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PIRACY OF PHONOGRAMS

IN PORTUGAL AND SPAIN

by

GILLIAN DAVIES

Associate Director General
and
Chief Legal Adviser of

IFPI (International Federation
of the Phonographic Industry)

A study requested by the Commission
of the European Communities

STUDIES
CULTURAL SECTOR

August 1989

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The Commission of the European Communities is concerned that the experts whom it commissions to write reports should express themselves with absolute freedom and independence; the views expressed in this report are therefore those of the author and should not be taken as reflecting the opinion of the Commission.

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FOREWORD

A comparative study of the problem of piracy of phonograms¹ (records and pre-recorded tapes) in the countries of the European Economic Community (EEC), written by the author of this study at the request of the Commission of the European Communities, was first published in 1980².

The subject aroused a great deal of interest, and a second edition was completed in 1984³. The reaction of the Commission to that study and, in particular, to its conclusions as to the importance of the piracy problem as it affects phonograms, was contained in its Green Paper on Copyright and the Challenge of Technology - Copyright Issues requiring Immediate Action, published in June 1988⁴.

Since 1984, many developments have taken place in the European Economic Community and in the recording industry. In particular, the EEC has been enlarged with the accession of Portugal and Spain in 1986 and the impact of the compact disc on the record market has also altered the traditional piracy pattern.

This study is not intended to be a third edition of the original. It is a supplement to take into account the accession of Portugal and Spain to the Community, neither of which was a Member State when the second edition was written. However, since the situation in Portugal and Spain cannot be taken in isolation, the first chapter of this study examines the evolution of piracy in the EEC as a whole from 1982 to 1988 (the previous edition was based on 1982 statistics). To this effect, figures since 1982 have been recalculated to include statistics for Portugal and Spain in order to make comparisons relevant. A brief update on the legal situation in the ten other Member States has also been included in Chapter IV.

"Piracy" is the term that is widely used to describe the manufacture of copies of legitimate phonograms without the authorisation of the original producer⁵ of the phonogram. It also covers the importation, distribution or sale to the public of such unauthorised copies for commercial gain.

Two different kinds of piracy of phonograms may be distinguished: "pirate" copies are unauthorised records or pre-recorded tapes which are packaged differently from legitimate ones; "counterfeits" are unauthorised copies made and packaged to resemble the legitimate records and tapes; "bootlegs" are unauthorised copies of a live or broadcast performance⁶.

This study is a supplement and the reader is referred, therefore, to the second edition of the main study where appropriate. The main study comprises seven chapters:

1. General Considerations Affecting the Problem of Piracy in the European Economic Community (EEC)
2. Comparative Study of the Incidence of Piracy in the Member States of the EEC
3. The International Conventions Relevant to Piracy in Force in EEC Countries
4. National Laws Available to Combat Piracy in Each of the Ten Member States of the EEC
5. Intergovernmental Recommendations
6. Conclusions and Need for Action by the Community
7. Proposals for Action

The author would like to thank the Directors and staff of the Associação Fonográfica Portuguesa (AFP) and of the Asociación Fonográfica y Videográfica Española (AFYVE) for their assistance in providing the information on which this study is based. She is also indebted to Mrs. Michèle Hung for her collaboration in the compilation and presentation of the economic and statistical information included in the study.

August 1989.

Footnotes to the Foreword

1. "Phonogram" is defined in the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 1961, and the Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, Geneva, 1971, as follows:

"Phonogram means any exclusively aural fixation of sounds of a performance or of other sounds".
2. "Piracy of Phonograms", by Gillian Davies; published for the Commission of the European Communities, Directorate-General Information and Market Innovation, Luxembourg, Document XII/235/80-EN. Published by ESC Publishing Limited., Oxford, U.K., 1981.
3. "Piracy of Phonograms - Second Edition", by Gillian Davies; published for the Commission of the European Communities, Cultural Sector, Document SG/culture/52/84-EN. Second edition published by ESC Publishing Limited, Oxford, 1986.
4. COM (88) 172 final, 7 June 1988.
5. Producer of phonograms is defined in the Conventions referred to in footnote ¹, above, as:

"the person who, or the legal entity which, first fixes the sounds of a performance or other sounds"
6. See also "Piracy of Phonograms - Second Edition", op. cit. paragraphs 10 to 18.

CHAPTER I - EXTENT OF PIRACY OF SOUND RECORDINGS IN THE EEC

I.1 THE RECORD MARKET IN THE EEC

I.1.1 In the first half of the 1980s, the recording industry experienced a serious recession: the turnover of the EEC recording industry dropped by 20% in real terms over a period of five years (Table 1). This recession had serious social consequences as large numbers of people employed in the industry were made redundant. For instance, the number of people employed directly by the recording industry in the United Kingdom dropped by 40% between 1978 and 1986 and in France by 50%.

I.1.2 By 1985, sales of sound recordings were beginning to increase again thanks to the advent of the Compact Disc (CD). The CD was launched in Europe in 1983 and its impact began to be felt by 1985. Since that year, sales of CDs have soared from 15.7 million units in 1985 to 129 million in 1988 and, in that year, turnover of the recording industry overtook that of 1980 in real terms. Total sales of sound recordings in the EEC reached the new record level of ECU 5.0 thousand million (US\$ 5.9 thousand million) at retail level for the year 1988. Employment in the recording industry has now stabilised and there are signs that it may be beginning to increase again.

I.1.3 Although the recording industry has seen a revival in its fortunes, there is no room for complacency; new digital reproduction methods have been developed and will soon be marketed which will make piracy and private copying of phonograms even easier than at present.

I.2 EXTENT OF PIRACY OF SOUND RECORDINGS

I.2.1 Evolution of Piracy in the EEC since 1982

I.2.1.1 Since 1982, it can be said that piracy of sound recordings has remained fairly stable in the EEC as a whole at around 3%. Piracy represented 3% of the total market (based on retail value figures) in 1982 and 3.5% in 1988 (Table 2).

I.2.1.2 During that time, the retail value of pirate sales increased from ECU 112.4 million (US\$ 110.2 million) to ECU 180 million (US\$ 212.8 million) (Table 2) but legitimate sales also increased in the twelve Member States from a total retail value of ECU 3.3 thousand million (US\$ 3.2 thousand million) in 1982 to ECU 5.0 thousand million (US\$ 5.9 thousand million) in 1988. The slight increase of 0.5% in piracy in 1988 may reflect the fact that 1988 saw, for the first time, the emergence of CD piracy.

I.2.1.3 Although the overall percentage of 3.5% of retail value may seem relatively modest, it should be pointed out that at national level percentages vary considerably. Whereas cassette piracy (based on units sold) represents only 3% and 4% of the total cassette market in the United Kingdom and Federal Republic of Germany respectively, in Greece and Portugal percentages are 30% and 45% respectively (Table 4). It should also be emphasised that, even in countries where the piracy level is low, this is so only because the national associations of record producers

(National Groups of IFPI) spend vast amounts of money each year on anti-piracy work. The associations often employ full-time investigators and a great deal of detective work and technical verification is needed before suspected products can be confirmed as pirate. In addition, legal costs for court proceedings are also high. For instance, the budget of the British Phonographic Industry (BPI) for anti-piracy activities in 1988 amounted to ECU 750,000 (USD 715.000) and the Asociación fonográfica y videográfica española (AFYVE), the Spanish association, spent the equivalent of ECU 500,000 (USD 475.000) in 1988.

