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Authors and performing artists in the face of the new technologies

by

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AUTHORS AND PERFORMING ARTISTS IN THE FACE OF THE NEW TECHNOLOGIES

by Jan Corbet

Copyright dates back to the 18th century. It acquired its modern form in the 19th century, when printing was the only technology in existence.

Even then it was possible for works to be performed at various remote places, beyond any direct supervision by their authors. This led to the creation of writers' associations as organisations for effectively controlling these multiple uses; without such organisations, even the best laws would have remained a dead letter.

Performing artists were still able to negotiate their remuneration directly, because their physical presence was still necessary for the performance.

With the invention of gramaphone records, radio and cinema, an initial technological wave brought about a change in the situation.

Authors' associations now became fully indispensable, because they alone had the means of maintaining relations with the multitude of users of equipment based on these new techniques and effectively distributing to the right holders concerned the remuneration pertaining to the already enormous quantity of work in use; moreover, they alone were powerful enough to stand up to the operators of these media and secure an equitable remuneration for authors.

On the other hand, the fate of performing artists was already less enviable. These new technologies enabled their performances to be reproduced ad infinitum. Even though their physical prescence was still needed at the beginning, for the recording or broadcast, all subsequent control had become impossible. The performers were at a loss, for legislation had not provided for this situation and their professional associations, set up for a very different purpose from that of authors' associations, were also powerless.

One immediate effect was disastrous technological unemployment. With the passage of time, this unemployment has gradually been reduced, but the legal situation is far from satisfactory (effective legislation exists only in a few countries, and the international conventions on the subject continue to meet with open hostility), while the professional structures are still not comparable to those of authors.

The wave of technological development that has occurred over the past 20 years has again opened up broadcasting and reproduction possibilities on a previously unknown scale, confronting authors and performing artists with new dangers and an unprecedented challenge.

In broadcasting, the new techniques are cable television and communications satellites; in reproduction, they are modern reprography, sound reproduction (cassettes) and audio-visual reproduction (video-cassettes).

Modern industry has permitted rapid popularisation of these technologies. In the industrialised countries, virtually every household has a radio and television set as well as a tape recorder.

In densely populated countries, such as Belgium and the Netherlands, almost all households have cable television. Video recorders, newcomers on the scene, are proliferating rapidly.

It should be pointed out that these various technologies can be combined, which amplifies their impact.

Let us examine the specific problems raised by each one in turn. In so doing, we shall give particular attention to the field of music, since the proceedings of this symposium are intended to contribute to European Music Year.

A. Broadcasting techniques

1. Cable television

Like its predecessor - cable radio - which still exists in a number of countries, cable television involves the transmission of programmes via a network of cables and wires to a large number of subscribers.

Either the programmes may be produced by the network operator himself (or, at any rate, injected by him in the network); or they may be picked up and relayed by him.

In certain countries, this latter process is the only one allowed by the public authorities.

In the case of cable television, the programmes consist mainly of audio-visual literary and artistic works, which explains the particular interest shown in this technique by playwrights and film-makers.

But, of course, other types of programmes may also be broadcast, such as sports and news programmes.

Original programmes might include news bulletins, weather forecasts, information about the stock and foreign-exchange markets etc.

Cable television began its development in the United States as a means of enabling viewers to receive distant signals which could not reach them over the air.

In Europe, it has developed particularly in centrally located countries, such as Austria, Belgium, the Netherlands and Switzerland, where viewers can receive signals from neighbouring countries and thus have a wider choice of programmes. Recently, larger countries, such as France, Great Britain and the Federal Republic of Germany, also began to set up a cable television network or announced their intention of doing so.

a. Legal problems

Let us first consider the distribution of radio programmes. In the countries party to the Berne Union - which include all the Council of Europe member states - there should not have been any problems concerning copyright.

Article 11 bis of the Berne Convention is clear.

Certain countries already had some case-law on cable radio (1), from which cable television does not differ in any essential way.

