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PROTECTION STANDARDS FOR BROADCASTING ORGANIZATIONS IN THE EUROPEAN COMMUNITY AND IN THE LEGISLATION OF THE SCANDINAVIAN STATES

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I. General

1. As mentioned before, the Copyright Acts of the five Scandinavian (or Nordic) States all date back to the beginning of the 1960s (with the exception of Iceland where the Act is about 10 years younger). These States were instrumental in the establishment of the Rome Convention and have traditionally been strong supporters of the protection of neighboring rights, including the rights of broadcasters. Thus the Copyright Acts of those countries - which are almost uniform - contain provisions on the protection of broadcasters´ rights which all follow the same main lines, namely granting sound radio and television broadcasters rights in respect of their programme-carrying signals which rights are based on a copyright approach to the protection. It has for a long time been the policy to treat as much as possible the holders of neighboring rights in the same way as copyright holders, in view of their important contributions in the cultural sectors in general and, for some of these categories, in view of the investments made for their productions.

2. This protection which thus existed from the outset was amended and strengthened with the implementation of two European Community Directives, namely

– *the Council Directive 92/100/EEC of 19 November 1992 on Rental and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property (the Rental and Lending Directive*) and

– the *Council Directive 93/83/EEC of 19 November 1992 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission (the Satellite and Cable Directive).*

3. In addition the broadcasting rights were also to some extent influenced by another Directive, namely the *Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights (the Term of Protection Directive*).

4. Also the applicability as from January 1, 1996 of the so-called *TRIPS Agreement* within the World Trade Organization (WTO) to some extent had an influence on the broadcasters´ protection.

5. The Directives have thus greatly influenced the legislation on, inter alia the broadcasters´ rights as they now exist in the Scandinavian countries (of which Denmark, Finland and Sweden are members of the European Community and Norway and Iceland are party to the European Economic Area (called the EEA, which comprises them and Liechtenstein - but not Switzerland - together with the European Community countries). It would thus be appropriate to give a short overview of the contents of the European Community Directives which have an impact in this respect.

6. In some respects the Directives deal with authors´ rights and in some respects with the related rights, among them the broadcasters´ rights. The broadcasters can be both holders of copyright in the program contents (either on the works-made-hire doctrine or as employers or other assignees or licensees) and holders of a related right in their signals. For this reason and also in order to give a full picture the description of the Directives below deal with both branches.

II. Council Directive (92/100/EEC) on rental right and on certain rights related to copyright in the field of intellectual property.

General

7. The Directive contains two Chapters, Chapter I on rental and lending right and Chapter II on rights related to copyright. Both Chapters contain provisions which have an impact on broadcasters´ rights.

Rental and lending

8. The provisions in the Directive apply to rental and lending of works protected by copyright but as references are made in the Chapter on related rights it is important to note also what is contained in Chapter I. The two notions are defined in Article 1.2 and 1.3. Thus, for the purposes of the Directive, "*rental*" means the making available for use, for a limited period of time, and for direct or indirect economic or commercial advantage. "*Lending*" means the making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public. These notions are further clarified in the preamble. One of the considerations state that from rental and lending are excluded "certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting , making available for the purpose of exhibition, or making available for on-the-spot reference use." Furthermore the same recital states that lending within the meaning of the Directive "does not include making available between establishments which are accessible to the public."

9. As mentioned, lending within the meaning of the Directive applies only to the making available to the public in establishments without the economic or commercial advantage mentioned in the provision. A recital states that where lending in such establishments gives rise to the payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishments, there is no direct or indirect economic or commercial advantage within the meaning of the Directive.

10. In addition, Article 1.2 states that the rights are not exhausted by sale or any other act of distribution. This is more or less self-evident anyway.

11. A third definition of some importance is the concept of a "film" which is used, inter alia, in respect of the producer of the first fixation of a film in Article 2. The term "film" shall for the purposes of the Directive designate a cinematographic or audiovisual work or moving images. Thus, it should be noted that the concept of "film" is thus wider than the normal concept of a work in that it could include also sequences of images which give the impression of moving without necessarily being a work.

12. The basic provision in the Directive in this respect is contained in Article 1.1 which prescribes an obligation for the Member States to provide for *an exclusive right to authorize or prohibit the rental and lending of originals and copies of copyright works* in accordance with the provisions in the Chapter and subject to Article 5 (which provides for a possibility of derogation from the exclusive public lending right).

13. Rental and lending rights shall, according to Article 2.1 *be granted to authors, performers, phonogram producers and producers of first fixations of films*. As a clarification is added that the principal director of a cinematographic or audiovisual work shall be considered either as the only author of that work or as one of the co-authors (Member States may provide that also other contributing authors shall be considered as its co-authors). A further clarification is that the rental and lending rights under the Directive do not extend to buildings and works of applied art. In addition, Article 5 prescribes that the Directive is without prejudice to Article 4 c) of the Computer Program Directive (which deals with the distribution right, including the rental, of computer programs). In respect of computer program consequently only that Directive remains applicable.

14. The Directive also contains some *rules on presumption*. First, Article 2.5 prescribes as a rule that when a concerning film production is concluded either individually or collectively, by performers with a film producer, the performer shall be presumed to have transferred his rental right, subject to contractual clauses to the contrary and also subject to Article 4 (an unwaivable right to equitable remuneration). This is an obligatory presumption ("*shall*") and concerns only performers. Paragraph 6, however prescribes that Member States may provide for a similar presumption with respect to authors. This is, however, a facultative provision ("*may").* As also mentioned, paragraph 7 contains a provision to the effect that Member States may provide that the signing of a contract concluded between the performer and a film producer shall have the effect of authorizing rental, on the condition, however, that the right to equitable remuneration is provided for in the contract; this provision may extend also to the related rights under Chapter II.

15. An important element in the context of rental is the safeguard for authors and performers in case they have transferred or assigned their rental right concerning a phonogram or a film (not other works or contributions) to the producer. According to Article 4.1. *those right-owners shall retain the right to obtain an equitable remuneration for the rental*. That right can not be waived (paragraph 2),but the administration of the right may be entrusted to collecting societies representing the two categories of right-owners. Member States also are entitled to impose administration by collecting societies of this right to remuneration and may also regulate the question from whom this remuneration may be claimed or collected. Thus, the States have a certain freedom to regulate some elements in the collection and the administration of the right.

16. Another important element in the Directive is the *derogation which is possible from the exclusive public lending right.*The main element is that according to Article 5.1 Member States may derogate from this right, "provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration, taking account of their cultural promotion objectives." In Article 5.2 is added that when Member States do not apply the exclusive lending right as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration. Exemption from the payment of the remuneration mentioned in paragraphs 1 and 2 may be made by Member States for "certain categories of establishments." According to an official statement by the Commission, for instance public libraries, universities and educational institutions may be exempted from the obligation to pay a remuneration. There is no recital explaining further the meaning of this exemption but, for instance in the Scandinavian countries, it has been considered possible to retain the public lending rights schemes on the basis of that provision.