I.2.2 Piracy by Configuration

I.2.2.1 The piracy pattern for cassettes and LPs has remained unchanged. In 1982, just as in 1986 and 1988, cassette piracy was the most widespread form of piracy.

I.2.2.2 However, cassette piracy appears to be diminishing. In 1982, it represented over 14% of all cassettes sold in the EEC; in 1984 this went up to 19%, to come down again to 11% in 1986 and 8% in 1988.

I.2.2.3 Record (LP) piracy has remained a small-scale problem, varying between 1.5% and 3% of units sold. Illegitimate records represented 1.6% of total units in 1986 and 1.5% in 1988. Unfortunately, this drop in LP piracy is overshadowed by the advent of CD piracy which now represents as much as 5% of the total CDs sold in the EEC.

I.2.2.4 In terms of value, LP piracy has remained fairly constant representing between 20% and 25% of the retail value of total pirate sales. However, in 1988, pirate CD sales represented over 28% of the total retail value of pirate sales so that pirate LPs and CDs combined represented 53% of the total retail value of pirate sales. In 1988, therefore, the retail value of disc piracy (LP and CD combined) was for the first time greater than that of cassette piracy alone.

I.3 THE EXTENT OF PIRACY IN THE EEC MEMBER STATES

I.3.1 Cassette Piracy

I.3.1.1 As can be seen from Tables 2-8, the extent of piracy varies considerably from one country to another, both in percentages of the total market and in value. The tables showing the percentages of piracy of the total market reflect more accurately the impact piracy has on the legitimate recording industry of a particular country. For instance, Table 4 shows that Portugal has the highest incidence of cassette piracy, nearly half the cassettes on the market being pirate products in 1988. However, if Table 5 is taken into account, the highest value of pirate cassettes sold is found in the Federal Republic of Germany with ECU 25.4 million (US\$ 30.1 million) in 1988, Portugal lagging far behind with sales of pirate cassettes estimated at around ECU 4.6 million (US\$ 5.5 million). But Germany is the largest domestic market for sound recordings in the EEC and ECU 25.4 million only represents 4% of the total cassette market. Although this percentage is still too high, it does not threaten the existence of the legitimate recording industry as it does in Portugal.

I.3.1.2 Belgium, Denmark, France, the Federal Republic of Germany, Ireland and the United Kingdom remain countries with low levels of cassette piracy. The Netherlands used to be a country with a low level of cassette piracy (around 5%). However, since 1986, cassette piracy has increased to 12.5% of the total market and is now estimated to represent about 16% of the market. The lack of specific legal protection for producers of phonograms in the Netherlands is certainly to blame for this increase as pirates are taking advantage of the situation.

I.3.1.3 The four southern EEC countries (Greece, Italy, Portugal and Spain) have been and, with the exception of Spain, still are the black spots of European piracy. Although piracy remains a serious problem in these countries, the situation has improved noticeably, particularly in Spain. In the latter country, cassette piracy used to represent around 40-50% of the market in the early 80s but is now down to 8%.

I.3.1.4 In Greece, the level of cassette piracy has come down steadily from 75% in 1982 to 30% in 1988. In Italy and Portugal, cassette piracy decreased from 30% and 80% respectively to 18% and 45% during the same period.

I.3.1.5 These improvements are due not only to the enactment of new laws in these countries but also to successful actions leading to court decisions setting valuable precedents, as in Greece¹. The co-operation of police forces and other competent authorities such as the Customs, as well as the efficient operation of IFPI national groups, are also essential factors.

I.3.2 LP Piracy

I.3.2.1 An analysis of record (vinyl LPs) piracy in the various Member States of the EEC does not show any significant change over the past seven years. LP piracy only exists in some countries (Belgium, France, the Federal Republic of Germany, Italy, the Netherlands and the United Kingdom) and consists mainly of bootleg recordings (i.e. recordings of artists' performances made without their consent). Only a few thousand copies are made of each bootleg recording and, therefore, these are regarded as collectors' items and fetch very high prices. That is one of the reasons why bootlegs are found mainly in the Member States of the EEC where relatively high per capita incomes prevail. The total number of pirate LPs sold in 1988 throughout the EEC was only 3.2 million but they fetched a total retail value of ECU 44.9 million (US\$ 53.1 million), which means an average price of ECU 14 (US\$ 16.5) per LP, much more than that of legitimate records. There is little doubt that bootleg recordings are getting increasingly expensive. This trend is particularly noticeable as the estimated retail value of bootleg products sold in the EEC has nearly doubled over the past two years from ECU 21.3 million (US\$ 24.6 million) in 1987 to ECU 44.9 million (US\$ 53.1 million) in 1988.

I.3.3 CD Piracy

I.3.3.1 Extent of CD Piracy

I.3.3.1.1 CD piracy is a new phenomenon, the importance of which was first assessed in 1988. CD piracy is becoming a serious problem in countries

which have developed CD markets and particularly in the Netherlands, where pirate CDs account for 22% of total CD sales, and in the Federal Republic of Germany, where CD piracy is estimated at 5%. Pirate CDs are also reported in the UK. CD piracy now represents a more serious problem in the EEC as a whole than LP piracy. In 1988, an estimated 6 million pirate CDs (or 5% of the market) were sold throughout the EEC at a value of ECU 50.7 million (US\$ 60 million).

I.3.3.2 Nature of CD Piracy

I.3.3.2.1 Up to now, CD piracy has consisted mainly of the reproduction of back-catalogue titles (recordings over 20 years old), the pirates seeking to take advantage of the differences in periods of protection between Member States. The back-catalogue titles are reproduced in countries where the protection of the original producer of phonograms has expired and are subsequently exported to other EEC countries where protection still exists, relying on the principle of the free movement of goods under Article 30 of the Treaty of Rome.

I.3.3.2.2 The applicability of Article 30 in these cases was raised before the European Court of Justice in the Case EMI/Electrola v. Patricia Records in which judgement was delivered on 24 January 1989. The facts can be summarised as follows: a Danish record company had manufactured a number of compact discs containing recordings made before July 1960, including works by Elvis Presley, Cliff Richard and Fats Domino. In Denmark, the duration of protection granted to these recordings was 25 years and this period had elapsed. (It should be noted that an amendment to the Danish copyright law passed in 1985 has extended the term of protection to 50 years, but recordings which had fallen into the public domain were not granted retrospective protection.) Authors' rights were duly paid to the Danish authors' society and there is consequently no doubt that the discs were legitimate as far as the Danish market was concerned. The discs were then exported from Denmark to the Federal Republic of Germany, where the recordings were still protected under German law.

I.3.3.2.3 The issue in the case was whether, in a situation where two Member States apply different periods of copyright protection to sound recordings, the owner of copyright in the State which gives the longer period of protection is entitled to exercise rights provided by its domestic law to prevent the importation of goods which embody the copyright work. The issue involves a consideration of the effect of Articles 30 and 36 of the Treaty of Rome.

I.3.3.2.4 The court ruled that the owner of copyright in the State which gives the longer period of protection was entitled to exercise rights provided by its domestic law to prevent the importation of copyright goods from countries with a shorter period of protection. And this, in spite of the principle of free movement of goods under the EEC Treaty.

I.3.3.2.5 Fortunately for the recording industry in the Community, the European Court of Justice closed a loophole which the pirates had sought to exploit. It is hoped that Community legislation will be introduced to require all Member States to harmonise their terms of protection at 50 years. In a reply² to a written question from a member of the European Parliament, the Commission has stated that "the many different terms of

protection in force in Member States are causing serious problems in trade in phonograms between Member States" and that it intends to take an initiative on the matter in the context of its Green Paper on Copyright and the Challenge of Technology³.