Accordingly, legal doctrine immediately accepted the applicability of copyright to cable television activities, while showing some hesitation about small networks (2).

However, the interests at stake were considerable, and cable television distributors sought to deny this obvious fact and initiated litigation on the ground that cable television was not a communication or, at any rate, not a "new" one. They also argued that there was no communication (or "new" communication) in the case of a viewer located in the broadcaster's reception zone (the zone in which satisfactory reception is possible with an individual antenna) or in the broadcaster's service area (the area at which the broadcast is aimed, usually the national territory).

All these theories have been dismissed by the Supreme Courts in all the countries concerned (3). But in spite of these judicial rulings, the governments of certain countries seem to be tempted by the theory of exemption in the broadcaster's service area and, in the absence of approval by their courts, they want to impose it through legislation.

Austria has already passed legislation to this effect (4). The Federal Republic of Germany and the Netherlands are thinking of doing the same, and even France, which has traditionally been the champion of copyright, is similarly inclined.

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(1) Supreme Court of the Netherlands, 27 June 1958; NJ 1958, 405
Brussels Court of Appeal, 3 June 1969; RW 1969/70; 1575

(2) In particular: Hermann J. Stern Die Weiterverbreitung von Radio- und Fernsehsendungen; Zürich, 1970.
Joachim von Ungern-Sternberg Die Rechte der Urheber an Rundfunk- und Drahtfunksendungen, Münich, 1973
Karl Neufischer Grundlagen, Begriffe und Rechtsfragen des Drahtfunks und des Drahtfernsehens, UFITA 54/1969,67.
Jan Corbet De auteursrechtelijke aspecten van de kabeltelevisie, in Kabeltelevisie, Universitaire Pers Leuven, 1975, p. 207.

(3) Supreme Court of Austria, 24 June 1974; RIDA, LXXXX, p 152 and 12 November 1979; EIPR 1980, p D - 119
Swiss Federal Tribunal, 20 January 1981; RIDA, 111, p 196
Supreme Court of the Netherlands, 30 October 1981; AMR 5/81, p 111
Belgian Court of Cassation, 3 September 1981 (n.p.) and 25 June (n.p.)
Conversely: Hamburg Oberlandesgericht, 14 December 1978; RFR 1979; but this appears to be a sui generis case.

(4) Act of 2 July 1980. French translation in RIDA, 107, p 199.

To ease their consciences, these countries requested directives, or at least advice and suggestions, from the World Intellectual Property Organisation (WIPO), UNESCO and the Council of Europe.

A group of independent experts, convened by WIPO and UNESCO, came to the unanimous conclusion that cable distribution of radio or television was carried out for an audience different from the one which the broadcast could reach (even though there might be partial overlapping). The group added that, owing to this difference in audience and the fact that traditional broadcasting and cable distribution were two different acts, the latter was "a communication to the public" in the sense defined by copyright law (1).

But when one reads the results of the work by the cable television sub-committees of WIPO, UNESCO and the Rome Convention, to which only government experts belong, one sees that there is not much left of this fine declaration, which was merely noted.

A general consensus is clearly no longer possible, and countries reserve the right to legislate as they please, which may even include the introduction of exemptions of some degree or other (2).

The work of the Council of Europe (Committee of Legal Experts in the Media Field) is not yet finished, but the results are unlikely to be any better.

It is, of course, highly doubtful whether such legislation is compatible with the Berne Convention. Unfortunately, the Berne Union has no organ for enforcing the Convention.

The various cultural reasons adduced to justify exemption in the service area are short-sighted. It is true that the public is to some extent spared, as licence fees are payable only in respect of programmes of foreign origin. But this is to the detriment of national authors, whose works are predominant in national broadcasters' programmes. And national authors are the creators of each nation's cultural identity.

