SOUND AND VIDEO-RECORDING AND THE COPYRIGHT LAW: THE GERMAN APPROACH

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I. THE PROBLEM

The recent federal court decisions in California concerning off-air videotaping in *Universal City Studios v. Sony Corp. of America* (the Betamax case)[1] have focused attention upon the issue of whether videotaping for home use constitutes copyright infringement and, if so, whether the manufacturer or importer of video-recorders can be held liable for contributory infringement by furnishing the instrument indispensable to infringement. Less attention was paid to the carrier of the allegedly infringing recording, the videotape itself. In contrast, in other countries presently debating the legality of home videotaping and related issues, the videotape itself is the subject of extensive discussions and legislative proposals.

During the last decade, the legal community of the Federal Republic of Germany has given much thought to the proposal that not only the recording machine, but the tape as well, should be subject to a levy for the remuneration of authors. The question of whether home taping for private use is an infringement has been settled in Germany by statute in Art. 53(5) of the revised German Copyright Act of 1965,[2] (UrhG) which states:

> If from the nature of the work it is to be expected that it will be reproduced for personal use by the fixation of broadcasts on visual

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[1] Universal City Studios v. Sony Corp. of Am., 480 F. Supp. 429 (C.D. Cal. 1979), *rev'd and remanded*, 659 F.2d 963 (9th Cir. 1981), *cert. granted*, 457 U.S. 1116 (June 14, 1982).

[2] Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz) of Sept. 9, 1965 Bundesgesetzblatt [BGBl] I, 1273, as amended [hereinafter cited as UrhG]. For English text, *see* UNESCO COPYRIGHT LAWS AND TREATIES OF THE WORLD 10-11 (Supp. 1977) (CLTW).

> or sound records, or by transferring from one visual or sound record to another, the author of the work shall have the right to demand from the manufacturer of equipment suitable for making such reproductions a remuneration for the opportunity provided to make such reproductions.[3]

This article examines the present German discussions, with an occasional comparison with other European jurisdictions, particularly Austria. Based on this analysis, some conclusions are drawn concerning the same legal problem in the United States.

While the *Betamax* case deals only with video-recording, and in the opinion of some scholars seems to permit the gratuitous taping of sound transmissions for private use,[4] copying of sound recordings and transmissions for home use cannot be excluded from consideration because European jurisdictions generally do not distinguish between the two types of taping but treat them as generically and legally identical.[5]

[3] *Id.* art. 53(5) (WIPO trans.).

[4] The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified at 17 U.S.C. §§ 101-810 (1982)) [hereinafter cited as the New Act] does not specifically permit sound recording for private use, nor does it expressly forbid it. The Copyright Act of 1909, Act of March 4, 1909, ch. 320, 35 Stat. 1075 [hereinafter cited as the Old Act], as amended by the Sound Recording Act, Pub. L. 92-140, 85 Stat. 391 (1971) did not address the question squarely either. The legislative history, in H.R. REP. No. 92-487, 92nd Cong., 1st Sess. 7, *reprinted in* 1971 U.S. Code Cong. & Ad. News 1566, indicates that section 1(f) of the Old Act implied a hometaping exemption, and that no changes were intended by the New Act. *See* A. LATMAN, THE COPYRIGHT LAW 174 (5th ed. 1979). There does seem to be a difference of opinion among scholars as to whether this exemption exists. Ernest Meyers, who represents the Recording Industry of America, argues in *Sound Recordings and the New Copyright Act*, 22 N.Y.L. SCH. L. REV. 573, 577 (1977), that under section 106(1) of the New Act the reproduction of a copyrighted work in the home is an infringing act, and points out that the opposite was true under the 1971 Sound Recording Act. He does not indicate how he arrived at his conclusion. Professor Nimmer in his treatise, 3 M. NIMMER, NIMMER ON COPYRIGHT § 8.05(C) (1983), seems to agree with Meyers, but cites portions of committee reports that seem to indicate that an implied exemption existed. Nimmer states that the matter is not settled because even the legislative history is in conflict. *Id.* It probably remains to be settled by judicial interpretation which should find no exemption for home sound taping of protected works. In his testimony before Congress on April 29, 1981, the Register of Copyrights, David Ladd, stated that the legislative history was so puzzling that the deliberations of Congress should not be weighed in the debate.

[5] The German statute speaks of "video- and sound-carrier," *Bild-und Tonträger*, in UrhG article 53(5) as does the recent amendment of article 42(5) of the Austrian statute, Urheberrechtsgesetznovelle of July 2, 1980, Osterreichisches Bundesgesetzblatt [OBGBI] 2315 (1980). Similarly, the British Copyright Act, 4 & 5 Eliz. 2, c. 74 (1956), as amended, refers in section 6 to broadcasts in every form without distinction. The Portuguese statute, Decree-Law No. 46980 (1966), as in articles 155 *et al.*, refers to video and sound broadcasts wherever broadcasts are mentioned. Marie-Claude Dock, the Director of the Copyright Division of UNESCO in Paris, in discussing the problem from an international viewpoint, and especially on the basis of the Berne Convention, speaks of "sound or video recording" and reiterates the fact that "the essential question is that of control by the owner of the right of reproduction over the uses made by users of protected works. *Circulation des informations et propriété intellectuelle*, in LA CIRCULATIONS DES INFORMATIONS ET LE DROIT INTERNATIONAL, 193, 208, 212 (1978) (trans. suppl.).

Further, German discussions of off-air taping usually frame the issue in terms of copying *per se* of a protected work. Thus, legal debates concerning the basic right of an author to control his work and to receive remuneration for its use necessarily include the issue of photocopying.[6]

[6] Copyright law is, in its broadest sense, concerned with the protection of the author and his work so that he may reap the financial benefits of his creativity. The legal theories on which copyright protection is based are diverse and, depending on the facts and circumstances, may lead to differing results in different jurisdictions. Many terms have been used to describe the nature of the bases of protection in various countries, and a clear-cut differentiation between the varying philosophies is not always easy to make. For the present purpose, the major theories are those based on property considerations on the one hand, and on a blend of personality rights and property rights in European civil law countries on the other. In a free society, property of any nature is subject to few restraints on alienability, a restraint that Anglo-American law generally abhors. Thus, an owner of any sort of property may completely divest himself of his rights in a given property by sale or gift. Anglo-American copyright law recognizes this principle by permitting the author to sign away by contract all of his rights contained in the bundle of copyright rights (17 U.S.C. § 106 (1982)) except for one innovative proviso. The New Act now allows an author who may have made a contract improvidently either to renegotiate his contract after thirty-five years, or to contract with a new party. 17 U.S.C. § 203 (1982). Thus, the power to sign away all rights is no longer absolute, because an assignment may be good for only thirty-five years. In practical terms, this restraint on alienation is so minor, and of significance probably only in a very small number of cases, that the United States and Great Britain, which share the common ancestry of the Statute of Anne of 1710, can properly be described as property jurisdictions. Copinger puts it this way:

> Nothing can with greater propriety be called a man's property than the fruits of his brain. The property in an article or substance accruing to him by reason of his own mechanical labour is never denied him: the labour of his mind is no less arduous and consequently no less worthy of the protection of the law. F.E. SKONE JAMES, COPINGER & SKONE JAMES ON COPYRIGHT, § 3, at 4 (11th ed. 1971).

American courts have confirmed this proprietal view of copyright as a unique intangible and incorporeal kind of property. Mr. Justice Holmes, in his concurring opinion in White-Smith Music Publishing v. Apollo Co., 209 U.S. 1 (1908), gave the classic definition of the special characteristics of copyright as property:

> The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is now *in vacuo*, so to speak. It restrains the spontaneity of men where, but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong.

Id. at 19 (Holmes, J., concurring).

An interesting theory is that United States copyright law, as contrasted to British and Commonwealth law, is primarily a matter of social contract instead of property theory even though it is expressed in property terminology. Noel, *Compulsory Licenses and Copyright*, 108 REVUE INTERNATIONAL DU DROIT D'AUTEUR 71, 98 (1981). Noel argues that Congress is directed by the Constitution in article I, section 1, clause 8: "to promote the progress of science and the

useful arts, by securing for limited times to authors . . . the exclusive right to their respective writings." She states that the creator of intellectual property, in return for "disclosing" his creation, is granted a number of exclusive rights. *Id.* at 99. She also maintains that the social contract approach is more adaptable to technological change and to derogation of creators' rights on the basis of the public interest. *Id.* at 101.

The European view questions why the creators' rights should be derogated at all. The public interest in the United States is maintained by limiting the time an author is granted exclusivity; a 17-year term in the case of patents, and the author's life plus fifty years in the case of copyrights under the New Act. The European view is particularly applicable where new exploitation possibilities arise from technological advances. "The starting point for any solution to the problem posed by the evolution of reproduction techniques should be unreserved recognition of the exclusive right of reproduction belonging to every author in respect to his work."

Koumantos, *Le droit de réproduction et l'évolution de la technique*, 98 REVUE INTERNATIONAL DU DROIT D'AUTEUR 3, 22-23 (1978).

Part of the social contract idea seems to be that the public should have access to the author's creation, and that free circulation of information is a public policy goal superior to the author's right of exclusivity. Europeans do not always share this view. "[I]n order for intellectual creations to circulate freely, they must first of all exist. If there is no right of exclusivity, no right to control, then why should the author produce?" *Id.* at 28-29.

The problem lies in the fact that, as the Register of Copyrights, David Ladd, remarked, it is often too easy to convince people that the public interest is always served when someone else's property may be had for free. Ladd, 3 BULLETIN OF THE NAT'L COUNCIL OF PATENT LAW ASSOC., bulletin no. 5823 (Winter 1981/82) (Speech delivered to the National Council of Patent Law Association on Oct. 31, 1981).

Arguably, Noel misreads the intentions of the framers of the Constitution when they designed the copyright clause. It was not meant to be a paternal grant to impecunious writers to be taken away or limited at will, but a provision that "empowers Congress to pass laws to preserve ownership rights in intellectual property. . . . A basic principle within our copyright law is that the owners of intellectual property are entitled to be compensated by those who are permitted to use their property." 97 CONG. REC. S. 15723 (1981) (Statement by U.S. Rep. Mathias in support of his amendment to the New Act concerning home video recording devices). *See also infra* notes 22 & 149. Contrary to Noel's view, the user of the intellectual property obtains a privilege in its use, thus diminishing the author's monopoly, and should, therefore, pay for its use either by a freely bargained agreement, or by means of a compulsory license, which is regrettably more often the case.

Without the protection of copyright laws, authors would have no incentive to concentrate their energies on the creation of works; they could spend their time at more profitable occupations not subject to interference by the public interest. "No man but a blockhead ever wrote except for money." 97 CONG. REC. S. 15723 (1981) (Rep. Mathias quoting Samuel Johnson). Would anyone seriously contend that the Beatles emerged from grimy Liverpool to entertain the world for purely altruistic, non-compensable reasons? Madison interpreted the constitutional intent in this manner:

> The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals.
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> THE FEDERALIST PAPERS, No. 43 (J. Madison), at 271-72 (Arlington House ed. 1965).

