place the authors of existing works that have not been written especially for the film that is to be produced, e.g. novels on which the script has been based, on the same footing as the authors of cinematographic works, without there being (as in sec. 88 of the German CL) a specific presumption for that category of authors. This does not however alter the fact that these authors of existing works also have the screen rights under sec. 13 of the Italian CL.

(229) Another way in which Italian law differs from the French and German laws, which provide only for refutable presumptions regarding the assignment of exclusive exploitation rights to the film producer, is that sec. 45 of the Italian CL resorts to some kind of cessio legis in that it simply provides that the exercise of the right of economic exploitation of the cinematographic work is vested in the person who has organised its production [370], albeit without prejudice to other legislation on cinematographic works. Sec. 46 of the Italian CL provides - as does French law also - that this right of economic exploitation relates only to the cinematographic exploitation

of the work produced [371]. Sec. 46 (2) of the Italian CL makes the further restriction that, except if otherwise agreed, the producer may not present or show adaptations or translations of the cinematographic work without the consent of the authors of the cinematographic work within the meaning of sec. 44 [372]. German law takes a further step in favour of the film producer both as regards the question of adaptations and translations (sec. 88 (1) (5), German CL) and the scope of the utilisation rights presumed to have been granted (sec. 89 (1) of the German CL: "all known modes of utilisation").

(230) Like sec. 17 (3) of the French, sec. 46 (3) of the Italian CL contains an exception (dubious because of its unequal treatment of the other groups of authors) in favour of composers of musical works, with or without words. The law grants them the right to claim "at source" i.e. directly from cinemas, a separate fee for the public screening of the cinematographic work. Sec. 16 of the implementing regulations provides that the amount of this separate fee shall be fixed by periodic blanket agreements between SIAE and the professional organisations concerned. If no agreement is reached, the matter is to be settled by decree. Sec. 16 of the regulations also contains individual provisions regarding the duration and possibility of terminating such blanket agreements. These provisions reflect the fact that in Italy the relevant collecting society (SIAE) is also responsible for collecting composers' royalties for the screening of films.

(231) The provisions of sec. 46 (4) of the Italian CL, dealing with the authors of the film story (soggetto) and script and the director, nevertheless indicate that a proportional sharing by these authors in the receipts from the screening of the film is considered reasonable in principle, even if they are not granted a direct right of sharing vis-à-vis the cinemas. According to these provisions, the authors of cinematographic works are entitled, if they are not remunerated by means of a share in the proceeds of screening the film, and except if otherwise agreed, to receive an additional fee if receipts reach an amount to be contractually agreed with the film producer. The form and amount of this additional remuneration are to be fixed contractually between the groups involved. The fact that this right may be varied by contract shows once more how reluctant even well-intentioned legislators are to enact mandatory provisions in the sphere of the remuneration of authors.

(232) As regards authors' moral rights, sec. 47(1) of the Italian CL provides first of all that the film producer has the right to make such alterations in the works used for the cinematographic work as are necessary for their cinematographic adaptation. Sec. 47 (2), on the other hand, deals with alterations to the cinematographic work itself. If no agreement is reached between the producer and one or more of the authors of the cinematographic work, a special technical committee will decide whether the alterations are necessary. Sec. 17

of the implementing regulations, in conjunction with secs. 28 and 29 thereof, contains special provisions on the formation of this committee. Sec. 48 of the Italian CL is also concerned with authors' moral rights and provides that the authors of cinematographic works are entitled to have their name, profession and contribution thereto mentioned when the film is screened.

(233) Sec. 49 of the Italian CL provides, just like sec. 15 (2) of the French, that the authors/composers of the literary and musical parts of the cinematographic work may reproduce them separately or otherwise exploit them, provided this is not prejudicial to the film producer's exploitation rights. On the other hand, sec. 50 of the Italian CL contains in a more diluted form than sec. 41 of its Danish counterpart provisions on the producer's exercise of exploitation rights. If the producer does not within 3 years of delivery of the literary or musical part complete the cinematographic work or does not permit the completed work to be screened within 3 years, the authors of these contributions are entitled to dispose freely of their work. These provisions constitute a duty on the part of the producer, and certain legal disadvantages ensue from his failure to perform the same. Unlike for instance sec. 41 of the Danish CL, Italian law does not place on the producer a duty in the full meaning of the word to exercise his right of exploitation of the cinematographic work. The provisions do however show clearly that quite a few of the special provisions of Italian law on cinematographic works definitely form part of the law of copyright contracts.

However, modern legislation on filming and film-production contracts should rearrange these matters by inserting them in the place allotted to them by the law, namely the "special part" of the law of copyright contracts. This would constitute a major step towards the introduction of balanced legislation that would take account both of the legitimate interests of the producer - i.e. an exploitation of the cinematographic work that is as flexible as possible and whose costs can be clearly calculated - and of the equally legitimate interests of the authors of the cinematographic work, in particular as regards remuneration.

7. Summary and appreciation

(234) The author of this study has already discussed in his general study on "Copyright Law in the European Community" the various solutions and interpretations used by the national legislators to safeguard the exploitation rights of film producers [373]. These range from countries such as Belgium, and to some extent Greece also, where there is a complete lack of legislation, by way of presumptions which are more or less pronounced but which may nevertheless be varied by contract, in such countries as Denmark, the Federal Republic of Germany and France, or of recourse to "cessio legis", as in Italy, to the film copyright of the producer in the United Kingdom, the Republic of Ireland and Luxembourg (and possibly also the Netherlands [374]. A characteristic feature of all these laws (except the Danish) is the fact that although they deal in principle with important aspects of filming and film-production contracts, they occupy a special

place in the relevant copyright laws.

(235) The more this legislation favours the film producers at the expense of the authors, the more it gives rise to problems, especially as regards the increasing opportunities for exploiting cinematographic works over and above the conventional ones, particularly in the audio-visual sphere. There would thus need to be at least a restriction, in accordance with French and Italian law, of the legal presumption of the grant of rights to the exploitation of the cinematographic work; and the audio-visual sphere would in future have to be clearly excluded from the legal presumption or the automatic grant of exploitation rights to film producers. Provision should also be made, as for instance in French law, at least for an express cross-reference to important provisions of the "general part"of the law of copyright contracts. The right place for such provisions would in any case be the "special part" of the law of copyright contracts,something that only Danish law has done to date, albeit by means of no more than minimum provisions. However, a reply to the fundamental question of whether and to what extent detailed provisions of law on filming and film-production contracts are useful and necessary can be based here, as with the other types of copyright contracts, only on general considerations. The solution favoured by the author of this study of collective agreements incorporated in appropriate collective systems regulated by law presupposes more or less sweeping changes in concepts at least in certain countries. In the following part of this study we shall therefore

try - without pretending to be exhaustive - to demonstrate on the basis of alternative solutions already existing in practice in various countries that it is possible, even without legislation, to protect and improve the situation of authors in the sphere of the primary law of copyright contracts.

C. Alternatives to legislation

I. Inadequacy of legislation

(236) On the whole, the results as regards both the "general part" and the "special part" of the primary law of copyright contracts are not very encouraging when measured against the fundamental question of this study, namely whether it is possible in practice to strengthen effectively and concretely the contractual position of structurally disadvantaged authors vis-à-vis the primary exploiters. This applies especially to the question of remuneration, which is of capital importance to freelance authors. Even when national legislators - e.g. in Denmark, the Federal Republic of Germany, France, Greece and Italy - have clearly attempted to influence, in one or both spheres, the relative strengths of the parties in favour of authors by means of extensive non-mandatory or even mandatory provisions of law, these efforts should be seen as a means of preventing excesses and abuse rather than evidence of the will to exercise a really positive influence on contract formulation with a view to ensuring that contracts will effectively contain guarantees, in particular of a remuneration that takes account of the quality and success of the work. To some extent, the provision in Greek legislation on performing and broadcasting contracts for minimum fees, and the time limit prescribed in principle by the Italian law on publishing contracts, are exceptions.

(237) However, the above remarks have probably shown clearly that it is not very realistic to place undue hopes in the effectiveness of legislation, except possibly in some limited fields; in other words, attempts to deal with the law of copyright contracts by means of legislation face obstacles that are difficult to surmount, especially where the "special part" is concerned, with the result that it is advisable to seek other solutions. However, to avoid the danger of devising purely theoretical schemes, it seems advisable to have recourse as far as possible to alternative solutions that already exist in this or comparable fields in the national schemes devised by the ten Member States of the European Community. The first question that arises in this context is whether, in view of the notorious ponderousness of the legislative process, it is not possible to use statutory instruments (regulations) for the normative regulation of the primary law of copyright contracts, or at least parts of it. It would obviously be necessary in this case to take account where appropriate of the limits placed on the use of such regulations [375] by the constitutional rules, which vary from one country to another.

II. Use of regulations (Statutory Instruments, Decrees)

(238) An example which has some connection at least with the law of copyright contracts of the use of regulations is provided by the Netherlands in respect of

reprography. At various points in the Dutch Copyright Law, the Crown, i.e. the Dutch Government, is authorised to make regulations. A Royal Decree "on the reproduction of works protected by copyright" was promulgated on 20 June 1974 under the authority of sec. 16(b) (6) of the Dutch CL, which lays down the limits for authorised copies for the various categories of public institutions and lists specific fees for each authorised copy [376]. A fee of 10 Dutch cents per page copied was laid down for public administrations, bookshops and higher educational establishments (universities), and a rate of 2½ cents per page copied for other schools. Sec. 17 (3) of the Dutch CL [377] contains similar authority to issue statutory instruments in the industrial sector, of which no use has yet been made. The fact that these regulations are in their very essence part of the law of copyright contracts is apparent from the fact that fees are laid down for copyright licences, even when such licences are mandatory by law.

(239) Italian law provides an example in the form of the Presidential Decrees issued under the authority of sec. 7 of the Italian CL (sec. 91 of that law as regards photographs), in conjunction with sec. 22 (2) (sec. 27) of the implementing regulations; they provide inter alia for adequate remuneration in the event of reproduction, which is lawful in itself, of parts of a work or of photographs in anthologies or other works for school use. The most recent provisions (all introduced separately) regarding photographs and other protected works

date from 1976 [378]. They specify absolute amounts [379] payable for the reproduction within the statutory limits of photographs or parts of works in anthologies for school use. The greater flexibility of statutory instruments as a means of dealing with these matters is apparent from the Italian example, in which such decrees supersede one another at relatively short intervals of time [380], thereby at least mitigating the danger of legislation soon becoming outdated when absolute amounts are specified. This makes it possible to adapt more quickly to changed economic circumstances. Even though the purpose of these Italian regulations, just like that of the Dutch Royal Decree on reprography, is to impose limits on copyright, such legislation is essentially part of the law of copyright contracts on the basis of a statutory licence.

(240) Statutory instruments thus seem a quite suitable means for dealing with certain marginal aspects of the law of copyright contracts. Would not this also be a possible means of dealing with the essential aspects of the law of copyright contracts, provided that the constitutional procedural limits are complied with when regulations are promulgated and the relevant enabling legislation is passed beforehand? A possible solution would be for legislators to confine themselves to establishing the principle, enshrined in French and Italian copyright law, of the author's proportional share in the proceeds of the sale or exploitation of his work, and to authorise the promulgation of regulations laying down appropriate rates of fees for the various spheres of exploitation of the work in the form of specific

minimum rates. Legislators could then confine themselves to laying down general provisions on the entitlement of authors to a reasonable share. Such enabling legislation would be conceivable not only for remuneration rates, but also for other matters such as fixing specific time limits for the exercise of assigned (conceded) exclusive rights, if the duty to exercise the assigned right within a reasonable period of time is generally laid down in the law itself.

(241) These examples and arguments clearly show that the use of regulations for such purposes necessitates action by legislators, at least in enacting enabling legislation, who will then be unable to avoid making a decision on the "positive approach" demanded in this study to the real needs of freelance authors. No such enabling legislation yet exists in the sphere of the primary law of copyright

III. Role of collecting societies or authors' associations as intermediaries when concluding and implementing individual copyright contracts

1. Definition of safeguarding activity and collective agreements

(242) Although the basic legal structures vary, the safeguarding of rights by collecting societies means in the final analysis that the collecting societies grant the general right, on behalf of many authors, to use works in their repertoire. The very fact that there is a collective and comprehensive grant of utilisation rights means that there is normally no direct contractual relationship between the exploiters of the works and the authors[381]. The authors' professional organisations are however tending increasingly to help their members with the conclusion of individual utilisation contracts also[382].

(243) In its simplest form, this help involves drafting their own standard contracts[383], whose use - admittedly not always with great success - is recommended when concluding individual utilisation contracts between authors and primary exploiters. Another form of help involves collecting information on contracts concluded and publicly exploiting such information, as witness a recent spectacular example in the United Kingdom[384]. The aim of this publicity campaign is to persuade the authors' primary contractual partners to observe a

minimum of equity when drafting contracts. Some authors' organisations go further and ask their members to let them see such utilisation contracts before finally concluding or signing them[385]. It is intended in this way to draw the author's attention to individual clauses in contracts that are greatly prejudicial to him. The presence of such clauses may in some cases lead to intervention by the organisation or by a confidential agent (lawyer).

(244) The authors' organisations play an equally important role in the management of individual utilisation contracts when they are authorised by the author to collect the remuneration payable to him under the utilisation contract and to check on the performance by the user of the work of his duty to render accounts. The literary section of the Italian Authors' Society SIAE offers this service voluntarily[386]. This system enables the organisation to take the place of the author who, as a rule, lacks the technical knowledge needed to collect the fees due to him. It is closely related to the very widespread use, especially in the English-speaking countries, of literary agents in relations between authors and publishers; the duties of these literary agents are often not confined to acting as intermediaries in concluding publishing contracts, but also include the complete management of the contracts, including in particular collecting fees and checking on the rendering of accounts[387]. An important difference between the Italian system and the use of agents is of course that the agent

does not represent the author alone, but has interests of his own, including a general "placement interest" vis-à-vis the relevant publisher. The use of literary agents may thus give rise to conflicts of interests.

(245) A special form of anticipatory intervention by authors' organisations is their conclusion with the exploiters of works or organisations thereof of blanket agreements, whose terms and conditions serve as a basis for individual utilisation contracts between authors and primary exploiters. In essence, this system of intervention of, or "screening" by authors' organisations is no more than the system of collective agreements, which has yet to be examined in detail below[388]. Mention should however be made here of the traditional system developed by the Société Française des Auteurs et Compositeurs Dramatiques (SACD) for managing "major rights" (stage performing rights) several decades ago, i.e. long before the modern idea of concluding collective agreements of the kind encountered in labour law took concrete shape. The SACD system consists of a blanket agreement (traité d'abonnement) concluded between SACD and the theatrical impresarios and an individual utilisation contract concluded between the author himself and the impresario. The blanket agreement enables fixed minimum conditions to be negotiated in favour of member-authors, and there is no evidence that this system has ever

given rise to objections from the standpoint of cartel law. In view of the individual nature, for historical reasons, of the system of SACD, which considers itself a collecting society for "major rights", we propose to examine it here separately from the general question of collective agreements.

2. The contractual system of the French Société des Auteurs et Compositeurs Dramatiques (SACD)

(246) The SACD system of combining the blanket agreement (traité d'abonnement) and the individual utilisation contract (convention d'autorisation) proper, has been explained particularly clearly by Schmidt[389]. Not the least of the peculiarities of the system is that the SACD, as a collecting society, consists solely of authors[390] and thus has a marked "trade union" connotation. Thus as already noted, the combination of the blanket agreement and the individual utilisation contract is closely related to the combination in labour law between collective agreements and individual contracts of employment.

(247) Schmidt[391] describes the contrat d'abonnement as a charter for relations between dramatic authors and theatres. It contains both provisions on the performance of the indivudal work which are applicable in the relations between author and theatre, including general provisions on the duties of the impresario vis-à-vis SACD, acting on behalf of the professional group it represents. As

a true blanket agreement, the contrat d'abonnement, contrary to the other blanket agreements concluded by collecting societies, assigns no rights of utilisation of the SACD repertoire. It does however authorise the subscribing impresario to conclude a utilisation contract with any member of the society. Conversely, SACD members are entitled to have their works performed in the subscribing theatres and in those theatres only. A performing contract within the meaning of French copyright law is not concluded until the author gives his individual permission for utilisation as a consequence of the acceptance of the work by the theatre[392].

(248) However, the importance from the standpoint of the law of copyright contracts of the traité d'abonnement as an alternative to legislation lies in its very nature of a blanket agreement. It lays down minimum conditions, including in particular minimum fees for authors. According to Schmidt[393] the normal rate applicable for instance to Paris theatres is, with certain exceptions, 12% of net receipts calculated in the manner specified in the blanket agreement. It also deals with other important questions of the law of copyright contracts. For instance, the impresario is required to guarantee a minimum of five performances. The blanket agreement also contains provisions on the presence and participation of the author during the rehearsal of the play, and also on his right of (co-) decision in the allocation of the parts and on the respect for his moral rights.