Problems should be more straightforward in the case of cable television's own programmes. Here, the relevant clause of the Berne Convention is no longer Article 11 bis but Article 11, which is, if possible, even clearer. Unlike Article 11 bis, it should be stressed, Article 11 does not allow the Union's member states to introduce a legal licence in this field.

The problems have not yet reached the critical stage: apart from some local schemes, cable distributors do not yet put out programmes of their own in Europe. In some countries, indeed, such programmes are illegal.

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(1) Le Droit d'Auteur (Copyright), 1980, p 138

(2) Documents BEC/IGC/ICR/SC.2 (Part II)/CTV/6 and BEC/IGC/ICR/SC.2 (Part II)/CTV/7.

It should be noted that original programmes may be by satellite. The resultant problems will be examined below.

Performing artists are much worse off than authors. In many countries, they are poorly protected by legislation, if indeed at all.

The Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, 1961) does not explicitly mention cable television. The Convention's concept of "communication" (Article 7) might be applied to cable television, but only as far as its own programmes were concerned, because the text excludes communications which are themsleves already broadcast performances. Furthermore, Article 19 removes all protection from performers who have agreed to the incorporation of their performances in a visual or audio-visual fixation. Lastly, the Rome Convention has been ratified by only a fairly small number of countries (1).

b. Practical problems

As part of the normal exercise of copyright, cable television operating licences are issued in the form of freely negotiated contracts.

The number of righholders with whom cable television is confronted is enormous. Indeed, it is even greater than for broadcasting, because the cable transmits several programmes at once. Furthermore, broadcasting has control over its programmes and can conclude the necessary agreements in good time; cable television, on the other hand, is dependent on broadcast programmes and can act only after the event.

Some believe that this difficulty can be overcome only by legislation, hence by the introduction of a legal licence. This was the solution adopted by Austrian law, as mentioned above. However, the need for such a solution is questionable. It is certainly not desirable and should be considered only as a last resort.

This was the opinion of the group of independent experts as well as of the WIPO, UNESCO and Rome Convention sub-committees. It was also expressed in the official commentary to the Berne Convention, issued by WIPO (2). But it is clear that negotiations are not possible with each individual rightholder. The only effective solution is collective management by authors' associations.

In the field of music, such associations have long existed on a general scale, and they function quite smoothly. The situation is less positive for theatre and literature, and downright unsatisfactory for the plastic arts. Although these fields are our primary concern here, it should be mentioned that efforts are being made to improve the situation. New associations are being created to manage the rights pertaining to works of these kinds (in the Federal Republic of Germany, for example) and existing associations are expanding their activities to include these areas (eg in the United Kingdom and the Netherlands).

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(1) At 1 January 1984, by 26 states, including 11 European.

(2) Guide de la Convention de Berne, 1978, p 82

Through the action of these associations, a model contract has been drawn up at international level. It has already been applied in Belgium, Norway and Sweden and is being used in negotiations in the Netherlands and Switzerland.

One difficulty is caused by the presence of non-organised rightholders. In the music sphere, they are a negligible minority made up of the ever-changing fringe of young novice composers who are not yet members of an association.

There is a bigger minority of this kind among playwrights and plastic artists.

An Austrian law has attempted to overcome this difficulty by introducing compulsory intervention by a collective management body. It is questionable, however, whether this law is compatible with the Berne Convention (1). The model contract mentioned above attempts to offer a remedy by providing cable television, within certain limits, with a guarantee against claims by third parties.

Performing artists are still very poorly organised. In several countries they are not organised at all. This is a truly vicious circle: performers are not organised because their rights are not recognised; their rights are not recognised because the performers themselves are not powerful enough to win them.

For the time being, performers' rights are being managed by broadcasting organisations, which give an undertaking on their behalf in the above-mentioned model contracts. Needless to say, this situation is hardly satisfactory.

2. Satellites

Unlike cable television, satellite technology is in its infancy, at any rate in Europe.

It is necessary to distinguish at the outset between communications or point-to-point satellites (CS) and direct-broadcasting satellites (DBS).