I.4 PIRACY IN PORTUGAL AND SPAIN

I.4.1 Piracy in Portugal

I.4.1.1 Level and Nature of Piracy

I.4.1.1.1 The level of audio piracy in Portugal is the highest in the EEC. This is so in spite of a noticeable drop in cassette piracy from 80% of the total market in 1986/87 to 45% in 1988. In numerical terms, this is the equivalent of 2.7 million pirate cassettes as compared to unit sales of 3.2 million legitimate cassettes.

I.4.1.1.2 The recent and substantial drop in the level of cassette piracy has had a noticeable impact on the sales of legitimate musicassettes which increased from 1.1 million in 1986 to 2.1 million in 1987 and 3.2 million in 1988. The main reason for this decrease in cassette piracy, however, is the fact that producers have cut the prices of legitimate product substantially in order to compete with the pirates. To make these cuts possible, cassettes have been marketed containing only half the repertoire included in the equivalent LP.

I.4.1.1.3 Piracy in Portugal takes two forms. About 40% of the total pirate product is poor-quality material produced by small-time market traders or "in-store taping". The remaining 60% is far more professional in that, whilst the audio quality remains poor, the appearance is convincingly genuine with the use of false trademarks, counterfeited to a high standard.

I.4.1.1.4 Apart from the significant quantity of material that makes no pretence to be legitimate, there are also discs and cassettes produced under dubious licensing arrangements. As a matter of practice, it is usually difficult to prove the invalidity of these licences which are exploited by pirates operating in Portugal who also seek to take advantage of the current uncertainty over those provisions of the Treaty of Rome which relate to the free circulation of goods (see, however, summary of recent EC Court Decision in the Patricia Case in paragraph I.3.3.2.2 above). As legal protection for phonograms in Portugal expires 25 years after first fixation, the situation often occurs where protection has terminated in Portugal but exists in other countries within the EEC.

I.4.1.2 Origin of Pirate Product

I.4.1.2.1 The pirate cassettes found on the market are all manufactured in Portugal.

I.4.1.2.2 In addition to the damage this causes to local sales, AFYVE, the Spanish National Group of IFPI, reports that the vast majority of pirate product found in Spain also comes from Portugal. Portuguese pirate cassettes are mainly exported to Spain but also to the other EEC countries.

I.4.1.2.3 The accession of Portugal to the EEC in 1986 made it much more difficult to stop and check the movements of Portuguese exports throughout the EEC. Some illegal products of Portuguese origin have also found their way to the USA.

I.4.1.3 Type of Music Pirated

I.4.1.3.1 International pop music and Portuguese repertoire are both heavily pirated. It is estimated that piracy of international pop music accounts for 40% of total piracy, while the remaining 60% consists of Portuguese music. This confirms IFPI's belief that governments cannot be complacent about piracy as it greatly affects national culture.

I.4.2 Piracy in Spain

I.4.2.1 Extent of Piracy

I.4.2.1.1 Piracy of music cassettes became very serious in 1983/1984. In 1984, 12 million pirate cassettes were sold on the Spanish market, which represented 52% of the total market.

I.4.2.1.2 Legitimate producers of phonograms felt threatened and, consequently, AFYVE began to devote larger resources to fighting piracy. Full-time investigators were employed to travel throughout Spain and relations with law-enforcement agencies improved. Moreover, AFYVE lobbied strongly to obtain a new copyright law, which gave producers new rights (rental right and private copying royalties) and stronger sanctions against infringers: Article 534 of the Penal Code was amended and consequently infringers are now liable to a fine of up to 3 million pesetas and imprisonment of from 6 months to 6 years for serious cases.

I.4.2.1.3 Cassette piracy went down from 52% in 1984 to 8% in 1988 which represented 2.4 million units for a value of 800-2,400 million pesetas.

I.4.2.1.4 In 1988, the Spanish Police seized 110,000 cassettes and 33 duplicating machines and made 160 arrests.

I.4.2.2 Origin of Pirate Product

I.4.2.2.1 Most pirate cassettes are imported from Portugal. AFYVE believes that any pirates of a certain importance carry out part or the whole of their activities with material imported from Portugal (particularly labels and inlay cards). Since the accession of Portugal and Spain to the EEC, it is even more difficult to control imports from Portugal into Spain. In the regions of Spain which are close to Portugal, the level of piracy is higher than the national average. For example, Extremadura and Salamanca are two notorious black spots. The province of Andalucia is also particularly affected. Illegal manufacture of cassettes is known to take place in Alicante and products are distributed through market traders.

I.4.2.3 Repertoire Pirated

I.4.2.3.1 As in Portugal, piracy is even more detrimental to Spanish music than to international pop music: 40% of pirate cassettes are of international pop music and the rest consists of Spanish repertoire.

Footnotes to Chapter I

1. See "Piracy of Phonograms - Second Edition", op. cit., paragraphs 230 to 242.
2. Reply given by Mr. Bangemann on behalf of the Commission QXW1479/88FR, 21 February 1989.
3. See footnote 4 of foreword.

CHAPTER II - NATIONAL LAWS TO COMBAT PIRACY - PORTUGAL

II.1 Membership of Conventions

II.1.1 Portugal is not a party to either the Rome or Phonograms Conventions. It is, however, a member of the Berne Convention (Paris Act 1971) and the Universal Copyright Convention (1971 Text). The Preamble to the Code of Copyright and Related Rights, 1985, refers to the fact that the Code was prepared taking into account the provisions of the Rome and Phonograms Conventions. Subsequently, the President of Portugal has reiterated his Government's intention to adhere to both these Conventions¹.

II.2 National Legislation

II.2.1 The present Code of Copyright and Related Rights was adopted in July 1985². This replaced the Copyright Code of 1966³ which provided protection against piracy for authors only. The new law also repealed and replaced Law No.41 of 1980⁴, which afforded protection to producers of phonograms against the unlawful reproduction of phonograms.

II.2.2 The protection of producers of phonograms and performers is contained in Title III of the new Code, entitled "Related Rights".

II.2.3 Producers of phonograms have the right to authorise or prohibit the reproduction and the distribution of copies of their phonograms to the public as well as the exportation of their phonograms [Article 184]. Distribution is defined as meaning "the activity devoted to offering a significant quantity of phonograms or videograms to the public, whether directly or indirectly, for sale or rental" [Article 176 (8)]. It is a condition of protection of producers of phonograms that all authorised copies should bear the notice provided for in the Rome and Phonograms Conventions identifying the producer or his representative together with the symbol (P) and the year of first publication [Article 185]. The protection of producers under the code lasts for 25 years from the end of the year in which the fixation was made. [Article 186].

II.2.4 The period of protection previously given to producers under the 1980 law for protection against the unlawful reproduction of phonograms was for 50 years [Article 4] and the reduction is much to be regretted, particularly since it goes against the current trend among EC Member States to lengthen to 50 years the protection granted to producers and performers. France enacted neighbouring rights legislation for the first time in 1985 and granted 50 years' protection to sound recordings⁵. Denmark increased the period of protection from 25 to 50 years⁶. Draft legislation in Belgium⁷ and the Netherlands⁸ proposes 50 years' protection for sound recordings.

II.2.5 The Code also provides that royalties should be paid on the sale of recording equipment and recording tape to provide remuneration in favour of authors, phonogram producers and performers for the private copying of phonograms [Article 82].