Other jurisdictions, such as West Germany, may call copyright an "all-encompassing and unified property right," O. VON GAMM, URHEBERRECHTSGESETZ 290 (1968), but they then proceeded to make a careful distinction between the two elements thought to constitute the totality of copyright: the author's personality right growing out of an intellectual and personal nexus to his work, and the commercial property right expressed in exploitation and utilization rights which can only be licensed but never wholly transferred by assignment or sale.

German law distinguishes between exploitation rights, *Verwertungsrechte*, UrhG art. 15 and utilization rights, *Nutzungsrechte*, UrhG art. 31. Article 15 provides the author with the exclusive right to exploit his work in its physical form. This right includes: 1. the right to copy (art. 16); 2. the right to distribute (art. 17); 3. the right to dispatch (art. 18); as well as diverse forms of performance and broadcast rights covered in articles 19-22. This list is illustrative only; the UrhG can accommodate a host of other uses not illustrated in these articles.

Article 15 thus regulates the general *forms* of exploitation envisioned by the lawgiver, whereas articles 16 ff. are concerned with specific *types of uses* that might be specified in contract. An all-encompassing licensing of all conceivable uses is prevented by article 31(4) which decrees that "the concession of utilization rights for as yet unknown types of utilization or obligations to utilize is without force and effect." Article 31(5) limits a blanket concession of utilization rights even further: "If the concession of utilization rights does not specifically enumerate the type of utilization intended to be covered, the extent [of a grant] of utilization rights shall be determined according to the purpose of the concession." (trans. suppl.).

In the 1920's, German law adopted the so-called *Zweckübertragungs-Theorie*, the theory of "transfer of intent." Nordemann, *Legal Relationships Between Authors and Users and the Position of the Author in Society*, 98 REVUE INTERNATIONAL DU DROIT D'AUTEUR 51, 67-69 (1978). Nordemann translates the term as such, even though "intent to transfer for a specific purpose" might express the idea behind the term more accurately. This theory establishes the rule that, in contracts between authors and exploiters, only those rights are transferred that are actually mentioned, or that are necessary for the accomplishment of the purpose intended by the contract. It is based, according to Ulmer, on the idea that copyright should remain the property of the author, and that licenses should cover only those rights that are absolutely required by the contract. This theory was codified in UrhG article 31 and is a major rule of interpretation especially in cases where contracts are either vague or overinclusive. Article 31(4) is of particular interest because it declares that the grant of utilization rights not known at the time of contracting is void and without force and effect. *See* O. VON GAMM, *supra*, at 114 & 436.

Thus, West Germany is not a property rights jurisdiction because the author's personality rights are of primary importance. Courts will discuss personality rights at great length before adding property consideration to a decision usually founded on personality rights. Most European Community members, particularly those which derive their legal system from the civil law tradition, base their copyright law on similar considerations.

A. DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY 66-67 (1978) discusses the differences in conceptual definitions among the civil law countries of Europe. For the present purpose, it is of little concern whether the dualist concept, as exemplified by French theory (two separate rights: personality rights, *droits moraux*, and property rights, *droits pecuniaries*), predominates, or the German monistic one (one unified right with two branches which are interdependent and intertwined, as personality rights also serve the author's financial interest, and the exploitation of property rights serve his intellectual interests). Both philosophies in their statutory formulation would probably arrive at the same result.

German legal thought was reinforced by a post-World War II revival of the natural-right theory which elevates the personality-rights aspect of copyright to a higher plane. *See* A. Dietz, *Ton- und Bildaufnahmen sowie Fotokopie (reprografische Vervielfältigung) zum eigenen Gebrauch in Recht und Praxis der Bundesrepublik Deutschland*, 1978 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT 457, 459 [hereinafter cited as Dietz I]. This revival influenced and aided German courts in their developing and reshaping of old legal norms enacted in form of the old LUG, until the copyright reform. Copyright law reform resulted in the new statute of 1965 which incorporated many judicially created rules and gave the courts once again a legal norm based on the new statute. One of the seminal decisions relating to the right of the author to forbid copying for private use emanated from the German Supreme Court, the *Bundesgerichtshof* [BGH], in 1955, in the *Grundig-Reporter* case. The Court enunciated the natural-law rule of authors' personality rights:

> Of significance for the interpretation of statutory provisions of copyright law is the controlling legal principle that the author's dominion over his work is a natural

consequence of his intellectual property which, in legislation, realizes nothing more than its recognition and more specific formulation. Judgment of May 18, 1955, Bundesgerichtshof, Gr. S.Z. [BGHZ], W.Ger., I ZR 8/54, 17 BGHZ 266 (1955). For complete German text, *see* 1955 GRUR 492 (trans. suppl.).

Copinger seems to establish what might be disrespectfully called a "sweat theory" of property rights. F.E. SKONE JAMES, *supra,* at 24. He compares the author's work with "mechanical labours" and concludes that both should be rewarded, without regard to any inherent rights in the intellectual person of the author. *Id.*[5] The predominant German view deals with the author's intellectual being, not with his actual "labours," and deduces property rights only from the work as ultimately fixed in tangible form. Where a physical labor analogy like Copinger's does appear, it usually relates to industrial property rights and not to the actual process of working. The latter aspect has been tentatively mentioned by Eugen Ulmer who sees modern trends toward strengthening copyright protection as being based on social considerations. Ulmer declares that the purpose of copyright is to protect intellectual labor. Even though copyright law is not a part of labor law, the property law content of copyright is the basis for the economic protection of the creators of intellectual work. E. ULMER, URHEBER- UND VERLAGSRECHT XI (5th ed. 1974). Note that the personality content of copyright is not mentioned in this quasi labor law analogy. *Id.*

Dietz, who favors the incorporation of the labor law analogy into German law, reports on attempts to form *IG Kultur*, an "Industrial Labor Union Culture," which was advocated by writers Martin Walser and Günter Grass at the 1970 Writers' Convention in Stuttgart. Dietz, *The Social Endeavors of Writers and Artists and the Copyright Law*, 3 INT'L. REV. INDUS. PROP. & COPYRIGHT L. 451, 455 (1972) [hereinafter cited as Dietz II]. The intent was to join this new union with an existing industrial labor union in order to negotiate blanket contracts between major users (e.g., publishers, broadcasting companies, movie producers, public institutions, and others), who "employ independent writers and artists who often in reality are quite dependent on these institutions but do not enjoy regulated compensation, fringe benefits, social security insurance, etc." Dietz proposes that the law licensing performing rights or collecting societies such as GEMA for music, (the German counterpart of ASCAP), *VG Wort* for literature, or *Verein Bildkunst* for fine arts, the Gesetz über die Wahrnehmung von Ureheberrechten und verwandten Schutzrechten [WahrnG] of Sept. 9, 1965, 1965 BGBl I, 1294, might be developed further to become a collective labor law statute for writers and artists. There is no American counterpart for the *Verwertungsgesellschaft Wort* (VG Wort), although there is a need to supervise the utilization of "small change" of copyright, here the use of literary works. Other artists are united in *Verein Bildkunst*, a collecting society for painters, photographers and other artists.

Some labor law scholars find a similarity in the position of freelancers and employed persons, and would like to see existing substantive labor law applied to both. 1 HUECK & NIPPERDEY, LEHRBUCH DES ARBEITSRECHTS 42 *passim* (7th ed. 1963), *cited in* Dietz II, *supra*, 456 note 47. The analogy is unreasonably stretched when freelancers are equated with those engaged in cottage-industry labor, as in the proposal to extend the cottage-industry statute, *Heimarbeitergesetz*, to "employee-like" persons such as freelance writers and artists. *Id.* at 457. Many freelance authors might reject the comparison of their intellectual labor to the unskilled work of a group which is unhappily at the bottom of the economic and social scales in Germany.

It appears that the labor law analogy is not well received. Present discussions tend to assure authors compensation for any use of their works, rather than to consider the establishment of wage scales or the negotiation of organized labor contracts. Also, the German Copyright Act, in its various compulsory license provisions, never sets the rate of compensation but leaves that up to negotiations between users and the *Berechtigten*, those entitled to receive the remuneration.

There might also be an anti-trust problem in such a collectively bargained contract, since the statute forbids standard contracts between users and associations of authors. Article 1 of the German anti-trust statute, *Kartellgesetz*, defines publishers, broadcasters, movie producers, as well as authors and artists as "enterprises." Standard contracts between enterprises, even if expressly declared to be non-binding, are illegal "recommendations" which might affect or

Photocopying is the subject of a separate section in the German copyright act.[7] The underlying principles of the photocopying provision are so similar to those of copying *per se* that the provision is often mentioned in discussions concerning other forms of copying. Since the rationale for regulating photocopying under German law is different from the American approach, expressed in the *Williams & Wilkins* decision,[8] an occasional comment on photocopying will be made where it is relevant to the discussion.

II. THE GERMAN APPROACH

A. *German Copyright Law Before 1965*

1. Background

Nations base their copyright laws on a variety of philosophical principles and theories. The most common include: property rights,

restrain competition. Gesetz gegen Wettbewerbsbeschränkungen of April 4, 1974, 1974 BGBl I, 896 [hereinafter cited as Kartellgesetz]. The "enterprise" concept covers all natural and juridical persons who actively participate in economic life. Authors and artists are included as soon as they begin to exploit their works. Associations are specifically covered in article 1(2) which states that "a resolution of the membership meeting of a legal entity will also be deemed to be the resolution of an association of enterprises to the extent the membership of such entity is composed of enterprises." This provision would seem to rule out collective bargaining by authors who, by this definition of the Kartellgesetz, are "enterprises." Only collecting societies are specifically exempt from these provisions because WahrnG, article 24, *supra*, changes the scope of Kartellgesetz, article 91, *supra*, by exempting collective societies from the provisions of the anti-trust law.

[7] UrhG article 54 states:

Copying for other private uses

(1) It is permissible to make or cause to have made simple reproduction copies of a work

1. for private scholarly use, if and to the extent that copying is necessary for that purpose,
2. for inclusion in a private archives if and to the extent that copying is necessary for that purpose, and if a personal copy is used as a master for duplication,
3. for personal information on current events, if a work is transmitted over the air,
4. for other private use,
   (a) if it involves small sections of a published work or individual article previously published in newspapers or magazines,
   (b) if it involves an out-of-print work, and the person entitled to compensation cannot be located. If the entitled person can be located and the work has been out-of-print for more than three years, he may refuse permission to duplicate only on the basis of weighty reasons.

(2) If copying covers the commercial purposes of the person entitled to make copies, he must pay adequate compensation to the author thereof.

(3) The rules of article 53(3) and (4) are to be applied correspondingly.

This article on photocopying of the 1965 Act is the subject of a proposed revision amendment in which article 54 would be merged with article 53 in order to cover all forms of copying in one article. Proposed article 54 would deal only with the obligation to compensate. *See infra* note 137.

[8] Williams & Wilkins Co. v. United States, 172 U.S.P.Q. 670 (BNA) (Ct. Cl. 1972), *rev'd* 487 F.2d 1345 (Ct. Cl. 1973), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

natural rights, rights based on social contract, and rights resting in the person of the author.[9] However, the common rationale underlying all national copyright laws is to give an author the right to control the use of his work and the right to receive remuneration for its use by others.