Communications satellites transmit a signal from one broadcaster to another, to a collective receiving system (a cable television network) or to a community of some size of other (village, cultural centre, university etc). The signal is not intended for the general public, which is normally unable to receive it. The necessary receiving installation needed is very bulky and costly, and the signal is very often coded.

Direct broadcasting satellites, on the other hand, emit a signal similar to the ordinary one. The general public can receive it with the aid of a relatively inexpensive installation hardly any more complicated than an ordinary antenna.

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(1) Dittrich Lettre d'Autriche, le Droit d'Auteur, 1981, p 77

Several television programmes are already being transmitted by a communications satellite: a programme of a private British station, SATV; and a joint programme, TV 5, produced by the Satellimages association, comprising the French-language broadcasting organisations TF1, A2, FR3, SSR and RTBF.

A project is in progress in the Netherlands, while a Belgian project has been abandoned. Other projects have been delayed for budgetary reasons. This is particularly true of DBS projects, which are much more expensive. Furthermore, direct-broadcasting satellites raise political, cultural and economic problems (1).

a. Legal problems

aa. Communications satellites

It is not certain whether the international conventions protecting authors (Berne Convention, Universal Copyright Convention) and performing artists (Rome Convention) provide effective protection.

The notion of "broadcasting" is not clearly defined in any of these conventions. The WIPO commentary refers to the Radio Regulations (2), which stipulate that broadcasts must be designed to be received direct by the general public. This excludes amateur broadcasts, telephone calls and Citizens Band transmissions.

Strictly interpreted, this definition means that neither the emission of a signal to a satellite nor its transmission to a central receiving station would fall within the scope of the conventions. Only retransmission of the signal by an earth-based broadcaster, its transmission by a cable system or its communication to the public would be affected.

This conception should be seriously examined because it might well be highly disadvantageous to authors and performing artists. A signal may be received in a country that has not ratified the conventions or whose legislation is very inadequate. Even if this is not the case, action limited to the "receiving" part of the operation cannot always ensure equitable remuneration for rightholders.

Even if the signal sent to the satellite is not directly intended for the general public, it is certainly not intended for the stars!

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(1) Cf. the Rapport intérimaire sur les réalités et tendances de la télévision en Europe: perspectives et opinions, report of the Commission of the European Communities to the European Parliament (document COM (83) 229 final)

(2) Guide, p 78

One convention, the Brussels Convention of 1974, protects only the programme-carrying signal itself and refrains from dealing with authors and performing artists who contributed to the programmes. It therefore offers no remedy to the problem and, besides, it has been ratified by only a few states (1).

bb. Broadcasting satellites

In theory, direct broadcasting satellites should not bring about any new legal problems, because what they involve is undeniably broadcasting in the sense of the conventions.

A problem of establishing liability may arise if the organisation originating the broadcast is not itself the owner or operator of the satellite. This problem goes beyond the framework of this report, but it is certainly not insurmountable.

b. Practical problems

The practical problems stemming from the use of satellites are not fundamentally different from those caused by cable television; indeed, the two systems often go hand in hand.

Direct broadcasting satellites will not even cause any particular problems at all, the broadcasting is just like any other and there is already almost 50 years' practice in this field.

B. Reproduction techniques

1. Aural and visual reproduction

These techniques are in fact fairly old. Problems occurred when technological and industrial developments brought them within the reach of the general public through simplication of the operation (cassettes) and production at low cost.

Tape recorders do, of course, enable original recordings to be made, but surveys in a large number of countries have clearly shown that, in reality, their owners record radio and television broadcasts or copy existing recordings - commercially produced records, cassettes and video-cassettes (2).

This has caused two problems: the problem of reproduction for private use, and the problem of illegal copies or piracy.

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(1) At 1 January 1984, by 8 states, including 4 European.