II.2.6 A useful feature of the Code which should be of considerable assistance in fighting piracy in Portugal is that producers of phonograms

have been given the right to audit establishments which press or duplicate phonograms and which stock material supports, such as blank tapes [Article 184 (2)]. This means that they should be able to keep a check on such establishments to ensure that they do not pirate, counterfeit or overpress. A similar right is given to the authors. Moreover, those who import, manufacture or sell blank tapes or other material supports for phonograms are obliged to communicate to the Director General of Theatre and Copyright the amounts imported, manufactured or sold. In addition, those who manufacture or duplicate phonograms are obliged similarly to communicate to the Director General of Theatre and Copyright the numbers of phonograms which they reproduce and to make available the documentation which confirms that the author (or phonogram producer) has given his consent [Article 143]. However, the right to audit is difficult to enforce in practice and a court order is a preliminary requirement.

II.2.7 The performers also have the right to authorise or prohibit (i) the broadcasting or communication to the public by any means whatsoever of their performances; (ii) the fixation of their unfixed performances, and (iii) the reproduction of a fixation made without authorisation or made for purposes other than that for which consent was given [Article 178]. The performers' protection lasts for a period of 40 years from the end of the year in which the performance took place [Article 183].

II.2.8 The scope of protection afforded to foreign producers of phonograms and performers is limited. The Law provides [Article 193] that producers and performers protected by approved and ratified international conventions shall benefit from protection but this has no effect since Portugal has not adhered to either the Rome or Phonograms Conventions. Phonograms are protected where one of the following conditions is fulfilled: the producer is of Portuguese nationality or has his headquarters on Portuguese territory; the fixation has taken place in Portugal; the phonogram has been published for the first time in Portugal or published in Portugal within 30 days from the date of first publication elsewhere (simultaneous publication). Performers are protected if the performer is of Portuguese nationality, the performance takes place on Portuguese territory or when the original performance was fixed or broadcast for the first time on Portuguese territory [Article 190]. Foreign phonograms rely for protection, therefore, on simultaneous publication in Portugal.

II.2.9 The Code has strengthened the penalties for infringement of copyright. Infringement is designated as an offence [Articles 195 and 196]. The offence of illegal exercise of rights [usurpação] is committed by anybody who makes any unauthorised use of a work or phonogram protected by the new law [Article 195], or who exceeds the limitations imposed on any authority given. Another offence of infringement [contrafacção] is punishable under Article 196 of the Code. A person is guilty of infringement if he unlawfully represents as being his own creation or performance, a performance, phonogram, videogram or broadcast which reproduces in whole or in part another person's work or performance, whether or not it has been published, or if he copies the same in such a way that the copy does not have any individuality of its own. For infringement to take place it is not essential that the reproduction should be made by the same process as the original or that it should be the same size or in the same form.

II.2.10 The offences of illegal exercise of rights and infringement are punishable with imprisonment of up to three years and a fine of from 50 to 150 days⁹ depending upon the gravity of the infringement. The term of imprisonment and the fine are doubled in the case of recidivism [Article 197]. The same penalties apply to whomsoever sells, offers for sale, imports, exports or in any way distributes to the public unauthorised copies of phonograms, whether the said copies have been made in Portugal or abroad [Article 199]. Except in the case of moral rights, criminal proceedings under the Code will be brought by public prosecution and do not depend on a complaint from the injured party [Article 200].

II.2.11 The Code also provides [Article 201] for the seizure of all illegally produced copies as well as their packaging and any machines or other instruments and documents which are involved in the infringement.

II.2.12 The Court will dispose of the seized goods; when it has been proved that they were intended for or were used in connection with the infringement they will be confiscated by the State and all illegal copies will be destroyed. In cases of flagrante delicto the following authorities will have competence to proceed to seizure: the Judicial Police, the Public Security Police, the Republican National Guard, the Revenue Police and the Directorate General of the Economy.

II.2.13 Civil proceedings may also be brought against those who infringe copyright and related rights and may be brought in conjunction with criminal actions [Article 203].

II.2.14 It should also be noted that the Code provides specifically that the protection afforded to rights owners under the law on unfair competition shall remain in force [Article 212].

II.2.15 Under the Industrial Property Code 1940¹⁰, anyone who counterfeits trade marks, as well as persons who use, sell, place on sale or distribute products bearing a counterfeit, are liable to a fine, which may be accompanied by a term of imprisonment [Article 217]. These offenders are also liable for damages [Article 227]. This has continued under the new Code.

II.2.16 Piracy in Portugal remains a serious problem and a new legislative initiative has been taken by the Secretary of State for Cultural Affairs in an effort to control it. On 18 May 1989 the Government approved Decree No. 227/89¹¹ which established a system of identification of legitimately produced records and cassettes by means of special security-printed stamps to be issued by the national currency printers.

II.2.17 By virtue of this Decree, the importation, manufacture, production, publication and distribution of sound recordings is made subject to the supervision of the General Directorate of Entertainments and Copyrights (DGEDA). All sound recordings, whether produced in Portugal or imported, must be authenticated by means of a stamp which may only be obtained by the holders of the relevant commercial rights. Any person applying for stamps must accompany his application by the following:

- (a) documents proving ownership of the commercial rights,

- (b) identification of the works included in the phonogram and respective authors,
- (c) artists' roster,
- (d) number of copies to be distributed,
- (e) number of copies to be manufactured or duplicated,
- (f) country of origin,
- (g) year of first publication.

II.2.18 The design of the stamp has been determined by order of the Secretary of State for Cultural Affairs. A fee will be paid for the stamps, which will accrue to the Cultural Promotion Fund.

II.2.19 Records and tapes which have not been authenticated will be seized and surrendered to the State without compensation.

II.2.20 Anybody who is found not to possess the documentation required to obtain authentication will be fined from 40,000 to three million escudos. Anybody manufacturing or duplicating sound recordings without having obtained authentication and authorisation will be fined from 40,000 to three million escudos. Materials, equipment and documents used in the perpetration of any infringement shall also be seized and surrendered to the State; the DGEDA will decide on their disposal, taking account of the public interest.

II.2.21 The Decree, which came into force on 1 August 1989, allows for a transitional period until 1 December 1989, within which records and tapes already on sale in Portugal must be authenticated.

II.3 Case Law

II.3.1 A great many actions were brought against pirates in Portugal following the adoption of the 1980 Anti-Piracy Law, as amended in 1982¹². This has continued under the new Code. The Portuguese National Group of IFPI works in close collaboration with the Portuguese Authors' Society and, with the support of the authorities, including the police, the two organisations have instigated investigations and proceedings in numerous cases and large quantities of cassettes and equipment have been seized.

II.3.2 However, there are many difficulties in the way of a successful anti-piracy campaign. The fines and prison sentences imposed to date have been lenient, providing little deterrent to pirates. The legal process is also extremely slow in Portugal; thus, cases of piracy prosecuted in the early 1980s are only now coming to Court. In a case against 32 defendants charged with piracy in 1975, judgement was not given until 1983¹³.

II.3.3 In more than 50 cases, pirates have been convicted and sentenced to imprisonment and/or fines. Terms of imprisonment have varied between 10 days and six months, commuted on payment of a fixed penalty per day. In these cases, fines ranging from 5,000 to 25,000 escudos were also imposed.

Some minor prison sentences of 5 days were not commutable, and the defendants were also fined up to 5,000 escudos. In many of these cases, the pirated product was delivered up and destroyed.

