NEIGHBOURING RIGHTS

The history of copyright as seen above in chapter on historical development reflects the development of technology. Copyright developed as the means by which 'works', i.e. materials deserving copyright protection, reach the public. At the beginning it was the invention of the printing press which gave copyright its impetus. The protection of printed material against unauthorised reproduction was the main concern of copyright and the right to prevent such reproduction, the reproduction right, was the basic and the main right, followed by the translation right in literary works. Until the second half of the 19th century the printing press was the sole technology involved in taking literary works of all kinds to their public. In the case of dramatic and musical works the main route of the work to its public was live performance and in the case of artistic works, exhibition. In the second half of the 19th century technology created photography, sound recording and silent films and in the 20th century, films with sound tracks, radio and television. These creations entirely transformed the copyright scene. This chapter, therefore, discusses the problem of deciding whether, in the terminology of 'copyright', these new subject matters need and deserve full copyright protection and, in the terminology of the droit d'auteur, whether they constitute 'works' to be protected. It examines the issue of neighbouring rights in the historical retrospect. The role of various International Conventions in this regard is also evaluated. The recent changes in the three countries under study in this regard are also put to close scrutiny.
(A) **HISTORICAL DEVELOPMENT & IDEOLOGY**

It became fairly clear by the first decade of the 20th century that photographs, cinematograph films and sound recordings deserved and needed some protection. Apart from terminology, the debates ranged over the question of who the initial copyright owner should be and what the scope and term of the right should be?

The history of the protection of photographic works over a century has nearly all the ingredients, both under national and international law, which characterise the copyright treatment of new technology and should be studied for that reason. The photograph had the advantage over other creations of modern technology that the 'author' was a physical person but the handicap was that it was doubtful whether taking a photograph demanded sufficient or any originality to qualify as a 'work'.

The Diplomatic Conferences in 1884 and 1885, which led to the Berne Convention, failed to agree on how to treat this new phenomenon. The final protocol of the original text said:

...it is agreed that those countries of the Union where the character of artistic works is not refused to photographs engage to admit them to the benefits of the Convention... They shall, however, not be bound to protect the authors of such works further than is permitted by their own legislation, except in the case of .... bilateral agreements.²

The Paris Diplomatic Conference (1886) brought photographs in
the Final Protocol. National treatment was to be granted to 'photographic works' except for the term. The term could be subject to reciprocity. Member states were to grant such national treatment where photographs were classed as artistic works in that country or had a *sui generis*, protection. A *voeu* was added to the effect that all member countries should protect *photographic works* and 'works produced by analogous process' for a minimum period of 15 years.

In the Berlin Act (1908) photographic works were for the first time included in the text of the Convention, which provides that 'this Convention shall apply to the photographic works. However, they were not classed as 'literary and artistic works', thus leaving both the nature of protection and the term to national legislation.

It was not until the Brussels Act (1948) that photographic works were included in the list of 'literary and artistic works'. The general report says that photographic works had 'reached the supreme rank of general protection'. The question of what kind of photographs were protected was discussed at length, but no agreement was reached.

The Stockholm Act (1967) was again preceded by protracted discussions and changed the text of Article 2(1) from the former text to 'photographic works to which are assimilated works expressed by a process analogous to photography'. The significance of this definition is that although works by any similar process are protected they nonetheless, have to be 'works', i.e. a certain undefined quantum of skill and artistic merit can be required by national legislation. The significance of the change in language is making the manner in which the work was 'expressed' rather than the technical process the decisive
factor in the definition. The Stockholm Convention agreed for the first time on a minimum term for photographic works of 25 years from the making of the work.\footnote{5}

The Berne Convention countries require no formalities for protection but, in the absence of proof to the contrary, the person whose name appears ‘in the usual manner’,\footnote{6} on the work will be presumed to be the another. In these circumstances it must be advisable to put a copyright-claiming symbol, e.g. the name of the photographer and the year, date of publication on all photographs which may be considered ‘works’.

In the Universal Copyright Convention (1952), photographic works are not listed in Article 1(7) in the non-exclusive list of works, but Article 4(3) results in protection for foreign photographic authors if national photographic works are considered artistic works under the national legislation. The term shall not be less than 10 years.

In the member countries of the Universal Copyright Convention, the copyright symbol, the name of the photographer, the year and the date of publication of the photograph are sufficient on a published picture to comply with any formalities required by the domestic law of another member country.

On the national level, the main problem has always been that the artistic character of photographs has been questioned. ‘A mere pressing of a button’, ‘any child can do it’, or ‘it is the camera not the human being that produces a picture’, have been the most common formulations of the doubts expressed and, within the framework of the Conventions, national laws still vary considerably.\footnote{7}
In the United States of America the courts have held most photographs to be protected by copyright, ever since the Supreme Court held in 1884 that they can constitute 'writings' within the Copyright Clause of the Constitution. In that celebrated case, a camera portrait of Oscar Wilde was held to show sufficient originality to qualify for copyright protection. Under the Copyright Act, 1976, photographs are protected as works.

In the United Kingdom photographs are now protected irrespective of 'artistic quality' as works under the Copyright Act, 1988.

In India also photographs are protected by the Copyright Act, 1957. Whether or not they possess any artistic quality.

The only photographs which may now not qualify as 'works' would be, for instance, passport photographs taken by a coin-operated machine, or traffic photographs taken by automatic traffic control cameras on the basis that they lack authorship.

Thus, after nearly a century of debate photographs are recognised as works, provided they contain some original elements. These could be the choice of the subject, the composition of the picture, the angle from which and the light in which they are taken, the choice of technical aids (like filters or lenses), the development, the cutting, or any other human influence. As learned Hand J. put it, 'no photograph, however simple, can be unaffected by the personal influence of the author'.

The next step beyond photograph was taken by the Paris Additional Act 1896, adding to 'photographic works', 'works produced by an analogous process'. this meant films - then in their infancy. The cinematograph film presented the first doctrinal problem of ownership:
who should be the initial owner of the copyright?