(2) For example: in the Netherlands, a study conducted in 1976 by the "Stichting voor Economisch Onderzoek van de Universiteit van Amsterdam"; in Belgium, a survey conducted in 1977 by SOBEMAP; in France, a survey conducted in 1976 by SOFRES.

a. Legal problems

aa. Reproduction for private use

Many older laws allow reproduction for private use without the author's permission. But they were enacted before recording equipment came into existence, when reproduction could be done only graphically and, of necessity, partially. In such circumstances, exemption from copyright was acceptable, especially since such reproductions were generally made for academic or research purposes.

With modern technology it is now possible to copy entire works, and when this is done it is usually for mere reasons of entertainment. Obviously this activity goes beyond the scope of the old laws.

Contemporary legal theory now stresses that even if the principle of absolute and exclusive copyright may no longer be applicable in practice, the author must nevertheless retain his right to remuneration.

The two main international conventions allow contracting states to make exceptions to the right of reproduction only on fairly precise conditions, viz (a) on the understanding "that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author" (Berne Convention, Article 9, paragraph 2); and (b) that the author cannot be deprived "of a reasonable degree of effective production" (Universal Copyright Convention, Article IV bis).

Several countries have already brought their legislation up to date in this area, while in others studies are in progress.

The main problem is to work out a system that is not academic but ensures effective protection and can be administered in practice.

The example offered by the Federal Republic of Germany's act of 9 September 1965 still seems to be the best. Section 53 (5) of the act provides for the levying of a licence fee from manufacturers of equipment capable of making reproductions "if work is of such a nature that it may be supposed that it will be reproduced for personal use by the recording of broadcasts on aural or visual media or by re-recording from one aural or visual medium on to another".

This is the only way for an author to obtain remuneration for a use which generally takes place in private, ie at the equipment owner's home. The system might be further improved by instituting a licence fee not only for recording equipment but also for reproduction media, ie cassettes and video-cassettes.

The German example has so far been followed only by Austria (act of 2 July 1980) and Hungary (act of 20 November 1982). Other initiatives are in progress.

Unfortunately, several states have borrowed this idea in order to pass legislation aimed at quite different objectives. The proceeds from the licence fee - which in this case might more correctly be called a tax - disappear in the state's coffers and are used for various purposes, albeit generally

for cultural ones, such as high level musical, literary, dramatic or film productions, the subsidising of theatres and libraries and the creation of jobs for performing artists. These purposes and intentions are, of course, highly desirable, but the use of the licence fee for such ends is highly questionable. The fee should be used to remunerate the rightholders whose works have been used; anything else would be nothing short of expropriation. The cost of pursuing the cultural and social goals in question should be borne by the entire community, not just by authors, who are denied by modern technology of a fair remuneration for their efforts.

This is the opinion of the international bodies which have examined the problem - WIPO, UNESCO (1) and the EEC Commission (2).

The Council of Europe decided only fairly recently to take up the matter, and a survey is being conducted among member governments (3).

As regards performing artists, the Rome Convention (Article 7) also protects them from the fixation of their performances and the reproduction of such fixation. But Article 15 allows states to make an exception with regard, inter alia, to private use, and this right is not subject to the same conditions as those described above in respect of the Berne Convention. However, in spite of this absence of a binding legal foundation for a solution to this problem along the lines adopted for authors, prevailing legal theory, like the international bodies already mentioned, is in favour of the same solution being chosen for performing artists for obvious reasons of equity.

bb. Illegal copies

It is also much easier to reproduce existing recordings on a fairly large scale with modern recording equipment than with the cumbersome and expensive apparatus needed for reproduction by the old techniques (record or film). Certain equipment specially designed to this end can make several dozen copies at once, ie on an almost industrial scale.

Naturally, all legislation condemns these practices, but the penalties are insufficient. Certain laws do not even prescribe any criminal penalties, and most of the laws that do so impose only fines. Moreover, the amounts of these fines have generally failed to keep up with economic trends. These insignificant penalties do not defer dishonest businessmen, who accept them as a calculated risk, since the profits expected are much higher. Law-makers must therefore introduce severer penalties in the form of higher fines as well as prison sentences.