17. As regards the *duration of the rights*, Article 11 of the Directive prescribes only that the rights provided for authors in the Directive shall not expire before the term provided by the Berne Convention. This provision is now superseded by the provisions in the Directive on the term of protection.

Related Rights

18. Chapter II deals with the protection of the so-called "related rights" in the Community. It deals with four basic exclusive rights to authorize or prohibit certain acts, namely the fixation right, the reproduction right, the broadcasting and communication to the public right and the distribution right.

19. *The fixation right* in Article 6 of the Directive shall be granted to performers in respect of their performances and to broadcasting organizations in respect of their broadcasts, whether they are transmitted by wire or over the air, including by cable or satellite. This includes consequently also cable distributors but Article 6.3. makes an important exception to the effect that: "a cable distributor shall not have the right provided for in paragraph 2 where it merely transmits by cable the broadcasts of broadcasting organizations."

20. Also broadcasting organizations are granted a fixation right under Article 73(1).2 and as regards the nature of the right the same applies as in respect of performers.

21. *The reproduction right* is dealt with in Article 7. The exclusive right shall cover the "direct or indirect reproduction" for performers, phonogram producers, producers of first fixations of films and broadcasting organizations.. The right shall be freely transferable, assignable or the subject of granting contractual licenses.

22**.** *The right in respect of broadcasting and communication to the public* is dealt with in Article 8 and deals with the rights in this respect of performers and of broadcasting organizations. Performers shall be granted an exclusive right to authorize or prohibit the broadcasting by wireless means and the communication to the public of their performances, except, however, where the performance is itself already a broadcast performance or is made from a fixation. This right consequently applies to both sound and audiovisual performances. It does not cover rebroadcasting or communication to the public of broadcast performances ("secondary use") nor does it apply in cases where the broadcasting or communication to the public is carried out through a fixation (probably this is not intended to cover ephemeral fixations which are generally made for purposes other than fixation properly speaking).

23. Consequently as a matter of principle, the Directive does not cover the use of fixations for broadcasting and communication to the public. As regards such secondary use of one particular category of fixations, namely phonograms published for commercial purposes (but not other phonograms and not audiovisual fixations) Member States shall provide "a right in order to ensure that a single equitable remuneration is paid by the user" and to ensure that the remuneration is shared between the relevant performers and phonogram producers; in the absence of an agreement between these two categories Member States may lay down the conditions as to the sharing of the remuneration. This is in fact a repetition of the provision in Article 12 of the Rome Convention.

24. Also broadcasting organizations shall be granted an exclusive right in respect of a) rebroadcasting of their broadcasts by wireless means and b) the communication to the public of their broadcasts but in this case only if such communication is made in places accessible to the public against payment of an entrance fee.

25. *The distribution right,* finally, is covered by Article 9. The Article contains a main principle and then a provision on exhaustion of the right. The main principle is included in Article 9.1 which states that Member States shall provide the exclusive right to make certain objects, including copies of them, available to the public by sale or otherwise. This right shall apply for performers in respect of fixations of their performances, for phonogram producers in respect of their phonograms, for producers of first fixations of films in respect of original or copies of their films and for broadcasting organizations in respect of fixations of their broadcasts (as set out in Article 6(2).

26. Then follows in Article 9.2 the *exhaustion of the distribution right*. The provision states: "The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent." This provision has been interpreted - also in countries which are the most reluctant to abandon the principle of international exhaustion - to allow only regional exhaustion of the distribution right in respect of the beneficiaries of related rights.

27. Furthermore the distribution right shall be without prejudice to the specific provisions in Chapter I, in particular Article 1.4 (which deals with the non-exhaustion of the rental and lending rights). Also, the distribution right shall be transferable and assignable or subject to the granting of contractual licenses (Articles 9.3. and 9.4).

Limitations of the rights

28. The limitations to the rights in Chapter II are dealt with in Article 10. Those are basically worded and correspond to those in Article 15 of the Rome Convention. Thus limitations may be provided for in respect of 1) private use, b) use of short excerpts in connection with the reporting of current events, c) ephemeral fixations by broadcasting organizations, and d) use solely for the purpose of teaching and scientific research. In addition, the same kinds of limitations may be provided for as those in connection with copyright in literary and artistic works; however, compulsory licenses may be provided for only to the extent that they are compatible with the Rome Convention. The only material difference to the provisions in the Rome Convention is that the limitations under the Directive are - naturally - made applicable also to producers of first fixations of films.

The duration of the rights; relations between the categories of rights

29. Article 12 of the Directive prescribes that the rights shall not expire before the end of the respective terms provided in the Rome Convention. As far as the rights of producers of first fixations of films are concerned, they shall not expire before the end of a period of 20 years computed from the end of the year in which the fixation was made. Also these provisions are now superseded by the provisions in the Directive on the term of protection.

30. Article 14 prescribes that the protection of copyright-related rights under the Directive shall leave intact and shall in no way affect the protection of copyright. This is an admonition to the legislator of the same kind as for instance Article 1(2) of the WPPT.

Transitional provisions and application in time

31. The provisions on this subject in Article 13 is particularly complex and have given rise to some difficulties in countries implementing the Directive. For countries which are to be bound by the Directive it could therefore be useful to deal with them in some detail.

32. First, the general principle under Article 13.1 is that the new provisions shall apply in respect of all copyright works, performances, phonograms, broadcasts and first fixations of films which, on July 1, 1994, either are protected in the Member States or meet the criteria of protection under the provisions in the Directive on the that date. However, as European Community Directives try never to infringe acquired rights, Article 13.1 also prescribes that the Directive shall apply without prejudice to acts of exploitation performed before that date.

33. Furthermore, the provisions on authorship in cinematographic works in Article 2.2 need not to be applied to cinamatographic or audiovisual works created before the date just mentioned. According to Article 13.2. the provisions must, however, be applied at the latest as from July 1, 1997. Whether it is necessary or desirable to change existing provisions has to be judged in the light of what the legislation presently in force prescribes; it would seem that the provision in Article 33(2) that copyright in an audiovisual work shall be enjoyed by the author(s) mentioning “the director.” would correspond to the provisions in Article 2.2.

34. Next issue concerns the treatment of the presumption in respect of the rental right regarding objects mentioned in Article 2.1. In this respect Article 13.3. prescribes that States may provide that the rightholders are deemed to have given their authorization to the rental of objects which are proven to have been made available to third parties for this purpose or have been acquired before July 1, 1994. In addition, the provision states that States may, in particular if the object is a digital recording, provide that the rightholder shall have a right to an equitable remuneration for the rental or lending of that object. This is a facultative provision and a policy decision will have to be taken how far the national legislator should go in this respect.