The rights of authors have been defined differently since the days of the Roman Empire when all rights in a written work reposed in the proprietor of the physical object.[10] Early English,[11] French,[12] and American statutes[13] began, albeit to a limited degree, to extend protection to the author for his creative product. Historically, there has been a tendency to increase the author's protection, especially when technological developments created new uses for works of authorship that were unforeseen at the time the copyright statutes were drafted.

Accordingly, the term "writings" as used in early American statutes[14] was broadened by judicial interpretation to extend to maps, forms, statues, photographs, and many other items not included in the dictionary definition of the term.

The civil law tradition of the European nations does not permit such expansive judicial interpretation of statutes like the common law does. For that reason, European jurisdictions expanded copyright protection by revising their copyright statutes more frequently than the United States did.

Originally, German copyright law was embodied by two separate statutes; one for literary and musicial works,[15] the other for works

[9] The term *author*, as used in this paper, includes the variety of terms and meanings found in the United States and abroad (e.g. author, originator, creator, *Autor*, *Urheber*, *Schöpfer*, *auteur*, *autore*, *auctor*). It also includes the proprietor who may not be the actual author.

[10] The possessor, *dominus*, of the physical object had ownership of all rights, whatever their nature. *See* K. VISKY, GEISTIGE ARBEIT UND DIE "ARTES LIBERALES" IN DEN QUELLEN DES RÖMISCHEN RECHTS 116 (1977).

[11] 8 Anne, ch. 19 (1710).

[12] During the French revolution, the government passed no less than four bills in the period between 1791-1793. *See* 1 S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 18 (1938).

[13] The first U.S. statute was the Copyright Act of May 31, 1790, 1 Stat. 124 (repealed 1802).

[14] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), was one of the early cases which included a photograph in the definition of "writings." Six years later, in U.S. v. Chase, 135 U.S. 255 (1890), a case which involved the mailing of an obscene letter, the Court mentioned in *dicta* that "writings" were synonymous with literary works. This decision does not seem to have had much influence on later cases which followed *Burrow-Giles*. Shaab v. Kleindienst, 345 F. Supp. 589, 590 (D.C. Cir. 1972) held that technical advances, unknown and unanticipated when the Constitution was written, are the basis for the sound recording industry. The copyright clause of the Constitution must be interpreted broadly to provide protection for this method of fixing creative works in tangible form. A host of other cases, before and after *Shaab*, agree. *See, e.g.*, Goldstein v. California, 412 U.S. 546, 562 (1973); Capitol Records v. Mercury Records, 221 F.2d 657 (2d Cir. 1955); U.S. v. Bodin, 375 F. Supp. 1265 (W.D. Okla. 1974).

[15] Gesetz betreffend das Urheberrecht an Werken der Literatur und Tonkunst of June 19, 1901; 1901 Reichsgesetzblatt (RGBl) 227, as amended [hereinafter cited as LUG].

of fine art and photography.[16] The "blinding speed of technological progress," as one German jurist called it,[17] forced the *Bundestag* (German parliament) to reform the copyright statutes; mere amendment was no longer sufficient. The original statutes, LUG and KUG, were completely revised and combined in the new Copyright Act of 1965,[18] but by 1972, a major amendment was necessary.[19] Finally, in 1982, a further amendment proposing the imposition of a fee on blank recording tapes was submitted to the *Bundestag*.[20]

Technological progress has always been ahead of legislation because statutes are written on the basis of current and foreseeable facts, and legislatures cannot predict technological advancements. When one considers how the pace of technological evolution has accelerated in the twentieth century, it is small wonder that new uses of copyrighted works were frequently not covered by existing statutes, making statutory reforms necessary. In making reforms, the legislatures often followed the path developed by case law. Surprisingly, this procedure holds true even for Germany, a civil law jurisdiction which does not recognize the doctrine of *stare decisis*, and in which courts are generally constrained "to find the law," not to legislate from the bench. In regulating copying for private use, the *Bundestag*, in UrhG article 53, to a large extent adopted rules first developed by the German Supreme Court.[21]

Prior to the 1965 copyright reform, LUG article 15(2)[22] permitted copying for private use without requiring permission from the author or payment to him provided the use of the copy[23] did not have a gainful purpose. Nothing was said as to whether a work could be

[16] Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie of Jan. 9, 1907, 1907 RGBl 7, as amended [hereinafter cited as KUG].

[17] Movsessian, *Leercassetten: Überlegungen zur Novellierung von Paragraph 53(5) UrhG*, 1980 GRUR 559.

[18] *See supra* note 2.

[19] Anderungsgesetz of Nov. 10, 1972; 1971 BGBl. I, 1784.

[20] Draft of a Bill to Change Legal Provisions in the Area of Copyright Law of September 17, 1982, Bundestagsdrucksache 370/82.

[21] Semantic problems may arise when looking at UrhG articles 53 and 54. Article 53 deals with *Vervielfältigungen zum persönlichen Gebrauch*, (copying for personal use in the private sphere without gainful commercial intent); Article 54 concerns *Vervielfältigungen zum eigenen Gebrauch* (copying for one's own use which may include copying for gainful purposes if adequate compensation is paid under article 54(2)). Although both terms, in German, are distinctive, their translation might result in confusion. For this reason, I shall refer to an article 53 use as *private use* or *home use* which excludes use for any gainful purpose, and to an article 54 use as *personal use*, which includes use for profit.

[22] *See supra* note 15.

[23] Another expression of German legal terminology is *Vervielfältigungsstück*. It means, roughly, "exemplar of reproduction" or a "copied copy."

copied *in toto* or only in part. In the context of its time, this was a reasonable provision because it allowed laborious manual copying from a book but enjoined reprints made commercially. Seldom did anyone ever copy an entire work by hand. Thus the author's income expectations were not threatened. The advent of tape and video recorders as well as photocopying machines changed this situation because entire works of literature, music, and television or radio broadcasts could be readily copied by anyone. LUG article 15(2) served as the exculpatory clause making such copying legal. Authors and other copyright proprietors viewed this statute with increasing concern, because now the threat of diminished income was real.

2. The *Grundig-Reporter* Tape Recorder Decision of 1955, the *GEMA-HINWEIS*, and the *Wire Recorder* Decision 1955

Notwithstanding the clear language of LUG article 15, the German Supreme Court shocked the legal community when it held, in its famous *Grundig-Reporter* decision of 1955, that copying for private use by tape recorder was an infringement of that article.[24] The decision is fascinating for American readers for a variety of reasons.

[24] A small excerpt from Professor Lindenmaier's 12,500-word report of the case in 1955 GRUR 492 illustrates the process of German statutory interpretation:

> To decide the question whether magnetic-tape recordings of copyrighted works require the permission of the proprietor if they are meant only for private use without gainful purpose depends solely upon whether this specific type of copying is encompassed within the scope of Art. 15(2) LUG.
>
> (a) One has to agree with the Court of Appeals that by its clear language Art. 15(2) LUG includes the production of such tape recordings, even if it is a reproduction *sui generis*, for the recorded tape does not only, as for instance sheet music would, reproduce the work in optically perceivable symbols (letters or musical notation), but also fixes its performance. This type of copying thus provides the complete enjoyment of the work without the need of intervention by a performing artist. The legislator of 1901 knew, indeed, at the time of enacting the statute, of the possibility of fixing the performance of a work of the musical arts in a mechanical apparatus. The amendment [to LUG of May 22, 1910] concerned itself primarily with a re-ordering of the legal situation concerning mechanical contrivances which serve auditory reproduction (Arts. 2(2), 12(2)(5), 22(a) LUG). The legislative history shows conclusively that fixation of a work on a sound carrier is a specific form of copying. The legislative report to that amendment states:
>
> The exclusive power of control of the author over the copying of his work extends also to the instrumentality which serves for the mechanical auditory reproduction without regard to the use of either permanently fixed parts [in the instrumentality] or of interchangeable accessories, and would follow without special provisions from the definition of that power to control. *See* Reichstag Debates, XII. Legisl. Period, 2d Sess., appendix to the stenographic reports, File No. 341, p. 1789. If Art. 15(2) does declare permissible every copying for private use, then one has to assume that this statutory provision, as far as its literal meaning is concerned, includes even the performance of a work on magnetic tape.

The facts of that case are similar to those of the *Betamax* case. GEMA, the performing rights society, sued Grundig, a large manufacturer of tape recording devices, for infringement of LUG articles 11 and 15.[25] GEMA sought an injunction ordering Grundig not to sell, rent, lease, or distribute on consignment or otherwise, any of its tape recorders without requiring the recipients of the tape recorders to get GEMA's permission prior to using them for taping, playing, and/or for public performance of any musicial works in GEMA's repertoire. GEMA also asked for an injunction prohibiting Grundig from advertising its tape recorders without a notice stating that any use of its tape recorders for taping and/or playback of works in GEMA's repertoire would require a GEMA license. GEMA also asked for an accounting and a declaratory judgment that Grundig had a duty to pay damages.

Grundig manufactures a variety of tape recorders, either as separate units or as part of radios or record players. In advertising and

> (b) One must take into account, however, in considering the scope of applicability of Art. 15(2), that during neither the enactment of the 1901 statute nor the 1910 amendment was there known a simple mechanism, the use of which demanded no prior technical training, for the purely mechanical process of copying performances on tapes from which the taped performance could be played back with a flawless sound level and completely true to nature. A process of fixing sound waves on a magnetized wire, invented about the turn of the century by the Dane Poulsen had become known in Germany through various patents (Peterson and Poulsen) in the years 1898 through 1902. These inventions, however, gained no practical importance because of insufficient sound volume in playback. Only by the end of the 1920's was this process used by large radio broadcasters and by movie producers. For private copying based on electro-magnetic principles, the process gained importance only in recent years because of the introduction of the tape recorder in the market place.
>
> Thus the [present] state of affairs concerning copying by means of such tape recorders was beyond the imagination of the legislator of 1901 at the time of enactment of Art. 15(2) and also in 1910 when the statute was amended . . . . It remains to be investigated whether the new situation created by the invention of the tape recorder results in conflict of interests unforeseen by the legislator, which is of importance to copyright law, and which cannot anymore be solved by application of Art. 15(2) because this situation is not covered by the resolution of conflicting interests intended by the enactor of that statutory norm. Contrary to the defendant's conception, the interpretation of a provision must, despite the clear wording of the statute, take into account intent and purpose of the statute, if the conflict of interests at bar could not have been envisioned at the time of enactment of the statute because it arose only subsequently by virtue of a change in the factual situation (citations omitted). The judge's obligation toward statute and law (Art. 20(2) GG) does not only permit him to develop the law for purposes of statutory law, but obligates him to do so for finding a just decision. Intent and purpose of a statute outranks its language. To utilize the intent and purpose for a specific case of application of the statute and to resolve the conflict from the view of *Treu und Glauben* [*ex aequo et bono*] in a just and sensible manner is the duty of a judge (citations omitted) (trans. suppl.).