(249) The blanket agreement (traité d'abonnement) also contains in

its present form provisions intended to encourage impresarios to produce new plays - something they are incidentally required to do, within certain limits. Impresarios have recently even been granted some share in receipts from re-runs of plays whose première they staged[394]. Another aspect of these agreements that should not be underestimated is the fact that they also deal with matters of cultural and programme policies, since their manifest aim is to promote the French-speaking theatre in particular[395]. Precisely because of these implications as regards cultural policy it remains to be seen whether one can seriously invoke the prohibition of discrimination as enshrined, for instance, in Art. 7 of the EEC Treaty to contest the privileged treatment so clearly enjoyed by French-speaking dramatic authors. The SACD in fact also acts in this sphere as the general agent of the French-speaking theatre. The preferential treatment of national works required by the traité d'abonnement concluded by the SACD with French impresarios cannot be interpreted as an infringement of Community law, any more than can broadcasting, for which many countries specify minimum periods of time for the broadcasting of their national works. On the other hand the principle of "national" treatment in international copyright law, which may be interpreted from the standpoint of Community law as an aspect of the general prohibition on discrimination for reasons of nationality (Art. 7 of the EEC Treaty), does not apply unless there are actual cases of acts of utilisation under copyright law. From the standpoint of the rights of the collecting societies[396], which are as a rule not concerned with placement and agency business, the complementary function

of SACD may of course appear dubious. This question is however of no great practical significance, since the only countries other than France where the "major rights" (theatrical performing rights) are administered by authors' societies are Belgium, where SACD and SABAM operate side by side[397], and to a lesser extent Italy[398]. It is also questionable whether, since SACD itself does not actually grant rights within the meaning of the law, it can be regarded as a collecting society. From a modern point of view, SACD should in fact be described rather as a professional organisation of authors (authors' union)[399] which has negotiated pay agreements for its members which lay down minimum conditions for the exploitation of their works.

(250) Neither these minimum conditions of the traité d'abonnement nor the general duties of impresarios vis-à-vis SACD alter the fact that the actual performing contract must be concluded between the author and the impresario. The author is completely free to decide whether or not to permit his work to be performed, even if it has already become part of the SACD repertoire on completion of the notification formalities. Conversely, the impresario is also completely free to decide whether he will accept for performance a manuscript that has been presented to him. The performing contract is however concluded by formal acceptance (including certain formalities in lieu thereof). The acceptance of the play by the impresario is announced to the outside world by means of the "Bulletin de réception"[400], which must

be signed by both the author and the theatre manager before being sent to SACD. At the same time, it must be stated whether the performing contract concerned is to be governed only by the general conditions, or whether it is subject to special conditions, which may however depart from the general conditions only to the benefit of the author[401]. Since there are very few legislative provisions governing performing contracts, it is the minimum protection conditions of the traité d'abonnement which largely determine de facto the content of individual performing contracts concluded in France between the impresarios and dramatic authors[402].

(251) The first consequence of this system of "incomplete management" of dramatic rights in France is that in a sphere where in the other countries the conclusion of individual contracts predominates, usually through the intermediary of theatrical publishers, theatrical agencies and suchlike, there exist binding requirements for the protection of authors, and especially as regards their remuneration. Moreover, the basic agreements provide that the fees due to the author may not be collected directly by him, but only by SACD, which then remits them to him after deduction of administrative expenses. Although no publishers are members of SACD, part of the fees may in accordance with the "Bulletin de déclaration" be paid to the publishers of existing dramatic works[403]. Hence the author, whose most important duty towards SACD - subject to penalties for non-compliance - is not to conclude performing contracts containing provisions less favourable than the minimum terms of the traité d'abonnement, is also helped, to some extent by way of protection against himself, by the society, which collects the fees and

undertakes the associated monitoring. The society also verifies that the impresario has performed his principal duty of staging the play.

3. Comparison with the position in other countries

(252) The fact that although France has this special system of collective administration of the interests of dramatic authors whereas most of the other countries continue to use the system of individual administration of the "major rights"[404] should not obscure the fact that agreements between impresarios and copyright owners are also possible in those other countries. In the Federal Republic of Germany this is for instance the case of the "Regelsammlung Verlage (Vertriebe)/Bühnen"[405], which contains a list of conditions customary in business transactions between the parties concerned, including reference rates for remuneration. In the Federal Republic of Germany there is also the "Neue Zentralstelle der Bühnenautoren und Bühnenverleger GmbH", which is not a collecting society and does not administer rights, but which monitors theatrical performances and accounts and, by special mandate, also collects the performing fees[406].

(253) From a technical point of view, there is thus some similarity between the French and German systems in many respects. The first difference lies however in the fact that the French system clearly forms part of the

primary law of copyright contracts. The case in point concerns a true "minimum terms" agreement for the benefit of freelance authors themselves, negotiated by a quasi-syndicalist organisation. On the other hand, the German system, which is prudently known as a "Regelsammlung" (collection of rules) so as to avoid trouble with the law on cartels, places the emphasis as much if not more on protecting the interests of publishers of dramatic works, although this does not mean that it has not had considerable indirect and beneficial effects on the protection of authors. It should however be borne in mind in this context that the actual system does not cover the contractual relations between publishers of dramatic works, who undertake the individual administration and placement of performing rights, and authors, so that the protection of authors is incomplete in this respect.

(254) The SACD practice of laying down minimum conditions for performing contracts, which has had the backing of the courts for several decades[407] and evidently does not fall foul of the law on cartels, is quite capable of being used as an alternative to legislation on individual aspects of the primary law of copyright contracts in other spheres also, e.g. that of publishing contracts. We have already mentioned[408] that there are also already signs that - possibly as a preliminary step - less use is being made of authors' organisations in the performance of publishing contracts (checking on accounts). However, if collecting societies themselves are to be entrusted with this task, which the literary section of the Italian SIAE performs

voluntarily[409], there is a danger of a conflict of interests because the membership of SIAE also includes publishers. Consequently, it would be better if such a scheme were to be operated by a professional organisation whose members were all authors. However, if we ignore the special historically based SACD system in France, this means entering the field of collective agreements and collective copyright remuneration agreements. From the standpoint of this study, such agreements should be regarded as the real alternative to legislation on individual types of copyright contracts, and will therefore be considered separately.

IV. Collective agreements and collective copyright remuneration agreements

1. Permissibility

(255) In view of the shortcomings of existing legislation, there is no doubt that the outstanding problems of the primary law of copyright contracts cannot be solved without a deliberately "positive approach" by legislators and a new quality in the drafting of the law of copyright contracts. A great deal would be achieved if it were possible to resort to binding agreements between organisations of authors and organisations of exploiters, which would lay down minimum protection terms and, being similar to collective pay agreements under labour law, ought not to give rise to objections under cartel law. The fact that the first concrete step towards making collective remuneration agreements in this sphere expressly permissible

was taken in the very country (the Federal Republic of Germany) which was hitherto virtually the only one in which objections under cartel law to such binding collective agreements had been voiced[410], gives food for thought. The 1974 provision concerned is that already mentioned in the introduction to this study[411], namely sec. 12(a) of the Federal German Law on Collective Pay Agreements, which subject to certain conditions granted a large group of freelance authors or their organisations the capacity to conclude collective remuneration agreements.

(256) Pursuant to this legislation the provisions of the Law on Collective Pay Agreements apply mutatis mutandis to persons who are economically dependent and who, like employed persons, are in need of social security (persons comparable with employed persons), if the work under contracts for service or work contracts for other persons, perform the required work themselves essentially without the help of employees, and work primarily for one person or for one organisation only. Persons who provide artistic, literary or journalistic services must receive from the person or organisation for whom they work, not less than one third of their total earnings from their paid services. This legislation created, albeit subject to the conditions laid down in sec. 12(a), the concept of "persons comparable with employed persons" in respect of freelance authors, thereby making applicable the provisions of the Law on Collective Pay Agreements.

(257) The difficult and controversial question[412] of who is actually covered by this legislation has hitherto prevented

the conclusion of true collective remuneration agreements in the field of publishing between associations of literary authors and associations of publishers. On the other hand, such collective remuneration agreements under sec. 12(a) of the Federal German Law on Collective Pay Agreements have already been concluded in the broadcasting sector, although they have generally excluded the very questions specifically concerned with copyright. Meanwhile however the 1981 Law on the Social Security of Artists[413] has introduced a general concept in social security law at least of the comparability of freelance authors with employed persons. This should in fact make it possible to go beyond the limits laid down in sec. 12(a) of the German Law on Collective Pay Agreements and to work on the assumption of a similarly broad concept of comparability with employed persons in the context of the law of contracts as well. In practice however this assumption will not be possible unless expressly authorised by the law. In the last resort, modern legislators concerned with the primary law of copyright contracts thus face the choice between laying down detailed provisions for individual types of the law of copyright contracts, and (doubtless the more elegant solution) expressly authorising the conclusion of binding collective agreements on pay and other matters, with provision of institutionalised arbitration.

2. The French alternative drafts of 1936

(258) This alternative emerged clearly - doubtless for the first time - in the context of attempts made in France in 1936 to reform copyright law, as apparent from two French bills which appeared almost simultaneously[414]

and which because of their model character we propose to examine in more detail here. One was the draft dated June 1936 of a law on publishing contracts[415] presented by the Société d'Etudes Législatives, and the other the Government Bill No. 1164 on Copyright and Publishing Contracts of 13 August 1936[416]. Doubtless mainly for political reasons, neither bill became law. They had been preceded in 1932 by Bill No. 1039 on Publishing Contracts, which also failed to become law[417].

(259) The June 1936 draft of the Société d'Etudes Législatives attempted to go beyond the few general provisions of the 1932 bill and to introduce comprehensive legislation on publishing contracts in the widest sense. The first title of the draft contained general provisions applicable to all publishing contracts, the second title contained special provisions for book publishing, the third for music publishing, the fourth for gramophone record publishing, the fifth for cinematographic film publishing, and the sixth for art publishing. It is not possible to analyse these draft provisions individually. A point that seems to us important however is the fact that, to judge from the subsequent 1957 legislation, this draft failed to become law precisely because of its most characteristic feature, namely its proposal to introduce, in addition to general legislation on

publishing contracts in the wider sense, special provisions for the various subsidiary aspects of publishing contracts. One of the reasons for its failure may have been the difficulty of finding really practical solutions for the individual types of contract, in view of the continual changes in practice[418].

(260) It is thus of particular interest that the Bill No. 1164, which appeared almost simultaneously, proposed that the sub-categories of publishing contracts should be regulated not by legislation but by collective agreements. The bill, which contained comprehensive provisions on the whole law of copyright, certainly did not wish to shirk introducing basic legislation on the primary law of copyright contracts. Thus it contained a series of general provisions on the "exploitation of the pecuniary right" (exploitation du droit pécuniaire) of the author and a well developed general part on publishing contracts. Moreover, many of these provisions were mandatory, with the consequence that "by law, all provisions to the contrary" would have been "null and void" (sec. 45 of the bill). Sec. 46 of the bill, however, contained the crucial provision. In the original, it read as follows:

> "Les modalités particulières d'application des règles énoncées dans les articles 30 et 45 ci-dessus, en ce qui concerne l'édition de librairie, l'édition musicale, l'édition phonographique, l'édition cinématographique et l'édition en matière d'oeuvres plastiques, graphiques et des arts appliqués, seront, dans le délai de six mois à dater de l'entrée en vigueur de la présente loi, déterminées par des accords interprofessionnels conclus entre les organisations professionnelles d'auteurs et les organisations professionnelles d'éditeurs.

> Si la demande en est faite par l'une des parties, le Ministre de l'Education nationale et des Beaux-Arts prêtera son concours, le cas échéant, par voie d'arbitrage, en vue de la conclusion desdits accords.
>
> A défaut de conclusion de ces accords dans le délai prévu ci-dessus, il sera statué par une loi ultérieure."

Thus according to these provisions the particular modes of application of the general provisions on publishing contracts in the sectors of book publishing, music publishing, gramophone record publishing, cinematographic film publishing and art publishing were to be determined within six months of the effective date of the law by interprofessional agreements between the professional organisations of the authors and those of the publishers. At the request of one of the parties, the Minister of Education and Fine Arts could assist by means of arbitration in concluding such agreements. If no such agreements were concluded within the specified period, the matter was to be dealt with by a further law.

(261) This provision of the bill, which was strongly criticised by Escarra, Rault and Hepp[419], would scarcely have been practicable if only because of the short time limit of six months. Nevertheless, the basic idea of this scheme is very important in the present context. It shows that the legislator realises that while it is best to leave it to the professional organisations of both parties to decide the details of contracts concluded between authors and publishers[420],

the author will gain nothing if such a system results in the legislator doing nothing at all about the matter. On the contrary, the legislator must, if he is really interested in including in the "special part" of the primary law of copyright contracts provisions for protecting authors but at the same time wishes to let this work be done by means of agreements negotiated independently between the professional organisations concerned, envisage the possibility of such agreements being frustrated for any reason whatever. The French bill took account of this possibility, albeit incompletely. It should be borne in mind in this context that freelance authors are as a rule not in a position to take industrial action[421], so that the legislator must have a compensating effect in addition to permitting the conclusion of collective remuneration agreements. We see here an essential difference between labour law and copyright law[422], resulting from the fact that the need of freelance authors for protection is not less but greater than that of ordinary employed persons. One must therefore ponder on the forms to be taken by such institutionalised backing in the event of the matter being dealt with by means of collective agreements.

3. Institutionalised backing for the conclusion of collective agreements

(262) In the related sphere of the law on collecting societies, copyright law now has

comparable provisions designed to allow the organisations involved to go to arbitration if no agreement can be reached. One might for instance mention here the arbitration procedure laid down in the 1965 German Law on Collecting Societies[423]. As regards contractual relations between the collecting societies and the users of the works, sec. 11 of this law provides firstly that the collecting societies must on request grant utilisation rights to anyone on reasonable terms (duty to conclude contracts). Moreover, sec. 12 of the law enshrines the duty of collecting societies "to conclude on reasonable terms blanket agreements" with associations of users, subject to certain conditions. However, sec. 14 of the law provides that if the parties are unable to agree upon the conclusion of such a collective agreement, each party may appeal to a special arbitration body[424] which has been set up at the Patent Office as the supervising authority for the collecting societies.

(263) There is an obvious structural similarity between this system and the procedure set out in sec. 46 of the abovementioned 1936 French bill, apart from the fact that the German procedure is much more elaborate[425]. On closer examination however we find that the German system differs from the French to the disadvantage of authors, in that - in line with the general tendency of the German Law on Collecting Societies - it is more concerned with preventing the users of works and their associations from being subjected to unfair conditions of use by the

collecting societies. Although this approach is almost too partial to be acceptable nowadays, it nevertheless forms the basis of most of the legislation on collecting societies in the other Member States of the European Community that have any such provisions at all, e.g. Denmark, United Kingdom/Republic of Ireland, Luxembourg and the Netherlands[426].

(264) Consequently, any application to the primary law of copyright contracts of the idea to be found in the law on collecting societies of the need for a procedure to deal with cases where the parties are unable to reach agreement on the conclusion of blanket agreements, would have to be accompanied by a "change of approach" with the protection of authors in mind. Even this alternative to legislation requires a decision by the legislator to lay down appropriate procedural provisions. The appropriate legislative decisions also have to be made in this case, although from a technical standpoint they might be relatively simple. Two main provisions might be needed. The first would need to authorise the conclusion of binding collective agreements on remuneration and other matters applicable to all freelance authors to whom the general concept of comparability to employed persons applies. The second could provide for a joint arbitration body with a neutral chairman to deal with cases in which despite the genuine endeavours of one or both parties no such binding blanket agreement can be concluded within a reasonable period (e.g. three years).

Details of the actual arbitration procedure could be laid down in implementing regulations. These two provisions might be supplemented, still by analogy with institutions under labour law, by making it possible to confer general binding force on the blanket agreements (collective copyright remuneration agreements) or the arbitration awards made in lieu thereof. In this field one might also envisage the introduction of a scheme similar to that used for the "contractual licence" (aftalelicens) in sec. 22 of the Danish CL[427], whereby general binding force is conferred by law, subject to certain restrictions, on the collective agreements negotiated between the parties concerned.

4. Existing forms of blanket agreements and collective agreements

(265) Practice to date also indicates the need to use collective agreements in the relations between authors and primary exploiters. It is precisely in the field of publishing contracts, which of all the special types of contracts is the one that has been the subject of most detailed legislation in the "special part" of the primary law of copyright in a whole series of countries, that we find in most of the countries examined blanket or standard agreements which are additional to legislation on publishing contracts or replace it more or less completely when it is non-mandatory. In the case of Denmark, we may mention the 1947 "standard contract" "for the publication of novels, short stories, anthologies of poetry

and comparable works"[428], which applied or still applies to the other Scandinavian countries as well as Denmark. Since 1978 the Federal Republic of Germany has had the "standard contract" for the conclusion of publishing contracts for literary and comparable works, which was agreed between the Verband Deutscher Schriftsteller and the Börsenverein des Deutschen Buchhandels[429]. France has the 1977 standard contract between the Société des Gens de Lettres de France and the Syndicat National de l'Edition[430]. Italy has had since 1976 the "contractual principles for relations between authors and publishers for the publication of printed works"[431], which were agreed between the Italian Publishers' Association on the one hand, and the National Union of Writers and the Free Union of Italian Writers on the other. Since 1973, the Netherlands has had the "Auteurscontract", which is applied between the Dutch Publishers' Association and the Association of Writers/Union of Writers[432]. In the case of the United Kingdom, mention should be made of the attempt by the Society of Authors, in conjunction with the Writers' Guild - in parallel with the minimum terms agreements between authors' organisations and broadcasting organisations or film producers, which we have mentioned several times[433] - to conclude just such agreements with the publishers[434].