35. Thirdly, the issue of the effects on existing contracts needs to be addressed. In this respect the principle is clearly stated in Article 13.6. to the effect that the Directive and the new provisions shall not affect any contracts concluded before the date of July 1, 1994. This principle is, however, subject to some modifications. Thus it is subject to the provisions of paragraph 3 on the possibility to extend the presumption in respect of authorization to rental. Another modification states that the principle is subject to paragraphs 8 and 9. Paragraph 8 prescribes that member States may determine the date as from which the unwaivable right to an equitable remuneration under Article 4 exists to a later date, however not later than July 1, 1997. In fact some members of the Community, for instance Denmark, Finland and Sweden, opted for this solution. Secondly. paragraph 9 provides that for contracts concluded before 1 July 1994, the unwaivable right to an equitable remuneration under Article 4 applied only if the authors or performers or their representatives have submitted a request to that effect before January 1, 1997; if there is no agreement on the sharing of the level of the remuneration, the member States may determine the level of it.

III. Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights

General

36. This Directive contains provisions on the harmonisation (generally upwards) of the term of protection in the Community Member countries and has a far-reaching impact, in particular in the field of copyright proper.

37. Articles 1 and 2 contain basic provisions relating to the duration of authors´ rights and Article 3 on the duration of related rights. Articles 4 to 6 deal with the protection of specific types of subject matter, and Article 7 with the protection in relation to third countries. Articles 8 to 10, finally contain various provisions, for instance on the application in time of the provisions in the Directive (Article 10).

38. According to Article 9 of the Directive it shall be without prejudice to the provisions of the Member States regulation moral rights. Consequently those are not affected by the Directive.

Duration of authors´ rights

39. Article 1.1 prescribes that the rights of an author of *a literary or artistic work within the meaning of Article 2 of the Berne Convention* shall run for the life of the author and 70 years after his death irrespective of the date when the work is lawfully made available to the public. Paragraph 2 then states that in the case of joint authorship the term shall be calculated from the death of the last surviving author. Paragraph 3 deals with the issue of anonymous or pseudonymous works and lays down a term of protection of 70 years after the work is lawfully made available to the public. However, in two cases the term has to be calculated according to paragraph 1., namely when the pseudonym of the author leaves no doubt about his identity or if the author discloses his identity within the term of 70 years from the making available. According to paragraph 4. the provisions in paragraph 3. shall also apply where a member State provides for particular provisions on copyright in respect of collective works or for a legal person to be designated as the rightholder; if, however, the contributing natural persons are identified as such in the versions of the work which are made available to the public the normal provisions apply. All these provisions are without prejudice to the rights of identified persons whose identifiable contributions are included in such works; for these consequently the provisions in paragraphs 1 and 2. shall apply. Special provisions apply in case a work is published in volumes, parts, instalments, issues or episodes and the term of protection is calculated from the time when the work was lawfully made available to the public. In such cases the term shall, according to paragraph 5. apply for each one of them separately.

40. Finally, this Article contains a special provision for works for which the term of protection is not calculated from the death of the author (basically, instead, from the lawful making available to the public) and which have not been lawfully made available to the public within 70 years from their creation. For those cases paragraph 6 prescribes that the protection shall terminate. Otherwise obviously, such works would enjoy protection idefinitely.

41. Article 8 then adds that the terms laid down in the Directive are calculated from the first day of January of the year following the event which gave rise to them.

42. As the provisions in Article 1 on authors´ rights cover all categories of works, any specific provision on 25-year protection for works of applied art (as allowed under the Berne Convention) would have to be deleted.

43. Article 2 of the Directive deals with the term of protection for *cinematographic or audiovisual works*. In these cases the provisions are very specific. First, Article 2.1 contains provisions on the authorship of audiovisual works The principal director of the work shall always be considered either as the author or as one of the authors but Member States are free to designate author co-authors. Then, Article 2.2 prescribes that the term of protection for works in this category shall expire 70 years after the death of the last of the following persons to survive, namely the principal director, the author of the screenplay, the author of the dialogue and the composer of the music specifically created for use in the work; this provision applies regardless of whether these persons are designated as co-authors or not.

44. In the context of these provisions on cinematographic or audiovisual works it is important to note the provisions in Articles 10.4 and 10.5 of the Directive, on the application in time as regards the provisions on authorship in Article 2.1.. Thus, according to the first provision, Member States do not need to apply the provisions in Article 2.1. to such works created before July 1, 1994, and according to the second provision the States may determine the date as from when the provision in Article 2.1 shall apply, provided that this is not later than July 1, 1997.

Duration of related rights

45. Article 3 in the Directive deals with the protection of four categories of rightholders, namely performing artists (in both the sound and the audiovisual sector), producers of phonograms, producers of the first fixation of a film and broadcasting organisations. The provisions established a uniform length of the term of protection in this area and also standardises the point of departure for the protection.

46. As first regards the *protection of performers*, Article 3(1) prescribes, as a general rule that the right shall expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully either published or communicated to the public within this period, the rights shall expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier.

47. As then regards the protection of *producers of phonograms*, the term shall according to Article 3(2) of the Directive expire 50 years after the fixation was made but that, if the phonogram is lawfully published or lawfully communicated to the public during this period, the rights shall expire 50 years from the first such publication or the first such communication to the public, whichever is the earlier.

48. Article 3(3) of the Directive contains provisions on the term of protection for *producers of first fixation of films* which are parallel to those regarding phonogram producers.

49. *Broadcasting organizations* shall according to Article 3(4) of the Directive enjoy protection for 50 years after the first transmission of a broadcast, whether the broadcast is transmitted by wire or over the air, including by cable or satellite. This definition of a "broadcast" corresponds to the one in Article 6(2) of the Rental and Lending Directive..

50. According to Article 8 of the Directive, the terms laid down are calculated from the first day of January of the year following the event which gives rise to them.

Protection of previously unpublished works.

51. Article 4 of the Directive contains a provision which is new in most European Copyright laws. It prescribes: *"Any person who, after the expiry of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public*." Provisions whose wording corresponds to those in the Directive will have to be introduced in the Copyright Acts of such existing or future members States of the Community

Protection of critical and scientific publications

52. Article 5 of the Directive contains provisions to the effect that Member States may protect critical and scientific publications of works which have come into the public domain; the maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published. This is a provision which is not obligatory ("may") and has not been implemented in for instance the Nordic countries..

Protection of photographs

53. Article 6 prescribes that photographs which are original in the sense that they are the author´s own intellectual creation shall be protected in accordance with Article 1 and that no other criteria shall be applied to determine their eligibility for protection. The second sentence of the Article then adds that Member States may provide for the protection of other photographs.

54. As mentioned, Member States are free to provide for protection of photographs other than original photographic works. In countries where no such provisions exist it is a question of national policy. It could only be mentioned in this context that the Nordic countries have in fact introduced in addition to the protection of the author of a photographic work also a neighboring right for the benefit of the producer of a photographic picture (that is, the photographer regardless of whether the picture qualifies as a work or not and regardless of whether the photographer is the author of the work or not). The right is an exclusive right to reproduce the picture and to make it available to the public and it applies to the picture in its original or an altered form and regardless of which technique has been used and if the picture is subject to copyright also copyright protection may be claimed. The special right lasts for 50 years from the year in which the picture was produced.

Application in time of the new provisions

55. Article 10 of the Directive deals with the application in time of the terms of protection provided for in the Directive. This is an Article which has presented a number of problems in its application in the Member States of the European Community.