The common law legislations answered: the ‘producer’, meaning the company that produced the film. The French and other European legislations answered: ‘the author of the cinematographic’, which in practice means, a plurality of individuals as joint authors ranging from the cameraman (the person ‘analogous’ to the photographer) to the director and actors starring in the film. The problem of how to treat cinematograph films was the first to show the great divide between those legislations, which followed the doctrine of the droit d’auteur (all Europe, with the exception of the U.K., the Republic of Ireland and all Latin America) and those which followed the doctrine of ‘copyright’ (mainly countries of the British Commonwealth including India and the U.S.). The main difficulty is not, as has often been maintained, the lack of originality or of quality of these new works. Right from the beginning, copyright recognised derivative works which by definition demand a pre-existing work. Such works are not original in the sense that they create something out of nothing, like writing a book or a song. Translations and musical arrangements were the first examples of such works to be recognised as suitable for copyright protection. Thus, its derivative nature is not the reason why the droit d’auteur doctrine found it impossible to recognise the producer of a film or data of a phonogram or a broadcast as an initial right owner. Lack of artistic or intellectual input in the making of a film, a record or a broadcast as there is in adapting an orchestra score for piano as much skill and labour as there is in compiling a street directory. This doctrine had never had any difficulty in recognising such adaptors or compilers as initial owners of copyright.
The real difficulty lay elsewhere. It lay in the fact that the adapter and the compiler are, like the photographer, physical persons, whereas film producers, phonogram producers and broadcasting organisations are companies or corporations. The difficulty is emphasised when one contemplates the moral, as opposed to the economic rights. Moral rights, it is said, which are based on the expression of the author’s personality and his intellectual link with his work, can’t exist in a company or corporation. The ‘copyright’ legislation of common law countries which, while recognising some moral rights, do not put much emphasis on them, they did not consider this difficulty insuperable and gave a copyright to the producer of a film or phonogram. In the light of the history of ‘copyright’ this is not illogical. The first copyright owners were ‘printers’, in modern terminology publishers, of books who combined artistic skills and judgement with technical skills and made the initial investment. They were individuals in the 17th and 18th centuries but in the 19th century many became companies. Thus, the copyright resided in the company. When broadcasting was invented ‘copyright’ legislations had no difficulty in granting a copyright to the broadcasting organisations which were responsible for creating and disseminating the programmes.12

In most countries copyright is a creature of statute. so that new copyrightable matter has to be protected by new legislation whereas the law of torts was largely, although not entirely developed by courts. However, in the history of copyright too there are exceptions to development by Statute. In France, for instance, the development of the droit d’auteur was left entirely to the courts for over a century and half
(between the first law of 1783 and the second of 1957), a period of rapidly developing technology. Thus, list of copyright owners has been added to from time to time, by legislation but sometimes by the courts, as new technology demanded it. The droit d’auteur has roots which are different from the common concept of ‘copyright’. It stems from the doctrine of natural law and the ideas of French Revolution. This resulted in a highly personalised approach to copyright which links the work with the personality and individuality of author. The difficulty of recognising such rights as dwelling in a limited company thus becomes almost insuperable.

When faced with the new technology the droit d’auteur jurisdictions reacted differently to each new invention. The photograph could still be fitted in by giving the original rights to the individual who takes the photograph. Nowadays, most photographs that have commercial value are taken by employees of companies (press, news agencies etc), but that can be dealt with, by the law under the separate heading of ‘employed author’. Films produced a major problem. It was resolved by a fiction, i.e. that a film is no more than a series of thousands of photographs stuck together, and cinematography was, until 1948 (Brussels Act), classed as a 'process analogous to photography'. That makes all the individuals who participated in this process, or at least most of them, co-authors: cameramen, cutters, actors, (at least stars, directors, scriptwriters, composers of music, etc. The film producing company has to acquire these rights from individual co-authors. This is very cumbersome but still feasible. The sound engineer or the 'producer' who is in charge of recordings in the studio or the performing artist as
the co-authors of a recording was felt to be stretching the point too far and the experience of treating films in this way had not been too encouraging. Even so, the making of a recording in a studio might still have been accepted as a team effort by named individuals. When it came to the making of a broadcast, the analogy became too strained. A broadcasting corporation is too large an enterprise to conceive as a team of co-authors. Thus, on the international plane for phonograms and broadcasts a new solution had to be found which would be acceptable to droit d' auteur countries.

The International compromise which led droit d' auteur but is nonetheless an intellectual property right and, as such, it is close to, connected with, or neighbouring or, the droit d' auteur. Italian law, one of the first to recognise these new rights in 1941, called them, diritti conessi (connected rights), German law verwandte schutzrechte, (related rights) French law droit voisins (neighbouring rights). In English Law the term "neighbouring rights" is now most commonly used. The Indian law does not use term "neighbouring rights".

The difference between granting these right owners a copyright or a neighbouring right can, as Prof. Francon remarks be both in space and in time:

A given work may enjoy a copyright in one country, but only a neighbouring right or related right in another. This is the case with photographs, enjoining a copyright in France, but only a neighbouring right under several other laws. Other works, formerly granted only a neighbouring right, may one day become the beneficiary of a copyright.
He adds: "this is, perhaps, the present direction of French Jurisprudence with respect to performing artistis". These were prophetic words, which seem to have been headed by the cour de cassation in 1982 in the Spedidame case. This concept has now been put into statutory form and rights akin to both copyright and neighbouring rights have been accorded to performers and producers of phonograms in the French legislation of 3rd July 1985.

In International law the first move towards neighbouring rights was made in 1928 by the Rome Revision Conference of Berne Convention when Conference, although refusing to grant a copyright to performers, as had been suggested, expressed a voeu at the end of the Conference that members of the Berne Convention should "consider the possibility of measures intended to safeguard the rights of performers". It was envisaged that a Convention or later two Conventions (one for Performers and Producers of Phonograms and one for Broadcasting Organisation) should be "annexed to the revised Berne Convention". Meanwhile, some countries, e.g. Austria in 1936 and Italy in 1941, granted neighbouring rights to performers and record producers. At the Brussels Revision in 1948 three voeux were expressed pointing in the same direction. On this occasion most states took the view that the rights of performers, phonogram producers and broadcasters were inter-linked and that a fair and equitable balance between them could only be achieved in one instrument. This view was widely shared and led, more than two decades later, to the signing of the Rome Convention in 1961. It was followed by the Phonogram Convention 1971, giving phonogram producers further rights which could be implemented by
national legislation granting a copyright or a neighbouring right and by
the Satellite Convention 1974 which took broadcasting rights into the
realm of public international law.

The term neighbouring rights in the narrow sense covers only the
rights of performers, producers of phonograms and broadcasting
organisations. In a wider sense it also covers other rights similar to
copyright, such as rights in photographs in certain countries, the rights
of film producers in certain countries or the rights in first editions of
books or typographical arrangements. These others rights are referred
to as related rights.

(B) RELATIONSHIP BETWEEN AUTHOR'S RIGHTS AND
NEIGHBOURING RIGHTS:

Neighbouring rights are nearly always rights in derivative
works because they presuppose a pre-existing work. Performers are
usually only protected if they perform works (thus excluding variety
and circus artists). Phonograms are nearly always recordings of work
(birdsong or sound effect being the unimportant and rare exceptions).
Broadcasts consist largely of performances of works (the broadcasting
of sporting or public events being some of the notable exceptions). Thus,
the comparison to be made is with copyrights in other derivative works.

Derivative works can be of many kinds. The first, historically,
was the translation of a work of literature into another language and
transcriptions of musical works (either upwards, e.g. orchestrating a
vocal or piano score, or downwards, e.g. by reducing an operatic score
to a version for the piano). Later followed the derivative works which
are achieved by changing the medium e.g. novel into film or play into radio or television play.