(266) These collective agreements, which are cited only as methodic examples and do not claim to be exhaustive, are clearly of a compromise nature and in many cases lag far behind the (non-mandatory) legislative

provisions on the subject. This is particularly clear if we contrast the provisions in secs. 2 - 5 of the 1978 German standard contract, dealing with comprehensive grants of secondary rights, with those of sec. 2(2) of the German Publishing Law, whereby the author retains the most important secondary rights[435]. This striking contrast does not however result solely from the paramount position of the publishers and the weakness of the authors, but equally from the changes that have taken place since 1901, when the Publishing Law was promulgated, in the field of publishing. These changes have modified the importance of book publishing per se, and publishers have increasingly become the "agents" of authors in the comprehensive exploitation of their works. The writers, who are as a rule unable to exploit their (existing) works comprehensively must willy-nilly accept such a development[436] unless - as is often the case in the English-speaking countries - they use an actual literary agent, who is as a rule somewhat more hesitant in granting secondary rights to publishers[437]. The real problem, as is generally the case when comprehensive secondary rights are granted to publishers, arises with regard to remuneration. Apart from the Danish/Scandinavian standard contract, which provides for minimum rates of authors' shares in the retail price of their books, and the minimum terms agreements[438] which the authors are trying to introduce in the United Kingdom, but which have hardly been accepted as yet by the publishers, such standard agreements do not specify any definite

figures for the remuneration of authors.

(267) Hence it must be said that the collective agreements hitherto concluded have largely failed to perform the comparable function of collective agreements (collective pay agreements) in the field of labour law, namely to guarantee remuneration. Moreover, there is no provision of law in any country to ensure that such agreements actually form the basis of individual agreements[439]. From the point of view of freelance authors, this is a serious shortcoming of these agreements, which (from a technical standpoint) often constitute exemplary solutions, of a standard not often attained by legislation, of the problems arising from publishing contracts. These shortcomings will doubtless not be overcome unless national legislators dealing with publishing contracts accept and regulate positively this type of agreement, instead of just more or less tolerating it. They will then have to encourage - especially as regards remuneration, if need be by means of gentle compulsion - the conclusion of such agreements by laying down procedural requirements, including provisions for arbitration etc. in the event of failure to reach agreement, as was proposed for the first time in the 1936 French bill[440]. Legislators would then not need to lay down detailed provisions in the "special part" of the primary law of copyright contracts. It will however doubtless still be necessary in future to lay down certain basic requirements in the "general part" of the law of copyright contracts of the kind now to be found in the legislation of the

countries examined, as described earlier[441].

(268) It is clearly possible even now in some countries to achieve complicated formulations of collective agreements and binding minimum terms agreements, even without compensatory action by legislators in the field of the primary law of copyright contracts. This is demonstrated both by the Scandinavian standard contract[442] and by the agreements already mentioned several times concluded in the United Kingdom between the authors' organisations and the BBC or the film producers[443]. An interesting example worthy of mention here is the "Screen Writing Credits Agreement" concluded on 1 May 1974 between the Film Production Association of Great Britain and the Writers Guild of Great Btitain. It contains detailed provisions on the duties of film producers to mention names, or to omit them if the author so wishes. These agreements are impressive from a technical standpoint because of their detailed provisions on the question of the mention of names in the opening credits of films or in film publicity. Such detailed provisions would doubtless be impossible of achievement in legislation on the subject. It should be added that in United Kingdom copyright law, statutory provisions for the right of mentioning names, which is to be understood as a part of the droit moral of authors, are largely lacking[444]. This example shows that it is also possible by means of collective agreements to extend the protection of authors to fields which do not belong solely to the law of copyright contracts

but already form part of the fundamental right-conferring provisions of copyright law.

(269) It is not possible to answer here the question how such binding agreements could be concluded in some cases - even without compensatory procedural provisions in the matter - and not in others, without carrying out more detailed studies of the relevant legal positions. It is however significant that even in the United Kingdom it has not yet been possible to conclude such minimum terms agreements for publishing contracts[445]. The agreements already achieved might thus be explainable by the special circumstances, not capable of generalisation, obtaining in the field of broadcasting and which doubtless stem from the special position of broadcasting organisations. Generally speaking it would thus seem largely true of all Member States of the European Community that legislation must first be enacted for establishing and preserving the law of collective copyright contracts (law of collective copyright remuneration agreements) including some kind of statutory arbitration procedure, if it is desired to bring about within a reasonable period of time binding agreements for the protection of authors in all fields of the primary law of copyright contracts. This presupposes of course a fundamental decision and a deliberate "positive approach" by national legislators to freelance authors. If one considers that the premise (based on labour and social law) of the comparability of the great majority of freelance authors with employed persons also opens up a European perspective[446], the demand for such a positive approach may also be applied to institutions of the European Community.

D. European perspectives

(270) The points made so far in this study, both in its introduction, with its attempt to define the concept of "primary law of copyright contracts", and in those parts concerned with comparative law and analyses, are all based on the premise that the primary law of copyright contracts is the part of copyright law that is most closely related to both individual and collective labour law. The need of the freelance authors concerned for protection vis-à-vis their primary contractual partners is especially like that of employed persons vis-à-vis their employers when the author's manual or brain work is the source of his income and the basis of his existence. Two important key countries of the European Community - France and the Federal Republic of Germany - have already drawn conclusions as regards social insurance on the comparable need of social protection of employed persons and freelance authors, resulting in a general concept of the "comparability with employed persons" of authors[447].

(271) German legislators have moreover taken the first step in principle to apply collective labour law (law on collective pay agreements) in the sub-sector of those categories of persons contemplated by sec. 12(a) of the Law on Collective Pay Agreements, and the decision of the Bundestag may be regarded as a further (somewhat cautious step in this direction[448]. In the other countries,

there would doubtless be less need of such specific provisions, since there is obviously no question there of objections to the use by freelance authors of collective agreements[449] being raised under cartel law, as there was in the Federal Republic of Germany because of a far-fetched interpretation of the concept of an "entrepreneur". Even in those countries which have no problems as regards cartel law, however, the problem shifts from the level of the law to that of the actual feasibility of such collective agreements, since the position of the authors' associations varies from one field to another of the primary law of copyright contracts and is not strong enough to impose appropriate contractual conditions, i.e. minimum terms.

(272) These findings and considerations however also have important consequences for the problems that arise in relations between copyright law and European Community law. These problems, in parallel with the law of industrial (patent) rights, have been examined mainly in the context of the free movement of goods (arts. 30 et seq., and especially art. 36, EEC Treaty) and the provisions regarding competition (arts. 85 and 86, EEC Treaty)[450]. The decisions of the European Court of Justice[451] and the practice followed by the European Commission in its decisions[452], both guided by the overriding objective of European integration, have thus led to some curtailment of copyright powers, whether as regards the exercise of rights, deriving from national copyright law, to seek injunctions for discontinuance or for payment of compensation[453]; as regards the permitted formulation of copyright contracts[454]; or as regards the self-organisation of authors and publishers into collecting societies[455]. Generally

speaking, the juristic validity of such decisions is undeniable if, as in the parallel cases of industrial (patent) rights, one works on the basis of the juristic-dogmatic content of copyright as a right of exclusivity or a monopoly, without bothering about the actual subjects of copyright which, from this objectivistic standpoint, are of secondary importance. The right owners affected by the decisions were in fact generally firms in the culture industry or collecting societies, which had in one way or another become successors in title to authors.

(273) The authors concerned nevertheless see a certain one-sidedness in the decisions of the European Court of Justice and the Commission, since they consider that their rights are being "trimmed" (albeit indirectly) without their being the subject - unlike employed persons in the context of the overall machinery of the EEC Treaty[456] - of a "positive approach" by the European institutions: an approach we have stressed here as also being necessary from the national legislators. A closer study of the provisions of the EEC Treaty shows however that there is indeed at least an initial basis in law for such a positive approach by the institutions of the European Community to freelance authors. A prior condition for this is however that Community law accepts the necessity of treating freelance authors, as "travailleurs culturels", largely in the same way as industrial workers. Such an idea may in fact be

inferred from the Commission's communication on "Community action in the cultural sector" of 22 November 1977[457]. Item 21 states inter alia that "If one deals with the complex subject of copyright and related rights, one must not lose sight of the economic and social position of cultural workers[458] and should be guided by the principle that every professional activity must provide the person who exercises it with a reasonable livelihood".

(274) When considering this question, one must also not lose sight of the fact that the main aim of the law on copyright is to create a reasonable livelihood for the authors in order to foster literature, science and the arts, even if the aspects of cultural policy concerned with content and programming have remained within the competence of the Member States[459]. However, in the same way that the above communication from the Commission defines the cultural sector as "the socio-economic system comprising the persons and enterprises who produce and distribute cultural assets and services"[460] and distinguishes it from culture per se, it is possible to distinguish between legislation on copyright and the promotion it implies of the work of the author as part of the infrastructure on the one hand, and culture itself on the other.

(275) When one takes account of these infrastructural aspects and takes as a basic criterion the need of the authors themselves for protection, one arrives almost automatically, so going beyond the preoccupations of arts. 36 et seq. and

85 et seq. of the EEC Treaty, at the provisions of the EEC Treaty dealing with workers and their social security. In particular, we come across Title III of Part 3 of the EEC Treaty on Social Policy. Freelance authors ought also to benefit from the albeit limited faculties conferred on the Commission by arts. 117 et seq. of the EEC Treaty[461].

(276) Art. 117(1) of the EEC Treaty stresses generally the necessity of promoting improvement of the living and working conditions of labour so as to permit the equalisation of such conditions in an upward direction. Art. 117(2) mentions in particular the approximation of legislative provisions as a means of achieving this. More specifically, art. 118 of the EEC Treaty then states that without prejudice to the other provisions of the Treaty and in conformity with its general objectives, it shall be the aim of the Commission to promote close collaboration between Member States in the social field, particularly in matters relating to labour legislation and working conditions, social security and the law as to trade unions and collective bargaining between employers and workers. When interpreting these provisions, Knolle (in Groeben/Boeckh/Thiesing) concludes[462] that while efforts to promote collaboration in the field of trade unions and collective bargaining must not call in question the right to conclude collective pay agreements, they may nevertheless assist efforts to develop

a materially uniform law on collective pay agreements and/or a uniform arbitration law in the Community.

(277) Transposed to matters of the primary law of copyright contracts, this means the application mutatis mutandis of these provisions and possibilities to the sphere of the individual and collective law of copyright contracts. Pursuant to art. 118(2) of the EEC Treaty, the Commission would thus be able in this case also to act in close contact with Member States by means of studies, the issuing of opinions and the organising of consultations. Under the general enabling provisions of art. 155 of the EEC Treaty, it would also be able to formulate recommendations for the matters involved in this context[463]. The fundamental difference in perspective compared with the current practice of applying European Community law to problems of copyright lies in the "positive approach", as expressed for instance in art. 117 of the EEC Treaty in the words "to promote improvement of the living and working conditions of labour". Moreover, the decisions of the Commission and of the European Court of Justice on questions of the law on competition should consider freelance authors as comparable, in the manner here recommended with employed persons, at least when the application of these provisions to acts of exploitation by the authors themselves is concerned.

(278) Concrete results of the positive approach by the European institutions to freelance authors that we call for here might, despite the generally limited opportunities pursuant to art. 117 et seq. of the EEC Treaty,

in particular involve the Member States being encouraged to strengthen and develop more effectivley than hitherto their largely fragmentary and ineffective legislation in large areas of the primary law of copyright contracts. In this context, the accent should not, as we should like to repeat yet again by way of summarising the results of this study, be placed so much on introducing provisions governing the content of the different types of copyright contracts. Attention should instead be devoted mainly to specifically permitting and regulating the conclusion of binding collective agreements, and in order to compensate for the weakness of isolated freelance authors, to promulgating supplementary procedural legislation for ultimately ensuring that authors and their associations will really be in a position to conclude such binding and effective agreements within reasonable periods of time.

List of abbreviations and abbreviated bibliographic references (names only) used

ALAI	Association Littéraire et Artistique Internationale
Amtsbl.Eur.Gem.	Amtsblatt der Europäischen Gemeinschaften (Official Gazette of the European Communities)
BBl.	Börsenblatt des Deutschen Buchhandels, Frankfurt Edition
BGBl.	Bundesgesetzblatt (Federal German Dfficial Gazette)
Cohen Jehoram	Cohen Jehoram (editor): Copyright Contracts, Monographs on Industrial Property and Copyright Law, Vol. 2, Alphen aan den Rijn/ Netherlands 1977
Colombet	Colombet, Propriété littéraire et artistique, Précis Dalloz, 2nd edition 1980
Copingen/Skone James	Copinger and Skone James on Copyright, 12th edition by Skone James/Mummery/Rayner James/ Latman/Silman, London 1980
Desbois	Desbois, Le droit d'auteur en France, 3rd edition, Paris 1978
De Sanctis	De Sanctis, Contratto di edizione, Milan 1965
Dietz	Dietz, Das Urheberrecht in der Europäischen Gemeinschaft, Schriftenreihe Europäische Wirtschaft, Vol. 91, Baden-Baden 1978; English version: Copyright Law in the European Community, European Aspects, Law Series No. 20, Alphen aan den Rijn, Netherlands 1978; French version: Le droit d'auteur dans la Communauté européenne, Collection études, Série Secteur culturel no. 2, Brussels and Luxembourg 1978.

EBU Review/Revue de l'UER	European Broadcasting Union Review/Revue de l'Union Européenne de Radiodiffusion
EIPR	European Intellectual Property Review
Fohrbeck/Wiesand/ Woltereck	Fohrbeck/Wiesand/Woltereck, Arbeitnehmer oder Unternehmer? Zur Rechtssituation der Kulturberufe, Berlin 1976
Fromm/Nordemann	Fromm/Nordemann (Vinck/Hertin): Urheberrecht. Kommentar zum Urheberrechtsgesetz und zum Wahrnehmungsgesetz, 4th edition, Stuttgart 1979
Gotzen	Gotzen, Het bestemmingsrecht van de auteur, Brussels 1975
Greco/Vercellone	Greco/Vercellone, I diritti sulle opere dell'ingegno, Turin 1974
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil
Hubmann	Hubmann, Urheber- und Verlagsrecht, 4th edition, Munich 1978
Huguet	Huguet, L'ordre public et les contrats d'exploitation du droit d'auteur. Etudes sur la loi du 11 mars 1957, Bibliothèque de droit privé, Paris 1962
Van Isacker	Van Isacker, De exploitatierechten van de auteur, Brussels 1963
Jarach	Jarach, Manuale del diritto d'autore, Milan 1968
J.O.	Journal Officiel
Laddie/Prescott/ Vitoria	Laddie/Prescott/Vitoria, The Modern Law of Copyright, London 1980

Lund	Lund, Ophavsret, Copenhagen 1961
NIR	Nordisk Immateriellt Rättsskydd
Pfeffer/Gerbrandy	Pfeffer/Gerbrandy, Kort commentaar op de auteurswet 1912, 2nd edition, Haarlem 1973
Plaisant	Plaisant, Propriété littéraire et artistique, Collection des Juris-Classeurs, loose-leaf collection, last section No. 117, May 1980
Reimer	Reimer (editor), Vertragsfreiheit im Urheberrecht. GRUR-Abhandlungen, Vol. 9, Weinheim/New York 1977
RIDA	Revue Internationale du Droit d'Auteur
Schmidt	Schmidt, Les sociétés d'auteurs S.A.C.E.M. - S.A.C.D.; Contrats de représentation, Bibliothèque de droit privé, Vol. CX VIII, Paris 1971
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
Ulmer I	Ulmer, Urheber- und Verlagsrecht, 3rd edition, Berlin/Heidelberg/New York 1980
Ulmer II	Ulmer, Gutachten zum Urhebervertragsrecht, insbesondere zum Recht der Sendeverträge. Publisher: Der Bundesminister der Justiz (Federal German Minister of Justice), Bonn 1977
VS Informationen	VS Informationen, published by the Verband der deutschen Schriftsteller (VS) in der IG Druck und Papier
Weincke	Weincke, Ophavsret. Reglerne, Baggrunden, Fremtiden, Copenhagen 1976

Wiese — Wiese, Buchautoren als arbeitnehmerähnliche Personen. Schriftenreihe der Internationalen Gesellschaft für Urheberrecht e.V. Vol. 58, Vienna 1980

Wink/Limperg — Wink/Limperg, Auteursrecht in Nederland, 10th edition 1975

Notes

1) Cf. Dietz. Only the paragraph numbers of this work, which are (almost) identical in the three editions, will be quoted here.

2) Cf. Dietz, para. 514.