56. Article 10.1 prescribes that where a term of protection is longer than the corresponding term provided for in the Directive is already running in a Member State on July 1, 1995, the Directive all not have the effect of shortening the term of protection in that Member State. This provision aims at certain special situations and will probably have no particular impact in Estonia.

57. The following provision in Article 10.2 deals with the retroactive effect of the new provisions. It prescribes: *"The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least in one Member State on the day referred to in Article 13(1) (i.e. July 1, 1995) pursuant to national provisions on copyright or related rights or which meet the criteria for protection under Directive 92/100/EEC"* (the Rental and Lending Directive). This provision means that the 70 year term of protection will have to apply also to works created before the entry into force. Most of the Member States of the European Community had a term of protection of 50 years. However, in Germany the term was 70 years, in Spain 60 years and in France 70 years for some types of works. In view of the so-called Phil Collins case on the non-discrimination it had to be assumed that Germany would protect all works of members of the European Economic Area (EEA) for a term of 70 years. As a consequence the Member States of the Community had, for complying with the provision in Article 10.2 to give a protection of 70 years for works whose authors are nationals in a EEA country. Thus, it would not be necessary to repeat in the national law the provision in the Directive to the effect that the work must be protected in at least one Member Statebut to apply the 70 year period to all works by nationals of EEA countries. This would also greatly facilitate matters for all concerned and also the work of, for instance, collecting societies who could rely on a uniform rule and do not have to check for each work whether in fact it enjoyed protection in any European State. For works originating outside of this area on the other hand the provisions on comparison of terms in the Berne Convention.

58. Where the term of protection is thus revived the question arises about acts of exploitation undertaken during the time when the work was unprotected. In this respect Article 10.3 prescribes that the Directive shall be without prejudice to any acts of exploitation performed before the date referred to in Article 13.1, that is July 1, 1995. Member States shall adopt the necessary provisions to protect in particular acquired rights. This is a particularly important provisions in particular in view of the fact that the longer term of protection may have the effect of reviving protection which had already expired so that the work was free for use. As mentioned in Recital 27, the respect for acquired rights and legitimate expectations is part of the Community legal order; in particular the Sates may provide in particular that in certain circumstances rights which are revived pursuant to this Directive may not give rise to payments by persons who undertook in good faith the exploitation of the works at the time when such works lay within the public domain.

59. There are of course different ways in which the effects of the retroactive protection may be mitigated. One example - but this is only one of many examples - can be seen in the

Swedish legislation by which this Directive was implemented. The provisions on the entry into force were based on the following principles:

- The new provisions on the extension of the term entered into force on June 30, 1995.

- The new provisions were made applicable also to works which had been created before the entry into force.

- The new provisions were, however, not made applicable to acts undertaken or rights acquired before the entry into force and copies of works which had been produced on the basis of the previous provisions could be freely distributed and displayed with the exception that the provisions on rental of such copies applied.

- If anyone before after the expiry of the term of protection but before the entry into force had initiated an exploitation of a work through the production of copies of it he could to the extent necessary and customary continue the planned production until January 1, 2 000. The same applied to persons who had initiated significant preparations for the production of copies of the work. Copies thus made could be freely distributed and displayed with the exception that the provisions on rental of such copies applied.

- If a work was part of a recording made after the expiry of the term of protection but before the entry into force of the new provisions, that recording could be used for radio- or television broadcasts to January 1, 2000. The same applied to public showing of audiovisual recordings.

Application of the new provisions to third countries

60. In this respect Article 7.1 of the Directive prescribes that where the country of origin within the meaning of the Berne Convention is a third country and the author of the work is not a Community national, the term of protection granted by the Member State shall expire on the day of expiry of the protection granted in the country of origin. The country of origin is under Article 5(4) of the Berne Convention as a general rule the country of first publication or, in the case of unpublished works, the country where the author is a national. In this context it should also be noted that according to Article 7(8) of the Convention, the term of protection shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work. This is the principle of *comparison of terms*.

61. The provisions mean that between the countries within the European Economic Area no comparison of terms takes place; this absence of comparison applies both for works where the country of origin is based on publication in an EEA country and in the case of unpublished works by EEA nationals. Also, no comparison of terms applies for works having their country of origin based on publication in a third country but the author is a EEA national. In all these cases Member States have to apply the terms provided for in the Directive. The only situation where a Member State has to make a comparison of terms is in the case a work both has its country of origin outside the EEA and the author is no national of an EEA country. In such cases Article 7.1 prescribes that the protection shall expire on the date it expires in the country of origin and may not exceed the term prescribed in Article 1. It should be noted that the

provisions on the comparison of terms apply only to terms which are calculated from the death of the author and not to other terms.

62. As far as related rights are concerned, Article 7(2) prescribes that the terms laid down in Article 3 shall apply also in the case of rightholders who are not Community nationals provided that Member States grant them protection. Such protection can be given on the basis of, for instance, the place where the performance took place. The terms under the Directive shall consequently apply not only to Community nationals but also to non-Community nationals who enjoy protection in a Member State. However, the provision goes on in stating that, without prejudice to the international obligations of the Member States, the term of protection shall expire no later than the date of expiry of the protection granted in the country of which the rightholder is a national and may not exceed the term laid down in Article 3. This is a comparison of terms for the neighboring rightholders to the effect that they are in fact protected but the term of their protection is limited to that in their country of nationality.

IV. Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmissions

63. This Directive contains a Chapter I with definitions and then two Chapters dealing with broadcasting of programmes by satellite and cable retransmissions. Then follow some general provisions in Chapter IV. This is of course one of the Directive having the most influence on broadcasters´ rights in the Community.

64. The Directive aims at harmonising certain legal concepts which relate to transborder satellite broadcasting and cable retransmissions of programmes from other Member States. The lack of uniform provisions in this field and the resulting legal uncertainty is seen as particularly harmful in a region like Europe and as an obstacle for the development of a common market in this field.

65. The Directive was to be implemented before January 1, 1995.

Some definitions

66. The whole Directive starts with a definition of *the concept of* "*satellite*" for the purposes of the Directive. This means, according to Article 1.1. any satellite operating on frequency bands which, under telecommunications law (that is, the rules of the International Telecommunications Union, ITU) are reserved for the broadcast of signals for reception by the public or for closed point-to-point communication. In this latter case, however, the circumstances in which individual reception of signals takes place must be comparable to those which apply in the first case. This is a particularly important definition in that it also communications satellites are brought in under the regime of the Directive. Recital 6 states that the distinction currently drawn between the types of satellites no longer has any justification as individual reception is possible and affordable nowadays with the types of satellites.

67. In this context also the question of *encryption* is dealt with. Article 1.2.b prescribes in the case of encrypted signals there is communication to the public on condition that the means

for decrypting the broadcast are provided to the public by the broadcasting organization or with its consent. Otherwise the obviously the decoders are piracy decoders and there is not any communication to the public under the Directive but just acts of piracy.