II.3.4 In two important cases in 1983¹⁴, judges awarded compensation for damages both to the Authors' Society and the National Group of IFPI, representing producers of phonograms. In the year up to 31 August 1985, more than 165,000 pirate cassettes were seized as well as the equipment in 8 recording studios used for duplication. In the same period, 311 raids were conducted in 74 different towns and cities throughout the country. Anti-piracy action has continued since on the same scale throughout Portugal and, from August 1985 to February 1987, nearly 400,000 cassettes were seized in hundreds of raids all of which have resulted in actions now pending.

II.4 Customs Legislation and Regulations

II.4.1 The new Copyright Code, as mentioned above, punishes any person who imports or exports illegally-reproduced copies of phonograms, whether the illegal copies have been made in the country or abroad. It is to be hoped, therefore, that with this provision in the Copyright Code co-operation will be established between the Customs authorities and the right owners to control imports and exports of pirate material.

II.4.2 Moreover, the Berne Convention is part of the national law of Portugal. Article 16 of the Berne Convention, as mentioned in Chapter 3 of the EEC Study, provides that infringing copies of the work shall be liable to seizure on importation in accordance with national legislation. Moreover, the Customs authorities can seize on exportation or importation all counterfeits as provided in Article 229 of the Industrial Property Code 1940.

Footnotes to Chapter II

1. Oral comment made by Dr. Mário Soares on 13 March 1987 on the occasion of a speech to commemorate the Centenary of the Berne Convention.
2. Código do Direito de Autor e dos Direitos Conexos, of 5 July 1985, Diário da República, 1st Series, No. 214 of 17 September 1985.
3. Decree-Law No. 46980, 2 May 1966. Diário do Governo, No. 99 of 27 April 1966.
4. Decree Law No. 41/80, Diário da República, 1st Series, No. 185 of 12 August 1980.
5. Law No. 85.860 of 3 July 1985. Article 30
6. Amendment to the Copyright Act 1961 of 16 June 1985. Article 46 as amended.
7. Bill No. 615 deposited before the Sénat de Belgique on 10 July 1987. Article 64.
8. Bill on Neighbouring Rights to amend the Copyright Statute of 1912, submitted to Parliament in August 1989, Article 11.
9. According to Article 46 of the Penal Code approved by Decree-Law 400/1982 of 23 September 1982, Diário da República, 23 September 1982, as amended, each day's fine is equal to an amount of between ESC.200 (USD 1.20) and ESC.10.000 (USD 61) fixed by the court taking into account the economic and financial situation of the guilty party and his personal responsibilities.
10. Industrial Property Code of 24 August 1940, as amended in 1980 and 1984.
11. Decree-Law No. 227/89 of 8 July 1989, Diário da República, 1st Series, No. 155 of 8 July 1989.
12. Decree-Law No. 291/82 of 26 July 1982. This Decree extended to videograms the protection afforded to phonograms by Decree Law No. 41/80 referred to above. It also increased the fines for piracy.
13. 8th Criminal Court of Lisbon, Second Section, Case 6690.
14. 8th Criminal Court of Lisbon, Second Section, Case 6690; 2nd Court of Oporto, Case 74577.

CHAPTER III - NATIONAL LAWS TO COMBAT PIRACY - SPAIN

III.1 Membership of Conventions

III.1.1 Spain has ratified the Phonograms Convention (with effect from 24 August 1974) but is not party to the Rome Convention. It is also party to the Berne Convention (Paris Act 1971) and the Universal Copyright Convention (1971 Text).

III.1.2 The preamble to the new Law on Intellectual Property refers to the fact that the Law adheres strictly to the criteria defined by the Rome and Phonograms Conventions. Subsequently, the Spanish Government has announced that it intends to ratify the Rome Convention¹. Its Instrument of Ratification is expected to be deposited with the Secretary General of the United Nations shortly.

III.2 National Legislation

III.2.1 A new Law on Intellectual Property² was adopted in November 1987 and entered into force on 7 December 1987. This replaced the Law concerning Intellectual Property of 1879 which protected authors of scientific, literary or artistic works against piracy. The new law also repealed the Decree of 1942³ which extended the protection of the law of 1879 to producers of phonograms, conferring on them the character of works protected by the law of 1879.

III.2.2 The new law is divided into three chapters relating respectively to (i) authors' rights, (ii) other intellectual property rights - namely the rights of performers, producers of phonograms, producers of audiovisual recordings, broadcasting organisations, and those relating to photographs (other than photographic works) and certain published editions, and (iii) remedies, sanctions and procedural matters.

III.2.3 Producers of phonograms have the exclusive right to authorise the direct or indirect reproduction, broadcasting, public performance, cable distribution, rental and other methods of distribution of their phonograms [Article 109(1)]. The right of distribution includes especially the right to authorise the importation and exportation of copies of the phonogram for the purposes of marketing [Article 109(2)]. The new law also provides that remuneration should be paid by the manufacturers and importers of recording equipment and blank tapes intended for commercial distribution to authors, producers and performers for the private copying of phonograms [Article 25].

III.2.4 In cases of infringement of the rights of producers of phonograms, the right to institute the appropriate proceedings belongs to both the producer and his licensee or successor in title [Article 110].

III.2.5 The duration of protection of producers of phonograms is 40 years from the beginning of the year following that of publication or, if it has not been published, following that of its production [Article 111].

III.2.6 For the first time in Spain, performers are granted rights of control over their performances in Article 102 of the Law on Intellectual

Property. The performer has the exclusive right to authorise the reproduction of his performances and the communication thereof to the public. His consent must be given in writing. Once the performer has consented to the making of a phonogram (or audiovisual work) he may not oppose its reproduction or communication to the public. The performer is entitled, however, to equitable remuneration for the broadcasting or other communication to the public of phonograms containing a fixation of his performance [Article 103]. The rights of performers last for 40 years from the beginning of the year following that in which the fixation was published, or following the year the performance took place where no such publication occurred.

III.2.7 Producers of phonograms enjoy protection when they are Spanish citizens or enterprises domiciled in Spain, when they are foreign and their phonogram is published in Spain for the first time or within 30 days of having been published in another country [Article 147]. Foreign performers are protected when they are ordinarily resident in Spain, where their performances take place on Spanish territory; where their performances are recorded on protected phonograms or audiovisual materials; where their unfixed performances are incorporated in protected radio broadcasts [Article 146]. The law provides that foreigners shall enjoy the protection available under international conventions and treaties to which Spain is party. Where no such treaty exists, protection may be extended on a reciprocal basis to foreigners of countries which afford protection to Spanish producers of phonograms and performers under their national laws (Articles 146 and 147). Prior to the entry into force of the new Law in 1987, all phonograms were protected irrespective of their origin. The protection of foreign producers of phonograms has therefore been restricted by the new legislation.

II.2.8 Remedies against infringement of the rights of all right owners, including producers of phonograms and performers, have been strengthened considerably in the new law. Chapter 3 of the law makes provision for enforcement of the rights granted. Right owners may apply for an injunction to restrain the infringement and are also entitled to be indemnified against material losses and moral damage [Article 123].

III.2.9 In granting an injunction, the judge may adopt any measures he considers necessary, including: suspending the infringing exploitation; prohibiting the infringer from resuming it; withdrawing unlawful copies from the market and destroying them; rendering useless any moulds, plates, matrices, negatives and other material intended solely for the reproduction of the unlawful copies, and where necessary destroying such materials; removing or placing seals on apparatus used for the unauthorised communication to the public [Article 124(1)].