There is little merit in the argument that these works, as derivative works, are inferior because they demand only technical and not artistic skills. It is difficult to argue that there is more artistness in transposing the orchestral score of the triumphal march from Aida for piano than in making a recording. The argument becomes untenable when giving a copyright to the photographer who (sometimes at any rate) only presses a button, and denying it to the maker of a film. The only distinction which is valid beyond argument is that the initial copyright owner in the case of neighbouring rights is in most cases a corporate body (with the notable exception in the case of performers) whereas the initial owner of other copyright is almost invariably a natural person (with the notable exception of the case of employed authors), whereas this - the only valid distinction - does not justify division of all copyrights into copyrights stricto sensu and neighbouring rights, it does have several consequences:

(i) Moral rights will, with the exception of performers rights, by definition in most cases be confined to authors

(ii) The scope of copyrights is, also by definition, wider than the scope of neighbouring rights, which encompasses only three categories of rights: the reproduction rights, the public performance rights and the broadcasting rights.

(iii) The term of neighbouring rights is, again by definition, almost invariably shorter than that of other copyright, as 50 years from the death of the author is always longer than 20 or 30 or even 50 years, from
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The quality of the reproduction right in neighbouring rights is often equal to a copyright. The phonogram producer, for instance, has the same absolute right to prohibit the unauthorised copying of his phonogram as the author of a book has to prohibit the unauthorised copying of his book. On the other hand performance right of the author is in many countries stronger than that of the neighbouring right owner. The author usually has an absolute right with the exception of broadcasting, where Article 11 bis of the Berne Convention permits a compulsory licence which, if a country makes use of the provision, may reduce the author's right, in effect, to a right to equitable remuneration. The phonogram producer or the performer has in most countries a right to equitable remuneration, such as under Article 12 of the Rome Convention.

Three fears were expressed on behalf of authors with regard to the establishment of neighbouring rights. The first was that some countries may protect neighbouring right owners while not protecting the original authors. This fear was allayed by Articles 23 and 24 of the Rome Convention which provide that a country can only ratify the Rome Convention if it has already ratified either the Berne Convention or the Universal Copyright Convention. The second fear was that where several authorisations were required, one from the author and one from the neighbouring right owner, the former may give his authorisation but the later may withhold it, thereby frustrating the use of the work and depriving the author of his royalty. An example would be a pianist performing a copyright work in a concert hall but objecting to the
recording of the concert, thus, depriving the composer of his royalties on the sale of the record. Such cases are rare and, in practice, the pianist will only object if he fears the conditions are not conducive to a good recording, in which case the moral right of the author will suffer together with the reputation of pianist.

The third fear was most substantial of the three and concerned the performance right. If a user has to pay two royalties for the same performance, one to the author and another to the neighbouring right owner, it was feared that he would only be prepared to pay less to the author. This is known as the cake theory. There is supposed to be only one cake and if the neighbouring right owners get a slice of it, the slice of the other would be smaller. Practice has proved these fears to be unjustified. The Intergovernmental Committee of the Rome Convention finally laid this fear at rest in 1979. After a very thorough investigation of the problem their report says:

> Several states members of the sub-committee expressed the firm view that the evidence in their countries, and the evidence available to the sub committee, indicates conclusively that copyright royalties have not decreased as a result of the remuneration paid to performers and producers of phonograms. It is, therefore, clear that there is no evidence to support the proposition that author's revenue has decreased as a result of neighbouring rights. (emphasis supplied).
(C) **OWNERSHIP, SCOPE AND TERM OF NEIGHBOURING RIGHTS:**

As to ownership, invariably it is a company or corporation in the case of phonogram producers and broadcasting organisations. It is usually an individual or a group of individuals (orchestra, chorus, popgroup) in the case of performers although some orchestras have formed companies for business purposes.

In the case of author's rights the scope of the right is a large bundle of rights which comprises apart from the basic reproduction right, *inter alia* the translation right, the performance right, the broadcasting right and the film rights. The scope of these new rights, whether they are classed as copyright or neighbouring rights, is confined to the reproduction right, the performance right and the broadcasting right.

Throughout the history of copyright the duration of the right has always been 'at the heart of the policy argument'. The statutory term represents the compromise between the interests of the rightowner and the public interest in the widest possible access to all works. For published works, most countries have now accepted the '50 years after the death of the author' term of the Berne Convention for works not published in the author's lifetime the period is usually 50 years from the end of the year in which the work was first 'published'. It is the latter type of term, i.e., a number of years from publications, that has become the rule for neighbouring rights. In the case of phonograms and broadcasts where the original right owner is not a physical person this is the only logical solution.

The minimum term under both the Rome Convention and the
Phonogram Convention is 20 years. Under national laws the term varies from 25 years in the Nordic countries and Germany, 50 years in the U.K. and India to 75 years in the U.S.

In the case of performers, the starting point of the term is in most national laws the time when the performance took place or when the performance was fixed. As performers, unlike producers of phonograms or broadcasting organisations, are physical persons with a natural lifespan, such a term, if it is as short as 20 years, leads to abnormal situations. When the performer who has made a recording in his twenties or thirties reaches his forties or fifties his new and protected recording may have to compete in market with his own earlier recording which are already in the public domain.

Thus, the rights in the new materials are always of shorter duration by definition and sometimes much shorter.

(D) NEIGHBOURING RIGHTS & PERFORMERS:
(i) Definition of Performer:

The classical definition in international law is actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. The definition is wide in that it includes performances of works in the public domain, but narrow in that it excludes all those who don't perform works, e.g. variety artists, acrobats, sports persons or extras on stage or in films.

It is rather paradoxical that although of all neighbouring rights owners - performers are closest to derivative authors such as translators of literary works or adaptors of musical scores who receive full authors rights are in many jurisdictions and in international law the weakest.
Unlike other neighbouring rights owners they are physical persons, like authors, and it is difficult to see the essential difference between the work of a derivative author, say a translator, or an arranger, and that of performer.

There seems to be two reasons for the weakness of the performers position in law. The first is historical and social. Actors or 'strolling players' were regarded as vagrants by the law during the formative period of copyright. Adam Smith, in his work gave players, buffoons, musicians, opera-singers, opera-dancers as classical examples of unproductive labour. Modern times have removed this social stigma and from the bottom of the social scale star performers have gone to the top and some have become the idols of modern society. The second reason is historical and technological. Adam Smith goes on to say: "The work of all of them perishes in the instant of its production". This was perfectly correct in his days. This reason was, however, removed with the invention of records - films, radio and television, from the time when performances could be fixed and the fixations both reproduced in large numbers and performed to large audiences, thus involving the two basic rights in the copyright bundle, the reproduction right and the performance right, the second reason too had been removed. The question of what, if any, rights performers, should have in law has been debated among jurists and legislators ever since.

When eventually some protection was given it took different forms in different countries. Germany, was the first country to follow the way shown by the Berne Convention. When faced with the new phenomenon of the film, the Convention declared it a process analogous
to photography. Although this is like saying that modern man is analogous to the Neanderthal man it seemed to serve the purpose of appeasing the traditionalists. Granting a right appeared not as an entirely new departure but as a gradual development. German Law followed this example in the field of performer's protection. It said, in effect, that the performance of a musical work by a performer is analogous to an adoption of the original work.\textsuperscript{22} The German Courts had, in 1940, when called upon to interpret the performance right of recorded performances, held\textsuperscript{23} that the right was given to all artists as performers of work from the start to the last violin in the orchestra and the last member of the chorus in an opera.