68. Linked to the notion of "satellite" is the notion of "*communication to the public by satellite*" which is defined in Article 1.2. It is a very specific definition which states: "*For the purposes of this Directive, "communication to the public" means the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth"*. This definition is clearly introduced in order to make it clear that the process is one single act; Recital 14 furthermore states that normal technical procedures relating to the signals should not be considered as interruptions in the chain of broadcasting. The same provision furthermore states that this act of communication to the public occurs solely in the Member State where, under the control and responsibility of the broadcasting organization the signals are introduced in a chain as just mentioned. In this way it is made clear that only one act occurs and that act occurs only in one Member State, namely the one where the whole process starts.

69. The question is then what happens in case the communication to the public under the Directive occurs in a non-Community State. The case when the protection in that State corresponds to that in the Community is not dealt with in the Directive because the application of the rules in the Directive creates no problem. However, if the emitting State does not provide for a protection corresponding to that in Chapter II, Article 1.2.d contains certain provisions having the basic effect that the Member State of the uplink station or, failing such an uplink station, the Member State where the broadcasting organization having commissioned the communication to the public has its principal establishment in the Community; in these cases the rights under Chapter II shall be exercisable against that broadcasting organization.

70. As mentioned, these definitions are very specific and they should, for the sake of legal certainty, be introduced in the national legislation of any State which is to be bound by the Directive.

71. Another definition in contained in Article 1(3) and deals with *"cable retransmission."* For the purposes of the Directive this means "*the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public*." Thus, such cable retransmission is different from so-called "cable-originated programs" which essentially correspond to "broadcasts" of original programmes over wire (if any of the conditions mentioned in the definition fails, it is no longer cable retransmissions but cable-originated programs where other copyright rules may apply. Also this specific definition would have to be inserted in the national law for the purposes of implementation of the Directive.

72. Finally, the Directive also contains, in Article 1(4) a definition of "*collecting society*" which for the purposes of the Directive means any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.

73. Article 1(5) contains a provision parallel to the one in Article 2 in the Term of protection Directive to the effect that the principal director of a cinematographic or

audiovisual work shall be considered as its author or one of its authors but that Member States may provide for others to be considered as its co-authors.

Broadcasting of programmes by satellite

74. According to Article 2 Member States shall provide *an exclusive right for the author to authorize the communication to the public of copyright works by satellite* subject to the provisions in this Chapter.

75. Article 3 then deals with the *acquisition of broadcasting rights*. Paragraph 1 of the Article makes it clear that Member States shall ensure that the authorization referred to in Article 2 may be acquired only by agreement. This excludes any form of compulsory licenses which would otherwise be permissible under Article 11bis(2) of the Berne Convention.

76. Then Article 3.2. to 4 contain provision on the so-called *extended effect of collective agreements between collecting societies and broadcasting organizations* so that the broadcaster may, on the same conditions as under the agreement, broadcast works of the same category subject to certain safeguards (terrestrial simulcasting, possibility for the rightowner to object to the use of his work in this way, etc.). Such extended effects may, however not apply to cinematographic works and the Commission has to be informed about which broadcasting organizations are allowed to avail themselves of the provisions.

77. These provisions are of a facultative character, and their application presupposes a comparatively well established organizational framework in the country concerned. It has been used in the Nordic countries since the beginning of the 1960s and has worked very well. The question whether it should also be introduced in other countries is, however, a matter of national policy; anyway the Directive gives a possibility to do so.

78. Article 4 deals with the rights of performers, producers of phonograms and broadcasting organizations These provisions contain mainly a reference to the provisions on the protection of these categories of rightowners under the Rental and Lending Directive. This Directive has been dealt with above.

79. Article 5 contains a provision on the relation between copyright and related rights and states a principle which is found also in other contexts to the effect that the protection of related rights shall leave intact and shall in no way affect the protection of copyright. Article 6 states the principle that the Directive contains provisions on minimum protection so that countries are free to provide for more far-reaching protection than that in the Directive.

Cable retransmission

80. Cable retransmission as defined in Article 1.3 is the other element in this Directive. The basic provision in this respect is contained in Article 8 which states that Member States shall ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and neighboring rights are observed and that such *retransmission takes place on the basis of individual or collective agreements* between *copyright* owners, holders or related rights and cable operators. Article 8.2. adds that notwithstanding these provisions Member States may retain until 31 December 1997, such

statutory licence systems which are in operation or expressly provided for by national law on 31 July 1991. As this time has now passed the consequence for States adhering to the European Community is that cable retransmissions are to be carried out on the basis of contracts for the exploitation of the exclusive right in this context.

81. Article 9 deals with the issue of exercise of the cable retransmission right, which exercise, due to the large number of works, inevitably must take place on the basis of collective agreements and with some security that also rightowners outside the contracting organizations are bound in relation to the cable operator (who otherwise would face too much of legal uncertainty).

82. Article 9.1 first provides that Member States shall ensure that *the right of copyright owners and holders of related rights* to grant or refuse authorization to a cable operator for a cable retransmission *may be exercised only through a collecting society.* In other works compulsory collective administration is provided for. Recital 28 makes it clear that the authorization right as such remains intact and that only the exercise of that right is regulated in order to ensure that contractual arrangements are not called into question by the intervention of outsiders holding rights in individual parts of the programme.

83. In order to comply with the Directive provision has to be made in national copyright law so that cable retransmission may take place only on he basis of an agreement with a collecting society. In addition, provision must, however, be made for the treatment of rightowners outside the contracting organization. In this respect Article 9.2 prescribes that where a rightholder has not transferred the management of his rights to a collecting society, the society which manages rights of the same category shall be deemed to manage also his rights (if there are several societies he shall be free to make a choice in this respect). Such a rightholder shall have the same rights and obligations resulting from the agreement as the rightholders as those who have mandated that collecting society and he shall be able to claim those rights within a period which may be fixed by the Member State but which must not be shorter than three years from the cable retransmission that contained his protected subject matter.

84. If provisions corresponding to those in the Directive concerning the exercise of the cable retransmission right do not exist in a country, such provisions will have to be included which have that effect. This can be done in different ways. Thus, the Nordic countries have recourse to the extended effect of collective agreements and have provided that cable retransmission may take place only if such an extended effect of a collective agreement actually exists. The conditions are those mentioned in the Directive. This could be a solution also for other countries, as in any case, organizations have to be set up and be operative in order to comply with the Directive.

85. Article 9.3 prescribes that Member States may provide for a presumption that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions in the Directive. This is a provision which aims at strengthening the collective administration. The introduction of a provision in the national law could be useful but is not necessary. None of the Nordic countries has such a provision.

86. The provisions on collective administration of cable retransmission rights aim at securing the proper functioning of cable operators´ work in face of the multitude of rightowners and of works. In respect of broadcasters, the situation is different, in particular as regards retransmissions of its own broadcasts. Article 10 in the Directive prescribes that Member States shall ensure that Article 9 on the collective exercise of the rights does not apply to rights exercised by a broadcasting organisation in respect of its own transmission and this irrespective of whether the rights concerned are its own or have been transferred to it by other rightowners. Consequently an exception from the collective administration in this respect will have to be provided for in the national law (as has been the case in the extended collective agreement provisions in the Nordic countries).