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(1) Joint meeting of the competent sub-committees; documents B/EC/SC.1/VAD/5 and IGC/SC.1/VAD/5. Cf. Le Droit d'Auteur 1978, p 406

(2) L'action communautaire dans le secteur culturel, 1977 and
Le renforcement de l'action communautaire dans le secteur culturel, 1982

(3) Committee of Legal Experts in the Media Field.
Documents MM-JU (82) 7 and (83) 8.

Swifter and more effective procedures should also be provided, for example in the framework of legislation on unfair competition.

b. Practical problems

There are two practical problems: the problem of organising rightholders and the problem of distributing licence fee proceeds.

The problem of organising rightholders is essentially the same as for cable television and satellites, but with one complicating factor. There is still a difference of legal opinion about the nature of a videogram. Is it merely a means of reproduction, like its forerunner, the phonogram, or is it more akin to a film? The answer to this question is important, because it will decide who are to be the rightholders and, hence, how they are to be organised. If no unanimity can be reached on this subject, managing the rights in question will be very difficult, because various solutions will have to be applied simultaneously. Nor should it be forgotten that the showing of films is very different from the showing of videograms and that it is much easier to supervise several dozen or, at the most, several hundred copies of a film than several thousand copies of a videogram.

However, the main problem is that of distributing licence fee proceeds. For cable television and satellites this problem does not arise, because there is always an originating broadcasting organisation which can provide a precise return of works broadcast, on the basis of which rigorous distribution is possible.

On the other hand, it would be inconceivable to demand a return of copied works from all owners of tape and video recorders. This should not, however, be an excuse for not distributing the proceeds to all rightholders or for diverting them to other uses, however laudible they may be. Authors' associations have wide experience of similar situations and have succeeded in providing satisfactory solutions.

Nor is it possible to determine with any accuracy the works exploited in public establishments with mechanical equipment. To ensure the distribution of the proceeds relating thereto, authors' associations conduct sample surveys and rely on presumptions and the laws of statistics. Such a method is perfectly feasible for private recordings. The enquiries mentioned above have shown that the main sources of recordings are, on the one hand, broadcasts, and, on the other, purchased, rented or borrowed phonograms and videograms. Original recordings are a negligible quantity. However, the production figures of broadcasting organisations and of phonogram and videogram manufacturers are known in detail. These could serve as a basis for a satisfactory distribution of the proceeds in question.

Perhaps certain adjustments will have to be made. It is obvious that such arrangements, based on the law of averages favour the current best-sellers. In small countries, in particular, this might bring about over-representation in distributions of popular and foreign works and be prejudicial to works of superior cultural quality and to the protection of the country's own cultural heritage.

Hitherto, authors' associations have been reluctant to intervene ie in the mathematical reality of distribution. But legislators might be

tempted to force them to do so, as modern technology increasingly supplants traditional forms of exploitation (theatres, concerts, cinemas), where a country's own cultural heritage could be better safeguarded.

Certain modifications ought not perhaps to be rejected out of hand, but the main principle of international conventions, viz the assimilation of the foreign to the national, should always be borne in mind.

Everything said above about authors also applies, mutatis mutandis, to performing artists.

2. Graphic reproduction

Graphic reproduction techniques - or, to use a neologism, reprographic techniques - are also fairly old. But their simplification and low-cost production have led to the widespread availability of reprographic devices. Even though it is not so much the general public that owns them, the general public nevertheless has easy access to them in schools, libraries, cultural centres and even department stores.

a. Legal problems

The legal problems raised by reprography, as well as the legal framework set by international conventions, are the same as in the case of aural and visual reproduction. But one may wonder whether the same solutions are available, as the operation of reprographic techniques differs in several ways from the use of aural and visual reproduction techniques.