[25] *See supra* note 15.

sales promotion materials, Grundig noted all the possible uses for its machines, emphasizing that the tape players could record radio transmissions or could be connected to ordinary record players for reproduction onto tape. Grundig's promotional literature stated that, while the recorders could be used by amateur movie makers to record sound tracks, by actors and orators to check on their vocal improvement and the quality of their delivery, as dictating machines, and as sales tools for product demonstrations in stores, the main purpose of the recorders was for the entertainment of the user.

LUG article 11 provided for the exclusive right of the author to control the exploitation rights of his work and, read in conjunction with article 15(1), forbade copying by any process, regardless of the number of copies made, unless the author's permission had been obtained in advance. Grundig claimed that article 15(2) exempted the copying done with its recorders and argued that the rights of the author must never transcend the individual's interest in keeping his private sphere free from claims under the copyright act. The German Supreme Court (BGH) rejected these arguments and held that the law requires the honoring of an author's personality rights even in the private sphere, and that even within the privacy of one's home no one may injure the author's interests in personality rights, diminishing his right of recognition, or alter the author's work.

Contrary to the usual civil-law practice of "finding the law" and not legislating by judicial authority, the Court, in almost common-law style, explained that the legislature of 1901 could not possibly have foreseen the technological progress that had been made by the year 1955. Despite the clear wording of LUG article 15(2), the Court held that the intent and purpose of subsection (2) of article 15 was to create a legal norm to balance conflicting interests. The lawgiver could not have predicted the present conflict of interest which arose as a result of subsequent factual changes. The BGH noted that although a judge is bound by statute and law through article 20(2) of the *Grundgesetz* (GG), the German Constitution, he is not only permitted to develop the law further by interpretation of statutory law, but is obliged to do so when necessary to arrive at a just decision.[26]

The Court then explained that the principle of personality rights as well as public policy require that the judiciary close the gap that arose in the old copyright act. The BGH observed that all civilized nations not only secured the personality rights of authors but had come to realize that authors may demand statutory assurance of an

[26] *Id.*

economically just reward for their work, and that another's enjoyment of their work, whether in public or in private, was the intrinsic justification for reasonable compensation.

GEMA scored a victory on the issue of infringement. Grundig was ordered to affix a notice, now known as the *GEMA-Hinweis*, which would warn potential purchasers not to infringe rights of persons represented by GEMA and of other copyright proprietors. GEMA lost on its claim for damages and an accounting. The BGH dismissed these claims, recognizing Grundig's reliance on prior interpretations of LUG article 15(2) as reasonable, especially since these interpretations were also supported by the writings of legal scholars.

A similar case was decided on the same day. In that case, record manufacturers sued the manufacturer of a wire recording device[27] on the grounds that the defendant violated the record producer's copyright in the recordings and violated the recording artist's performance rights. The BGH reiterated the reasoning of *Grundig-Reporter* and added that the artist's performance rights[28] were also violated by the copying of records and tapes by means of wire recorders. As in *Grundig-Reporter*, the court emphatically rejected the idea that the private sphere was immune from copyright infringement claims, and that private use was a defense to such infringement.

Following these two decisions, manufacturers and importers of tape recorders and wire recorders were theoretically obligated to print in all their promotional literature as well as in space advertisements the *GEMA-Hinweis* notice, warning recorder purchasers of their potential copyright liability. However, *Grundig-Reporter* was read to require this notice only if the manufacturer's or importer's advertising promoted the various possibly infringing uses. Thus, Grundig ceased to advertise the suitability of its equipment for taping radio broadcasts and for copying records. Grundig also stopped inserting the notice in promotional materials and advertisements under the belief that its "neutral" advertising did not require notice under *Grundig-Reporter*.

3. The 1960 Decision Concerning the *GEMA-HINWEIS*

GEMA again brought an action for copyright infringement. On January 22, 1960, the BGH imposed a positive duty on Grundig to

[27] Judgment of May 18, 1955, Bundesgerichtshof, Gr. Sen. Z., [BGHZ] W. Ger. I ZR 10/54. For the German report by Federal Supreme Court Justice Dr. Krüger-Nieland, *see* 20 Archiv für Urheber-, Film-, Funk- und Theaterrecht [UFITA] 335 (1955).

[28] Both the old LUG and the present UrhG grant performers' rights, unlike the United States copyright law. The period of protection is presently 25 years, not the 70 years *post mortem auctoris* otherwise applicable in German copyright law.

insert the *GEMA-Hinweis* in all its advertising or promotional materials in clearly legible type and in a prominent position even if the materials were "neutral" as to off-air taping and copying.[29] The Court also restated the rule that manufacturers can be held contributorily liable, a rule it had first pronounced in its May 1955 decision. The holding of the latest decision can be summarized thus:

> He who introduces machines into the market place which by the nature of their design and intended purpose are capable of a use that may result in an infringement of copyrights of third parties, even though this capability may not be generally known to the purchasers of the machines concerned, has the duty to institute serious measures to prevent a use of the machines that may violate the law.[30]

At the same time, GEMA tried to negotiate voluntary blanket license agreements with manufacturers and importers for a one-time license fee of DM 10.00 per recorder because it realized the difficulty of licensing each individual owner of a tape or wire recorder. Few of the manufacturers cooperated in these negotiations.[31]

GEMA also tried to induce private purchasers to sign up voluntarily for annual licenses at an initial rate of DM 10.00 per recorder. This fee was later increased to DM 12.00. For this purpose, the *Zentralstelle für private Überspielungsrechte* (ZPÜ), a collection bureau for private-taping licenses, was formed. By 1965, no more than about five thousand of many millions of owners had signed up.[32]

4. The *Tonbänder* Decision of 1963

Another important juridical development occurred in 1963. Leading authorities had pointed out that the recording machines were only part of the problem, and that something had to be done concerning the recording tape.[33] On June 12, 1963, the BGH held in *Tonbänder*[34] that the *GEMA-Hinweis* notice, that was required for tape recorder manufacturers, be prominently affixed in clearly legible type

[29] Judgment of Jan. 22, 1960, Bundesgerichtshof, Gr. Sen. Z., [BGHZ], W. Ger., I ZR 41/58.

[30] Reimer, untitled comments on these BGH decisions in 1965 GRUR 109 (trans. suppl.).

[31] Dietz I, *supra* note 6, at 460.

[32] *Id.*

[33] The recording tape is known in German as *Tonträger*, "sound carrier," or *Tonband*, "sound tape."

[34] Judgment of June 13, 1963, Bundesgerichtshof, Gr. Sen. Z. [BGHZ], W. Ger., Ib ZR 23/62.

on recording tapes. The courts reasoned that the sale and use of tapes also contributed in a legally significant manner to the danger of copyright infringement, and held that it was not unreasonable to require tape manufacturers to counteract potential infringing uses of their tapes by using the GEMA notice.

5. The *Personalausweise* Decision of 1964

GEMA's next suit was brought against retailers of tape recorders, but it asked for too much when it asked the courts to impose a duty on retailers to sell these machines to purchasers who showed legal identification and signed a license agreement. GEMA further requested that the names and addresses, together with the license, be forwarded by the retailer to GEMA. The BGH rebuffed this extraordinary demand in its *Personalausweise* decision in 1964.[35] The Court held that retailers had to include the GEMA-notice in their printed promotion pieces and in sales negotiations, but that they did not have to post the notice inside the store or place it in their shop windows. The BGH further noted that it transcended the limits of reasonableness to ask retailers to exact license contracts at the point of sale and force the customer to show identification. The Court observed that knowledge of the identity of the purchaser would not prevent a violation and that transmittal of names to GEMA would make sense only if GEMA could control the actions of tape recorder owners in their own homes. GEMA announced that it was considering the possibility of using neighbors, concierges, etc. as informants for its investigatory purpose. The BGH viewed this as a clear danger to the inviolability of the home sphere that is guaranteed by GG article 13. GEMA, rather weakly, argued that it did not intend to violate article 13 but its disclaimer was drafted in such a non-binding form that it would have permitted GEMA to pursue such a course of conduct despite its assertion to the contrary. This the BGH would not permit.[36]

[35] Judgment of May 29, 1964, Bundesgerichtshof, Gr. Sen. Z. [BGHZ], W. Ger., Ib ZR 4/63, 42 BGHZ 118 (1964).

[36] Legal authors recoiled at the idea of keeping track of purchasers, as did Reimer, *supra* note 30, at 110: "The demand of proof of identity is in no wise a part of the business relationship between seller and buyer under the civil code, and evokes unpleasant memories of police-state circumstances." (trans. suppl.).

B. The German Copyright Act of 1965

1. Theoretical Considerations

The German private law of obligations is based on freedom of contract, [37] one of the leading forms of private autonomy that permits the individual to arrange his affairs on his own behalf.[38] German legal thought divides freedom of contract into freedom of entering into a contract, which is limited by law only in cases where there is a statutory duty to contract as, for example, between the post office or a utility and a citizen, and the freedom of fashioning the content of the contract within the bounds of statutory rules that may either be discretionary (*jus dispositivum*) or mandatory (*jus cogens*).[39]

Von Gamm views copyright law as mostly discretionary in character; mandatory rules exist only where necessary to protect the author.[40] One major exception is the compulsory license, which limits the author's freedom of contract and his otherwise recognized right to control the use made of his work by depriving him of the right to refuse to contract.[41] Thus a compulsory license is a non-voluntary paid permission to do what would otherwise be illegal.[42] But "[o]nce the principle of civilized copyright law which gives the author absolute control of his work is abandoned, he finds himself always in the weaker bargaining position, unable to extract really fair remuneration from those who make use of his creation."[43] The already feeble power of the author is thus diminished further by a compulsory license because the issue now becomes not whether prior authorization to use the work will be given or has been obtained, but solely how much the author is to receive.

Compulsory licenses appear in at least two basic forms—the mandatory license fee as in the United States[44] and the fee-bargaining compulsory licenses of UrhG articles 53 and 54[45] in Germany. The German version sets a ceiling for bargaining at 5 percent of the factory

[37] BGB articles 145, 241, 305. *See also* Palandt, *Bürgerliches Gesetzbuch: Kommentar*, Einleitung n.2a, 2b; Einführung vor Art. 145, Para. 3 (3rd rev. ed. 1977).

[38] *Id.*

[39] *Id.*

[40] O. von Gamm, *supra* note 6, at 104.

[41] *Id.*

[42] Noel, *supra* note 6, at 51.

[43] Nordemann, *A Right to Control* or *Merely to Payment?—Toward a Logical Copyright System*, II Int'l Rev. Indus. Prop. & Copyright L. 49, 53 (1980).

[44] 17 U.S.C. § 115 (1982) (the New Act version of section 1(e) of the Old Act).

[45] *See supra* note 4.

price of a tape or video recorder. Austria has a similar statute[46] which provides for only "adequate compensation."[47] The German and Austrian provisions are really semi-discretionary or "hybrid" compulsory licenses since the statutes do not prescribe the amount to be paid, as is done in the United States. The European method may appear fairer on its face to authors because the price is open to negotiation; in reality it is rather cumbersome because the payor does not know what his obligation will be and the author does not know what he will receive. Moreover, authors often have to wait an unduly long time until they receive payment because of extended negotiations between collecting societies representing the author and the users.