3) On 1.1.1981, Greece became the tenth Member State of the European Community. It was thus necessary to extend this study to include Greek copyright law. For linguistic reasons, however, the author had to rely largely on secondary sources, and mainly on the introduction by Koumantos to the section on Greece in: Möhring/Schulze/Ulmer/Zweigert (eds.), Quellen des Urheberrechts. Gesetzestexte aller Länder mit deutschen Übersetzungen, systematischen Einführungen und tabellarischen Übersichten, Frankfurt am Main, loose-leaf collection, section 11, 1980. Cf. also Asprogerakas-Grivas, Das Urheberrecht in Griechenland, Schriftenreihe der UFITA, No. 34, Munich 1969. Both works contain German translations of the provisions of Greek law on copyright, which are printed in the original in: Koumantos, Pneumatike idioktesia, Athens 1967 (with supplement: French summary of contents), pp. 261 et seq.

4) This applies, for instance, to the important collection of rules on dramatic performances quoted by Ulmer (I), p. 389 and 484 et seq.: Regelsammlung Verlage (Vertriebe)/Bühnen, of 1964.

5) Urhebervertragsrecht. Materialsammlung, 2nd edition, Berlin 1974 (1st edition, Baden-Baden 1960).

6) Cf. Plaisant, in particular: Fascicules 26^{bis} and 26^{ter}; cf. also Plaisant, Le droit des auteurs et des artistes exécutants, Paris 1970, Annexes V et seq.

7) Publishing Agreements. A Book of Precedents, London 1980.

8) A Guide to Royalty Agreements. Prepared by the Agreements Committee of the Publishers' Association, 5th edition, London 1972; cf. also The Society of Authors (publ.), Publishing Contracts, Quick Guide 8, London 1979.

9) Der Verlagsvertrag. Ein Handbuch für die Praxis des Urhebervertragsrechts mit Vertragsmustern, Erläuterungen und den Gesetzen über das Urheberrecht und das Verlagsrecht sowie sonstigen vertragrechtlichen Bestimmungen, 4th edition, Neuwied and Darmstadt 1978.

10) Fohrbeck/Wiesand, Der Autorenreport, Reinbek bei Hamburg 1972; ditto, Der Künstlerreport. Musikschaffende - Darsteller - Realisatoren - Bildende Künstler - Designer, Munich/Vienna 1975. The author did not become aware until he had completed his study of the work of Menger, La Condition du compositeur et le marché de la musique contemporaine; published by the Ministry of Culture (Service des Etudes et Recherches) and the Fondation SACEM pour la Communication Musicale, La Documentation Française 1981 (as quoted by Le Monde, 6 August 1981, p. 9).

11) Cf. for example Fohrbeck/Wiesand/Woltereck, pp. 139 et seq., 348 et seq.

12) De juridische, economische en sociale situatie van den literaere vertaler in de Europese Gemeenschap. Study on behalf of the European Commission - Studie Culturel Sektor XII/961/79 - NL. (French version: Situation juridique, économique et sociale du traducteur littéraire dans la Communauté Européenne - XII/961/79 - FR.). Cf. in particular pp. 78 et seq.; 115 et seq., and 122 et seq. (French version). Cf. also the spirited critical article by Janvier, Vous avez dit auteurs? La situation des traducteurs littéraires en France, in: RIDA No. 107 (January 1981), pp. 3 et seq., and the interview with Birkenhauer (President of the Verband deutschsprachiger Übersetzer), in BBl. No. 96 of 30.11.79, pp. 2365 et seq. Cf. also Crampton, The Pink Book, in: The Author, Summer 1981, pp. 139 et seq.

13) La protection des photographies dans la Communauté Européenne. Study carried out on behalf of the Commission of the European Communities 1977 - Etudes secteur culturel XII/739/78-F. Cf. especially pp. 86 et seq., 103 et seq. and 227 et seq.; cf. also Duchemin, Suggestions en vue d'une amélioration de la protection des photographies dans la Communauté Européenne, RIDA No. 105 (July 1980) pp. 3 et seq. and No. 106 (Dct. 1980) pp. 25 et seq. (especially pp. 107 et seq. in this case).

14) Les contrats d'exploitation des droits de l'artiste interprète ou exécutant. Study carried out on behalf of the Commission of the European Communities. Etudes secteur culturel XII/47/80-F. Cf. especially pp. 60 et seq.

15) Das Recht der Interpreten in der Europäischen Wirtschaftsgemeinschaft. Study carried out on behalf of the Commission of the European Communities, 1977. Studien im Kulturbereich XII/52/78-DE. (Original French version: Le droit des interprètes et exécutants dans la Communauté économique européenne, 1977, Etudes Secteur Culturel XII/52/78-F).

16) Cf. Ulmer II; cf. also views of the Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht, in: GRUR Int. 1980, pp. 1060 et seq. and references in Dietz, (note 122 below) p. 3 (especially notes 7 and 8).

17) Cf. preamble of Government Copyright Bill of 1962 (Bundestagsdrucksache IV/270) p. 28: "It is moreover proposed to supplement the new Copyright Law by a comprehensive law on copyright contracts, which is to contain provisions for all types of contracts in the field of copyright." Cf. also p. 56; cf. Schulze, "Urhebervertragsgesetz auf Raten?" in: UFITA, Vol. 84 (1979) pp. 147 et seq.; cf. also Roeber, Überlegungen für ein Urhebervertragsgesetz, in: UFITA, Vol. 80 (1977) pp. 105 et seq.; ditto, Die fachliche Diskussion um ein Urhebervertragsgesetz. Zur Methode und zur inhaltlichen Ausgestaltung der gesetzlichen Regelung, in: Film und Recht 1979, pp. 77 et seq.; Samson, Notizen zur Struktur des Urhebervertragsgesetzes, in: Film und Recht 1979, pp. 342 et seq.

18) Printed in Dutch, French and English in: De Uitgever 1974, pp. 110 et seq.

19) Cf. for example Cohen Jehoram. Aspecten van het uitgavecontract/Aspects du contrat d'édition, in: De Uitgever 1974, pp. 34 et seq.; ditto, Auteursrecht en uitgavecontract/Droit

d'auteur et contrat d'édition, loc. cit. pp. 36 et seq.; Toelichting bij het ontwerp van den Studiecommissie uitgavecontract voor boek 7, titel 8 van het Ontwerp-BW uitgaveovereenkomst, in: De Uitgever 1976, pp. 63 et seq. (Cf. also the comparison of the original draft with the provisions of the draft proposal of the Study Committee of the Dutch "Vereniging voor Auteursrecht", in: De Uitgever 1976, pp. 53 et seq.); Veltman Fruin, Wettelijke regeling van de uitgeefovereenkomst. Enkele critische notities, in: De Uitgever 1974, pp. 307 et seq.; Hirsch Ballin, Zum Vorentwurf einer gesetzlichen Regelung des Verlagsrechts in den Niederlanden, in: UFITA Vol. 73 (1975), pp. 17 et seq.

20) Significantly, the problem of the law of copyright contracts was not raised in the Green Paper on the Reform of Copyright Law submitted in 1981 by the British Government, if we ignore certain secondary aspects (employed authors, reversionary interests, droit moral). Cf. Reform of the Law relating to Copyright, Designs and Performers' Protection. A consultative document. Presented to Parliament by the Secretary of State for Trade by Command of Her Majesty, July 1981, London. Her Majesty's Stationery Office, Cmnd. 8302.

21) Articles by Cohen Jehoram, Corbet, de Sanctis, de Freitas, Stuyt, Françon, reproduced in: De Uitgever 1974, pp. 36 et seq., and in Cohen Jehoram, pp. 3 et seq.

22) Articles by Corbet, von Linstow, Françon, Hillig, Schulze, Hirst, Fabiani, Cohen Jehoram, Dietz, Karnell, Rosina, Walter and Reimer, in: Cohen Jehoram, pp. 91 et seq., also in: Reimer and in: ALAI (ed.), Journées d'études Berlin-Ouest, 1 et 2 Octobre 1975: "Liberté des contrats et droit d'auteur", Paris 1976.

23) Communication of the Commission to the Council. Submission of 22 November 1977, Bulletin of the European Communities, supplement 6/77 (published in all languages of the Community).

Cf. the report of the Dutch "Studiecommissie nieuwe europese plannetjes", in: Auteursrecht 1980, pp. 67 et seq., and Corbet, L'action communautaire dans le secteur culturel. Une évaluation, in: Raccolta dei Studi in omaggio a Valerio de Sanctis = Il Diritto di Autore 1978, No. 3, pp. 147 et seq.

24) The expressions used in the other Community languages ("travailleurs culturels", "cultural workers", "operatori culturali", "werkers op cultureel terrein" and "kulturarbejdere") show even more clearly what is meant here.

25) Recommendation concerning the Status of the Artist, adopted by the General Conference of UNESCO at its twenty-first session (Belgrade, 23 September to 28 October 1980), in: Copyright Bulletin (UNESCO) 1980, No. 4, pp. 7 et seq. (See Appendix I below). Cf. also Schulte, Künstlersozialversicherung - ein zweiter Anlauf, in: Zeitschrift für Rechtspolitik 1980, p. 11 et seq.; ditto, Die soziale Sicherung der Kulturschaffenden als sozialpolitische Aufgabe, in: Zentralblatt für Sozialversicherung, Sozialhilfe und Versorgung 1981, pp. 165 et seq. and 193 et seq. (in this case, p. 165 et seq.).

26) Cf. Recommendation on the Legal Protection of Translators and Translations and the Practical Means to Improve the Status of Translators, adopted by the General Conference of UNESCO at its nineteenth session (Nairobi, 26 October to 30 November 1976) in: Copyright Bulletin (UNESCO) 1976, No. 4, pp. 9 et seq.; cf. also the draft text, in: RIDA No. 90 (Oct. 1976) pp. 196 et seq. Cf. also Bulletin 2 of the Society of Authors, "Translators as Authors", London 1978.

27) Cf. the discussion of the term "author" in the broadcasting context in Fohrbeck/Wiesand/Woltereck, p. 115, and generally details on pp. 76 and 459; for Italy, cf. Ciampi, Relazione del Direttore Generale della S.I.A.E. all'Assemblea delle Commissioni di Sezione del 18 maggio 1963, in: Il Diritto di Autore 1963, pp. 193 et seq. (in this case p. 196). Cf. also criticism by Schulte, loc. cit. (Note 25 supra: Die soziale Sicherung.....), p. 166 on the lack of information in this sphere.

28) Das Urheberrecht als individuelles Herrschaftsrecht und seine Stellung im Rahmen der zentralen Wahrnehmung urheberrechtlicher Befugnisse sowie der Kunstförderung, Arbeiten aus dem juristischen Seminar der Universität Freiburg/Schweiz 47, Freiburg 1978.

29) Cf. Riklin, op. cit. pp. 290 et seq., especially pp. 314 et seq.; on the concept of pluralism in publishing, cf. also Friedrich, Zu Situationen einer Branche. Buch und Markt, BBl. No. 47 of 29.5.81, pp. 150 et seq.; cf. also Koktvedgaard, Upphovsrättens funktion i dagens samhälle, in: NIR 1976, pp. 111 et seq.; ditto, Den nordiske ophavretsreform aktuelle tilstand, in: NIR 1978, pp. 249 et seq. (in this case: pp. 252 et seq.); Grosheide, Moeten kunstenaars van de wind leven?, in: Auteursrecht 1979, pp. 63 et seq. Cf. generally also Wiesand et al., Literaturförderung im internationalen Vergleich, Studien zur Kulturpolitik, Cologne 1980.

30) Especially clear are the latest decisions of the European Court of Justice regarding the "difference of fees" (Gebührendifferenz) in the associated cases 55/80 (Musik-Vertrieb membran GmbH v. GEMA) and 57/80 (k-tel International v. GEMA), judgment of 20.1.1981 RIDA No. 109 (July 1981), pp. 174 et seq. = GRUR Int. 1981, pp. 229 et seq.; also confirmed by the ruling of the European Court of Justice in the "Le Boucher" case, case 62/79 (Coditel v. Ciné Vog Films), judgment of 18.3.1980, Official Collection of the European Court of Justice 1980, pp. 881 et seq. = RIDA No. 105 (July 1980) p. 156 = GRUR Int. 1980, pp. 602 et seq. Cf. also Dietz, paras. 27 et seq. Cf. in addition Joubert's critical notes on the judgment, in: RIDA No. 109 (July 1981) pp. 188 et seq. and the critical views of the British Publishers' Association as expressed in its memorandum of September 1980 to the European Commission and the United Kingdom Government ("On European Community Law and Copyright in Literary Works").

Reproduced in German in GRUR Int. 1981, pp. 380 et seq.; cf. also the excellent résumé of decisions of the European Court of Justice and Commission in the field of intellectual property by Bonet, Propriétés intellectuelles, in: Revue trimestrielle de droit européen, No. 1/1981, pp. 97 et seq.

31) Thus for instance the practice of the Commission as regards decisions on the application of art. 85 of the EEC Treaty to agreements on copyright, as apparent from the annual reports on competition policy: e.g. Sixth report on competition policy (published in conjunction with the "Tenth general report on the activity of the European Communities"), Brussels-Luxembourg 1977, paras. 162 et seq. (Cases of "BBC" and "The Old Man and the Sea") and Ninth report on competition policy (published in conjunction with the "Thirteenth report on the activity of the European Communities"), Luxembourg 1980, paras. 116 et seq. (Cases of "London Weekend Television" and "Ernest Benn Ltd."). Cf. also GRUR Int. 1977, pp. 272 et seq. (in this case p. 275) and 1980, pp. 590 et seq. (in this case pp. 596 et seq.).

32) In particular, arts. 48 et seq. and arts. 117 et seq. of the EEC Treaty. We shall not consider here arts. 48 et seq., which deal with the free movement of workers, to which the provisions on the free movement of services in arts. 59 et seq. correspond, if freelance authors are included in the liberal professions (cf. art. 60(2), EEC Treaty). They are hardly relevant to the general problems of copyright dealt with in this study, except as regards the prohibition of discrimination.

33) Cf. Dietz, paras. 315 et seq.; cf. also Fabiani, Note in tema di diritto di autore. Interesse sociale e tutela della personalità, in: Diritto di Autore 1975, pp. 155 et seq.

34) Cf. basic text by Beck, Der Lizenzvertrag im Verlagswesen, Urheberrechtliche Abhandlungen, No. 2, Munich and Berlin 1961; cf. also Lange, Der Lizenzvertrag im Verlagswesen, Schriften zum Medienrecht, No. 3, Berne 1979.

35) This excludes in particular the sphere where - to different extents in the individual countries - copyright does not originate in the person of the author, but indirectly in the person of the employer/client or producer; cf. Dietz, paras. 96 et seq.

36) Cf. paras. 36 et seq. and 97 et seq. below for greater detail.

37) Cf. para. 103 below

38) Cf. sec. 48 of the German Publishing Law.

39) Cf. for example Ulmer, pp. 386 et seq.; Polet/Van Lingen, op. cit. (note 12 above), pp. 87 et seq. and 122 et seq. (French version); Duchemin, op. cit. (note 13 above), p. 104; Cohen Jehoram, The Author's place in Society and Legal Relations between Authors and those Responsible for Distributing their Works, in: Copyright 1978, pp. 385 et seq. = Le Droit d'auteur 1978, pp. 404 et seq. = Auteursrecht 1978, pp. 53 et seq.

40) Cf. Gotzen, paras. 226 et seq. (with further references); ditto, De artistieke eigendom en de mededingingsregels van de Europese Economische Gemeenschap, Louvain 1971, paras. 153 et seq.; Ulmer I, p. 407; Plaisant, Fascicule 12, para. 22.

41) Cf. Dietz, paras. 563 et seq.

42) Cf. Plaisant, Fascicule 12, paras. 11 et seq., especially paras. 23 et seq.

43) Cf. especially the fundamental study by Schmidt.

44) Cf. paras. 246 et seq. below.

45) Cf. for instance Vinck, Die Rechtsstellung des Urhebers in Arbeits- und Dienstverhältnissen, Schriftenreihe der UFITA, No. 41, 1972; Rojahn, Der Arbeitnehmerurheber in Presse, Funk und Fernsehen, Urheberrechtliche Abhandlungen, No. 15, Munich 1978; ditto, Das Arbeitnehmerurheberrecht in den Gebieten der neuzeitlichen Medien, in: Film und Recht 1979, pp. 69 et seq.; Ulmer I, pp. 400 et seq.; Cuvillier, Salariat et droit d'auteur, in: Le Droit d'Auteur 1979, pp. 121 et seq. = Copyright 1979, pp. 112 et seq.; Gautreau, Un principe contesté: le droit pécuniaire de l'auteur salarié ou fonctionnaire, in: RIDA No. 84 (April 1975), pp. 129 et seq.; Grassi, The legal regime of intellectual works by authors in permanent employment, in: EBU Review 1979 No. 5, pp. 49 et seq. = Revue de l'UER 1979 No. 5, pp. 49 et seq.; Limperg, Les droits des employés en leur qualité d'auteurs, in: Le Droit d'Auteur 1980, pp. 235 et seq. = Copyright 1980, pp. 293 et seq.; Lindgård, Arbejdstagernes opharsrettigheder, in: NIR 1978, pp. 352 et seq.; Godenhielm, Arbetstagares upphovsrätt in: NIR 1978, pp. 321 et seq.; De Sanctis, Einige Gedanken zu den Rechtsproblemen des Auftragswerkes, in: GRUR Int. 1973, pp. 333 et seq.; Carosone, Riflessioni in tema di opere dell'ingegno create in rapporti di lavoro subordinato, in: Raccolta di studi in omaggio a Valerio de Sanctis, Il Diritto di Autore 1979 No. 2/3, pp. 59 et seq.; Corbet, Vijf jaar auteursrecht 1970 - 1974, in: Rechtskundig Weekblad 1976-77, cols. 2017 et seq. (in this case, cols. 2021 et seq.). Cf. also Dittrich's work on comparative law: Arbeitnehmer und Urheberrecht, Schriftenreihe der Internationalen Gesellschaft für Urheberrecht, Vol. 55, Vienna 1978.