Means to facilitate the conclusion of cable retransmission contracts

87. It is of great importance to see to it that agreements are in fact reached for the purposes of cable retransmission. The Directive contains certain provisions in this respect. First, Article 11 contains an obligation for Member States to ensure that, where no agreement is concluded, either party may call upon *the assistance of one or more mediators* and the Article also contains provisions on various procedural aspects of the case. As just mentioned, this provision contains an obligation and provisions to this effect have to be introduced in the national legislation. This can be done in different ways depending on the national legal traditions but the important thing is that such a mechanism exists and is functioning.

88. The second aspect concerns what in the Directive is called *prevention of the abuse of negotiating position.* According to Article 12 Member States shall ensure by means of civil or administrative law as appropriate that the parties enter into and conduct negotiations in good faith and do not prevent or hinder negotiation without valid justification. If a State has on January 1, 2000, in operation a body with jurisdiction over cases where the right to retransmit programmes by cable has been unreasonably refused or offered on unreasonable terms by a broadcasting organization may retain that body for a time of eight years from that date. Also this provision is of a binding character; the States have to ensure that means are available to mitigate abuses of negotiating position. Also this measure can be framed in different ways in national laws. The measures can, as in Sweden, be modelled on the provisions on the duty to conduct negotiations in the labour market or they can be made part of unfair competition law etc. Also here, the framing of the provisions can be different but the mechanism must be there.

V. Some words about the TRIPS Agreement

General

89. One of the multilateral trade agreements which form part of the results of the Uruguay Round in the framework of the General Agreement on Tariffs and Trade (GATT) is the so-called TRIPS Agreement (the Agreement on Trade-related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods). At the same time the former GATT was transformed into the World Trade Organization (WTO). The TRIPS Agreement has an impact on all intellectual property rights, both indirectly in that certain standards are established for the protection and indirectly in that the provisions are made for the enforcement of the rights

and for dispute settlement in case of conflict concerning the fulfilment of the obligations. Because that Agreement will also influence broadcasters´ rights a few words will be said here about it.

90. The system for the protection of intellectual property rights under the TRIPS Agreement includes the following elements

– **protection of intellectual property has to be given to nationals of WTO countries according to certain standards to among others, also broadcasters.**

– **certain main principles (national treatment and most-favoured-nation principles) have to apply to that protection**

– **certain fairly detailed standards have to be applied to the enforcement of the rights**

– **the provisions relating to dispute prevention and dispute settlement have to be respected**

– **a national institutional framework must exist for administering the relations to the WTO** (in order to **prepare** for instance the information requested in many contexts of the operations of WTO and the so-called Review Meetings in the TRIPS Council).

Standards

91. As first regards *the standards to be applied in the field of copyright* (industrial property is left aside in this context) those are included in Part II (Standards Concerning the Availability, Scope and Use of Intellectual Property Rights) Section 1 (Copyright and Related Rights), which Section includes Articles 9 to 14. Those may concern also broadcasters in their capacity of holders of copyright in their programme contents.

92. Article 9 contains a *general provision (*"*compliance clause***")** to the effect that members of the WTO shall comply with Articles 1 - 21 of the 1971 text of the Berne Convention; however, no such obligation exists as regards the moral rights in article 6bis in the Berne Convention. This provision also states a general principle in copyright law to the effect that "copyright protection shall extend to expression and not to ideas, procedures, methods of operation or mathematical concepts as such." The "compliance clause" does not extend to other conventions in the field of copyright or neighboring rights, such as the Rome Convention or the Phonograms Convention.

93. Articles 10 to 13 contains provisions on certain elements of copyright law which are not explicitly stated in the Berne Convention. Those concern *computer programs* and also *data bases***.** Furthermore rental rights are to be granted in respect of certain types of copyright-protected material. The obligation in the TRIPS Agreement is, however, less far-reaching than that under the European Community Rental and Lending directive. On the other hands, it corresponds to the rental provision in Article 7 of the WIPO Copyright Treaty (WCT). The TRIPS obligation prescribes first (emphasis added) that "In respect of at least *computer programs* and *cinematographic works*, a Member shall provide authors and their successors in title a right to authorize or prohibit the commercial , rental to the public of originals or copies

of their copyright works." Then follow two modifications of that rule. First the provision states a "*material impairment test*" to the effect that: *"A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has lead to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors or their successors in title."* Then follows a modification of the obligation in respect of *computer programs* stating that: "In respect of computer programs this obligation does not apply to rental where the program itself is not the essential object of the rental."

94. Contrary to the case in the WCT and the WPPT (and to some extent the European Community Rental and Lending Directive) the TRIPS Agreement does not contain provisions on any *distribution right*. This reflects the difficult discussions in the course of the negotiations and the only remaining trace of those discussions is contained in Article 6 on the *exhaustion of the distribution right.* This Article prescribes: "*For the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above, nothing in this Agreement shall be used to address the issue of exhaustion of intellectual property rights*." Consequently, the issue of whether national, regional or international exhaustion shall be applies is not covered by any obligation under the Agreement and can not be invoked in any dispute settlement procedure in WTO. The corresponding principle of freedom to chose the appropriate national solution in this respect is included in Article 6(2) of the WCT and Articles 8(2) and 12(2) of the WPPT. On the other hand, regional (and not international) exhaustion is the rule in respect of related rights in the European Community according to Article 9.2 of the Rental and Lending Directive, while the question of regional or international exhaustion is still under discussion in the copyright field in the context of the proposed Directive on Copyright and Neighboring rights in the Information Society.

95. Finally, as regards authors´ rights, Article 13 contains an important provisions on *limitations and exceptions*, which corresponds to Article 9.2 of the Berne Convention where it is, however, limited to the right of reproduction. It also is contained in Article 10 of the WCT and Article 16 of the WPPT. The TRIPS provision on this so-called three step test prescribes. *"Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."* This is aimed at the legislator who has to see to it that any limitations and exceptions can pass this three step test.

96. Article 14 deals with the protection of *performers, producers of phonograms (sound recordings) and broadcasting organisations.* These provisions correspond to some extent to those in the Rome Convention and the Phonograms conventions. They are self-contained in that the TRIPS Agreement does not contain any compliance clause to those conventions similar to that in regard to the Berne Convention. Of particular interest is *broadcasters´ rights* which are dealt with in Article 14.4. They shall have the right to prohibit (not an exclusive right) the following acts when undertaken without their authorization, namely the fixation, the reproduction of fixations and the rebroadcasting by wireless means of broadcasts as well as the communication to the public of televisions broadcasts. It is added that if member states do not grant such rights to broadcasting organizations they shall provide the owners of copyright in the subject matter of broadcasts with the possibility to preventing those acts subject to the provisions of the 1971 Berne Convention.