A vocal critic of the compulsory license system is Nordemann, who believes that German authors have generally had negative experiences with it.[48] He cites as an example the public lending right which started out as the *Büchereigroschen*, "library dime"; (a *Groschen* is DM .10, or 10 *Pfennige*) but after long negotiations between the collecting societies and various German governmental units ended up as the *Bibliothekstantieme*, "library royalty," worth only 5½ *Pfennige* per loan per title.[49] Additionally, the *droit de suite* in the German statute[50] has never been implemented successfully because art dealers refuse to furnish the required information and make no payments. Further, the negotiations for a tape-recorder fee, limited by a maximum fee of 5 percent of the ex-factory price of the recording component, ended up at approximately 2.2 percent after the first negotiations,[51] and crept up to only slightly more than 4 percent after many years, never reaching the 5 percent ceiling.[52]

Nordemann prefers that the fee be "governed by the haggle of the market,"[53] and dislikes government controlled fixing of compensation and collection. He wrote:

> The State determines the rate of royalty. The State oversees the collection of sums due. The State imposes sanctions on defaulting

[46] Urheberrechtsgesetz of April 9, 1936, 1936 Osterreichisches Bundesgesetzblatt [OBGBl] 131 [OUrhG].

[47] In the 1980 amendment to OUrhG, Urheberrechtsnovelle of July 2, 1980, 1980 OBGBl 2315.

[48] Nordemann, *supra* note 6, at 69.

[49] *Id.* at 61. *See also* Seemann, *A Look at the Public Lending Right* 30 Copyright L. Symp. (ASCAP) 71 (1983).

[50] UrhG article 26.

[51] Nordemann, *supra* note 6, at 69.

[52] *Id.*

[53] Nordemann, *supra* note 6, at 52.

> users. . . . [S]uch system suffers from a lack of elasticity. It is therefore up to us Europeans—even without a Statue of Liberty—to preserve individual freedom as far as possible. We only need state interference when it is absolutely necessary. And Europe has found out that, with the help of its collecting societies, state interference is unnecessary.[54]

But at the same time, when speaking of the *droit de suite* in Germany, Nordemann criticizes the omission of a royalty-setting authority in the German act on the grounds that long delays are experienced in reaching an agreement between owners and users.[55]

In order to avoid a steady growth of government bureaucracy, it might be advisable to allow non-governmental bodies such as collecting societies to handle compulsory licenses. In the United States, that opportunity was lost when the New Act established the Copyright Tribunal.[56]

2. Background for Revision

The pioneering BGH decisions of the years 1955 through 1964, all based on the old LUG,[57] left GEMA and other interested parties feeling that, in spite of GEMA's court victories, the *casus belli* was unresolved. There was still no effective way for the copyright proprietor to achieve control over the use of his works through taping, or to receive adequate payment for such use. The various BGH decisions did not provide for any enforcement mechanisms in the event of copyright infringement by individual owners of tape recorders. Instead, the *Grundig-Reporter* decision observed that the existence of a legal claim did not depend upon the degree of its enforceability. Commentators discussing these various decisions criticized this pronouncement noting that a court which recognizes a legal claim should also provide a remedy within the framework of statutory possibilities.[58] One noteworthy suggestion for possible remedies may be found in the articles of the German Civil Code itself, which the BGH discussed but did not choose to apply.

In Part IV of its *Personalausweise* decision,[59] the BGH raised the possibility that GEMA might have an action against manufacturers

[54] *Id.*
[55] Nordemann, *supra* note 6, at 63.
[56] *See* 17 U.S.C. §§ 161-810 (1982).
[57] *See supra* note 15.
[58] Reimer, *supra* note 30, at 110.
[59] 1965 GRUR, *supra* note 35, at 108.

based on article 1004 of the Civil Code, *Bürgerliches Gesetzbuch* (BGB),[60] as interferors, or based on articles 823 and 830 BGB[61] as accessories to a violation of a statute, provided GEMA could prove that the recorders and tapes were specifically designed and produced for the predominant purpose of violating GEMA's copyrights in spite of the GEMA-notice. However, such proof would seem impossible to produce.

In this and other *dicta*, the BGH observed that if a simple, practical way, without undue burden to the public, could not be found to collect copying fees from users, then the best solution might be to permit the sale and distribution of the recorders upon a lump-sum fee agreement to be paid by manufacturers and importers for each recorder. The Court gave no weight to the argument that at the moment of sale it was still undetermined whether the use of the tape recorder would infringe copyrights. It drew an analogy to public performances of music where practical considerations in administering authors' and performers' rights, in view of a plethora of possible uses, mandated a lump-sum fee arrangement.

The Court further stated that GEMA would probably have to be satisfied with a one-time fee on each recorder despite the fact that it had a theoretical right to demand a license fee from each user. The BGH also raised the question of whether a further fee should be imposed on the tapes used in recorders. Finally, the Court maintained that shifting the fee from user to manufacturer or importer was not unreasonable because:

> [I]t agrees with the predominant system (which is also used in other cases of utilization of copyright properties) whereby the commercial utilizer, as for instance the record producer, book or music publisher, or theatre or concert impresario, pays the copyright fees and then passes them on to the final consumer in the framework of his pricing structure.[62]

[60] Article 1004(I) of the German Civil Code, *Bürgerliches Gesetzbuch* [BGB], provides: "If property is encroached upon in a manner other than by larceny or detainer, then the proprietor can demand from the interferor the removal of the encroachment. If further acts of encroachment are to be feared, the proprietor may sue for an injunction." (trans. suppl.).
[61] BGB article 823 is a general tort article which is also the basis for the general personality right known to German legal theory:
"He who intentionally or negligently and in violation of the law injures life, body, health, freedom, property, or any other right of another is obliged to make restitution to that person for the damages occasioned thereby." (trans. suppl.).
[62] 1965 GRUR, *supra* note 35, at 108.

3. The Revision Movement and the Resulting Law

The need for copyright reform, rather than for further amendments to LUG and KUG, had been obvious for some years. Soon after Germany returned to a semblance of normalcy after World War II, work on recasting the copyright statute began. The most controversial issue was whether copying for private use should be exempt in the new statute, or whether the author's absolute right to control of his work should be retained.[63] A government draft in 1954, published before the *Grundig-Reporter* decision, would have exempted sound taping.[64] Violent criticism followed, and dire predictions were made that record sales would plummet unless *Bundestag* provided for a new statute which accounted for future technological progress.[65] The argument for an exemption was based on the theory that copyright claims had to stop where the individual's private sphere began. One year later, *Grundig-Reporter* roundly rejected this contention.[66] Legal scholars had already cast grave doubt on the proposition. One theorist considered it a "topsyturvyfication" of the applicable legal relationships.[67] He felt that an infringement can never be justified merely because it occurs in private rather than in public. The consequence of permitting such infringement might result in the drying-up of the well-spring which nurtures intellectual life.[68]

The Ministry of Justice published a revised draft in 1959 which clung to the principle that copying for private use was permissible, but it inserted a limitation for video and sound-recordings which required that such tapes "be rendered unusable at the latest within one month of production."[69] A committee of the *Internationale Gesellschaft für Urheberrecht* (INTERGU)objected to this provision on the grounds that it was an improper deviation from the existing state of the law, and that it would permit a taking of property to which authors were legally entitled without compensation.[70] This committee appeared to assign precedential value to the various BGH decisions,

[63] Schulze, *Tonbandgeräte und Urheberrecht*, 38 UFITA 254 (1962).

[64] Draft by the Federal Ministry of Justice of May 19, 1954, *reprinted in* 16 Schriftenreihe der Internationalen Gesellschaft für Urheberrecht [INTERGU] 1 (1960).

[65] Hubmann, *Die Beschränkung des Urheberrechts nach dem Entwurf des Bundesjustizministeriums*, 19 UFITA 53.

[66] 1955 GRUR, *supra* note 6, at 496.

[67] Hubmann, *supra* note 65, at 72-73.

[68] *Id.*

[69] *See supra* note 64.

[70] Movsessian, *supra* note 17, at 564.

an uncommon occurrence among civil-law scholars in view of the fact that the statute itself had been neither amended nor revised.

The next government draft, published in 1962, deprived authors of their right to control but, for the first time, granted them a right of compensation from private users.[71] This draft rejected the proposal to impose a fee on manufacturers and importers of recorders because these businesses did not use protected works in an infringing manner, but merely sold objects which could be used for both lawful and unlawful purposes.[72] The upper house of *Bundestag*, the *Bundesrat*, objected to this version,[73] and the government withdrew the draft.[74]

The argument of the *Bundesrat* was "everything but convincing."[75] It assertion was that a claim for compensation for private use was not enforceable, because there was relatively little hope that private users would willingly pay, or that manufacturers or importers would voluntarily shoulder the burden.[76] The *Bundesrat* position was a warmed-over version of the reasoning behind the 1954 draft which had been debated thoroughly and found wanting. *Grundig-Reporter* and its progeny had established conclusively that the existence of a legal claim did not depend upon the degree of its enforceability. It had laid to rest the idea of an immunity for private use. Scholars had commented that the effect of a statutory prohibition on law-abiding citizens should not be underestimated or belittled,[77] particularly since practical ways and means could usually be found to carry out a legal mandate. The validity of German optimism about the willingness of the average citizen to obey a law when he cannot see or feel how any one is being injured, particularly where the entitlement is based on an abstract legal principle, may be doubtful. The German citizen, like the American, defies the law in more serious cases such as drug smuggling and use.

The discussions in parliament came to a halt after the BGH decided *Personalausweise*[78] in 1964 and established the principle that an au-

[71] *Bundestags-Drucksache* IV/270, 177 (1954). *See also* 45 UFITA 155 (1965).

[72] *Id.* at 72 (explanation of the former article 54, now article 53). The purchaser of a recorder could use it to reproduce negotiation or dictation as easily as he could use it in a legally infringing manner.

[73] 284th Sess., June 11, 1965, *Bundesrat-Protokoll* 1962/240, at 8. *See also* 46 UFITA 237 (1965). The Bundesrat, unlike the United States Senate, is composed of the prime ministers of each *Land* of the Federal Republic of Germany.

[74] Appendix 2 and 3 of draft in *Bundestags-Drucksache* IV/3401 (1965).

[75] Movsessian, *supra* note 17, at 565.

[76] *Id.*

[77] Krüger-Nieland, *Das Urheberrecht und die Entwicklung der Technik insbesondere der privaten Vervielfältigung mittels Magnettonband und Fotokopie*, 1957 GRUR 535, 541.

[78] BGH, *supra* note 59.

thor had a claim against a manufacturer as a quasi-accessory to copyright infringement.[79] In 1965, article 53(5)[80] was enacted which "was without precedent in national and international copyright law."[81] This subsection followed the trend of German copyright legislation and provided that claims could only be raised through a collecting society. The fee imposed on tape recorders was not to exceed 5 percent of the factory price of the tape recorder.