46) In the Federal Republic of Germany, there has in recent years been an upsurge of proceedings to obtain the status of employed persons for broadcasting authors formerly treated as freelances. A fundamental study on this subject is by Ossenbühl, Rechtsprobleme der freien Mitarbeit im Rundfunk, Beiträge zum Rundfunkrecht, No. 17, Frankfurt am Main 1978 (cf. especially case-law references, pp. 29 et seq.); cf. also Herschel, Freie Mitarbeiter, Arbeitnehmer und arbeitnehmerähnliche Personen im Medienbereich. Die neue Rechtsprechung des Bundesarbeitsgericht, in: Film und Recht 1980, pp. 573 et seq.

47) Cf. Dietz, paras. 503 et seq.

48) Cf. para. 103 below for more details.

49) Cf. in this respect the lively argument between composer and publisher in the magazine "Das Orchester": Korn, Wozu braucht der Komponist einen Verleger?, in: Das Orchester 1981, pp. 17 et seq.; Schneider, Musikverlag und Autor, in: Das Orchester 1981, pp. 118 et seq.; cf. also ditto, Musikverlag und Tonträgerproduktion. Formen und Methoden einer verlagsrechtlichen Vervielfältigung und Verbreitung von Musikwerken, in: Film und Recht 1980, pp. 627 et seq.; cf. also Krüger-Nieland, Zur ausserordentlichen Kündigung eines Musikverlagsvertrages aus wichtigem Grund seitens des Komponisten, in: UFITA Vol. 89 (1981), pp. 17 et seq. (especially pp. 22 et seq.); Schenz/Platho, Der Musikverlagsvertrag und seine ausserordentliche Kündigung aus wichtigem Grund. Ein Beitrag zur Besinnung auf spezifisch urheberrechtliche Lösungen im Urhebervertragsrecht, in: Film und Recht 1979, pp. 227 et seq.; Rehbinder/Grossenbacher, Schweizerisches Urhebervertragsrecht, Schriften zum Medienrecht 5, Berne 1979, pp. 32 et seq. Cf. in general Von Hase, Der Musikverlagsvertrag, Urheberrechtliche Abhandlungen, No. 3, Munich 1961. Cf. also the discussion in the columns of

RIDA on the role of music publishers against the background of a series of relevant decisions of the French courts, which were required to give an interpretation, on the basis of the French Copyright Law, of music publishers' duties of reproduction and distribution in modern times: Desbois, L'obligation de publication et de diffusion des éditeurs de musique, in: RIDA No.58 (Oct. 1968), pp.163 et seq.: Plaisant, Les obligations de l'éditeur de musique, in: RIDA No.60 (April 1969), pp.77 et seq.; Marbot, Les usages de la profession d'éditeur de musique dans le domaine de la chanson, in: RIDA No.61 (July 1969), pp. 49 et seq. Cf. also Auric, Les contrats entre compositeurs et organismes de radiodiffusion, in: RIDA Vol. 59 (January 1969), pp. 97 et seq.; Schmidt, L'application jurisprudentielle de la loi du 11 mars 1957, in: RIDA Vol. 85 (July 1975), pp. 3 et seq. (in this case pp. 63 et seq.); Tournier, Over pseudo-uitgevers en echte uitgevers. Over pseudo-auteurs en echte auteurs, in: Auteursrecht 1978, pp. 6 et seq. (with reply by Stuyt, loc.cit., pp. 36 et seq.); ditto, Promozione delle opere di varietà musicale, in: Il Diritto di Autore 1977, pp. 68 et seq.; cf. also interview with Tournier in: Le Monde, 6 August 1981, p. 9.

Cf. also Leonelli, Il contratto di edizione musicale, in: Il Diritto di Autore 1972, pp. 428 et seq.; Limperg, Is het rozegeur en maneschijn met de uitgave - kontrakten van muziekwerken,in: Auteursrecht 1980, pp. 53 et seq.; Flint, A User's Guide to Copyright, London 1979, pp. 107 et seq.

50) Cf. previous note.

51) Cf. analysis by Schadel, Das französische Urhebervertragsrecht, Urheberrechtliche Abhandlungen No. 5, Munich and Berlin 1966, p. 14; Mellert, Die Urhebervergütung im französischen Urheberrechtsgesetz (Loi sur la propriété littéraire et artistique), Europäische Hochschulschriften, series II, Rechtswissenschaft, Vol. 115, Berne/Frankfurt am Main 1975, pp. 11 et seq.

52) Cf. notes 17 and 18 above.

53) Cf. details in Grasselli, Diritto del lavoro e diritte di autore. La problematica del contratto di edizione, in: Il Diritto di Autore 1976, pp. 251 et seq. (in this case pp. 258 et seq.); cf. also Algardi, Evoluzione della figura dell'editore. Suoi diritti e sua attuale funzione, in: Il Diritto di Autore 1977, pp. 1 et seq. (in this case p. 9).

54) Nutzungsorientierte Entwicklung im internationalen Urheberrecht, in: Rechtsvergleichung, Interessenausgleich und Rechtsfortbildung. Festschrift für Eugen Ulmer zum 70. Geburtstag, GRUR Int. 1973, pp. 247 et seq.

55) Cf. Reimer, Rechtsvergleichende Bemerkungen zur Vertragsfreiheit im Urheberrecht, in: Reimer, pp. 155 et seq. (in this case p. 158)=RIDA No. 92 (April 1977), pp. 3 et seq. (in this case p. 13). Cf. also Ulmer, Some thoughts on the Law of Copyright Contracts, in: International Review of Industrial Property and Copyright Law, Vol. 7 (1976), pp. 202 et seq. (in this case p. 216); Hillig, Die Vertragsfreiheit im deutschen Urheberrecht, in: Reimer, pp. 1 et seq. (in this case p. 4).

56) Fohrbeck/Wiesand/Woltereck, p. 177; cf. also Engelmann, Was fordern die Schriftsteller?, in: VS Informationen No.4/1978, pp. 1 et seq.

57) Cf. Cohen Jehoram, loc.cit. (note 39 above) p. 385 "... Copyright is one of the instruments for procuring payment for authors in accordance with the work they perform." Cf. also the committed report by Janvier, loc.cit. (note 12 above) on the question of the

remuneration of literary translators; cf. also Bowen, Making a living: the playwright's problem, in: The Author, Spring 1979, pp. 3 et seq.; Burton, Don't let it get you down: some birthday thoughts, in: The Author, Spring 1980, pp. 6 et seq.; Birkenbauer, loc.cit. (note 12 above).

58) Cf. the example in para. 268 below; cf. also Ulmer II, p. 39.

59) Cf. Findlater, Authors' contracts: the need for a new deal, in: The Author, Autumn 1980, pp. 12 et seq.; cf. also information in: The Author, Spring 1981, p. 2, The Author, Winter 1980, p. 55 and The Author, Summer 1981, p. 34; Black, The Regulation of Copyright Contracts. A Comparative View, in: EIPR Vol. 2 (Dec. 1980), pp. 386 et seq. (in this case p. 387).

60) Cf. op.cit. (notes 10 and 11 above).

61) Dietz, paras. 23 et seq.; cf. also fundamental article by Van Isacker, De la "Propriété Littéraire" au "Droit au Salaire", in: SABAM 1967, pp. 91 et seq. (= auteursrechtbelangen No. 66/November 1967, pp. 10 et seq.).

62) Cf. as regards the Federal Republic of Germany the tables entitled "Die wichtigsten Interessenorganisationen der Kulturberufe" (including membership figures), in Fohrbeck/Wiesand/Woltereck, p. 459.

63) Cf. note 26 above.

64) Cf. note 25 above.

65) Cf. note 11 above.

66) Cf. note 10 above.

67) Cf. note 10 above

68) Cf. op.cit., p. 103.

69) Op.cit., p. 105.

70) Op.cit., p. 108.

71) One of these rules of thumb is "10% for the author" in (ordinary) editions of books. Cf. Hertin, Kommentar zu den "Hinweisen", VS Informationen No. 3/1977, pp. 2 et seq. (in this case p. 4) (see also note 200 below); Rehbinder/ Grossenbacher, op.cit. (note 49 above), p. 22. Some of these rules of thumb are also to be found in "Collections of rules" (Regelsammlungen); in most cases they are not even recommendations, but are simply for information. Cf. for Federal Republic of Germany, Ulmer I, p. 389.

72) Cf. Janvier, loc.cit. (note 12 above).

73) Cf. para. 17 above.

74) Law No. 75-1348 of 13.12.1975, J.O. of 4.1. and 29.4.1976, reproduced in Plaisant, Fascicule 26 sexies (textes), p. 3 (cf. also Fascicule 26 sexies, commentaires, p. 7); cf. also Schulte, Probleme der sozialen Sicherheit der Kulturschaffenden in der Europäischen Gemeinschaft. Study carried out on behalf of the Commission of the European Community, Studien im Kulturbereich XII/21/80, paras. 1334 et seq.; also Cohen Jehoram, loc.cit. (note 39 above), p. 387.

75) "Le financement des charges incombant aux employeurs au titre des assurances sociales et des prestations familiales est assuré par le versement d'une contribution par toute personne physique ou morale, y compris l'Etat et les autres collectivités publiques, qui procède, à titre principal ou à titre accessoire, à la diffusion ou à l'exploitation commerciale d'oeuvres originales relevant des arts visés par le présent titre" (Sec. L 613-4 (III) of the Code de la sécurité sociale (Social Security Code) as set out in sec. 1 of Law No. 75-1348).

76) Law No. 57-803 of 19.7.1957, J.O. of 20.7.1957, reproduced in Plaisant, Fascicule 27 (3^{e} cahier), p. 8.

77) Cf. Colombet, p. 267; Mellert, op.cit. (note 51 above),

pp. 210 et seq. (with further references).

78) Gesetz über die Sozialversicherung der selbständigen Künstler und Publizisten (Künstlersozialversicherungsgesetz - KSVG) of 27 July 1981, BGBl. Part I, No. 31 of 1.8.1981, pp. 705 et seq.

79) Cf. relevant information in "Künstlersozialversicherungsgesetz (KSVG) vom Bundestag verabschiedet", in: Film und Recht 1980, p. 294 and "Kein Mangel an Stoff. Dauerthema KSVG ...", in BBl. No. 47 of 29.5.1981, p. 1508. Cf. also Hohmann, Am Künstlersozialversicherungsgesetz scheiden sich die Geister, in: Film und Recht 1980, pp. 13 et seq.; Schulte, loc.cit. (note 25 above).

80) Bundesrats-Drucksache 260/79, p. 19.

81) Author's emphasis.

82) Cf. Bundestags-Drucksache, loc.cit. p. 19.

83) Sec. 12(a) Tarifvertragsgesetz (TVG), version of 25.8.1969 (BGBl. Part I 1969, p. 1323). Sec. 12(a) TVG was inserted by the "Gesetz zur Änderung des Heimarbeitsgesetzes und anderer arbeitsrechtlicher Vorschriften (Heimarbeitsänderungsgesetz)" of 29 Oct. 1974, BGBl. Part I 1974, p. 2879 (in this case: p. 2884). Cf. also detailed analysis of this law in Wiese pp. 31 et seq.

84) Cf. Film und Recht 1974, p. 602.

85) Op.cit. (note 74 above) paras. 1334 et seq. (France) and paras. 1495 et seq. (German draft).

86) For certain basic elements in the Netherlands cf. Cohen Jehoram loc.cit. (note 39 above) p. 387; cf. also Dittrich (K), Schriftsteller und Übersetzergewerkschaft 75 Jahre alt, in BBl. No. 103 of 9.12.1980, pp. 3099 et seq.

87) Recommandation 857 (1979) relative à la protection sociale des travailleurs intellectuels et des professions libérales

et artistiques (indépendants et salariés); cf. Schulte, loc.cit. (note 25 above) p. 11 (note 5); ditto, loc. cit. (note 25 above: Die soziale Sicherung ...) pp. 171 et seq.

88) Cf. the relevant criticism by Gotzen, op.cit. (note 14 above) p. 22, who is opposed to the rigoristic German interpretation of the concept of the entrepreneur being included too quickly in the European law on competition; c.f also Black, loc.cit. (note 59 above) p. 388. Cf. in general Loewenheim, Urheberrecht und Kartellrecht. Überlegungen zur Anwendung des GWB bei der Verwertung von Urheberrechten und verwandten Schutzrechten, in: UFITA Vo. 79 (1977), pp. 175 et seq.

89) Cf. information on the Writers' Guild by Willis, in: The Author, Autumn 1978, p. 145, which says, "Over the years the Writers' Guild has successfully negotiated a number of very important agreements about pay and conditions for writers, and it is the only union of writers recognised by the BBC, the major television companies and the film industry." Cf. also information on the new "agreement on minimum terms negotiated by the Writers' Guild and the Theatre Writers' Union with the National Theatre, the RSC and the Royal Court", in: The Author, Spring 1980, p. 44 and Winter 1979, p. 193; cf. also Bowen, Making a living: the playwright's problem, in: The Author, Spring 1979, pp. 3 et seq. Cf. also information in: "The Author", Winter 1978, p. 153 on the acquisition by the "Society of Authors" of the status of an independent trade union.

90) Cf. Dietz, Die sozialen Bestrebungen der Schriftsteller und Künstler und das Urheberrecht, in: GRUR 1972, pp. 11 et seq. (in this case: pp. 12 et seq.) and Dietz, paras. 40 et seq.

91) Likewise Fernay, Droit d'auteur, salaire et droit de grève

(Quelques réflexions en marge du droit), in: RIDA No. 41 (Oct. 1963) pp. 5 et seq., who draws attention to the protection given by exclusive rights, although he favours the assimilation of copyright law into the sphere of labour law. Grosheide, loc.cit. (note 29 above) p. 65, opposes a combination of copyright and labour law, but favours a "general incomes policy" for artists.

92) Likewise Fernay, loc.cit., p. 31; somewhat more optimistic is van Isacker, loc.cit. (note 61 above) pp. 96 et seq., although he also calls attention to the need for State arbitration.

93) Cf. "Bericht der Bundesregierung über Erfahrungen bei der Anwendung des § 12a des Tarifvertragsgesetzes (Artikel II § 1 des Heimarbeitsänderungsgesetzes)", Bundestags-Drucksache 8/716 of 4 July 1977, reproduced in: Film und Recht 1977, pp. 607 et seq. The report stated that the only practical success noted was in the broadcasting sector, and things have changed little since then.

94) Cf. para. 29 and note 83 above.

95) Cf. paras. 270 et seq. below.

96) This applies to sec. 38 of the German CL (contributions to periodical compilations) or secs. 34 and 36 of the French CL (Publisher's option; lump-sum remuneration in certain cases of book and newspaper publishing).

97) Cf. notes 18 and 19 above.

98) The decision in principle to accept or reject a work (and hence on the first prerequisite for its success) must be taken by the primary exploiter, even taking as a basis the view expressed here. If however he accepts the work (and thereby expresses his interest in it) he must not be able at will to beat the author down below a minimum standard of remuneration

(even if he cites the increased risk in the cultural sphere).

99) Essentially sec. 3 of the Belgian CL and sec. 3(2) of the Luxembourg CL; see paras. 36 et seq. and para. 84 below.

100) Cf. also summary in Reimer, loc.cit. (note 55 above).

101) Cf. especially contribution by Corbet, op.cit. (notes 21 and 22 above).

102) In general, cf. Ulmer I, pp. 12 et seq.; Desbois, pp. 402 et seq.

103) Cf. especially van Isacker, p. 35; Recht, Lettre de Belgique, in: Le Droit d'Auteur 1960, pp. 129 et seq. (in this case p. 129); Corbet, Cinq ans de jurisprudence en matière de droit d'auteur (1960-1964), SABAM 196, pp. 185 et seq. (in this case p. 195); cf. also Gotzen, Gibt es im belgischen Urheberrecht ein Rückrufsrecht wegen gewandelter Überzeugung, in: GRUR Int. 1977, pp. 177 et seq. (in this case p. 179).

104) Cf. van Isacker, p. 105.