III.2.10 Judges are empowered to grant injunctions "in the event of infringement or where there are good and reasonable grounds to fear that infringement is imminent". Precautionary measures for the immediate protection of the rights concerned may include: (i) the accounting and deposit of revenue earned or fines equivalent to payments owed; (ii) stopping reproduction, distribution and communication to the public, as appropriate; and (iii) seizure of copies produced or used for reproduction or communication to the public [Article 126].

III.2.11 The right owner may choose to be indemnified either by payment of the profits he has lost as a result of the unlawful use or by payment of the remuneration he would have received had he authorised the exploitation. Moral prejudice entitles the right owner to damages even if he has not suffered economic prejudice. Claims for damages may not be brought after five years have elapsed from the time when they could legitimately have been filed [Article 125].

III.2.12 Injunctions are available both in civil and criminal proceedings and "shall not prevent the institution of such other measures as may be provided for in the legislation on criminal procedure" [Article 128].

III.2.13 At the same time as the new Law on Intellectual Property was adopted, Article 534 of the Penal Code was amended to increase the penalties in cases of piracy. Fines of up to one and a half million pesetas have been introduced and, for serious cases, fines of up to three million pesetas and prison sentences for periods of from six months and one day to six years have been provided for. Moreover, for the first time, the Penal Code recognises plagiarism of works, including phonograms, as a criminal offence.

III.2.14 A number of other legal measures have consistently proved useful weapons in the fight against piracy.

III.2.15 In addition to the remedies provided for by the new Law on Intellectual Property, the Law Concerning the Institution of Criminal Proceedings⁴ is also relevant in cases of piracy. Under its provisions, the police may request a judge to issue a judicial order permitting entry to and inspection of the premises of a suspect. Such orders may be given with respect to a private house or a factory. If there is prima facie evidence of an infringement taking, or having taken, place, pirate copies may be seized and placed in the custody of the court. Equipment capable of being used to infringe may be sealed.

III.2.16 The judge then instigates proceedings against the offender and the injured party is joined to the case. If the judge is satisfied that there is prima facie evidence of piracy, the offender is prosecuted and has to put up bail to be allowed his provisional liberty and is obliged to deposit sufficient funds to cover any eventual damages. Since the entry into force of the new law, this procedure has been superseded thereby in most cases.

III.2.17 The production of misleading cover versions or sound alike (see Chapter 1, paragraphs 7.5 - 7.8 of the EEC Study) has been a serious problem in Spain in the past. A sound alike is a recording which imitates the style and voice of the artist whose original interpretation of the musical work led to success. If the imitation is such as to tend to confusion, and the producer attempts to pass the new recording off as including a performance of the original well-known artist, the cover version is illegal. Such illegal imitations infringe the General Law for the Safeguarding of Consumers and Users 1984⁵ as well as the Law on Intellectual Property. The former provides that "the offer, promotion and false and misleading advertising" of products, activities, and services, shall be prosecuted and punished as fraud. Sound alikes may also be held to infringe Article 18 of the Spanish Constitution which "guarantees the right

to honour, to personal and family privacy, and to one's own image". This provision of the Constitution is regulated by the Law on the Fundamental Human Rights of 1978⁶, and a Royal Decree of 1979⁷ and the Law on the Right to Honour, to Personal and Family Privacy and to One's Own Image 1982⁸. This legislation provides for rapid procedure against anybody who, without authorisation and for commercial purposes, uses the photographic image of a particular person. Action can also be taken against unfair competition [Articles 88 and 89 of the Trade Mark Law of 10 November 1988].

III.2.18 In the case of counterfeits, where the trade mark of the phonogram producer is infringed, both civil and criminal proceedings can be instituted under the Trade Mark Law of 10 November 1988 [Article 35]⁹. Counterfeiting of trade marks is punishable by a term of imprisonment of between six months and six years [Article 280 of the Penal Code].

III.3 Case Law

III.3.1 Until 1983, piracy stricto sensu, counterfeiting and bootlegging, were not substantial problems in Spain. Case law on the subject is, therefore, relatively recent. Subsequently, piracy escalated dramatically and, both before and after the entry into force of the new Law on Intellectual Property, a large number of judicial orders have been granted against pirates and both illegal copies and the equipment used for making such illegal copies have been seized by the authorities.

III.3.2 Prior to the entry into force of the new law and the revised Penal Code, penalties for piracy were weak (1-6 months' imprisonment and fines of from 30,000 to 600,000 pesetas). During 1987, judgement was given in five cases of piracy and the defendants were sentenced accordingly¹⁰. However, in some of these cases large sums were awarded in damages (20-30 million pesetas)¹¹. In another case, all the assets of a pirate were seized, including several million pesetas on bank deposit¹².

III.3.3 Since the new law and revised Penal Code entered into force, many actions have been brought against pirates but, due to the slowness of civil and criminal proceedings, it will be some time before judgement is given in these cases.

III.3.4 During 1988, judicial orders were made to seize pirate material in 100 cases; pirate product seized was worth 101 million pesetas and included 69,000 cassettes, 19 cassette duplicating plants and approximately 140,000 cassette inlay cards and boxes. Of the 100 pirates accused, 85 were hawkers, 12 were engaged in duplication and three in smuggling and warehousing of pirate product.

III.3.5 The precautionary measures provided for in Article 126 of the Law on Intellectual Property were invoked in an important parallel imports action brought in Barcelona against an importer of records and tapes¹³. According to Article 109, the producer enjoys the exclusive right to authorise the distribution of his phonogram and distribution is expressly defined as including the right to authorise the importation and exportation of copies of phonograms. In the case in question, the importation was unauthorised and the court was requested to grant an injunction to prevent distribution of the imported copies under Article 126(2). The judge made

an order not only suspending distribution of the imported copies but also instructing all Spanish Customs posts to seize all imports of the records or tapes in question.

III.3.6 Orders for precautionary measures are interim decisions like injunctions; final judgement in the case is awaited.

III.4 Customs Legislation and Regulations

III.4.1 There are no specific provisions in the Copyright Law referring to powers of the Customs authorities to intervene to prevent the importation of pirated goods. However, in relation to phonograms, the right of distribution includes especially the right to authorise the importation and exportation of copies of phonograms for the purpose of marketing and the co-operation of the Customs authorities is required to enforce these rights. Moreover the Berne Convention is part of the national law of Spain. Article 16 of the Berne Convention, as mentioned in Chapter 3 of the EEC Study, provides that infringing copies of the work shall be liable to seizure on importation in accordance with national legislation. Furthermore, under the Industrial Property Statute of 1929 the Spanish Customs may confiscate, upon importation, all counterfeits of registered marks, without prejudice to the rights of action of the right owner.

III.4.2 In practice, the Spanish Customs authorities are prepared to co-operate with the prevention of imports and exports of illegal product to and from Spain. The Customs authorities have been particularly active in assisting the record industry and the Spanish Authors' Society, SGAE, to control trans-border traffic in pirate material between Portugal and Spain. They have refused, however, on a number of occasions to seize consignments of pirate product in transit through Spanish ports from the Far East to Africa.