The enactment of UrhG article 53(5) has helped to quiet down the debates that lasted for more than a decade. This may prove that article 53(5) represents a just balance of conflicting interests.[82]

4. The *Bundesverfassungsgericht* Decision of 1971

A constitutional challenge of the new provision by tape recorder manufacturers was rejected by the Supreme Constitutional Court, the

[79] This excerpt of the BGH's *Personalausweise* decision gives some of the Court's reasoning:

> [The facts show that] the machines supplied by the defendant are designed for taping of music and are predominantly used for a purpose which infringes upon plaintiff's rights. Despite the thorough instructions concerning the rights of the plaintiff given [by the Court] during a number of years, do users, except for a minute minority of them, neglect to obtain the plaintiff's permission for the taping of protected music. . . . The defendant thus acts at least with a qualified intent [*bedingtem Vorsatz*] [to infringe] if it places the recorders . . . on the market and limits itself to a notice that the plaintiff's rights have to be observed when using the machines, even though the defendant cannot reject the fact based on experience gathered in the meantime, that the danger of an infringing use of the machines is diminished thereby only to an insignificant extent. This would be sufficient to affirm the objective fact that the defendant aided and abetted those infringements (citations omitted).
>
> The basis for the plaintiff's prayer for relief is the preventive action for an injunction with the corresponding application of Art. 1004 BGB as well as the so-called *deliktische Unterlassungs-oder Beseitigungsklage* (Arts. 11, 15, 36 LUC, Art. 823 (1, 2) BGB) [an action in tort suing for a cease-and-desist order and damages] (citations omitted). A precondition is that there be an adequate causal relationship between the conduct of the defendant which is sought to be enjoined and the anticipated illegal encroachment by tape recorder owners into the rights of copyright proprietors, *i.e.*, that the conduct of the defendant is an inescapable condition of the infringing event and that, objectively judged, this event is not beyond the realm of probability (citations omitted). . . . One cannot raise the objection that the factual process of reproduction as such is set in motion not by the supplier [of the machine] but by an independent act of the tape recorder user. . . . Copyright case law has always recognized that full liability for infringement of copyright is applicable also where this infringement can only be put into effect through the intervention of third parties. BGH, *supra* note 59, 1965 GRUR at 105-06.

[80] *See supra* notes 2 & 7.

[81] Dietz I, *supra* note 6, at 461.

[82] Dünnwald, *Internationale Aspekte der privation Überspielung in Ton und Bild*, 59 UFITA 153, 160 (1977).

Bundesverfassungsgericht (BVerfG), in 1971.[83] That Court affirmed that it was not a violation of the equal protection principle of the German Constitution that parliament made a choice between those who might be held liable (owners of tape recorders, manufacturers of recording machines, manufacturers of blank tapes, or dealers in tape recorders) and those who had to pay the copyright fees (manufacturers and importers). The BVerfG pointed out that the fee would be passed on to the purchaser even though the manufacturer was directly liable for payment.[84]

5. Video Recorders and the German Statute

Video recorders were not on the open market at the time of the 1965 copyright reform. Thus, they did not enter the initial discussions in any significant manner, but scholars and legislators knew of them and included them in their draft of UrhG article 53(5) as identical to sound recorders.[85] This was not innovative because prior law and the BGH had dealt with sound and video as so closely related as to be legally identical. Treatment of this kind was providential for authors and other copyright proprietors since by 1979, machines for the private recording of television broadcasts were already on the market and were expected to be offered at prices which would ensure them of wide distribution within a few years.[86] In 1971, manufacturers and importers of video recorders, guided by the unambiguous wording of UrhG article 53(5), had concluded an agreement with ZPÜ which probably approached the statutory limit of 5 percent of the ex-factory price of the equipment.[87]

[83] BVerfG, decision of July 7, 1971, 1 BvR 775/66, 31 BVerfGE 255, *noted in* 1972 GRUR 488.

[84] Dietz I, *supra* note 6, at 461.

[85] Reinbothe, *Compensation for Private Taping under Sec. 53(5) of the German Copyright Act*, 12 INT'L REV. INDUS. PROP. & COPYRIGHT L. 36, 48 (1981), refers to the "uniform provisions for sound and video recordings" in the new UrhG article 53(5).

[86] Reischl, *Harmonisierung des Urheberrechts in Europa*, 4 INTERGU YEARBOOK 133, 141 (1979).

[87] Exact figures are not available. Dünnwald, *supra* note 75, at 138. In 1976, GEMA received DM 4.6 million from manufacturers and importers. Imports accounted for approximately DM 3.5 million of that sum, so that German manufacturers contributed about DM 1.1 million. Assuming that the sum was GEMA's 40 percent share of ZPÜ income (GEMA's share went to 42 percent in 1977), then the total video recorder fee income amounted to approximately DM 16.5 million that year, a significant sum for a new invention as compared to the sound recorder fees of DM 19 million collected in the same year. Assuming further that the retail price of video recorders was then about DM 2000.00, the 1976 fees represent the sale of 160,000 to 165,000 video recorders. *See* Dietz I, *supra* note 6, at 463, n.36(a).

Predictions have been made that, should audio-visual instruments become mass-market items (as they have become in the United States where a video recorder can be bought for as little as $350), then claimants other than those already organized in ZPÜ[88] will come forth, especially professionals in the fine arts and film.

Still to be determined is whether videotapes should be subject to a copyright fee similar to the fees for recorders.[89] At present there is little discussion on that subject. From a legal viewpoint, all the arguments have already been made in the discussions of sound tapes and cassettes. Since existing law already protects most of the copyright proprietors involved, the only ones who would profit are those affected by the transmission of visual images, such as movie directors and producers, set designers and painters. The fact that videotapes are considerably more expensive than sound tapes does not alter the situation. On the one hand, the law considers not the cost of an infringing item, but the effect of the infringement on the protected work. On the other hand, the cost of a video broadcast is correspondingly higher than that of a sound transmission.

It has been argued that the video recorder fee should be 10 percent rather than the statutory 5 percent "in order to reestablish a minimum of justice."[90] However, even if a percentage increase would remunerate additional claimants, it would present an unjust solution. The machine fee is an inflexible and inequitable method of compensation since it does not reflect the frequency with which the machine is used. A levy on blank tapes would be more just, and the higher fees mandated by higher factory prices would make it possible to compensate additional claimants whose rights may also be infringed by acts of off-the-air video taping.

Anticipating the need for a special collecting society to receive the recorder fees, GEMA, VG Wort, and the *Gesellschaft für die Verwertung von Leistungsschutzrechten* (GVL), which represents performing artists and record manufacturers, had founded ZPÜ already long before the passage of UrhG article 53(5) in 1965.[91] UrhG article 53(5) prescribed a fee not to exceed 5 percent, but allowed the actual percentage to be determined by bargaining between ZPÜ and individual manufacturers and importers. The manufacturers, who

[88] *See supra* note 32 and accompanying text.

[89] Dietz approves the foresight of *Bundestag* in explicitly including video recorders in the scope of UrhG article 53(5). Dietz I, *supra* note 6, at 463.

[90] G.E. FROMM & W. NORDEMANN, URHEBERRECHT (3rd ed. 1970) 120, § 53(5)(h).

[91] Dünnwald, *supra* note 82, at 157.

were united in the *Zentralverband der elektrotechnischen Industrie* (ZVEI), an industry association of electronics manufacturers, agreed to pay a lump-sum fee of DM 4 million for each of the years between 1966 and 1968. Both sides assumed that this amount would be roughly 5 percent of expected sales. In practice, it turned out to be less than half that amount, approximately 2.2 percent,[92] because of an unanticipated rise in sales volume. ZPÜ was forced to renegotiate regularly and now collects slightly more than 4 percent. This figure is based on estimates of anticipated sales minus a "quantity discount" for having made a lump-sum fee agreement with ZPÜ rather than requiring individual agreements with each manufacturer.[93]

Importers, particularly large department store chains, were charged a flat 5 percent by ZPÜ, but the importers charged discrimination and sued. In its decision of January 30, 1970,[94] the BGH agreed and held that ZPÜ's actions, because of its monopoly position, were unjustifiably discriminatory as compared to its treatment of manufacturers. ZPÜ must now negotiate with each importer and try to reach the 5 percent maximum rate allowed by UrhG article 53(5) if possible.

6. The Unsatisfactory Solution

The practical experience with UrhG article 53(5) was quite unsatisfactory.[95] The provision was called inadequate by most, and even pusillanimous by some.[96] Only a few scholars considered it appropriate.[97] The *Bundestag* linked the 5 percent fee to the ex-factory price, on the assumption that the expensive reel-to-reel tape recorders retailing at that time at a cost of between DM 600.00 and DM 900.00 would provide adequate compensation.[98] With a wholesale discount of 50 percent, the factory price was between DM 300.00 and DM 500.00, and the fee per recorder was between DM 15.00 and DM 22.50.

[92] Nordemann, *supra* note 43, at 52.

[93] Dietz, *supra* note 6, at 462.

[94] BGH, decision of Jan. 30, 1970, *reported in* 1970 GRUR 200.

[95] *See* G.E. FROMM & W. NORDEMANN, *supra* note 90, § 53, n.1.

[96] Movsessian, *supra* note 17, at 561.

[97] *See* Reinbothe, *supra* note 85, at 45. Reinbothe thought the fee was appropriate because the income it generated "had reached such a remarkable amount." Even more remarkable is the potential number of copying incidences. Compared to GEMA's total 1978 income of over DM 400 million, its 42 percent share of DM 24 million, or not quite DM 10 million, is not all that impressive. *See id.*, at 43, n.27. See also Dietz I, *supra* note 6, at 463.

[98] Schenz, *Zur privaten Musikülberspielung auf Leercassetten im Mediensystem einer urheberrechtlichen Neuregelung*, 24 FILM UND RECHT 637, 638 (1980).

Rapid progress again outpaced good legislative intentions. Just about the time UrhG article 53(5) was enacted, the first cassette recorders appeared on the market.[99] Retail and wholesale prices of tape recorders dropped quickly, reducing the per-unit fee collected. While the total amount of money collected increased rapidly, the number of recorders in the hands of German families grew disproportionately by leaps and bounds.[100]

In 1978, a market study commissioned by the GVL and the German District of the International Federation of Producers of Phonograms and Videograms (IFPI) and performed by the *Gesellschaft für Marketforschung* (GFM) of Hamburg, a market research organization, was published. Its purpose had been to serve as a supporting document to an official GVL petition addressed to the Federal Ministry of Justice, which requested that article 53(5) be amended to include the imposition of a fee on blank tapes similar to the fee on recorders.[101] This study revealed the following facts:

* In 1971, 22 million German households owned 21 million radios, 17 million television sets, 11 million record players, and 6 million tape recorders.
* By 1977, there were 1,940 tape recorders in each 2,000 households, or 970 per thousand. Since there was multiple ownership, 62 percent of all households owned one or more tape recorders.
* 50 percent of the tape recorders were used almost daily, and another 32 percent were used "a few times" each week (presumably between two and four times per week).[102]
* 47 percent of the owners rated off-air taping of music as the most important use of their recorders.
* 83 percent of all taping was of protected works performed by others for which no compensation is paid.
* 71 percent of recorder owners tape radio or TV broadcasts off-the-air; 12 percent borrow records or prerecorded tapes to copy them; 9 percent buy such material with the intent to make copies.
* Only 6.5 percent actually record by means of microphone.[103]

[99] Kreile, *Vervielfältigung zum persönlichen Gerbrauch*, 4 INTERGU YEARBOOK 95, 111 (1979).