97. Provisions on *the term of protection* are included in Article 14.5. It provides that the term of protection in respect of the rights available under the Agreement shall be, for

performers and producers of phonograms, at least the end of a period of 50 years from the end of the calendar year in which the fixation was made or the performance took place. The term of protection for broadcasters shall be is at least 20 years from the end of the calendar year in which the broadcast took place.

98. *Limitations and exceptions* to the rights prescribed are available according to provisions in Article 14.6. That provision states in its first sentence that any member of WTO may provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. This means primarily that the provisions under Article 15 of the Rome Convention would be applicable. Those include a possibility to provide for exceptions in respect of a) private use, b) use of short excerpts in connection with the reporting of current events, c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts, and d) use solely for the purpose of teaching or scientific research. In addition, the second paragraph of that Article states, basically, that the same limitations may be prescribed as in connection with the protection of copyright with the exception that compulsory licenses may be provided only to the extent that they are compatible with the Rome Convention. Furthermore, Article 16 provides for a possibility of wide-ranging reservations as regards Article 12, i.e. the right to equitable remuneration for the use of commercial phonograms for communication to the public (which right is, however, not included in the TRIPS Agreement). Another reservation possibility concerns the broadcasters´ rights in respect of communication to the public of television broadcasts; if such a reservation is made, other contracting parties are not obliged to grant such a right to broadcasting organisations with headquarters in that state. Another important reservation concerns States who grant protection to producers of phonograms solely on the basis of fixation (like the Nordic countries) instead of the criterion of nationality or first publication; if the protection was granted on that basis on October 26, 1961, a notification may be made to the effect that the criterion of fixation may be maintained. (The TRIPS Agreement provides protection on the basis of nationality; consequently the protection of producers of phonograms in the Nordic countries had to be extended to nationals of all other WTO member States (but in respect of the right to remuneration under Article 12 the fixation criterion could be maintained as the TRIPS Agreement does not cover this right).

99. The second sentence of Article 14.6 deals with a matter which already has been the subject matter of a dispute settlement in the framework of the WTO, namely the *application in time*It prescribes: “However, the provisions of Article 18 of the Berne Con vention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms”. The Article in the Berne Convention referred to deals with the protection of works existing in a country at the time of the entry into force of the Convention. It prescribes first that “ (1) This Convention shall apply to all works, which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.” It then continues: (2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.” The modalities for the “retroactive” application are dealt with in (3), where it is said: “The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of that principle.” The dispute settlement case just mentioned concerned Japan´s unwillingness to grant 50 years retroactive protection to phonograms at least not further back than to the point in time in the 1970s when phonograms

became protected in Japan. Japan finally amended its provisions so that protection was actually granted back to 1946.

The principles for protection (National Treatment and Most-Favoured Nation Principles).

100. The protection which follows from the obligations in Part II has according to Article 1.3 of the Agreement to be given to the *nationals* of other Contracting Parties. Consequently it may be necessary to amend the national provisions on the applicability so that it extends to nationals of WTO countries. (It is not necessary to extend such protection to "habitual residence" or first publication in such a country. The appropriate method if implementing the obligations may be freely chosen by the WTO member state itself. Furthermore, the application is subject to two principles. One concerns national treatment and is dealt with in Article 3 and the other one deals with Most-Favoured Nation treatment and is dealt with in Article 4. Both principles are important and their application is frequently discussed in the framework of the TRIPS Council.

101. *The National Treatment Principle* is contained in Article 3 of the Agreement. Paragraph 1 of that Article prescribes: *"Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided for in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention"...etc.* The Article further states that in respect of performers, producers of phonograms and broadcasting organizations, the obligation applies only in respect of the rights provided in the TRIPS Agreement (and consequently not in respect of other rights which may be granted under national laws). If a country avails itself of the provisions in Article 6 of the Berne Convention (on restriction of protection in respect of works of countries outside the Berne Union) or Article 16.1.(b) of the Rome Convention (on reciprocity concerning the protection of broadcasters´ rights in respect of communication to the public of their television broadcasts), this must be notified to the TRIPS Council. Paragraph 2 of the Article deals with derogations from the principle in relation to judicial and administrative procedures.

102. The exceptions to the national treatment principle which are possible under the Berne Convention concern mainly the comparison of the term of protection under Article 7(8) and the droit de suite under Article 14ter of the Convention. The exceptions possible under the Rome Convention are dealt with in the context of that Convention below.

103. *The Most-Favoured Nation-principle (MFN***)** implies in essence that, with regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other member states of the WTO. This is a particularly important principle because it makes it impossible, for instance, to treat another particular country better than others or, in other words, bilateral concessions in this field may no longer be possible. Also, it should be noted that the principle applies to advantages etc. granted to any other country, which has to be interpreted in the sense that the principle is applicable also in relation to advantages granted to countries outside the WTO.

104. There are four exceptions to the MFN which are set out in the second sentence of the Article. Thus, under (a) exemption is made for advantages etc. deriving from international instruments on juridical assistance and law enforcement of a general nature ant not particularly confined to the protection of intellectual property.

105. The next exception, mentioned in (b) refers to advantages, etc. "granted in accordance with the Berne Convention (1971) or the Rome convention authorising that the treatment accords be a function not of national treatment but of the treatment accords in another country." The relevant provisions in the Berne Convention seem to be 2(7) on the protection of works of applied art, 6(1) on the protection available in relation of works from a country outside the Berne Union which fails to protect adequately the works from authors from the Union, 7(8) on the comparison of terms, 14ter (1) and (2) on the protection of droit de suite, and, finally, 18 on certain limitations possible when a country joins the Berne Union. All those Article are incorporated in the TRIPS Agreement by means of the compliance clause in Article 9. . In addition should be mentioned certain declarations possible in relation to the right of translation under Article 30 of the Berne Convention.

106. As regards the *Rome Convention* it would seem that the relevant provisions where it would be possible to derogate from the MFN would be those in *Article 15(2)* on the possibility to apply the same limitations to the rights under the Convention as those applied in respect of copyright and the possibility under *Article 16(1)(a)(iv)* to limit the rights in respect of secondary exploitation of phonograms (the Article 12 right) on the basis of reciprocity, and, finally, Article 16(1)(b) which gives a possibility for reservation in respect of the right under Article 13(d) for broadcasting organisations in respect of communication to the public of televisions broadcasts in public places against the payment of a fee.

107. In item c. is included a particularly important exception to the MFN, namely that exceptions are possible in respect of such rights of performers, producers of phonograms and broadcasting organisations not provided under this Agreement. This correlates to the provision on national treatment in Article 3 which applies only to the rights provided under the Agreement.

108. The next and final possibility for exception to the MFN is included in item (d) and relates to advantages etc. deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement on condition that such agreements are notified to the TRIPS Council and do not constitute an arbitrary or unjustifiable discrimination against nationals of other members of WTO. This makes it possible to maintain advantages granted to another State on a bilateral basis on the condition that it was concluded before January 1, 1996. and that the agreement in question is notified to the WTO. This provision has been applied for instance as regards certain bilateral agreements in the copyright field concluded with the former Soviet Union.