Footnotes to Chapter III

1. Inter alia at meetings of the Executive Committee of the Berne Convention and Intergovernmental Committees of the Universal Copyright Convention and of the Rome Convention, Geneva, June/July 1989 (see document ILO/UNESCO/WIPO/ICR.11/8, paragraph 23).
2. Law on Intellectual Property (Ley 22/87 de 11 noviembre, de propiedad intelectual), No. 22 of 11 November 1987.
3. Decree of 10 July 1942 Conferring upon Phonographic Works the Character of Works Protected by the Law of Intellectual Property.
4. Law Concerning the Institution of Criminal Proceedings (Ley de Enjuiciamiento Criminal) of 14 September 1882, as amended in 1977.
5. The General Law for the Safeguarding of Consumers and Users (Ley General para la Defensa de Consumidores y Usuarios) No. 26 of 19 July 1984.
6. Law No. 62, 1978.
7. Decree 342, 1979.
8. Law on the Right to Honour, to Personal and Family Privacy and to One's Own Image (Ley sobre el Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen), No. 1 of 5 May 1982.
9. Ley de Marcas, No. 32, of 10 November 1988.
10. Albacete, Sentencia número 84, Apelación penal 74/87.
Granada, Sentencia número 348, Causa 141/85
Toledo, Sentencia número 58, Procedimiento Oral 81/87
Valladolid, Sentencia número 237, Procedimiento Oral 14/87 c
Segovia, Sentencia número 118, Apelación Penal 79/86
11. Salamanca, Juzgado de Instrucción número 1, Diligencias Previas 593/88
Córdoba, Juzgado de Instrucción número 4, Diligencias Previas 2043/85
Madrid, Juzgado de Instrucción número 8, Sumario 82/87 H.
12. Badajoz, Sumario 36/87.
13. Juzgado de Instancia número 8 de Barcelona, Autos 63/88 4^a

CHAPTER IV - LEGISLATIVE DEVELOPMENTS IN THE OTHER TEN MEMBER STATES
SINCE 1982

IV.1 Denmark

IV.1.1 Denmark passed an amendment to its 1961 Copyright law on 16 June 1985. This amendment extended the period of protection for phonograms, performances and broadcasts from 25 to 50 years.

IV.2 France

IV.2.1 Law No.85-660 of July 1985 introduced for the first time in France a specific legal protection for, inter alia, producers of phonograms and performers. This law, which came into force on 1 January 1986, grants producers of phonograms the exclusive right to authorise the reproduction, distribution and rental of their phonograms. They are also granted a right to equitable remuneration for the broadcasting, unchanged and simultaneous cable transmission and direct public communication of published phonograms. Performers are entitled to receive half of this remuneration.

IV.2.2 As far as performers are concerned, their written authorisation is required for the fixation of their performances, their reproduction or communication to the public. Phonograms and performances are protected for a period of 50 years.

IV.2.3 Infringements to the rights of producers of phonograms and performers are sanctioned by imprisonment of from three months to two years and/or a fine of from FrF 6,000 to 120,000. The sanctions are doubled for subsequent offences.

IV.2.4 The 1985 French law also provides for a royalty on blank tapes for the benefit of authors, producers and performers.

IV.3 Federal Republic of Germany

IV.3.1 An amendment to the Copyright Law of 1965 was passed by the Bundestag on 23 May 1985 and entered into force on 1 July 1985. The most important change in the law, with regard to piracy, consists in the increase of penalties for "professional piracy" [Article 108a].

IV.3.2 The new Article 108a of the law provides that copyright and related rights infringements (unlawful duplication or dissemination) will now be liable to imprisonment of up to five years or a fine. Previously the penalty was only a fine or a prison sentence of up to one year. This offence has now become a public offence, with the result that the injured party only needs to lodge a complaint with the public prosecutor, who will investigate and bring an action before the criminal court. Previously copyright and related rights infringements could only be prosecuted privately, which meant that the injured party had to prove the infringements before the courts. As a result of this amendment, it is now far easier to prosecute offenders.

IV.3.3 Cases of "professional piracy" [Article 108a] are now subject to the application of the general law provisions in respect of seizure and impounding, and not the exceptional provisions of Article 110. This means that, as a rule, the seizure and impounding of "equipment used for committing the offence" also become possible in cases of piracy.

IV.3.4 The new law also increased the authors', producers' and performers' rights in respect of private copying. An additional private copying royalty was imposed on blank audio and video cassettes and the rates of the existing royalty on audio and video hardware were revised.

IV.4 Greece

IV.4.1 The turning point in the recording industry's fight against piracy in Greece was in 1983 when the Supreme Court, in its Decision No. 462 of 8 March 1983, equated piracy with forgery and fraud against the public. The consequence of this decision was that any person convicted of piracy would be sentenced to heavy penalties under the relevant provisions found in the Criminal Code. As a result the Five-Member Court of Appeal, in its Decision No. 752 of 17 October 1983, applied the above-mentioned decision of the Supreme Court and imposed high penalties: one pirate was sentenced to a six and a half year prison sentence, the heaviest sentence ever imposed for the piracy of sound recordings anywhere in the world. However, in the early months of 1988, it appeared that certain courts had started to reconsider the view that piracy was a violation of the Criminal Code. In order to preclude any change in interpretation of the law by the Greek courts, the Government amended Article 13 of the Criminal Code in October 1988 specifically to extend the definition of a document to cover sound recordings so that piracy of sound recordings will continue to be formally regarded as an act of forgery and fraud and punished accordingly.

IV.5 Ireland

IV.5.1 In Ireland, an amendment to the Copyright Act 1963 came into force on 11 December 1987 which deals, inter alia, with offences and penalties. Under the Amendment Act, possession for the purposes of trade of an infringing copy is now considered an offence. The power of the District Court under Section 27(4) to order the seizure of goods without warrant is extended to situations where goods are "exposed for sale, let for hire or offered or exposed for hire". The limitations on the granting of search warrants are eased. Cinematographic films are specifically mentioned as seizable goods and the unauthorised public performance of a cinematographic film is an offence. First offenders are now liable to a fine of £100 per infringing copy up to a limit of £1,000 per transaction. For subsequent offences, infringers are liable to the same fine or six months' imprisonment or both. Previously, the fine was only £5 per infringing copy up to a maximum of £100.

IV.6 United Kingdom

IV.6.1 On 15 November 1988, the United Kingdom enacted the Copyright, Designs and Patents Act. This Act repeals and completely replaces the 1956

Copyright Act, and its copyright provisions came into force on 1 August 1989. This Act also contains provisions covering the rights of performers and, in consequence, repeals the Performers' Protection Acts 1958-1972.

IV.6.2 The introduction of an exclusive right for record producers to authorise the commercial rental of their phonograms is a major feature of the new law. It should be noted that neither authors nor performers have any rental right as the Government took the view that rental interfered primarily with the producer's right of exploitation. As under the 1956 Act, the producers of sound recordings have the exclusive right of reproduction, publication, public performance, broadcasting (including satellite transmission) and cable distribution (subject to a "must carry" obligation). The duration of protection remains unchanged at 50 years from publication.

IV.6.3 A welcome innovation is the introduction in the Act of a new category of rights in performance which are known as "recording rights" (Section 189). These belong to persons who have the "benefit of an exclusive recording contract to which the performance is subject". This right has been introduced in response to representations from the recording industry when it was discovered that the courts would not recognise the record producer as having a right of action under the Performers' Protection Act. This new weapon will be most useful in the fight against bootlegging.

IV.6.4 Regarding the rights of performers contained in Part II of the Act, one of the major changes brought about by the 1988 Act is the introduction of civil rights for performers, whereas previously only penal sanctions were available against infringers. This means that an infringement of the performers' rights is now actionable as a breach of duty and the performers can obtain damages. The definition of "performance" has been extended to include "a variety act and any similar presentation" (Section 180).