[100] Movsessian, *supra* note 17, at 560. *See infra* app., Table 1.

[101] Thurow, *Zur Notwendigkeit einer urheberrechtlichen Abgabe auf Leercassetten*, 22 FILM UND RECHT 590 *passim* (1978) reports in detail on this market study.

[102] Dünnwald, *supra* note 82, at 154.

[103] *See* Thurow, *supra* note 101, reporting the IFPI-GEM market study.

* By 1978, there were 21 million tape recorders, the overwhelming majority of which were used for off-air taping of protected works; between 83 percent and 95 percent of such works were so used.[104]

By 1978, the anticipated recorder fee of DM 15.00 or more had declined to approximately DM 4.50.[105] Some claim that the fee dropped as low as DM 1.30 to DM 1.55 for average quality tape recorders, and even as low as DM .73 for inexpensive recorders sold in discount stores.[106] Since there are almost as many recorders as there are households,[107] it is not surprising that the market for tape recorders is stagnating.[108] In contrast, sales of blank cassettes seem to be booming.

In 1977, GFM, the market research firm in Hamburg, determined that each tape recorder owner possessed approximately 14.6 blank tapes, and thus there was a total of 330 million blank cassettes in all of Germany.[109] Each cassette was used more than once, at an average use of up to 3.5 times per tape.[110] Another 88 to 90 million cassette were sold between April 1977 and April 1978,[111] and sales for subsequent years are estimated at about 100 million cassettes.[112] The recording potential of such a large number is staggering.[113] Every man, woman, and child living in Germany could thus record more

[104] *Id.* at 593, cites 83 percent; Kreile, *supra* note 99, at 112, uses the figure of "more than 95%;" Movsessian, *supra* note 17, at 560, uses 90 percent; Schulze, *Vergütungspflicht bei privater Vervielfältigung—Revision der deutschen Gesetzgebung*, 23 FILM UND RECHT 179, 180 (1979), states that 65 percent applies to the taping of radio broadcast only; if one were to add the commonly cited figure of 15 percent for copying of records or prerecorded tapes, Schulze's estimate would be 80 percent.

[105] Movsessian, *supra* note 17, at 560.

[106] Schulze, *Does the Copyright Law Keep Pace with Technological Development?* 20 GEMA NEWS 17, 20 (Feb. 1980).

[107] G.E. FROMM & W. NORDEMANN, *supra* note 90, § 53(5)(h).

[108] *Id.*

[109] Movsessian, *supra* note 17, at 560. *See also* Thurow, *supra* note 97, at 594.

[110] Movsessian, *supra* note 17, at 560; Nordemann, *supra* note 43, at 51, (speaks of two-time use). *Cf.* Thurow, *supra* note 101, at 594. Thurow claims a three and a half time use, the same incidence claimed in Austria. Even at a two-time rate of use, the numbers are large. Nordemann states:

> [t]he smallest cassette with 60 minutes playing time can contain as many as 20 hits. Even if each cassette is used only once, this means 20 × 90 million or 1.8 billion recordings per year. And this, it should be noted, is a minimum. Many cassettes are used over and over again and most of them have a longer playing time than 60 minutes.

Nordemann, *supra* note 43, at 51.

[111] Movsessian, *supra* note 17, at 560.

[112] *See infra* app., Table 2(a).

[113] Dietz I, *supra* note 6, at 463.

than two hours' worth of playing time per year of copyrighted works. While there can be no exact statistics as to the actual taping done, some scholars arrive at huge numbers.[114] Similar estimates could be established for the United States. As the population of the United States is almost four times that of West Germany, the uncompensated use of copyrighted works would be much greater.

What does the German "home tapist"[115] record? GFM has suggested the following:[116]

* 39 percent international pop music
* 43 percent German pop and folk music
* 5.7 percent classical music
* 1.4 percent live music, either at home or at public concerts
* 1/10 of 1 percent dictation

The balance covers all other conceivable uses.

In 1977 about 175 million prerecorded "sound carriers" (records and tapes) were sold of which 25 million were prerecorded tapes.[117] These records and tapes had a storage capacity of 6.4 billion minutes of playing time, whereas the approximately 90 million blank tapes sold that year could store 6.7 billion minutes of playing time if they were used only once.[118]

The economic impact is significant. While it is impossible to predict how many prerecorded tapes would have been bought if home taping were not so inexpensive and convenient, some hypothetical calculations are worth considering, as suggested by Thurow.[119] For example, if the 90 million blank tapes had been sold as prerecorded tapes at a retail price of DM 15.00 per tape, the additional sales for the industry would have amounted to DM 1.35 billion. In 1977, the industry actually sold DM 1.9 billion. Thus, the annual total could have been DM 3.25 billion. The portion of the retail price of DM 15.00 attributable to authors' royalties and performance rights royalties (i.e., for composers, lyricists, performing artists, and producers) would have been DM 3.00 per tape, so that an additional DM 27 million would have accrued to these copyright proprietors. Instead, the fee imposed on tape recorders, when recalculated on the basis of blank tapes sold, generates DM .15 or approximately a $.06 royalty

[114] *See infra* app., Table 2(b).

[115] McDavid, *Tape Recording for Home Use: The Right to Delayed Enjoyment*, 1972 REVUE INTERNATIONAL DU DROIT D'AUTEUR 67, 110.

[116] Thurow, *supra* note 101, at 593.

[117] *Id.* at 594.

[118] *See infra* app., Table 2(b).

[119] Thurow, *supra* note 101, at 593.

per tape. This calculation does not even take into account the economic impact these sales would have had on wholesalers, distributors, retailers, advertising media, etc. Put starkly into perspective:

> If one compares the sales figures for blank cassettes to the total number of sold pre-recorded sound carriers, one observes that the blank cassettes cream off more than one third of the total present-day market for sound carrier music. This development harms especially composers, lyricists, and performing artists as well as those who utilize their interests economically, the music publishers and manufacturers of sound carriers. Also affected are writers and publicists.[120]

It is not surprising on the basis of the above data that a number of music-related industry associations[121] demanded reasonable compensation for the infringing use of blank cassettes in the form of a fee imposed on the tapes.

7. The Government's Amendment Draft of 1980

Despite the fact that most scholars seem to favor a fee on blank tapes or cassettes in addition to the fee on recorders, the German government submitted a draft of an amendment to the 1965 UrhG on September 8, 1980. This amendment still does not provide for such a fee but nonetheless attempts to remedy the situation.[122] The draft proposes to reorganize UrhG articles 53 and 54 in a more logical way to ensure adequate compensation of authors based on the recognition of technical progress since 1965. The present article 53, because of the way the statute had been drafted, had been considered in effect a "subsection" of article 54.[123]

Proposed article 53 would deal with copying of any kind for both private and personal use and would permit such copying under certain circumstances.[124] Proposed article 54 would establish the duty of

[120] Kreile, *supra* note 99, at 112 (trans. suppl.).

[121] Movsessian, *supra* note 17, at 560-61, states that the Spitzenverband Deutscher Musik (SPIDEM), an association of music-related associations composed of the German composers', lyricists', music publishers', and music arrangers' associations, published a number of articles on the subject in SPIDEM's information bulletion, *Musikspiegel*, which demanded of parliament that it follow its declaration of principles of 1965 by also granting reasonable compensation on sales of blank cassettes.

[122] *Referentenentwurf eines Gesetzes zur Änderung des Gesetzes über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz)* of Sept. 8, 1980, *reprinted in* 89 UFITA 85 (1981).

[123] G.E. FROMM & W. NORDEMANN, *supra* note 95, § 53(1).

[124] The government commentary to the *Referentenentwurf*, *supra* note 115; 89 UFITA at 97, states:

paying adequate compensation without limiting it to the 5 percent ceiling as in the present article 53(5). Proposed article 54(1), the video and sound recording subsection, would make one significant change. The present statute speaks of *Funksendungen*, radio or television broadcasts through the air, whereas the proposed provision uses the term *Sendungen*, broadcasts by any means, in order to cover cable transmissions as well. But

> [t]he proposals to take into account the greatly increased recording potential that arose since introduction of the blank cassette by instituting a duty of compensation on blank cassettes alone or supplementary to the recorder fee has not been adopted by the draft for predominantly practical considerations.[125]

The government draft argues that because of the tremendous number of tapes sold annually, it would be difficult to collect and control a blank tape levy. Collection and control would be disproportionately extensive requiring costly administrative procedures in addition to the collection cost of the recording machine fees.[126]

Aside from the fact that the BGH has ruled that enforceability does not control entitlement,[127] there are hundreds of other fees or taxes that are collected daily which are just as large or even larger, such as, the cigar, cigarette, and tobacco taxes.[128] Moreover, since a mechanism exists to collect the recorder fees, it would be relatively easy to extend it to blank tapes, particularly if the fee is imposed on manufacturers and importers so it can be collected at the source before the cassettes enter the stream of commerce. GVL argued:

> Difficulties in collection and control of the levy which can only be met with great administrative expense are not envisioned. The number of manufacturers—there are, in essence, only two large German companies—and of importers of blank cassettes is even smaller than that of manufacturers and importers of sound-recorders. It is our experience that these companies immediately form a utilizers' organization in order to be able to enter into a blanket agreement. . . . Since these companies have a duty of disclosure as to manufactured and imported blank cassettes, ZPÜ's control . . . should not lead to a significant increase in its administrative expenses.[129]

More curious is the argument that consumers would "lack understanding"[130] for such a blank tape fee. Is the government saying that it can more easily weather the lack of understanding on the part of authors, publishers, record manufacturers, performing artists, and others who are being deprived of a constitutional property right under GG article 14? Should one assume that this difference is based on the simple political arithmetic that copyright proprietors represent fewer votes than the young people said to be primarily affected by a socially unjust levy?[131]

Blank cassette manufacturers claim that an imposition of the levy would ruin the blank tape business because the price of inexpensive cassettes, at DM .90, or less than $ .40, could not go without a huge loss in sales.[132] This argument is invalid since the fee for low-cost cassettes would be 5 percent of one-half of the retail price, or DM .0225, which is approximately one cent! He who can afford a 90 *Pfennig* cassette in Germany can also afford to pay as much as 95 *Pfennige*.

Finally, the government's commentary states that the possibility of recording non-copyrighted materials on blank cassettes must not be overlooked.[133] Since the percentage of such use is insignificantly small,[134] it would seem that Bundestag could easily disregard as *de minimis* these infrequent non-infringing uses.

A simple solution for the blank cassette problem was proposed by the Director General of GEMA, Professor Erich Schulze. He suggested leaving UrhG articles 53 and 54 intact, but amending article 53(5) by adding "and of video and sound carriers" wherever there is a reference to manufacturers or importers of video or sound recorders.[135] His proposal would also eliminate the existing 5 percent ceiling on royalties and would replace it with the phrase "adequate compensation" that was used in the 1980 government draft. This would eliminate an aspect of compulsory licenses which Nordemann does not like and

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"The design of Arts. 53, 54 had to be changed because the duty to compensate applicable for works copied on video and sound carriers in case of private use has now also been extended to personal use, and because a duty to compensate has been introduced for reprographic copying for private as well as for personal use." (trans. suppl.).