105) Renauld, Droit d'auteur et contrat d'adaptation, Brussels 1955, pp. 9 et seq. and 115 et seq.; Recht, Le droit d'auteur en Belgique, Brussels 1955, pp. 54 et seq.; van Isacker, pp. 56 et seq. and 103 et seq.; Nouten, L'évolution du droit d'auteur en Belgique depuis 1965, in: Ius auctoris vindicatum. Festgabe für Erich Schulze, Jahrbuch der Internationalen Gesellschaft für Urheberrecht e.V., Vol. 2 (1965-1973), Munich/ Berlin 1973, pp. 105 et seq. (p. 121).

106) Cf. van Isacker, pp. 118 et seq.

107) Cf. van Isacker, p. 121.

108) Reproduced in Weincke, p. 107.

109) Cf. Weincke, pp. 106 et seq.

110) Cf. Lund, pp. 95 et seq. and 199; Weincke, p. 106.

111) Cf. Lund, pp. 196 et seq.

112) Cf. Lund, pp. 200 et seq.; von Linstow, in: Reimer, p. 30.

113) Cf. para. 38 above.

114) Regarding this old provision, cf. Lund, pp. 201 et seq.

115) Cf. von Linstow, op.cit. (note 112 above) pp. 91 et seq.

116) Cf. Weincke, p. 107.

117) Loc.cit.

118) Cf. Lund, p. 216; Weincke, p. 111; cf. also Lund Christiansen, Organisationernes betydning inden for ophavsretten, in: NIR 1978, pp. 279 et seq. (in this case p. 281) (= Interauteurs No. 189 (1978) pp. 45 et seq., in this case p. 47).

119) Cf. note 17 above.

120) Cf. especially Ulmer I, pp. 114 et seq.; Hubmann, p. 20.

121) Cf. Ulmer I, pp. 364 et seq.; Hubmann, p. 192; Fromm/ Nordemann, p. 241 et seq.; cf. in general Genthe, Der Umfang der Zweckübertragungstheorie im Urheberrecht, Frankfurt am Main/Berne 1981.

122) Cf. Dietz, Die Entwicklung des bundesdeutschen Urheberrechts in Gesetzgebung und Rechtsprechung von 1972 bis 1979, in: UFITA Vo. 87 (1980) pp. 1 et seq. (= Lettre de le République fédérale d'Allemagne/Letter of the Federal Republic of Germany, in: Le Droit d'Auteur 1980, pp. 72 et seq. and 112 et seq./Copyright 1980, pp. 85 et seq. and 129 et seq.; in this case: paras. 97 et seq. (with further bibliographic references, especially note 152).

123) Cf. para. 114 below.

124) Cf. para. 41 above.

125) Cf. Ulmer I, pp. 373 et seq.

126) Cf. para. 106 below.

127) Cf. Ulmer I, pp. 373 et seq.

128) Cf. Ulmer I, pp. 375 et seq.; Dietz, pp. 109 et seq.

129) Cf. para. 42 above.

130) Cf. Ulmer I, p. 395.

131) Cf. Dietz, loc.cit. (note 122 above), paras. 115 et seq.

132) Cf. para. 222 below.

133) Cf. Dietz, para. 207.

134) Cf. Huguet, p. 27.

135) Pp. 6 et seq.; pp. 123 et seq.

136) Cf. for example, Desbois, p. VII.

137) Cf. Desbois, pp. 275 et seq.; cf. also Tournier, Peut-on acquérir la propriété d'une oeuvre de l'esprit selon la loi française du 11 mars 1957, in: RIDA No. 20 (July 1958) pp. 3 et seq.

138) Cf. critical remarks in Huguet, pp. 125 et seq.; cf. also Desbois, p. 635.

139) Cf. Huguet, p. 126; Desbois, p. 638.

140) Cf. para. 48 above.

141) Cf. Huguet, pp. 167 et seq.; Desbois, P. 623; Plaisant, Fascicule 13, para. 46; Françon, La jurisprudence française récente en matière de contrat d'édition, in: De Uitgever 1974, pp. 94 et seq.

142) Cf. in particular the references in the previous note; also Françon, La propriété

littéraire et artistique, Que sais-je? 2nd edition, Paris 1979 p. 80.

143) Cf. Desbois, p. 534; Colombet, p. 254.

144) Cf. Desbois, pp. 534 et seq.; ditto, Le pacte de préférence consenti aux éditeurs, in: GRUR Int. 1973, pp. 252 et seq.; Schmidt, loc.cit. (note 49 above), pp. 33 et seq.

145) Cf. Huguet, p. 139.

146) Cf. paras. 71 and 177 below.

147) Cf. para. 55 above.

148) Cf. Desbois, p. 671; Huguet, p. 139; Colombet, p. 258.

149) Cf. Desbois, loc.cit.: "... cependant, une proportion infime, manifestement choisie pour éluder la règle tout en donnant l'illusion de la respecter, devrait être traitée comme un forfait: elle aurait été inspirée par la volonté de faire fraude à la loi." Likewise Colombet, p. 158.

150) Cf. Desbois, p. 678; Colombet, p. 260; Mellert, op.cit. (note 51 above), pp. 169 et seq.

151) Likewise Desbois, p. 686; Colombet, p. 263.

152) Cf. para. 52 above.

153) Cf. Desbois, pp. 472, 483 et seq.

154) Cf. Desbois, pp. 354 et seq.; Colombet, p. 148.

155) Cf. Koumantos, op.cit. (note 3 above), p. 9.

156) Sec. 11 refers to the waiting period for re-exploitation of contributions to newspapers and other compilations of works; sec. 12 refers to the duty to publish in respect of prizewinning works in competitions, and to works assigned against payment.

157) Cf. paras. 176 et seq. below.

158) Cf. Dietz, paras. 550 et seq.

159) Cf. Copinger/Skone James, p. 169.

160) Cf. Copinger/Skone James, p. 168; Laddie/Prescott/Vitoria, pp. 354 et seq.; Cornish, Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights, London 1981, pp. 381 et seq.

161) Cf. Copinger/Skone James, p. 151.

162) Cf. para. 46 above.

163) Cf. Copinger/Skone James, pp. 151 et seq.

164) House of Lords, 16.10.1974, in the case of Music Publishing Co. Ltd., The Weekly Law Reports 1974, pp. 1308 et seq.; cf. Copinger/Skone James, pp. 527 et seq.; Ulmer II, pp. 6 et seq. Black, loc.cit. (note 59 above), p. 392 (note 11) also refers to the general importance of this decision as regafds the law of copyright contracts.

165) Cf. Copinger/Skone James, pp. 160 et seq.; Laddie/Prescott/Vitoria, pp. 346 et seq.; Black, loc.cit. p. 387.

166) Cf. Copinger/Skone James, p. 163; cf. also Copyright and Designs Law, Report of the Committee (appointed) to consider the Law on Copyright and Designs ("Whitford Report") London 1977, pp. 157 et seq.

167) Cf. Flint/Dearsley, The Redwood Case - The Settled Issues, in: EIPR Vol. 1 (December 1979) pp. 338 et seq.: cf. also Green Paper, op.cit. (note 20 above) p. 41; Bragiel, The Redwood Cases. The Commercial Significance of the Reversionary Provisions of the Copyright Act 1956, EIPR Vol. 3 (March 1981) pp. 91 et seq.

168) Cf. Whitford Report, op.cit., p. 156.

169) Cf. para. 133 below.

170) Cf. para. 53 above.

171) Cf. para. 30 above.

172) Some of these agreements have come to the knowledge of the author of this study.

173) Cf. Greco/Vercellone, pp. 269 et seq. and 312 et seq.; Jarach, pp. 163 et seq.; De Sanctis, pp. 43 et seq.; on publishing contracts generally, cf. also Frisoli, Funzione del contratto di edizione, in: Il Diritto di Autore 1966, pp. 330 et seq.; also the comparative law study by Piperno, Appunti sul contratto di edizione nella legislazione italiana, francese e inglese, in: Il Diritto di Autore 1962, pp. 285 et seq.; Algardi, La tutela dell'opera dell'ingegno e il plagio, Padua 1978, pp. 143 et seq.

174) Cf. para. 63 above.

175) Cf. para. 66 above.

176) Cf. paras. 41 and 52 above.

177) See note 18 above.

178) Cf. Pfeffer/Gerbrandy, p. 10; cf. also case law cited in Bartels, Auteurswet 1912, 10th edition, Zwolle 1973, p. 15; also Komen/Verkade, Compendium van het auteursrecht, Deventer 1970 (with supplement 1973) pp. 22 et seq.

179) Cf. Lingen, Auteursrecht in hoofdlijnen, Groningen 1975, p. 101; cf. also Cohen Jehoram, Limits to freedom of copyright contracts in the Netherlands, in: Cohen Jehoram, pp. 165 et seq. (in this case p. 168) (= Nederlands Juristenblad 1976, pp. 521 et seq.).

180) Cf. para. 80 above.

181) Cf. Cohen Jehoram, loc.cit. p. 169; ditto, Copyright and the publishing contract in the Netherlands, in: Cohen Jehoram, pp. 57 et seq. (in this case p. 60).

182) Cohen Jehoram, loc.cit., p. 60, points out that the "Zweckübertragungstheorie" (interpretation according to the purpose of the contract) was already enshrined in 1912 in Dutch copyright law, if correctly interpreted.

183) Cf. also Cohen Jehoram, p. 172.

184) Even the good advice given in relevant literature on the need for care in drafting copyright contracts cannot greatly change things; cf. e.g. Copinger/Skone James, p. 521.

185) Cf. para. 73 above.

186) Cf. para. 37 above.

187) Cf. paras. 45 et seq. above.

188) Cf. paras. 64 et seq. and 82 above.

189) Cf. also the list of problems in Reimer, loc.cit. (note 55 above), pp. 160 et seq.

190) Cf. paras. 70 et seq. above.

191) Cf. foreword, note 18 above.

192) Cf. para. 13 above.

193) Greek legislators have devoted their attention almost exclusively to the various forms of performing contracts; cf. paras. 70 et seq. above.

194) The Danish CL devotes 8 sections to publishing, 1 to performing and 2 to filming contracts; the French CL devotes 16 sections to publishing and 5 to performing contracts; and the Italian CL 18 sections to publishing and 6 to performing contracts.

195) For details cf. paras. 213 et seq. below.

196) Cf. paras. 200 et seq. below.

197) See here for example the "model agreement between clients and industrial designers" proposed by Limperg, Praktijkgids voor de bescherming van vormgeving tegen plagiaat, Deventer 1978, pp. 43 et seq., which also deals with questions of the assignment of copyright.

198) Cf. Reimer, loc.cit. (note 55 above), pp. 158 et seq.

199) Cf. e.g. Génin, L'éditeur, Collection Statuts Professionnels, Paris 1960, pp. 19 et seq.; Grannis (editor), What Happens in Book Publishing, 2nd edition, New York/London 1967, with articles in section V on "Special Areas of Publishing": The Children's Book Department (Karl); Religious Book Publishing (Exman); Textbook Publishing (Brammer); Technical, Scientific and Medical Publishing (Benjamin); University Presses (Seltzer); Mass Marketing Paperbacks (Lewis); The Trade Paperback (Johnson Jr.); Publishing Books to Sell by Mail (Tebbel).

200) Reproduced in UFITA Vol. 84 (1979), pp. 162 et seq.; also in Wiese, pp. 93 et seq.; preceded by "Hinweise für den Abschluss von Verlagsverträgen", jointly compiled in 1977 by the Verlegerausschuss des Börsenvereins and the Verband Deutscher Schriftsteller; reproduced in: VS Informationen No. 3/1977, pp. 2 et seq. (with commentary by Hertin).

201) Cf. "Bericht des Verleger-Ausschusses", BBl. No. 41 of 16 May 1980, p. 1247, and Pestum, Normverträge gelten auch für Kinder- und Jugendbuchautoren, in: VS Informationen No. 3/1979, pp. 7 et seq.

202) Jointly issued in brochure form by the Hochschulverband and the Börsenverein.

203) The Scandinavian "Normalkontrakt" (cf. para. 42 above) also applies only to belles lettres and comparable works; cf. also Lund Christiansen, loc.cit. (note 118 above) pp. 281 and 284; likewise the "contrat type d'édition" agreed between the Société des Gens de Lettres and the Syndicat National de l'Edition in 1977, which is concerned with works of "littérature générale"; cf. Plaisant, yellow page (11, 1977) before Fascicule 26^{bis}.

204) Cf. note 49 above.

205) Plaisant, Fascicule 13, p. 3.

206) Cf. note 18 above.

207) Sec. 13 of the draft provides that its provisions may not be departed from except if expressly permitted by law; such departures are however quite common, albeit sometimes subject to written agreement. Cohen Jehoram, loc.cit. (note 179 above), p. 166 describes this latter impediment to different contracts as a compromise between wholly mandatory and wholly optional provisions; cf. also details in German version of Cohen Jehoram's article in: Reimer, p. 84.

208) Cf. Ulmer II, pp. 87 et seq. Like Cohen Jehoram, Ulmer, who differentiates between conditions of broadcasting contracts that are absolutely necessary and those that are necessary to a lesser extent - cf. para. 200 below - proposes a formal impediment (special notification) for certain agreements which deviate from the non-mandatory provisions.

209) Cf. para. 71 above.

210) Cf. para. 104 below.

211) Cf. Lund, p. 215.

212) Cf. para. 116 below.

213) Cf. note 118 above.

214) Cf. note 203 above, and Lund, p. 215.

215) Cf. Lund, pp. 215 and 233 et seq.

216) Cf. Bappert/Maunz, Verlagsrecht. Kommentar, Munich and Berlin 1952, pp. 23 and 28; Leiss, Verlagsgesetz. Kommentar mit Vertragsmustern, Berlin/New York 1973, p. 18; Ulmer I, p. 427.

217) Cf. note 200 above.

218) Cf. Ulmer I, p. 448; cf. Götz von Olenhusen, Schriftsteller, Recht und Gesellschaft, Freiburg im Breisgau 1972, pp. 115 et seq.

219) Cf. preamble of Government bill, op.cit. (note 17 above), p. 27.

220) Cf. sec. 141 (4), German CL.

221) Cf. para. 98 above.

222) Cf. Ulmer I, p. 430; Bappert/Wagner, op.cit., p. 40.

223) Cf. note 220 above; also Ulmer I, p. 448.

224) Cf. Bappert/Wagner, op.cit., pp. 241 et seq.; Ulmer I, pp. 454 et seq.

225) Cf. para. 99 above.

226) Cf. para. 53 above.

227) Cf. for details Ulmer I, p. 474.

228) Cf. Bappert/Wagner, op.cit., pp. 29 et seq.

229) Cf. Ulmer I, p. 470 (with further references).

230) Cf. Ulmer I, pp. 462 et seq.; also para. 52 above.

231) Cf. para. 105 above.

232) Cf. para. 94 above.

233) Cf. paras. 98 and 104 above.

234) Cf. Plaisant, Fascicule 13, p. 3; Colombet, p. 278; Schadel, op.cit. (note 51 above), p. 78; Fernay, La cession et le contrat d'édition, in: RIDA No. 19 (April 1958), pp. 257 et seq. (in this case p. 321).

235) Cf. also Fernay, loc. cit.

236) Cf. Fernay, loc.cit.

237) Cf. note 49 above.

238) Cf. para. 67 above.

239) Cf. para. 110 above; cf. also Mellert, op. cit. (note 51 above), pp. 207 et seq.

240) Cf. Plaisant, Fascicule 13, p. 17; for a comparative law study see Strömholm, La concurrence entre l'auteur d'une oeuvre de l'esprit et le cessionnaire d'un droit d'exploitation en droit allemand, français et scandinave. Etude de droit comparé. ACTA Instituti Upsaliensis Jurisprudentiae Comparativae X, Stockholm 1969.

241) Cf. Schadel, op.cit. (note 51 above), p. 36; cf. also as regards comparative law Brandi-Dohrn, Der urheberrechtliche Optionsvertrag im Rahmen der Verträge über künftige Werke nach deutschem, österreichischem und französischem Recht, Urheberrechtliche Abhandlungen, No. 6, Munich/Berlin 1967.

242) Cf. para. 113 above.

243) Cf. note 51 above, and Fernay, loc.cit., p. 319.

244) Cf. detailed account in De Sanctis, pp. 76 et seq.

245) Cf. De Sanctis, p. 128.

246) De Sanctis, p. 122, describes sec. 122 of the Italian CL as the backbone (spina dorsale) of overall legislation on publishing contracts.

247) Cf. para. 76 above.

248) Cf. para. 99 above.

249) Cf. De Sanctis, pp. 129 et seq.; cf. also comparison with French legislation in Piperno, loc.cit. (note 173 above), pp. 316 et seq.

250) Cf. para. 67 above.

251) Cf. De Sanctis, pp. 137 et seq.

252) Cf. para. 120 above.

253) Cf. De Sanctis, pp. 202 et seq., especially note 30.

254) Cf. para. 83 above.

255) Cf. also Jarach, p. 81.

256) Cf. para. 85 above.

257) According to Cohen Jehoram, loc.cit. (note 198 above), p. 165, it is however possible that the (improved) draft may form a basis for a separate publishing law that is not part of the Civil Code.

258) Cf. note 19 above.