In Italy, the Copyright Law, 1941, one of the first laws to use the term neighbouring rights didn't give performers a right to allow or forbid the fixation of their performance but a right to equitable remuneration if their performance was recorded or broadcast.\textsuperscript{24} The term is 20 years. By subjecting the right to a kind of compulsory licence and giving it a much shorter term the law indicated that it was not quite like a droit d'auteur but a neighbouring right.

In France, Statute law completely disregarded performer's rights as other neighbouring rights. The laws of 1791 and 1793 were not revised until 1957 and then proposals for performer's rights were rejected. However, the courts recognised a performer's droit moral as early as 1937\textsuperscript{25} saying that whereas performers had no copyright it was equitable to recognise a right in their personal creation, i.e., the interpretation they give to their roles, which is the sole manifestation of their art perceptible by the senses and thus punished.
Then in the landmark judgement in *Spedidame* case, the *caur de cassation* (supreme court) held that:

Whereas artists do not benefit from the protection of the Copyright Law 1957 they are nonetheless entitled by virtue of the rules of the common law to demand that their performance is not used for a different purpose from that which they have authorised.

Finally, the law of 1985 put the position into statutory form giving the performer the basic rights he has under the Rome Convention which France has subsequently ratified.

In the United Kingdom, performers were not given either a copyright or a full neighbouring right but protection by way of criminal sanctions. The offence is to make a phonogram or a film of a live (unfixed) performance without the consent of the performer or to broadcast such a live performance (including diffusion, by wire) without his consent. In each case, to constitute the offence the user has to act both knowingly and without the written consent of the performer. The advantage of this method of protection is immediacy. A private prosecution for an infringement can be undertaken by the performer and be concluded by a fine very quickly. The disadvantage is the practical difficulty of securing the presence of the artist, particularly foreign artists, in court to give evidence and the fact that penalties, being fines, have constantly to be kept under review because of inflation otherwise they cease to be an effective deterrent.

Faced with the problem of illicit recording of live performances
(known as bootlegging) the courts in the U.K. had to reconsider both the scope of the general economic torts and the extent to which injunctive relief may be available against the commission of the criminal offences. It has been held in the U.K. that where a performer's performance has been recorded without his permission and phonograms made from this illicit recording and sold, he is entitled to an injunction.

Under the 1988 Copyright Act, rights similar to copyright are conferred upon performers in relation to their live performances and recordings of these performances. India has also followed this in 1994 Amendment of Copyright Act, 1957.

In Latin America, Mexico was the first country to give performers rights which are akin to author's rights and subsequently other Latin American countries followed the suit.

(ii) Rights of Performers:

The basic rights given to performers under various legislations are the right to:

(a) Control the fixation of a live performance;
(b) Control the broadcasting or communication to the public of a live performance;
(c) Control subsequent reproductions of the first fixation;
(d) Control the broadcasting or communication to the public (including communication by cable) of such a fixation.

The first two rights are usually expressed as a right to authorise or forbid. They are absolute rights. The right to 'control' subsequent reproductions of the first fixation is under the Rome Convention
exercisable only if the reproduction is made for purposes different from those for which the performers gave their consent.\textsuperscript{52} The right to control the broadcasting or public performance of the first fixation, i.e., a phonogram, is also invariably granted in the form of an equitable remuneration for the use of phonogram on the air or in public. This is a form of a compulsory licence. It is justified by the fact that the user would not be able to obtain the authorisation of the performers for each separate use.

In view of the fundamental differences of approach between national legislations, the first international instrument, the Rome Convention, adopts the solution of the lowest common denominator. Performers have 'the right to prevent' unauthorised fixations of their live performances. This can be implemented on the national level by an absolute right (e.g. Germany, Japan) or a neighbouring right (e.g. the Nordic countries) or protection by criminal provisions (e.g. the United Kingdom until 1988\textsuperscript{33}).

Some countries grant certain moral rights to performers in respect of their performances. Thus, they have the right to oppose any diffusion transmission or reproduction of their performance which might be prejudicial to their honour or reputation.\textsuperscript{34} These provisions echo Article 6\textit{bis} (1) of the Berne Convention equating the performer to an author in this respect. However, in International Convention law there is as yet no recognition of such a moral right.

It has been said that even the granting of a copyright or a neighbouring right doesn't fully compensate the professions of performance, particularly musicians, for the fundamental changes
brought about by the new media (films, records, broadcasts), usually referred to as technological unemployment. Once a performance is recorded it can be repeated in public without the necessity of engaging the performer whose performance has been recorded or indeed without the presence of any performer at all. Performers have, thus, lost countless employment opportunities.\textsuperscript{35} It is also being brought out\textsuperscript{36} that the performance right in their recorded performances benefit the stars for more than the rank and file musicions who rarely get into a recording or film studio and, therefore do not benefit from any additional income for the profession as a whole. The exercise of any rights performers have under various national legislations suffered from the additional difficulty that quite frequently many performers are participating in one performance. Provision had, therefore, to be made for the collective exercise of their rights and collective societies formed for the purpose.

There is no doubt that there is growing sympathy among legislators for the idea of legal protection for performers. The most recent laws, e.g. in France, Spain, U.K. India, and Latin American countries clearly show such a trend. The impetus comes undoubtedly from the Rome Convention, but the most recent legislation shows a tendency to grant more extensive rights than the Convention provides, such as moral rights for performers in Spain and Latin America and a wider definition of ‘performers in India’ than the Rome Convention (article 3), which is restricted to performers who perform literary or artistic works. The new definitions include variety artists but not yet sportsmen and women. On the other hand, the development of technology, such as digital recording
and satellite broadcasting, has underlined the serious weakness produced by Article 19 of the Rome Convention which has the effect that as soon as a performer consents to the inclusion of his performance in a film (including cinema, television or videogram), the protection which Article 7 of Rome Convention ceases to apply and he can’t prevent any further uses made of the fixed performance. Thus, once released the fixed performance can be used in ways which the performer has not agreed to or which were not even within his contemplation.

His only remedy is against the maker of the original film if the contract provides such a remedy. This leads back to the position before the Convention, when the only protection of performers was contractual. It makes the rights of the performer dependent on his bargaining power. The ‘Star’ will alone be able to insist on terms protecting his or her interest. The relatively unknown performer will not. His only remedy lies in collective bargaining by performers union. These collective agreements are frequently negotiated as ‘multi-media’ agreements under which the first user accepts responsibility for subsequent uses of the performance.

(E) NEIGHBOURING RIGHTS & PRODUCERS OF PHONOGRAMS :

(i) Legal Status of Phonograms :

In the early days, a phonogram was no little more than a recording of sounds, a kind of fascimile reproduction of a performance of musical or literary works, or both, involving only technical skills, But gradually advancing technology made record production an act form which
probably demands as much creativity as any other derivative work. Phonograms were first included in the list of 'work' in the United Kingdom in 1909; other common law countries such as India and Australia followed.