TABLE 1

SALES OF PHONOGRAMS IN THE E.E.C.

1980 - 1987

Value of Trade Deliveries

Current Value and Constant Value
('000)

Year	Current Value ECU	Indice 1980 = 100	Constant Value ECU	Indice 1980 = 100
1980	1,786,087	100	1,786,087	100
1981	1,931,415	108.1	1,757,483	98.4
1982	1,948,768	109.1	1,626,700	91.1
1983	1,874,348	104.9	1,468,999	82.3
1984	1,901,751	106.5	1,422,610	79.7
1985	2,080,231	116.5	1,491,719	83.5
1986	2,192,341	122.7	1,514,254	84.8
1987	2,510,958	140.6	1,686,069	94.4

TABLE 2

PIRACY IN THE EEC

Retail Value in US\$ (in millions)

	1982	1984	1986	1987	1988
BELGIUM/LUXEMBOURG	0.7	0.8	0.8	0.8	2.1
DENMARK	-	-	-	-	-
FRANCE	14.7	10.3	10.0	7.0	4.6
GERMANY (FR)	22.5	18.7	38.6	52.7	100.2
GREECE	19.0	11.3	12.1	6.3	7.8
IRELAND	0.1	0.2	-	-	-
ITALY	21.2	23.9	28.5	32.0	41.5
NETHERLANDS	8.6	4.8	4.5	7.4	30.9
PORTUGAL	4.5	8.4	7.5	9.0	5.5
SPAIN	2.7	28.4	12.3	15.5	7.5
UNITED KINGDOM	16.2	15.6	2.8	3.3	11.7
TOTAL US\$	110.2	122.4	117.1	134.0	212.8
(ECU	112.4	155.0	119.0	116.2	180.0)
% OF TOTAL MARKET	3.0%	4.8%	3.0%	2.7%	3.5%

- Insignificant

TABLE 3

CASSETTE PIRACY IN THE EEC

Units (in millions)

	1982	1984	1986	1987	1988
BELGIUM	0.07	0.04	-	-	0.1
DENMARK	-	-	-	-	-
FRANCE	1.4	1.3	1.4	0.7	0.6
GERMANY (FR)	3.0	1.9	2.5	5.0	2.5
GREECE	9.5	8.0	3.0	1.5	1.7
IRELAND	0.02	0.03	-	-	-
ITALY	5.5	4.5	4.8	5.6	5.0
NETHERLANDS	0.18	0.25	0.65	0.6	0.8
PORTUGAL	4.2	7.0	5.5	5.0	2.7
SPAIN	1.6	12.0	5.4	4.3	2.0
UNITED KINGDOM	1.8	2.0	1.13	2.3	2.3
TOTAL	27.27	37.02	24.38	25.0	17.7
% OF TOTAL MARKET	14.36%	19.20%	11.19%	10.6%	8.0%

- Insignificant

TABLE 4

TAPE PIRACY IN THE EEC

As a % of units sold

	1982	1984	1986	1987	1988
BELGIUM	4.0%	3.0%	2.3%	2.3%	5.0%
DENMARK	-	-	-	-	-
FRANCE	5.0%	5.0%	3.0%	3.0%	2.0%
GERMANY (FR)	7.0%	5.0%	5.5%	5.6%	4.0%
GREECE	7.5%	64.0%	34.9%	24.0%	30.0%
IRELAND	3.0%	3.0%	approx.5%	approx.5%	7.0%
ITALY	30.0%	25.0%	33.0%	30.0%	18.0%
NETHERLANDS	5.0%	5.0%	12.5%	12.5%	16.0%
PORTUGAL	N/A	80.0%	80.0%	80.0%	45.0%
SPAIN	N/A	50.0%	30.0%	17.0%	8.0%
UNITED KINGDOM	6.0%	5.0%	2.0%	3.4%	3.0%

- Insignificant

N/A Not available

TABLE 5

CASSETTE PIRACY IN THE EEC

Value (in million US\$)

	1982	1984	1986	1987	1988
BELGIUM	0.23	0.3	-	-	0.7
DENMARK	-	-	-	-	-
FRANCE	12.1	8.4	8.4	6.8	2.1
GERMANY (FR)	14.3	10.6	12.9	33.6	30.1
GREECE	19.0	11.3	12.1	6.3	7.8
IRELAND	0.1	0.15	-	-	-
ITALY	17.7	16.0	28.5	32.0	29.4
NETHERLANDS	1.3	1.4	3.8	4.0	4.7
PORTUGAL	4.5	8.4	7.5	9.0	5.5
SPAIN	2.7	28.0	12.3	15.5	7.5
UNITED KINGDOM	9.7	12.0	2.7	3.1	10.9
TOTAL US\$	81.63	96.55	88.2	110.3	98.7
(ECU	83.3	122.3	89.6	95.7	83.4)

- Insignificant

TABLE 6

RECORD (LP) PIRACY IN THE EEC

Units (in millions)

	1982	1984	1986	1988
BELGIUM	0.2	0.07	-	0.08
DENMARK	-	-	-	-
FRANCE	0.3	0.3	0.3	0.05
GERMANY (FR)	1.5	1.2	5.4	1.8
GREECE	-	-	-	-
IRELAND	-	-	-	-
ITALY	1.0	1.5	1.0	1.1
NETHERLANDS	0.9	0.54	0.06	0.06
PORTUGAL	-	-	-	-
SPAIN	-	-	-	-
UNITED KINGDOM	0.7	0.5	0.04	0.06
TOTAL	4.6	4.11	6.8	3.15
% OF TOTAL MARKET	1.6%	1.73%	3.11%	1.5%

- Insignificant

TABLE 7

RECORD (LP) PIRACY IN THE EEC

As a % of total market

	1982	1984	1986	1987	1988
BELGIUM	1.0%	1.0%	-	-	2.5%
DENMARK	-	-	-	-	-
FRANCE	0.5%	0.5%	1.0%	1.0%	1.0%
GERMANY (FR)	1.5%	2.0%	3-4.0%	3-4.0%	3.0%
GREECE	-	-	-	-	-
IRELAND	-	-	-	-	-
ITALY	5.0%	7.0%	1.0%	1.0%	7.0%
NETHERLANDS	3.0%	3.0%	1.0%	1.0%	1.0%
PORTUGAL	-	-	-	-	-
SPAIN	-	-	-	-	-
UNITED KINGDOM	1.0%	1.0%	0.3%	0.1%	0.1%

- Insignificant

TABLE 8

RECORD (LP) PIRACY IN THE EEC

Value (in million US\$)

	1982	1984	1986	1987	1988
BELGIUM	0.7	0.5	-	-	1.3
DENMARK	-	-	-	-	-
FRANCE	2.6	1.9	1.9	1.9	2.5
GERMANY (FR)	8.2	8.1	25.7	19.1	35.9
GREECE	-	-	-	-	-
IRELAND	-	-	-	-	-
ITALY	3.5	7.9	-	-	12.1
NETHERLANDS	7.3	3.4	0.7	3.4	0.8
PORTUGAL	-	-	-	-	-
SPAIN	-	-	-	-	-
UNITED KINGDOM	6.5	3.6	0.1	0.2	0.5
TOTAL US\$	28.8	25.4	28.4	24.6	53.1
(ECU	29.4	32.2	28.85	21.3	44.9)

- Insignificant

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