259) This provision has been deleted from the (improved) draft prepared by the "Publishing Contracts" Study Committee of the Dutch Copyright Association because of its unforeseeable consequences; cf. De Uitgever 1976, p. 73.

260) The above Study Committee's draft has also proposed a great improvement by introducing the concept of the "creator of a literary, scientific or artistic work".

261) However, cf. para. 227 above.

262) Cohen Jehoram, loc.cit. (note 179 above), p. 166, calls the remuneration provisions "the weakest regulation possible" because they are non-mandatory. At the same time however he recognises that it is difficult to exercise greater constraint.

263) Cf. para. 134 above.

264) Cf. Cohen Jehoram, loc.cit., p. 168.

265) As regards the "contractual quality" of the work when (subsequently) delivered, cf. also Ulmer I, pp. 437 et seq.; Ulmer II, pp. 111 et seq.

266) Cf. Ulmer I, pp. 438 et seq.

267) Cf. note 19 above.

268) Cf. Lingen, op.cit. (note 179 above), pp. 106 et seq.; Cohen Jehoram, loc.cit. (note 181 above), p. 58; cf. also Limperg, loc.cit (note 49 above), p. 53.

269) Cf. e.g. Mundhenke, Der Verlagskaufmann, Frankfurt 1977, pp. 38 et seq.; Grannis, Introduction: General View of a Diverse Industry, in: Grannis (editor), op.cit. (note 199 above), pp. 3 et seq. (in this case pp. 15 et seq.).

270) Cf. para. 129 above.

271) Cf. details in note 194 above.

272) Cf. Lund, pp. 195 et seq. and 211; Weincke, pp. 109 et seq.

273) Cf. for details Desbois, pp. 326 et seq.

274) Cf. Dietz, pp. 147 et seq.

275) Cf. paras. 189 et seq. below.

276) Cf. Huguet, pp. 186 et seq.; cf. generally Matthyssens, La limitation dans le temps des droits exclusifs de représentation (Etude de droit français), in: RIDA No. 31 (April 1961), pp. 39 et seq.; cf. also ditto, L'obligation de représentation des titulaires de droits exclusifs, in: RIDA No. 83 (January 1975) pp. 3 et seq.

277) Cf. paras. 63 et seq. above.

278) Cf. paras. 186 et seq. above.

279) Cf. Schmidt, pp. 30 et seq.; Valmy, Le théâtre lyrique en France, in: Interauteurs No. 190 (1979), pp. 53 et seq.

280) Cf. para. 187 below.

281) Cf. Schmidt, pp. 243 et seq.

282) Cf. generally Dietz, paras. 581 et seq.

283) Huguet however infers from the wording of the law ("ne peut transférer le bénéfice de son contrat") that

in connection with the sale of a business enterprise reassignment is also possible as regards performing contracts; doubts by Dubois, pp. 709 et seq.

284) Cf. especially the detailed account by Schmidt, pp. 5 et seq. (Première partie. La conclusion et l'exécution des contrats de représentation théâtrale dans le cadre de la S.A.C.D.).

285) Cf. generally Schmidt, pp. 127 et seq. (Deuxième partie. La conclusion et l'exécution du contrat général de représentation des oeuvres musicales dans le cadre de la S.A.C.E.M.).

286) Cf. for details paras. 246 et seq. below.

287) Cf. Schmidt, pp. 49 and 59 et seq.

288) Cf. Schmidt, pp. 77 et seq.

289) Cf. Desbois, p. 660; Colombet, p. 257.

290) Cf. Dietz, paras. 589 et seq.

291) Cf. Asprogerakas-Grivas, op.cit. (note 3 above), pp. 5 et seq.; cf. also criticism in Mélas, Lettre de Grèce, in: Le Droit d'Auteur 1964, pp. 85 et seq. and 1975, pp. 226 et seq.

292) Cf. para. 134 above.

293) Cf. paras. 134 et seq. above.

294) Cf. De Sanctis, p. 369; Greco/Vercellone, p. 305.

295) Cf. however De Sanctis, op.cit., p. 338 regarding assignment in connection with sale of a business enterprise.

296) Cf. generally De Sanctis, pp. 307 et seq.; Greco/Vercellone, pp. 350 et seq.; cf. also S.I.A.E. (editors), Settantacinque anni di attività, Rome 1957.

297) Cf. De Sanctis, p. 368.

298) Cf. De Sanctis, loc.cit.

299) Cf. for details paras. 176 et seq. above.

300) Cf. discussions and resolutions of the Conseil International des Auteurs et Compositeurs Dramatiques (CIAD) in the context of the Conféderation Internationale des Sociétés d'Auteurs et Compositeurs, at the CISAC Congress in Toronto 1978, in: Copyright Bulletin (UNESCO) 1978 No. 4, p. 31; cf. also Renoy, in: SABAM 1979, pp. 117 et seq. Cf. generally: "Zur Lage der Musiktheater in Europa". Thurnauer Schriften zum Musiktheater Vol. 4, published by the Forschungsinstitut für Musiktheater an der Universität Bayreuth, Thurnau 1979.

301) Op.cit. (note 12 above) p. 125.

302) Cf. Schultz, Das neue Erhebungssystem für Urhebertantiemen an den Bühnen. Statt der früheren Prozentualabgabe von den Kasseneinnahmen nunmehr Urheberabgabe pro Besucher, in: Film und Recht 1977, pp. 220 et seq. As regards Belgium and France see (not very detailed) information on "Un nouveau contrat entre auteurs et directeurs de théâtre", in: SABAM 1973, p. 76.

303) Cf. Süddeutsche Zeitung (SZ) No. 150 of 4/5 July 1981, p. 127; according to SZ No. 188 of 17 August 1979 p. 25, every seat sold in the 83 publicly-managed theatres in the Federal Republic of Germany was subsidised by more than DM 57 during the 1977/78 season.

304) Note 302.

305) Cf. note 4 above.

306) Cf. Ulmer I, pp. 406 et seq.

307) Cf. Ulmer, loc.cit.; cf. generally Beilharz, Der Bühnenvertriebsvertrag als Beispiel eines urheberrechtlichen Wahrnehmungsvertrages, Urheberrechtliche Abhandlungen No. 9, Munich 1970.

308) Even the provisions of French law on the "contrat général de représentation" (cf. paras. 174 et seq. above) do not deal with the relations between authors and collecting societies; cf. para. 175 above.

309) On the distinction between "major" and "minor rights", cf. De Sanctis, pp. 292 et seq.; Ulmer I, pp. 247, 256 and 406 et seq.; cf. also the "Abgrenzungsvereinbarung" (delimitation agreement) between GEMA and the broadcasting organisations on "minor" rights, reproduced in: GEMA-Nachrichten No. 67 (December 1965) p. 19; Thielemans, Droits de Représentation et Droits d'Exécution (Grands droits, petits droits) in: SABAM 1967, pp. 11 et seq., 108 et seq. and 206 et seq.; Bussmann, in: Ulmer/Bussmann/Weber, Das Recht der Verwertungsgesellschaften, Weinheim 1955, p. 12.

310) Cf. Ulmer I, p. 412.

311) Cf. para. 10 and note 46 above.

312) Cf. para. 77 above. The following examples may be cited: "Television Teleplays Agreement between the British Broadcasting Corporation and the Writers' Guild of Great Britain" of 23 October 1971; "Television Dramatisation Agreement. The British Broadcasting Corporation and the Writers' Guild of Great Britain" of August 1971; "Television Series and Serials Agreement. The British Broadcasting Corporation and the Writers' Guild of Great Britain" of December 1969; "Television Educational Drama Agreement between the British Broadcasting Corporation and the Writers' Guild of Great Britain" of 30 November 1971. Similar agreements were concluded by the Writers' Guild with the Independent Television Companies for the various sectors (original teleplays; dramatisations and adaptations; series and serials; light entertainment). However, cf. also the report by Syrop on the difficulties in the negotiations (often threatened with breakdown) on remuneration rates, even with the BBC: Crisis in BBC radio,

in: The Author, Autumn 1980, pp. 3 et seq. and Winter 1980, p. 60.

Cf. also the "Principes directeurs qui doivent régir les relations contractuelles entre auteurs et organismes de télévision" drafted by CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs), reproduced in: SABAM 1976, pp. 128 et seq.

313) Cf. Lund, pp. 82 et seq.; Weincke, p. 55.

314) Cf. para. 167 above.

315) Cf. Dietz, paras. 366 et seq.

316) Cf. Kur, Bestrebungen zur gesetzlichen Regelung der Reprographie für den Schulgebrauch in den Nordischen Ländern, in: GRUR Int. 1981, pp. 441 et seq. (in this case: p. 444); cf. also Koktvedgaard, loc.cit. (note 29 above), NIR 1978, p. 254; Lund Christiansen, loc.cit. (note 118 above) p. 287; Kyrklund, Organisationernas roll inom upphovsrätten, särskilt beträffande avtalslicens, in: NIR 1978, pp. 293 et seq.; Licenskonstruktioner og fotokopiering. 1. Delbetaenkning fra udvalget vedrørende revision of ophavsretslovgivningen. Betaenkning No. 912, Copenhagen 1981, pp. 40 et seq.

317) The original provision reads: "Har Danmarks radio eller radiofonierne på Faerøerne og i Grønland i medfør af aftale med en organisation, som omfatter es vaesentlig del af danske ophavsmaend til en bestemt art af vaerker, ret til ad udsende de af organisationen repraesenterede vaerker, må radiofonien mod ydelse af vederlag tillige udsende udgivne vaerker af tilsvarende art af ophavsmaend, som ikke repraesenteres af organisationen."

318) Cf. Kur, loc.cit.

319) Cf. Lund, p. 167.

320) Cf. Dietz, paras. 410 et seq.

321) Cf. especially Ulmer II, p. 48.

322) Cf. Ulmer II, pp. 48 et seq.

323) Cf. para. 217 below regarding the two different presumptions in respect of cinematographic works in secs. 88 and 89 of the German CL.

324) Loc.cit.

325) Ulmer II, pp. 57 et seq.

326) Ulmer II, pp. 85 et seq.

327) Ulmer II, pp. 87 et seq.

328) Cf. for details Ulmer II, pp. 132 et seq.

329) Ulmer II, pp. 123 et seq.; especially pp. 127 et seq.

330) Cf. para. 29 above.

331) Ulmer II, pp. 97 et seq.

332) Ulmer II, pp. 140 et seq.

333) Ulmer II, pp. 108 et seq., especially p. 111.

334) Ulmer II, pp. 113 et seq.

335) Ulmer II, pp. 118 et seq.

336) Ulmer II, pp. 145 et seq.

337) Cf. e.g. Flechsig, Gesetzliche Regelung des Sendevertragsrechts?, in: GRUR 1980, pp. 1046 et seq.; Flechsig is however opposed to the idea of legislation to regulate broadcasting contracts and, doubtless, to any radical improvement at all in the contractual situation of authors of broadcast works.

338) Ulmer II, pp. 27 et seq., especially pp. 32 et seq.; also Flechsig, loc.cit. pp. 1049 et seq.

339) Ulmer however refuses to take this last step; cf. Ulmer II, p. 35. On the other hand, see also Flechsig, loc.cit. p. 1050. Cf. however remarks in paras. 31 et seq. above.

340) Cf. para. 262 below.

341) Cf. para. 169 above.

342) Cf. Desbois, pp. 192 et seq.

343) Cf. para. 176 above.

344) Cf. Ulmer II, pp. 124 et seq., for details on various countries.

345) Cf. para. 180 above.

346) Cf. also Greco/Vercellone, p. 323.

347) Cf. Dietz, para. 293; Jarach, pp. 62 and 100.

348) Cf. especially paras. 200 et seq. above.

349) Cf. Dietz, paras. 132 et seq.; as regards the legal situation in the Netherlands, cf. also Cohen Jehoram, Het filmrecht in Nederland, de bestaande situatie, in: Auteursrecht 1978, pp. 17 et seq.; Spoor, de VvA en de filmkwestie, loc.cit., pp. 19 et seq.

350) Cf. e.g. "Agreement between the Film Production Association of Great Britain and the Writers' Guild of Great Britain" of 1 May 1968; "The Screenwriting Credits Agreement between the Film Production Association of Great Britain and the Writers' Guild of Great Britain" of 1 May 1974; cf. also para. 77 above.

351) Cf. Lund, pp. 237 et seq.

352) Cf. para. 42 above.

353) Cf. note 351 above.

354) Cf. Lund, pp. 81 et seq. and 238.

355) Cf. Weincke, Ophavsretten og den tekniske eksplosion, in: NIR 1976, pp. 62 et seq. (in this case: p. 65).

356) Cf. Ulmer I, 2nd edition 1960, pp. 173 et seq. for a theoretical justification of the different treatment of film composers; Bohr, op.cit. (see following

note), pp. 53 et seq. differs, and includes film composers among the film authors, together with script writers and directors.

357) Cf. also Ulmer I (3rd edition 1980), pp. 203 and 494 et seq.; cf. generally also Bohr, Die Urheberrechtsbeziehungen der an der Filmherstellung Beteiligten, Schriftenreihe der UFITA, No. 57, Berlin 1978, especially pp. 100 et seq.

358) Cf. para. 199 above; cf. also the grant of rights in the context of the "Tarifvertrag für Film- und Fernsehschaffende" of 30 March 1979, reproduced in: UFITA Vol. 86 (1980), pp. 180 et seq. (in this case: pp. 182 et seq.; concerns only film authors under a contract of employment); cf. Neufeldt, Neue Tarifverträge für Film- und Fernsehschaffende, in: Film und Recht 1980, pp. 127 et seq.

359) Cf. preamble to Government bill, op.cit. (note 17 above), p. 98.

360) Cf. note 234 above.

361) Cf. Desbois, pp. 177 et seq.

362) For a comparison of German and French legislation on cinematographic works, cf. also Ulmer I, pp. 199 et seq.

363) Cf. harmonising interpretation in Desbois, pp. 800 et seq.

364) Cf. Desbois, loc.cit.; Plaisant, Fascicule 17, p. 23; cf. also Tournier, L'article 17(3) de la loi française du 11 mars 1957, in: RIDA No. 46 (1965), pp. 139 et seq.

365) Cf. Plaisant, loc.cit.

366) Cf. Plaisant, loc.cit., Tournier, loc.cit., pp. 151 et seq.

367) Cf. Desbois, pp. 788 et seq.; Plaisant, loc. cit., p. 22.

368) On the concept of "cinematographic exploitation" cf. Plaisant, loc.cit., p. 23; Tournier, loc.cit., p. 141.

369) Cf. Greco/Vercellone, p. 238.

370) On the lack of clarity of this provision, cf. Greco/Vercellone, pp. 240 et seq.; cf. also Jarach, p. 88.

371) Cf. Greco/Vercellone, pp. 246 et seq.; it is true that these authors believe that the cinematographic exploitation of the work includes its broadcasting by television; cf. also Assumma, Diritto degli autori al compenso ed utilizzazione televisiva dell'opera cinematografica, in: Il Diritto di Autore 1980, pp. 395 et seq. (with numerous further references).

372) Cf. Greco/Vercellone, p. 249.

373) Cf. Dietz, paras. 122 et seq.

374) Cf. note 349 above.

375) In the Federal Republic of Germany for instance, the provisions of sec. 80 of the Basic Law (Constitution) require inter alia "the content, purpose and scope of statutory instruments" to be set out in the enabling legislation before regulations are promulgated.

376) Cf. for details Cohen Jehoram, Zehn Cents Urhebervergütung je Photocopie in den Niederlanden, in: GRUR Int. 1975, pp. 161 et seq.; text of regulations reproduced in Wink/Limperg, pp. 121 et seq.; cf. op.cit. pp. 67 et seq.; Lingen, op.cit. (note 179 above), pp. 73 et seq.

377) Cf. Cohen Jehoram, loc.cit., p. 164; ditto, Licences in Intellectual Property - A Review of Dutch Law, in: EIPR Vol. 2, June 1980, pp. 184 et seq. (in this case p. 187); Wink/Limperg p. 70; Lingen, op.cit., p. 81.

378) "Decreto del Presidente del Consiglio dei Ministri 6 luglio 1976. Nuova determinazione delle tariffe per la riproduzione di fotografie in antologie scolastiche" and "Decreto del Presidente del Consiglio dei Ministri 5 maggio 1976. Nuove determinazioni dei compensi per la riproduzione di brani o parti di opere tutelate in antologie

scolastiche", both reproduced in: Presidenza del Consiglio dei Ministri. Servizi Informazioni e Proprietà letteraria artistica e scientifica (publ.), Protezione del diritto di autore e di altri diritti connessi al suo esercizio. Normativa interna e convenzioni internazionali, Rome 1979, pp. 124/125 et seq., also in: Il Diritto di Autore 1976, p. 377 et seq./217.

379) E.g. 400 lire for a black-and-white, 1500 lire for a colour photograph; 4000 lire for a page of prose (= 2,000 characters) and for one page of poetry.