(ii) Rights of Producers of Phonograms:

Producers of phonograms enjoy the three basic rights in the 'bundle of rights' granted to right owners: the reproduction right; the public performance right; and the broadcasting right.

The reproduction right is a right *erga omnes* to authorise or prohibit any reproduction of a protected phonogram. The Rome Convention gives the right to prohibit reproduction whether such reproduction is 'direct or indirect'. These words replaced the words 'directly or when broadcast' and it was understood that 'indirectly' covered reproduction from a matrix (in case of disc) or from a pre-existing phonogram, such as a tape or from a 'recording off the air'. The last mentioned method of reproduction is known as 'home taping', an activity which is simple with the equipment now available in the market in most countries. Home taping would be contrary to international law in countries which have ratified the Rome Convention unless it is covered by the private use exception of Article 15(1)(a) which is a matter of national law.

If the phonogram which is home taped contain works protected by copyright, usually musical works, it also infringes the author's right under the Berne Convention. The 1967 Revision Conference of the Berne Convention made the meaning of Article 9 (2) very plain:
If it is considered that reproduction conflicts with the normal exploitation of a work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author.

It seems clear that the practice of home taping both 'conflicts with a normal exploitation of the work'. Therefore, the practice doesn’t seem to be covered by fair use exception but is an infringement. The Whitford, Committee in the U.K. came to the same conclusion. We reject the suggestion that fair dealing should be extended generally to permit some free audio and video recordings because fair dealing to an extent such as is accepted as reasonable for literary works, for example, would not satisfy the need for most users, while a widening of the term, would create a virtual free-for-all with copyright owners getting no benefit.

However, the exercise of the reproduction right both by the author and by the phonogram producer in these circumstances would be an intolerable intrusion in the privacy of the user’s home and the right is, therefore, unenforceable in practice. The practice of home taping is a good example of new technology eroding the most basic right of the copyright owner, the repuduction right, to such an extent that only legislation can restore the balance. The only practical legislative
approach seems to be the one first adopted in Germany. The law of the erstwhile Federal Republic of Germany provides for a royalty on the recording equipment and for a royalty on the blank tape used for the recording. Under these provisions a royalty is based on the sale of each piece of recording equipment or on the sale of each blank tape or both. The royalty is shared by authors, performers and phonogram producers. Similar solutions were subsequently adopted in other major European countries such as France and Spain. In the United Kingdom, such a solution was rejected in the Copyright Act of 1988, so was in India in 1994 Amendment.

The reproduction right in phonogram applies to parts of phonograms since, as the Rome Convention Report states, 'the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram'. This is important as it prevents the copying of one track of an LP (long playing record) and probably even part of a track if the part is substantial.

The right owner is the entity which first fixes the sounds. This excludes both the technicians or operators employed by the recording company and any entity merely pressing records, i.e., duplicating the first fixation which is the original recording.

The protection under the Phonogram Convention is on the one hand, wider and, on the other, less strictly defined. It is wider because it gives a distribution right and a right against importation of illicit reproductions as well as a reproduction right. It is less strictly defined because the means of implementing the reproduction right is left to national legislation which is free to ensure protection by such means as
the law of unfair competition without granting a reproduction right. However, most legislations now give the phonogram producer a reproduction right.46

(iii) Rental Rights:

New technology in the form of compact discs (CD) and digital audio tape (DAT), apart from improving the quality of the sound base, created a much more durable phonogram. They can be played many times without deteriorating. This makes it possible to offer phonograms for hire as well as for sale. A new trade in renting phonograms developed first in Japan47 which introduced a rental right in phonogram in 1985. In U.K., U.S.A., France and Spain phonogram producers have an absolute right to authorise or prohibit the rental of their phonograms. This new right is yet another right which can probably only be exercised collectively by a collective society on behalf of all right owners.

(iv) Remedies for infringement of the Reproduction Right in Phonograms:

As the copying of pre-recorded tapes is now a very simple operation which almost anybody can carry out and even the illicit copying of discs which requires a plant can be made extremely profitable, 'piracy' (illicit copying for commercial purposes) of phonograms is today practised in many countries, with far larger number of copies, than piracy of books and printed matter ever had been. Thus, enforcement of the reproduction right and the remedies available to authors and phonogram producers at the national level have become of prime importance.
Like other copyrights, the copyrights and 'neighbouring rights' of producers of phonograms and performers are usually governed by contracts and these contracts provide contractual remedies in cases of breach. These remedies include injunctions and action for damages. But the distinguishing feature of copyright is that, being a right *erga omnes*, it can be enforced against all types of persons with whom the owner of copyright or the neighbouring right has no contractual relation, but who has infringed his rights.

(a) **Civil Remedies** :

(I) **Search & Seizure** :

In the United kingdom as discussed at length in the next chapter the courts make orders *ex parte*, after hearing *in camera* and in the absence of the defendant, ordering the defendant or the occupier of his premises to permit the plaintiff and his lawyer to inspect the defendant's premises. The order enables the plaintiff's lawyers to take possession of infringing copies and documents and other relevant materials or require the defendant to keep infringing stock, thus securing or preserving the evidence. The order is known as an 'Anton Piller Order', named after one of the first reported cases in which such an order was made.48

(II) **Injunction** :

This is an order made by the court directing the defendant to desist or refrain from committing acts which infringe the plaintiff's copyright or neighbouring right. Such injunctions can be granted at the end of the trial (Final injunctions) or at the outset (interlocutory injunctions). For wilful breach of an injunction the courts can impose
fines or even imprisonment.

It is the interlocutory injunction which is most effective because of its immediacy, speed and low cost. In practice, it often has the effect of settling the case, as the defendant, deprived of the opportunity to make a quick profit, desists and allows final judgement to be given against him without trial. This is particularly so in the case of phonograms of popular music or newspaper articles or topical broadcasts where at the end of the trial, many months later, the infringing copies would no longer be of much value. The courts require an undertaking from the plaintiff to make good the damage which may be caused to the defendant should the defendant succeed at the trial. Then the remedy of Delivery up is usually coupled with an injunction which orders the defendant, to surrender infringing copies and the machinery or other equipment used in the process of production.

(III) Compensatory Remedies:

Generally, the purpose of an award of damages is to restore the plaintiff to his position before the infringement. Such damages are thus compensatory. However, the courts can also award punitive damages in copyright cases. Whereas the measure of damages in the case of compensatory damages will generally be what the plaintiff could have charged for a licence or the value of lost sales or royalties, the measure of punitive damages is always at the discretion of court. They are awarded in cases where the breach is flagrant and the defendant stood to make substantial profits from his conduct, as 'it is necessary for the law to show that it can not be broken with impunity'.
(b) **Criminal Remedies**

In the countries where the producers of phonograms have a copyright or a neighbouring right, the law usually provides criminal as well as civil remedies by making infringement an offence. Such offences usually show three characteristics:

(I) a public prosecution will, generally, only be undertaken on the application of the injured party. In countries where the legal system permits private prosecutions the injured party can itself prosecute;

(II) the prosecutor must prove that the infringement was intentional;

(III) the primary sentence will be a fine and only in cases of recidivism or exceptionally large scale infringements a prison sentence may be imposed.