[125] *Id.*

[126] *See supra*, note 122; BGHZ, *supra* note 24.

[127] Schenz, *supra* note 98, at 638.

[128] Dünnwald & Thurow, Letter from GVL to the Federal Minister of Justice of Dec. 19, 1980, *commenting on* the *Referentenentwurf*, *supra* note 122.

[129] 89 UFITA, *supra* note 122, at 99 (trans. suppl.).

[130] Movsessian, *supra* note 17, at 561.

[131] Thurow, *supra* note 101, *passim*.

[132] 89 UFITA, *supra* note 122, at 100.

[133] Thurow, *supra* note 101.

[134] Kreile, *supra* note 100, at 111.

[135] Nordemann, *supra* note 43, at 52.

would restore freedom of contract. However, there is a chance that enforcement will lag due to protracted negotiations during which the copyright proprietors will not be paid.

Although the BGH has established that there should be liability for infringing copying which might best be compensated through a blank cassette levy, and although authoritative legal scholars have agreed in principle that this is the best solution, it may yet be a while before such a fee is finally instituted. In view of the government's resistance to instituting the tape recorder fee despite a number of BGH and BVerfG decisions between 1954 and 1965, it seemed certain in 1980 that many drafts of revision or amendment would be made and rejected before the blank tape fee could be enacted.

8. The Government Amendment Draft of 1982

Because of the negative response to the 1980 amendment draft, a further draft was submitted by the government to parliament on September 17, 1982. Apart from amending other provisions of the 1965 UrhG, it restructures the entire duplication and copying provisions of articles 53 and 54 in a manner similar to the 1980 draft. Thus, the new article 53 proposes to regulate all duplication for private and personal use, and the new article 54 deals with the obligation to compensate authors.[136]

An interesting aspect of the 1982 draft is that all copying of any protected work, whether of printed materials, sound or video broadcasts, public lectures or performances, is treated the same in article 53, thus viewing all forms of copying as legally identical regardless of what means, process, or materials are used. There are provisions allowing for the different nature of each type of work, but basically the provisions are straightforward and all copying of any kind whatsoever is covered.

The important change in the 1982 draft is the acceptance of the proposal to levy a fee on blank tapes as well as on recording machines. Thus, the government bowed to the urgent calls for a tape fee by scholars and authors. The compensation rates appear to be quite reasonable and reflect the opinion voiced by various groups: DM 2 for tape recorders, DM 15 for video recorders, DM .10 per hour of play of blank sound tapes, and DM .40 per hour of play for blank video tapes.

[136] Bundestagsdrucksache No. 370/82 of Sept. 17, 1982.

It is too early to predict whether the amendment will be enacted since scholarly commentary must be awaited.

IV. Conclusion

Why should the United States be concerned about how the Federal Republic of Germany structures its copyright statute? In this era of rapid inter-continental communications and nearly world-wide utilization of authors' works, it is practical and advisable that the laws protecting intellectual property rights not be too divergent among the major civilized nations to avoid international legal problems where works are used outside an authors' homeland.

Major international treaties such as the Berne Convention or the Universal Copyright Convention attempt to provide for a minimum level of protection of authors' rights among contracting nations. However, the effectiveness of treaties hinges on how the individual national statutes implement this international protection. The United States has differed from European nations in the scope of its statutes to protect authors, artists, and other copyright proprietors. Although protection has been expanded in the 1976 Copyright Act, the types of protection known as performers' rights, *droit de suite*, and most importantly, compensation rights for copying by sound or video recorder or by photocopying machine are missing.[137] Video recording is presently the subject of a proposed amendment[138] but copying of recordings, whether of off-air transmissions or of records or tapes, might also benefit from legislative attention.

The Ninth Circuit, in its recent *Betamax* decision,[139] has addressed part of the issue. By making a distinction between audio and video recordings the court contributed to a problem that the New Copyright Act raises.

[137] The "Mathias amendment" S. 1333, 97th Cong., 2d Sess. (1982), proposed to add a new section 119 to the New Act which, in section 119(a), exempts from infringement liability those who make a single videotape of a television broadcast if it is for the private use of the individual and immediate members of his or her immediate household. Section 119(a) then imposes, via a compulsory license, a fee on recorders to be paid by manufacturers and importers in an amount and manner determined by the Copyright Royalty Tribunal and the Register of Copyrights. The balance of the new section 119 deals with how the fees are to be calculated, deposited, and distributed to those proprietors having a claim on them, as well as other technical matters. *See Legal Problems Arising from the Use of Videocassettes and Audiovisual Discs*, 12 Copyright Bull., No. 4, at 8 (1978) (Joint Report of Subcommittee of the Intergovernmental Committee).

[138] *Id.* at 9.

[139] 659 F.2d 963, 967 (9th Cir. 1981).

An implied exemption from the coverage of section 106 of the New Act for home sound taping, but not for video recording, appears to lack logic. German doctrine refuses such a distinction. Internationally, a similar attitude prevails as evidenced in discussions at joint meetings of the Executive Committee of the International Union for the Protection of Literary Works (Berne Convention) and the Intergovernmental Copyright Committee of the Universal Copyright Convention. During Subcommittee meetings of the two bodies on November 24, 1978, it was expressed that in both types of recordings "the owners of the rights did in every case suffer a loss which, if it could not be avoided, should at least be mitigated."[140] In concluding that the lack of technical means to prevent large numbers of uncontrolled recordings of both kinds made it necessary to establish a system of compensation, the subcommittees stated that this system should consist of

> a single-standard charge on the sale price of recording equipment and material supports [which is] intended to compensate all the professional groups whose interests were at stake.[141]

From a philosophical viewpoint, the distinction between sound and video recordings appears hard to defend. There may be technical and cost differences between the two but there are no legal ones. In both cases the unremunerated use of an author's work is involved, for which there ought to be payment. The distinction between audio and video is artificial and creates problems for which there are only illogical arbitrary solutions.

For example, hypothetically, is a performance of Aaron Copland's *El Salón México* by the Boston Pops under the baton of Arthur Fiedler any less worthy of protection when it comes into one's home via the classical music radio station, from which one may tape it, than when it is broadcast by a public television station, from which one may not tape it? American law, unlike its German counterpart, does not afford protection to the labor of performing artists; therefore, the only portion that is protectable would be the visual, mute image of Fiedler and the orchestra going through their motions. If one listens to a "simulcast" performance where the image is seen on mute TV and the sound is heard on the radio, then what deserves protection on TV? Where is the social value of that protection? Is it the higher cost of a television broadcast? Comparative costs in using a protected work

[140] *Id.* at 967, n.4.
[141] *Id.* at 968.

should not be considered in deciding whether to protect the author, or to exempt his work from protection.

Section 106, subsection (1) of the New Act grants the owner of copyright or one authorized by the owner the exclusive right, *inter alia*, "to reproduce the copyrighted work in copies or phonorecords," subject to limitations contained in sections 107 through 118. This phrase should clearly apply to both audio and video recordings.

The Ninth Circuit based its distinction on the fact that section 102(a) of the New Act lists these two types of recordings in separate subsections,[142] and cited Congress' "special solicitude for audio-visual works."[143] It went on to explain that the relatively large investment in such works and the "especial danger posed by unauthorized reproduction" is reflected in this Congressional concern.[144] The court, in explaining that video-recording had been overlooked in the discussions before passage of the 1971 Sound Recordings Act, because "[t]here was never a considered review of the home video recording problem,"[145] stated that:

> [t]here is absolutely nothing in the 1971 legislation which would indicate that the Congress was in any way concerning itself with home video recording. *It is well settled that silence cannot be viewed as an expression of Congressional intent* (citations omitted)[146] . . . *Resort to the legislative history is entirely unnecessary when the statute is clear and unequivocal on its face.*[147] (emphasis added)

Finally, the court held it was an infringement of the New Act to video tape off-the-air broadcasts at home for purely private use.

The legislative history of the New Act does not discuss home taping of sound transmissions, nor does it expressly grant an exemption in section 114. Professor Nimmer confirms this view when he states that the section does not suggest a limitation because a reproduction is made for non-commercial or non-distribution purposes.[148] Professor Latman comments that there is no indication that Congress intended a change from the 1971 Sound Recording Act (where an

[142] 17 U.S.C. 102(a)(6) (1982) (motion pictures and other audio-visual works); 17 U.S.C. 102(a)(7) (1982) (sound recordings).
[143] 659 F.2d at 968.
[144] *Id.* at 969.
[145] 3 M. NIMMER, *supra* note 4, § 8.05(c).
[146] *See* A. LATMAN, *supra* note 4, at 174.
[147] 659 F.2d at 968-69 (citing U.S. v. Oregon, 366 U.S. 643 (1961)).
[148] 3 M. NIMMER, supra note 4, § 8.05(c).

exemption for sound recordings existed by implication).[149] As the Ninth Circuit said, silence is not an expression of Congressional intent,[150] and resort to legislative history is unnecessary where the statute is clear and unequivocal on its face.[151]

The *Betamax* court cannot have it both ways: because of the absence of any comment on video taping in the legislative history of the 1971 Sound Recording Act (an act not concerned with video taping, but intended as a stop-gap measure to put tape pirates out of business during the sixteen years that negotiations for the revision of the U.S. Copyright Act dragged on), there is no exemption for home video recorders under the New Act, express or implied. Despite the absence of any comment on home sound recording in the much more extensive legislative history of the New Act, there is an implied exemption for home sound taping because of the outdated legislative history of the 1971 stop-gap amendment which was meant to be superseded by the New Act. This does not seem well-reasoned.

The Ninth Circuit also examined the fair use doctrine to see whether an exemption under this doctrine was possible, and correctly held that it was not. This doctrine should play no role in these considerations. Both sound and video taping concern the *intrinsic* use of the work, rather than a *productive* one as indicated by section 106 of the New Act. Where an author's work is copied for private enjoyment, the required "use by a second author of a first author's work" needed to invoke the fair use doctrine is lacking.[152]

Copyright law in the United States may not be so different from the European and international view as may be apparent at first sight. While the United States may treat these generically similar acts of recording in separate subsections of its statute, the principle appears to be that both should be equally protected. This would not only be a fair and just result for the American author and the producer of sound as well as video recordings, but would also avoid alienating the United States from its treaty partners in the Universal Copyright Convention and our neighbors in the Berne Convention. Since in all these treaties the principle of "national treatment" is of importance, the protection of both types of recordings may be advisable by amendment of the New Act, if necessary. Based on the experience of Germany, a levy on blank tapes used for both sound and video recording seems the most

[149] *See id.*; Meyers, *supra* note 6, at 573.
[150] 659 F.2d at 968.
[151] *Id.* at 969.
[152] L. SELTZER, EXEMPTION AND FAIR USE IN COPYRIGHT 24 (1978).

equitable solution because it considers the frequency with which the recording machine is used. The collection of fees directly from the manufacturers and importers by the Copyright Royalty Tribunal would be no more complex, and perhaps less so, than the collection of other compulsory license fees which is now the Tribunal's responsibility.