First of all, the users are institutionalised. Although the ultimate user is, of course, also an individual, the holder of the equipment is a school, library, business, etc. Next, a large part of the material copied is not protected. This is the case with: books and documents belonging to the public domain that are copied in schools and libraries; commercial correspondence in businesses; and official documents in public administrations. Lastly, copies are often made for research or teaching.

For these reasons, instituting a licence fee for such equipment, as in the case of aural and visual reproductions, does not appear desirable. Legislation should merely establish the principle of a licence fee and leave it to the interested parties to negotiate the amount, while reserving the right to fix itself the amount if agreement cannot be reached. Individual agreements suited to each particular case could be negotiated with educational institutions, libraries, public administrations and businesses according to the volumes used.

Apart from the licence fee, legislation should also deal with certain incidental, but nonetheless important, questions, such as what part of a work can be reproduced and how many copies are permissible per user.

Performing artists are not affected by reprography.

Illegal copying for commercial purposes (piracy) does not (yet) appear to have taken on the same proportions as in the case of aural and visual reproduction, but what was said above on this subject also applies, mutatis mutandis, to reprography.

b. Practical problems

Whereas the absence of performing artists facilitates the problem of organising rightholders, the problem is complicated by the presence of other rightholders who have not yet felt the need to organise themselves for the purpose of collectively managing their rights, such as publishers (of literature), researchers, and in general, authors of non-literary works.

Their organisations are still in an embryonic stage, and there is thus the same vicious circle as already mentioned with regard to performing artists in several countries.

The problem of licence-fee distribution will be both simpler and more difficult than in the case of aural and visual reproduction. It will be simpler because it is possible to obtain returns of works or extracts of works, reproduced on the premises of institutional users. More difficult because in this field there are no parallel sources of information capable of providing a basis for a distribution arrangement. All the data needed for distribution will have to be obtained from the users themselves. The only solution possible is a statistically sophisticated system of sample surveys.

The requirement to furnish information on works copied is arousing considerable opposition among the users, particularly educational institutions and libraries (1). There is nothing alarming, however, about a well-organised survey system that imposes a minimum of formalities on a reasonable sample of variable users. Such a system is already operating satisfactorily in the Scandinavian countries.

The same critical observations about the dangers of applying the law of averages as those mentioned in connection with the distribution of licence fees for aural and visual reproductions can be reiterated here.

Conclusions

It seems undeniable that the impact of the new technologies on the exploitation of musical, literary and artistic works and of artistic performances is considerable. Habits have been radically transformed; the place of communication is shifting from a public area to the private home. Technical progress has been and still is very rapid; the evolution of the law is not keeping pace.

It has been pointed out that, in practice, users possess what they consider a legitimate right of free use (2). It is not easy to combat this mentality,

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(1) F Gotzen (ed.) "Reprographie", reports of a seminar on reprography at the Catholic University of Leuven, Kluwer, Antwerp, 1978.

(2) Fiscor L'enregistrement à domicile des oeuvres protégées: une épreuve amère pour le droit d'auteur Le Droit d'Auteur, 1981, p 55

and authorities have always been afraid of taking unpopular measures. But it is too simple to claim that free access to the property of a third party is always in the public interest. The public should nevertheless be aware that it is in great danger of sawing off the branch on which it is sitting.

If the traditional forms of exploiting musical, literary and artistic works and artistic performances disappear, and if the new forms do not allow rightholders to derive a decent income from them, the very sources of creativity may well dry up. This danger is no longer a figment of the imagination in some of the most interesting cultural sectors, such as poetry, theatre and avant-garde music, or in an entirely different sector, scientific publishing.

True promotion of the public interest consists of encouraging the talent of creative artists by effectively protecting them and setting an acceptable price for access to their works (1).

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(1) David Ladd, Register of Copyrights of the United States, observations to the National Council of Patent Law Associations, Washington, 31 October 1981.