Criminal remedies have three disadvantages, first, the strict proof of copyright is sometimes very difficult; secondly, fines fixed by law become derisory in countries with high inflation rates and have to be periodically revised or indexed to remain effective; and thirdly, in many countries the courts are reluctant to impose prison sentences for copyright offences.

(V) **Performance Rights in Phonograms**

This right is granted either to the phonogram producer or to the performer or to both. In many cases the right is subject to compulsory licence being expressed as a right to *equitable remuneration*.

(a) **The Public Performance Right**

Producers of phonograms usually have a right in the public
performance of their phonograms. This takes the form either of an absolute right or of a right to equitable remuneration when protected phonograms are played in public. This right can be effective if exercised by a collective society.

(b) **The Broadcasting Right:**

Producers of phonograms have in many countries a right in the broadcasting of their phonograms which can be an absolute right or can take the form of a right to equitable remuneration. This right is always exercised by a bulk licensing contract with a broadcasting organisation or with a group of broadcasting organisations.

Performers also have in many countries a right in the broadcasting of their recorded performances which has also taken the form of a right to equitable remuneration. It also has to be exercised in conjunction with record producers as the user is only bound to pay *one single equitable remuneration* to both.

(F) **BROADCASTING ORGANISATIONS:**

In order to understand the relative dearth of private international law relating to broadcasting organisations, one must look at the nature of broadcasting organisations and the history of their international relations. Among the beneficiaries of the Rome Convention, performers are private individuals and phonogram producers are private or public companies whereas broadcasting organisations are either departments of state (usually in authoritarian countries), public law corporations with a charter (mainly in Western Europe), or commercial organisations (mainly in North and South America) which need a licence from the
government in order to be able to operate. Thus, their dependence on the
government or their proximity to the government and also their influ-
ence on the government is far greater than that of either authors or
publishers among the copyright owners or of the other two neighbouring
right owners. They perform a public service and their task is cultural
and artistic as well as being a leading agency of news and current
affairs. It is, thus, not surprising that the international problems being
encountered by broadcasting organisations with regard to their rights
tended to be dealt with either at the diplomatic level or by public
international law, whereas copyright is, in its essence, the exercise of
a private right. Thus, in the early days of broadcasting (sound broad-
casting) in the 1930s and 1940s the interest of broadcasting organisations
in solutions based on copyright was not of very great importance to
them. The Rome Act, of the Berne Convention 1928 had established the
broadcasting right of copyright owners *jure conventionis* and broad-
casting organisations regarded themselves primarily as users of copy-
right material.

At the Brussels Revision Conference of the Berne Convention in
1948 the broadcasters played the role of the largest user achieving a
compulsory licence and other user benefits.

Immediately, thereafter, and in the 1950s, broadcasters repre-
sented by the EBU (European Broadcasting Union ⁹⁸) actively partici-
pated in the preparatory work for the Rome Convention. This period
did, however, also see the advent of television which made broadcasting
organisations the largest single user of copyright of all kinds (news,
literature, drama, music etc.).
In the 1950s and 1960s broadcasting organisations felt several anxieties about their rights in their broadcasts:

First, there was a widespread fear in the 1950s that hotels, restaurants and other public places would increasingly charge entrance fees from their customers (either openly or through increased charges for food and drink or other services) for watching television programmes. Thus, an European Agreement on the Protection of Television Broadcasts which was concluded in 1960 and is still in force. This threat to the rights of broadcasting organisations subsided as soon as most households acquired televisions sets and the demand to see television programmes in public places diminished.

Secondly, cable networks and community aerials were taking television programmes, they are known as CATV (Community Antennae Television), and making them available to private homes charging subscription fees but denying the rights of broadcasting organisations in their programmes. Broadcasting organisations pleaded for a right against cable operators at the Diplomatic Conference for the Rome Convention in 1961, but failed because hardly any of the countries represented had any legislation to support such a right. With the exception of the European Agreement for the Protection of Television Broadcasts, the problem is still largely unreasolved at the international level.

Thirdly, when first communication satellite were launched the major broadcasting organisations represented by the EBU were concerned that other less scrupulous broadcasting organisations would take their programmes off the satellites instead of entering into agreements with the organisation originating the programme and paying royalties or
at least entering into programme exchange agreements. They succeeded in achieving the Satellite Convention 1974 but during the preparatory stages, due to legal and political difficulties, copyright or neighbouring rights protection had to be abandoned and replaced by public law commitments to be entered into by ratifying governments. The subject of protection is not the programme, which should be the subject of either a copyright or a neighbouring right, but the programme carrying signal. Thus, with respect to this problem at any rate, the broadcasting organisation were forced to return to protection by public as opposed to private international law, which is where they had started from half a century earlier.

However this history is not concluded, because with the advent of direct satellite broadcasting, when broadcasts transmitted via satellite are receivable in private homes without the help of a receiving earth station, the protection of the programme (as opposed to the signal) once more returns to the sphere of private international law.

(i) **Broadcasting Via Satellite**

Recent technological development and, in particular, broadcasting via satellite have made it possible for television programmes to reach a wider public than originally intended outside the borders of the originating broadcasting organisations. This has created both political and legal problems. The political problem is how to regulate programme content without resorting to censorship of one kind or another. This has been addressed in the
European Community by a Draft Directive on Television Without Frontiers and in a Draft Convention by the council of Europe. The tendency is to impose minimum programme standards, protect children, guard against obscenity and try to encourage European Programme Production. Only the legal problems are examined here.

There are two types of satellite broadcasting direct broadcasting by satellite (DBS) and transmission by fixed service satellite (FSS). DBS is broadcasting for direct reception by members of the public, although the signal is transmitted via a satellite. FSS, sometimes referred to as point to point broadcasting, is the transmission of the signal via satellite to a ground station from which it is rebroadcasted or distributed by cable.

(ii) Broadcasting Via - DBS:

Following question have to be considered in this regard:

(a) is broadcasting by DBS broadcasting as defined by the International Conventions?

(b) where does broadcasting by DBS take place?

(c) which national law (or laws) is applicable?

(d) which broadcasting organisation is responsible for compliance with appropriate law?

(e) what are the rights of copyright owners and neighbouring rights owners in broadcasting by DBS?

As far as first question is concerned it is generally accepted that broadcasting via DBS is broadcasting as defined in Interna-
tional law and that the satellite is for legal purpose not different from a territorial transmission although it is orbiting in space.

The ITU (International Telecommunications Union) Regulations define broadcasting as 'a radio communication service in which transmissions are intended for direct reception by the public.' The Berne Convention, when defining the scope of the author's right Article 11 bis, para 1, speaks of 'the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusions of signs, sounds or images.' The words 'communication to the public by any other means of wireless diffusion' clearly envisages not only one kind of communications to the public, by means of wireless diffusion (the traditional one), but also other possible kinds of communications to the public by other means of wireless diffusions. Thus, the elements of a definition of broadcasting which emerge are: 'Communication of works or other subject-matter to the public by wireless means.' With such a clear a definition emerging from the major International Convention there is no need to go any further or to borrow a definition from another International Instrument, such as the Radio Regulations whose subject matter is not copyright.