380) Examples of previous legislation were the decrees of 1963 and 1968 on protected works, and of 1964 on photographs. The proposal by Gotzen, Le droit de prêt dans le cadre de la législation belge sur le droit d'auteur. Propositions pour sa mise en oeuvre en Belgique, in: RIDA No. 96 (April 1978), pp. 33 et seq. (in this case pp. 55 et seq.) that the amount of the "droit de prêt" (fee for borrowing books) should be fixed annually, subject to enabling legislation, by Royal Decree, may also be mentioned here.

381) Regarding the various forms of contractual relations between authors' societies and collecting societies, cf. Gotzen, pp. 221 et seq. (with further references).

382) Cf. e.g. De Sanctis, p. 203 (note 30) on the (voluntary) checking of contracts and collection activities in respect of publishing contracts concluded individually. Cf. also the report on the survey of its members conducted by the Belgian SABAM with a view to introducing similar services, and which generally had a positive reception, in: SABAM 1981 No. 3, pp. 41 et seq. and SABAM 1978, pp. 52 et seq. (in this case p. 54); cf. also details of the Author Service of the British Society of Authors in that society's publicity, The Author Vol. 89 No. 3 (Autumn 1978) p. 146: "The Society provides members with legal and business

advice in all matters affecting their rights as authors". Cf. also remarks by Du Bois, De maker, zijn werk en zijn auteursrechtorganisatie, in: Auteursrecht 1978, pp. 61 et seq. (in this case p. 64), who anticipates that collecting societies will in future generally be involved in the implementation of copyright claims (reduced essentially to rights of remuneration); also the very radical general considerations of the Dutch "Commissie incasso, beheer en repartie auteursrechten" (Cibra) reproduced in: Auteursrecht 1979, pp. 83 et seq. Cf. also Veltman Fruin, Reacties op de cibra nota, in: Auteursrecht 1980, pp. 37 et seq.

383) Cf. e.g. the specimen publishing contracts of the Society of Authors, op.cit. (note 8 above), the "Normvertrag des Verbandes deutschsprachiger Übersetzer" (1970 version), reproduced in: VS Informationen No. 3/1977, pp. 10 et seq. and Delp, op.cit. (note 9 above) p. 288, or the "Grundnormen zum Regievertrag im Fernseh- und Filmbereich" proposed in the Federal Republic of Germany by the Bundesverband der Fernseh- und Filmregisseure, in: Film und Recht 1980, pp. 586 et seq.; cf. draft blanket agreement of the Rundfunk-Fernseh-Film-Union im Deutschen Gewerkschaftsbund with a "Tarifvertrag über Urheberrechte arbeitnehmerähnlicher Mitarbeiter einer Rundfunkanstalt", in: Film und Recht 1975, pp. 169 et seq./324 et seq., cf. also the now outdated "Muster für einen Verlagsvertrag des VS e.V.", 1972 version, (again) reproduced in: VS Informationen No. 3/1977, pp. 8 et seq.

384) Cf. British Publishers: what authors say. A survey, in: The Author, Autumn 1980, pp. 1, 15 et seq.; Till, Aktionen der Society of Authors and Writers' Guild. "Ausbeuterische Verleger" blossgestellt. Schwarze Listen anhand von Fragebogen-Umfrage, in: BBl. No. 79 of 23.9.1980, p. 2373.

385) Cf. e.g. Legat, An occupation for incompetents, in: The Author, Winter 1979, pp. 161 et seq. (in this case p. 165); Le Fanu, Be prepared, in: The Author, Summer 1980, pp. 73 et seq. (in this case p. 73).

386) Cf. De Sanctis, loc.cit. (note 382 above).

387) Cf. generally Farrar, Securing and Selecting the Manuscript, in: Grannis (editor), op.cit. (note 199 above) pp. 27 et seq. (in this case pp. 35 et seq.); Sissons, The agent's changing role, in: The Author, Summer 1979, pp. 53 et seq.; Wales, Writing for Television, in: The Author, Winter 1978, pp. 182 et seq.

388) Cf. paras. 255 et seq. below.

389) Cf. Schmidt.

390) Cf. Plaisant, Fascicule 12, p. 8.

391) Cf. Schmidt, p. 49 ("Le contrat d'abonnement, véritable charte des rapports des auteurs dramatiques et des théâtres...."). The contrat d'abonnement is reproduced in Schmidt, pp. 301 et seq.

392) Cf. paras. 168 et seq. above.

393) Schmidt, pp. 51 et seq.

394) Cf. Schmidt, pp. 124 et seq.

395) Cf. Schmidt, pp. 54 et seq.

396) Cf. especially the decision of the Commission in the "GEMA" case, decisions of 2 June 1971 and 6 July 1972, Official Journal of the European Communities 1971 No. L 134, p. 15 and 1972 No. L 166, p. 22; GRUR Int. 1973, 86 (with note by Schulze).

397) Cf. Plaisant, Fascicule 12, p. 22; Thielemanns, loc.cit. (note 309 above) p. 12; cf. also: La perception des droits de représentation d'ouvrages dramatiques, in: SABAM 1962, pp. 5 et seq.

398) Cf. De Sanctis, p. 309.

399) Schmidt also hints at this, pp. 8 and 21 et seq.

400) Specimen reproduced in Schmidt, p. 332.

401) Cf. Schmidt, pp. 80 et seq.

402) Cf. Schmidt, p. 126: "Le traité d'abonnement imposé par la S.A.C.D. à la direction des entreprises de théâtres, sous la forme d'une réglementation complète, uniforme, permanente, codificatrice dans une large mesure des usages et de la jurisprudence constitue un complément indispensable du chapitre 1, du titre III de la loi.

Ne faisons pas grief au législateur de son laconisme, car il s'agit de rapports juridiques extrêmement complexes et techniques que les organismes représentatifs des auteurs et les syndicats de théâtres sont mieux à même de régler entre eux."

403) Cf. Schmidt, p. 119.

404) Cf. Ulmer I, pp. 406 et seq.

405) Quoted in Ulmer I, p. 484.

406) Cf. Ulmer I, p. 408.

407) Cf. court decisions quoted in Schmidt, pp. 78 et seq.

408) Cf. para. 244 above.

409) Cf. De Sanctis, p. 203 (note 30).

410) Cf. para. 30 above, and Ulmer II, pp. 27 et seq.

411) Cf. para. 29 above.

412) Cf. Report on Experiences of the Federal Government, loc.cit. (note 93 above) pp. 611 et seq.; also report on the parliamentary background to this legislation, in: Film und Recht 1974, pp. 510 et seq. and 594 et seq.; cf. also Wiese, pp. 30 et seq.; Riepenhausen,

Tarifvertrag zum Urhebervertragsrecht. Erläuternde Hinweise zum RFFU-Entwurf über Urheberrechte arbeitnehmerähnlicher Mitarbeiter einer Rundfunkanstalt, in: Film und Recht 1976, pp. 310 et seq.; cf. also Schulze, Stellungnahme zum deutschen Referentenentwurf für eine Urheberrechtsnovelle, in: Film und Recht 1981, pp. 25 et seq. Schulze goes beyond sec. 12(a) of the Law on Collective Pay Agreements and demands (p. 26) that "die Berechtigten das Recht erhalten, sich zum Zwecke der Wahrnehmung zusammenzuschliessen und die Verwerter verpflichtet werden, mit solchen Vereinigungen zu verhandeln", this being the only way that "eine ausgewogene Verhandlungsposition" could be created; cf. also ditto, loc.cit. (note 17 above), pp. 149 et seq.

413) Cf. paras. 27 et seq. above.

414) Cf. generally Escarra/Rault/Hepp, La doctrine française du droit d'auteur. Etude critique à propos de projets récents sur le Droit d'auteur et le Contrat d'édition, Paris 1937.

415) Reproduced in Escarra/Rault/Hepp, op.cit., pp. 173 et seq.

416) Reproduced in Escarra/Rault/Hepp, op.cit., pp. 193 et seq.

417) Reproduced in Escarra/Rault/Hepp, op.cit., pp. 167 et seq.

418) Cf. Schadel, op.cit. (note 51 above), pp. 15 et seq.

419) Cf. op.cit., pp. 43 et seq. The pomposity, based on the particularly "sacred" nature of intellectual property (cf. pp. 34 et seq.), with which these authors reject the labour-law concept upon which bill No. 1164 is based is almost unthinkable nowadays. When one considers circumstances in the culture industry nowadays, does it not sound highly exaggerated when the comparison of authors to employed persons is regarded as an insult? Cf. p. 44: "C'est faire injure au 'créateur' d'une oeuvre

(auteur ou même inventeur) que de l'assimiler à un simple salarié, qui se borne à accomplir, dans une condition subordonnée, un travail qui ne contient en soi aucun effort de création".

420) This consideration also forms the basis of the system of the "contractual licence" (aftalelicens) in force in the broadcasting sector in Denmark and the other Scandinavian countries, which has also been discussed in connection with other sectors; cf. paras. 192 et seq. above.

421) Cf. also especially Fernay, loc.cit. (note 91 above), p. 31; ditto, Grandeur, misère et contradictions du droit d'auteur, in: Il Diritto di Autore. Volume celebrativo del cinquantenario della Rivista. Raccolta di studi in omaggio a Valerio de Sanctis, Rome 1979, pp. 259 et seq. (in this case p. 273) (= RIDA No. 109 (July 1981) pp. 139 et seq.); generally less sceptical, Graselli, loc.cit. (note 53 above), pp. 255, 258 and 260, and van Isacker, loc.cit. (note 92 above).

422) Cf. para. 92 above.

423) Cf. Dietz, paras. 581 et seq. Cf. generally Reinbothe, Schlichtung im Urheberrecht. Urheberrechtliche Abhandlungen No. 16, Munich 1978.

424) On the need for reforming this procedure, cf. Ulmer I, pp. 422 et seq. (with further references); Schulze, loc.cit. (note 17 above), pp. 149 et seq.

425) Cf. the relevant "Verordnung über die Schiedstelle nach dem Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten" of 18.12.1965 (amended by regulation of 26.6.1970), reproduced in Fromm/Nordemann, pp. 562 et seq.

426) Cf. generally Dietz, paras. 563 et seq. above.

427) Cf. paras. 192 et seq. above.

428) Cf. para. 102 above.

429) Cf. paras. 94 and 103 above.

430) Cf. note 203 above; cf. also Caillé, Contrat-type auteur/éditeur, in: Interauteurs No. 188 (1977), pp. 45 et seq. According to more recent information (cf. Publishers' Weekly, Vol. 219 No. 26 of 26 June 1981, pp. 21 et seq. and BBl. No. 59 of 10 July 1981, pp. 1758 et seq.) a "Code des usages" was drafted in 1981 by the French Publishers' Association and the "Permanent council of authors", which represents 19 different groups; the code is however still only a recommendation. On the problems of writers in France, cf. also Caradec, Authors in France, in: The Author, Winter 1980, pp. 42 et seq.

431) Reproduced in: Il Diritto di Autore 1977, pp. 128 et seq. (Principi contrattuali nei rapporti tra autori ed editori per la pubblicazione di opere a stampa); cf. Algardi, loc.cit. (note 53 above), pp. 9 et seq.

432) Cf. Wink/Limperg, p. 22; Cohen Jehoram, loc.cit. (note 181 above), p. 58.

433) Cf. notes 312 and 350 above.

434) Cf. information in: The Author, Winter 1980, p. 55; Spring 1981, p. 2 and Summer 1981, p. 34; cf. generally Black, loc.cit. (note 59 above), pp. 387 et seq.

435) Cf. paras. 103 and 105 above.

436) Cf. however critical remarks by Engelmann, Was sich Autoren von den Verlagen erhoffen, in: VS Informationen No. 3/1979, pp. 1 et seq.; "Längst betrachten einige grosse Verlage die verlegerische Seite ihres Geschäfts schon mehr als einen lästigen, leider nicht völlig vermeidbaren Nebenerwerb, und auch ein paar kleine Verlage haben entdeckt, dass es Besseres (sprich: Pro-

fitlicheres) gibt als das Herausbringen und Pflegen von Originalausgaben. Sie sind ins Agenturgeschäft eingestiegen und richten ihr Augenmerk fast nur noch auf den Verkauf der Nebenrechte. Die Originalausgabe bekommt dadurch einen neuen Stellenwert: sie wird zur kurzen Werbeaktion, die eingestellt werden kann, wenn Vorab- und Nachdrucke, Auslands-, Taschenbuch-, Buchgemeinschaftslizenzen und andere "buchnahe" sowie Film-, Fernseh- und sonstige "buchferne" Rechte gewinnbringend verkauft worden sind" (loc.cit., p. 1, r.h. column); cf. also Birkenhauer, loc.cit. (note 12 above), p. 2367: "Die berühmte Hardcover-Erstauflage is ein teurer Prospekt für die Nebenrechte"; cf. also ironic remarks by Ramseger, Zur idealen Vermarktung ist's noch weit, in: BBl. No. 73 of 11.9.1979, pp. 1745 et seq.; and Bond, Merchandising Rights, in: The Author, Summer 1981, pp. 36 et seq.; Stein, A modest proposal. How to Make Trade Book Publishing Profitable, in: Publishers Weekly, Vol. 217 No. 20 of 23 May 1980, pp. 35 et seq.; Evans, Sub Rights Directors. Six Sets of Rules in a Big Money Game, in: Publishers Weekly, Vol. 215 No. 25 of 18 June 1979, P. 56; Machin, New technology and new markets, in: The Author, Winter 1979, pp. 157 et seq.; Legat, An occupation for incompetents, in: The Author, Winter 1979, pp. 161 et seq.; Dystel, Mass Market Publishing- More Observations, Speculations and Provocations, in: Publishers Weekly, Vol. 218 No. 24 of 12 December 1980, pp. 18 et seq.; Ducheyne, Le Pocketbook à notre époque, in: SABAM 1965, pp. 171 et seq.; Koktvedgaard, loc.cit. (note 29 above) NIR 1976, p. 114 (cf. also discussion paper by Schulz-Lorentzen on this subject, in: NIR 1977, pp. 59 et seq., in this case P. 85); cf. also "Verslag van de Studiecommissie 'Auteursrechtenbureaus' van de Vereniging voor Auteursrecht: Het partnerschap van auteur en exploitant", in: Auteursrecht 1981, pp. 3 et seq.

437) Cf. note 387 above.

438) Cf. note 434 above.

439) Despite all the recommendations of the professional associations, it is still left to the individual author to ensure that the blanket agreement is applied when concluding the utilisation contract. Cf. generally also the "Forderungen des 3. Kongresses der europäischen Schriftstellerverbände" (Vienna, 16-18.11.1979), reproduced in: VS Informationen 3/1979, p. 10; demand 5 concerns "die allgemeine Anerkennung der Tariffähigkeit als Schriftestellerverbände", and demand 1 "die Anerkennung der Tatsache, dass freiberufliche Schriftsteller eine arbeitnehmerähnliche Tätigkeit ausüben".

440) Cf. paras. 260 et seq. above.

441) Cf. para. 89 above.

442) Cf. para. 102 above.

443) Cf. notes 312 and 350 above.

444) Cf. Whitford Report, op.cit. (note 166 above), p. 17.

445) Cf. note 434 above.

446) Cf. end of Foreword, above.

447) Cf. paras. 24 et seq. above.

448) Cf. para. 29 above.

449) Cf. e.g. Black, loc.cit. (note 59 above), p. 388: "In Germany collective agreements are, it is understood, contrary to the Federal cartel laws, unless they are merely reduction to writing of existing custom and practice in 'Rule Collections'. United Kingdom unfair competition or restrictive practices legislation may also be concerned at some stage with the problem, but has not been so concerned yet - as between authors and users".

450) The "dogmatic trick" used for this course of action involves the grouping and equal treatment of copyright and the protection of industrial property (patent, trademark and design rights) under the general concept of "intellectual property" (propriété intellectuelle). Cf. the excellent account by Bonet, loc.cit. (note 30 above).

451) Cf. note 30 above.

452) See note 31 above.

453) A particularly striking example is the case of the "difference of fees" decision of the European Court of Justice (note 30 above).

454) Cf. the export prohibition clauses forbidden by the Commission (note 31 above).

455) Cf. note 396 above.

456) Cf. note 32 above.

457) Cf. note 23 above.

458) Cf. also note 24 above.

459) Regarding the need for a committed cultural policy, based also on the resources of social, copyright and media law, cf. Wiesand, Kulturpolitik - nein danke? Kulturpolitik - ja bitte!, in BBl. No. 60 of 14 July 1981, pp. 1795 et seq.

460) Cf. op.cit. (note 23 above) para. 3.

461) Cf. Knolle in Groeben/Boeckh/Thiesing, Kommentar zum EWG-Vertrag, 2nd edition, Baden-Baden 1974, Vol. 1, pp. 1509 et seq.; the current President of the Commission of the European Communities, Gaston Thorn, quite naturally proceeds from the assumption that creative artists ("professionnels de la culture") may invoke art. 117 of the EEC Treaty; cf. Kieffer: Entretien avec M. Gaston Thorn, in: Nuova Europa, Arts-Letters-Science, No. 34 (1981), pp. 3 et seq. (in this case p. 4).

462) Op.cit., p. 1521.

463) Cf. Knolle, loc.cit.; Haedrich in Groeben/Boeckh/Thiesing, op.cit., Vol. 2, p. 122.