The Rome Convention defines broadcasting in Article 3(7) as 'transmission by wireless means for public reception of sounds or of images and sounds'. The Universal Copyright Convention mentions broadcasting in Article IV bis but does not define it. The Satellite Convention does not contain a definition of broadcasting either; it deals with signals which it defines in its Article 1 and excludes DBS broadcasting in its Article 3.
As to the second question, the leading International instrument, i.e., Article 11 bis of the Berne Convention, defines broadcasting in terms of communication to the public and speaks of diffusion (not emission) broadcasting and diffusion are held to take place where the communication to the public takes place. In the case of a DBS broadcast this is in all countries covered by the footprint of the satellite. The view that satellite broadcasting by DBS takes place, in the country of emission' of the broadcast, meaning the country of the broadcasting organisation emitting the signal containing the broadcast, seems contradicted by the fact that the concept of emission which is narrower than communication to the public or diffusion is not used in any of the International Instruments. A satellite broadcast certainly starts with the emission of the signal towards the satellite but it does not end there. The communication involves both the so-called up-leg phase of the broadcast and the down leg phase and only the combination of both is to be considered as broadcasting. The motivation for the emission theory is that other interpretations would result in considerable practical difficulties, which is probably the case.

The third question as to the application of national laws is of considerable practical importance as some countries, members of the Berne Convention or of the Universal Copyright Convention, or both, treat the broadcasting right of copyright owners as an exclusive right to allow or forbid the broadcasting of their works, whereas others applying a compulsory licence system treat it merely as a right to equitable remuneration.

As the Berne Convention demands national treatment the appli-
cable law must be the national law of each country covered by the *footprint* of the satellite. If that *footprint* covers several countries, the broadcast must comply with the laws of each of the countries so covered. It is here that the supporters of the *emission theory* see the difficulties. They point out that it would be difficult to enforce the laws of other countries if the case was brought before the court of the country of emission. However, this difficulty arises in many cases where the courts have to deal with conflict of law situations. They also point out that enforcement against a broadcaster whose headquarters are in another country may be difficult.

In view of these difficulties, broadcasters take the view that national legislation in the country where the broadcasting organisation emitting the broadcast is established should be applicable to the transmission of the programme and the rule adopted by the 3rd World Conference of Broadcasting Unions in Tokyo (27 Feb. 5th March 1980)\(^{62}\) and confirmed by the 4th and 5th Conferences in 1983 and 1986 lays down this principle.

Against the legal and practical difficulties which no doubt exist in many cases, it must be said that unless there is impossibility as opposed to difficulties, such difficulties should in the large majority of cases not be sufficient to deny the copyright owners their rights.\(^{63}\)

As to the fourth question, the responsibility for compliance with the applicable copyright laws rests with the broadcasting organisation that gives the order for the broadcasting through DBS. "No other entity has any responsibility. In particular no person who receives the broadcast in any country has any responsibility for such reception".\(^{64}\)
Broadcasters generally accept that it is the broadcaster originating the direct broadcasting by satellite (that is the body determining the programme and giving the order for its distribution) which is responsible vis-a-vis the owners of the copyright concerned. 65

Finally, as far as rights of copyright owners and neighbouring right owners in broadcasting by satellite (DBS) are concerned, both according to the definition of the Berne Convention, 66 which is the leading International Instrument for author’s rights, and under the definition of the Rome Convention, 67 which is the leading International Instrument for neighbouring rights, satellite broadcasting by DBS is broadcasting. The rights involved are the rights flowing from broadcasting, and both the authors in their phonograms, and broadcasting organisations in their programmes, enjoy the same rights as in the case of traditional broadcasting.

(iii) Broadcasting Via FSS:

As these transmissions are not for direct reception by the public the situation is less clear and opinions seem to differ on the question whether the transmission of a signal to a satellite intended, with the aid of an earth station, for public distribution, constitutes broadcasting within the meaning of this Article. 68 One view is that it is broadcasting, as the programme is ultimately destined for reception by the public. Others argue that there is no need to protect copyright owners against FSS transmission as they are already protected against distribution by cable, from the point of reception of the signal which is communication to the public according to the Berne Convention. 69
National legislations have only recently begun to deal with this problem. The French law of July 1985 assimilates transmission of a work towards a satellite to a performance including the Act of telediffusion. This is any distribution by telecommunication process and includes broadcasting by telecommunication process and includes broadcasting and cable diffusion. U.K. law provides that FSS transmissions, lawfully receivable by the public, will count as broadcasting for the purpose of copyright and neighbouring rights protection.

The Satellite Convention 1974 puts an obligation on contracting countries to prevent unauthorised distribution of programmes transmitted by way of FSS satellite when these programmes are not intended for direct reception by the public, but it expressly excludes broadcasting via DBS.

The principles agreed by the government experts, no doubt speaking de lege ferenda stipulate that both the laws of the country of emission and of the countries of the final phase of broadcasting should be taken into account. They also suggest that both the broadcasting organisation emitting the programme through fixed service satellite and the organisation distributing it by cable should be considered separately and jointly liable to copyright and neighbouring right owners.

(iv) Distribution of Broadcasts by Cable (Cable Casting):

The difference between broadcasting and Cable Casting from the general public's point of view is that anyone can pick up broadcast programmes provided his receiving set is suitable, whereas a cable cast is addressed to a known public of subscribers. There are two kinds of
distribution of programmes by cable, captured broadcast programmes
(also known as cable retransmission) and cable originated programmes.
The captured programmes are those originated by a broadcasting
organisation and picked up and distributed simultaneously with the
original broadcast. This form of cable distribution is frequently used
when there are geographical difficulties for reception such as mountain­
ous country or large cities. The cable originated programmes are those
which are either produced by the cable company or picked up off air but
modified in content or in time, i.e., either altered in some way or
broadcast later, not simultaneously.75

Whereas broadcasts including satellite broadcasts by DBS are
covered by Article 11 bis, para (1) (i) of the Berne Convention as
communication to the public by .... means of wireless diffusion, cable
transmissions are covered by Article 11 bis para (1) (ii) as 'communi­
cations to the public by wire. Wire is referred to as cable in modern
terminology. The working definition in the annotated principles76 says
cable means a wire, beam or any other conducting device through which
electronically, generally, generated programme carrying signals are
guided over a distance ...'. The issue for national legislation is whether
in both cases (captured or originated programmes, the authorisation of
the right owner is required or whether distribution is permitted without
such authorisation but subject to the payment of an equitable remunera­
tion. However, it is generally agreed that captured programmes must be
authorised by right owners if the communication by cable is made by an
organisation other than the original one which broadcasts the work.77
(V) **Rights of Broadcasting Organisations:**

Generally speaking broadcasting organisations have following rights:

(i) An absolute right to 'authorise or prohibit the rebroadcasting of their broadcasts'.

This can be said to be the basic broadcasting right, the equivalent to the reproduction right of copyright owners.

Rebroadcasting in the strict sense means the simultaneous relay of the programme. Deferred broadcasting must by definition imply the fixing of the broadcast first so that, if done without the consent of the original broadcasting organisation, the infringement already takes place at the time of fixation and before the fixation is rebroadcast.

(ii) Broadcasting organisations have an absolute right to authorise or prohibit the fixation of their broadcast. The right is the equivalent of a recording right but usually takes the form of a reproduction right as a copy of the first fixation is made and sent to the other broadcasting organisations under a contract between the two broadcasting organisations (either against payment or by way of programme exchange agreement).

(iii) Broadcasting organisations have an absolute right to 'authorise or prohibit the communication to the public of their television broadcasts'. This right is the equivalent of a public performance right and may be subject to a compulsory licence. The right is, however, restricted to the public performance of television broadcasts as opposed to sound broadcasts and exercisable only if the communication to the public is made in places accessible to the public against the payment of entrance fee. Public places which install television sets, e.g. hotels,
restaurants, bars, public houses, don't charge an entrance fee' but it is
arguable that a fee for such facilities is included in calculating the prices
for food and drink or accommodation.

The basic right of broadcasting organisations is, therefore, a kind
of reproduction right. The subject of the right is the broadcast. This
meant the content of the programme which is being broadcasted. Like
the phonogram the broadcast is a derivative work. It may, and usually
does include other works such as the script of a talk or a play or a
musical work, all of which are separately protected as original works.
It may include derivative works such as the performance of actors or
singers or phonograms, or it may contain a combination of all of these
which is very common. On the other hand, if it is a live broadcast of a
state occasion - like a swearing - in ceremony or a funeral, a sporting
event or a political event do not contain any original protected works,
yet it is still the subject - matter of copyright or a neighbouring right.
As in the case of phonograms, if the legislation gives broadcasting
organisations a reproduction right it does not matter whether it is called
a copyright or a neighbouring right. It entitles broadcasting organisations
to allow or forbid the rebroadcasting or the fixation of their programmes
without their consent.

It can, thus, be said by way of conclusion that neighbouring right
are now firmly recognised and they are certainly going to stay. Some
countries have infact treated neighbouring rights at par with copyright.
But it is, indeed, shocking to note that performers in films still do not
enjoy adequate protection.
The position of performers can only be improved if the law recognises multiple rights in a cinematographic film. But at the same time it should also be understood that the salvation of performers and other neighbouring rights owners really lies in the collective administration of neighbouring rights since at the individual level they will find it extremely difficult to get what is their due.
2. See Generally, RICKETSON, THE BERNE CONVENTION.
3. A wish expressed by the Conference which is not binding on Governments but should encourage them to take action.
4. Article 3.
5. Article 7 (4) (6).
6. Article 15 (1).
7. STEWART, Supra note 1.
10. Section 2 (K).
12. STEWART, Supra note 1, p. 188.
17. Rome Convention, Article 14; Phonogram Convention, Article 4.
18. Denmark: Copyright 1960, Articles 45 and 47; Germany: Copyright Act 1965, Article 82.
20. Rome Convention, Article 3 (a).
21. SMITH, ADAM, THE WEALTH OF NATIONS Book II, ChIII,

22. Article 2/2, Copyright Law, 1910.
23. BCH (Bundesgerichtshof) 31st May 1960: quoted in STEWART. Supra note 1, p. 195.
25. Tribunal Civil de la Seine JCP 1937 II 247.
26. Ibid.
32. Article 7 (c) (ii), Rome Convention.
33. Now both Civil & Criminal protection: Copyright Act 1988, Section 180 ff.
34. For instance Article 81 of Italian Copyright Law 1941.
35. A government report in the erstwhile Federal Republic of Germany in Sept. 1973 stated that unemployment of singers, actors and dancers averaged 11.6%. Among all workers it was 1% at the time (Quoted in GOTZEN, FRANK'S Study PERFORMERS' RIGHTS IN THE EUROPEAN ECONOMIC COMMUNITY (1977), published by the Commission of the European Communities.)
38. Rome Convention, Article 10.
39. Berne Convention, Article 9 (2).
41. Copyright Act, 1965, Section 53(5).
42. Copyright Amendment Act 1980. Section 42.
43. For an analysis of the available legislative options see Generally Stewart. ‘Home Taping the Legal Basis For the Compensation of Copyright Owners’ (July 1980) EIPR 207.
45. Phonogram Convention, Article 3.
47. It was estimated that there were over 4000 record rental outlets in Japan in 1987 and that retail sales have declined between 30% and 60% in areas where such new outlets operated. See Davies, G. (1988) EIPR p. 128.
49. In the case of US V. EC Tape Service Inc the Court of Appeals of Wisconsin Awarded 'punitive damages' of a million dollar on top of Compensatory damages (27 Oct 1981) quoted in STEWART, Supra note 1, p. 207.
50. United Kingdom, per Lord Devlin in Rookes V. Barnard (1964) AC 1129 at 1120 ff.
51. See German Copyright Law 1965, Article 109, as amended by the Copyright Amendment Law 1985, Article 1 (12); However, the authorities can now act 'ex-officio' if it is deemed in the public interest.
52. See U.K. Copyright Act 1956, Section 17.
53. In cases of complicated licensing and sublicensing contracts, ownership of the original copyright is often difficult to ascertain. The presence in court of a famous star performer to give evidence in a foreign court is often difficult to secure.

54. Australia, India & U.K. etc.

55. Germany, Mexico etc.

56. Denmark, Sweden & France etc.

57. Rome Convention, Article 12.

58. The OIR (Organisation International Radio) was founded in 1946. In 1950 the EBU was founded by 23 European Broadcasting Organisations. The OIR moved to Prague and changed its name to OIRT (International Radio and Television Organisation) Covering Eastern Europe.


60. International Telecommunication Union, Article 84 Ap-Spa 2 Radio Regulations.

61. See the Views of the Director General of WIPO in Copyright (May 1986) 158.


63. STEWART, STEPHEN, Supra note 1 p. 217.

64. Supra note 61.


66. Berne Convention, Article 11 bis.

67. Rome Convention, Article 3 (f).

68. Berne Convention, Article 11 bis, para (1).

69. Berne Convention, Article 11 bis, para (i), (ii).

70. Copyright Act 1988, Section 20.


72. Satellite Convention, Article 3.
73. Synthesis of Principles in the Memorandum of the Secretariats
    UNESCO/WIPO/CGE/SYN 3 - II (June/July 1988) p. 6.
74. Ibid. p. 8.
76. See ANNOTATED PRINCIPLES p. 145.
77. See Fabiani 'Copyright and Direct Broadcasting by Satellite'
78. Rome Convention, Article 13 (1).
79. Rome Convention, Article 3 (g).
80. Rome Convention, Article 13 (b).
81. Rome Convention, Article 13 (d).
82. It is interesting that the same mistake was made 60 years later,
    when the problem of protection of computer programs was raised
    and the initial answer was that they should be patented rather
    than copyrighted.