Enforcement

109. One of the most important parts of the TRIPS Agreement and the one which has caused most discussions in the TRIPS Council and also a number of dispute settlement procedures is **Part III: Enforcement of Intellectual Property Rights**. This Part contains a number of detailed and very specific obligations in the enforcement field, divided into General Obligations (Article 41), Civil and Administrative Procedures and Remedies (Articles 42 to

49), Provisional Measures (Article 50), Special Requirements Related to Border Measures (Articles 51 to 60) and Criminal Procedures (Article 61).

110. It should be underlined that these provisions are of extraordinary importance. So far, international intellectual property conventions have contained no or only a few provisions on enforcement. The TRIPS Agreement, on the other hand, contains far-reaching obligations which have to be observed in detail; the importance of those provisions is shown inter alia by the fact that about 1 900 questions about the implementation were asked by WTO member states to each other in the course of the so-called Review Meeting on Enforcement (see below). Most of these provisions are mandatory ("shall") but some are facultative ("may"). A tendency has, however, been shown in international discussions to interpret the facultative provisions in the light of the general obligations in Article 41 so that they are given a sort of mandatory character.

111. There is no need to refer to all the details of the provisions in Part III but only to stress a few points which have been seen as important in the practical experience since the TRIPS Agreement came into force.

112. As regards the *general obligations* it is important to note that members of WTO shall ensure that enforcement procedures as specified in that Part are in fact available and that they permit "effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements". The key points are that the procedures must be efficient (not merely symbolic), that remedies must be expeditious (in intellectual property cases immediate action is frequently necessary) and that remedies must constitute a deterrent (again, merely symbolic penal sanctions are not enough). Furthermore, the Article, for very good reasons in some countries, stresses that procedures shall be "fair and equitable" and shall not be "unnecessarily complicated or costly or entail unreasonable time-limits or unwarranted delays." This is a point especially for countries where procedures are notoriously slow and extremely formalistic or complicated.

113. Section 2 of Part III deals with *civil and administrative procedures and remedies*. It deals mainly with civil procedures but, according to Article 49, to the extent that any civil remedy can be ordered as a result of an administrative procedure on the merits of a case, that procedures shall follow principles equivalent to those just mentioned. The main elements of the obligations relating to civil procedures are, first, according to Article 42, that members of WTO shall make available to right holders *civil judicial procedures* concerning the enforcement of rights covered by the Agreement. In other words civil enforcement procedures must be available for all TRIPS rights.

114. As mentioned above, there is frequently a certain urgency in intellectual property cases. This aspect is taken care of by several provisions in the Agreement. Thus Article 44 deals with *injunctions*, i.e. members have an obligation to ensure that the judicial authorities are able to order a party to desist from an infringement (in particular to prevent the entry into commercial channels of goods after customs clearance.. One of the very basic remedies in respect of intellectual property cases is *damages.* The basic principle in this respect is contained in Article 45.1. It states (with emphasis added) that: "The judicial authorities *shall* have the authority to order the infringer to pay the right holder damages *adequate to compensate for the injury* the right holder has suffered because of an infringement of his intellectual property right by an infringer who *knew or had reasonable grounds to know* that

he was engaged in an infringing activity." The important point here is of course that damages must be adequate and not merely - as has so frequently happened in the past - symbolic; intellectual property rights and infringements in them must be taken seriously and adequately compensated. In addition, the judicial authorities shall be able to order the infringer to pay the right holder´s expenses. It is here added that those may include appropriate attorney´s fees and recovery of profits and/or the payment of pre-established damages in certain cases.

115. As mentioned above, there is frequently a great urgency in intellectual property cases because the harm done to the right-owner arrives very quickly and can be considerable if remedies are not applied immediately. For this reason the TRIPS Agreement contains a whole Section (Section 3 containing one single Article 50) dealing exclusively with the details of *provisional measures*. In fact, such measures are often the only efficient means of combating piracy. Those measures shall, according to Article 50.1, be available on a "prompt and effective" basis for two purposes. One is to prevent an infringement of an intellectual property right from occurring and in particular to prevent the entry into the channels of commerce of goods, including imported goods immediately after customs clearance. The other one is to preserve relevant evidence in regard to the alleged infringement. Of great importance is also the provision in the second paragraph, according to which provisional measures shall be available inaudita altera parte, in particular in two situations, namely that a delay is likely to cause irreparable harm to the right holder and the other one where there is a demonstrable risk of evidence being destroyed.

116. The last Section of Part III (Article 61) deals with *criminal procedures*. Such must obligatorily be available at least in cases of wilful trademark counterfeiting and copyright piracy on a commercial scale. The remedies available must include imprisonment and/or monetary fines which are sufficient to provide a deterrent consistent with the level of penalties applied for crimes of a corresponding gravity. This means that the gravity of such infringements should correspond to that of serious crimes against property (theft, etc.) and the sanctions imposed must really imply a deterrent effect not only on the accused but also on potential infringers. The provision adds that in appropriate cases the remedies available shall also include the seizure, forfeiture and destruction of infringing goods and of any material and implements the predominant use of which has been in the commission of the offence.

VI. Broadcasters´ rights in Scandinavian Copyright Law

117. As the provisions in the copyright laws of the five Nordic countries are practically uniform the example of Sweden is taken as the illustrative example here.

118. In the Swedish Copyright Act (Swedish Statute Book 1960, No 729) the provisions on sound radio and television organizations is contained in Article 48. It reads now after having been amended several times in order to comply with the Community Directives:

" A sound radio or television broadcast may not without the consent of the radio or television organization

1. *be recorded on a material support from which it can be reproduced, or*
2. *be rebroadcast or made available to the public in places where the public has access against an entrance fee.*

A broadcast which has been recorded on a material support as mentioned in the first paragraph, item 1, may not without the consent of the broadcasting organization be transferred on another material support until fifty years have elapsed from the year in which the broadcast took place. Furthermore, the material supports may not without the authorization of the organization be made available to the public before the same time has elapsed.

The provisions of Articles 6 -9, 11, second paragraph, 12, 15, 16, 21, 22, 26 - 26b and 26e shall apply in respect of sound radio and television broadcasts referred to in this Article.

When a copy of a recording under this Article has, with the consent of the organization, been transferred within the European Economic Area, that copy may be further distributed.

If a sound radio or television has a claim for remuneration for such a retransmission as referred to in Article 26 f (cable retransmission) which has taken place with the authorization of the organization, the claim shall be put forward at the same time as the claims referred to in Article 26 i, fifth paragraph."

119. The first paragraph deals consequently with the recording of broadcasts and with rebroadcasting etc, and the second with the reproduction and with the distribution of such recordings.

120. The protection applies to *sound radio or television broadcasts*. This notion refers to emissions to the public in the sense that those emissions can be received by the public by means of publicly available reception equipment. Thus, interactive services ("on demand video") fall outside the scope of the provision. There are, however, certain services about which there are some doubts whether they would fall inside or outside the concept of broadcasting, for instance so-called multichannel broadcasting where specialized material is emitted, usually in digital form, in a continuous stream over a great number of channels which makes it possible for the listener or the viewer to more or less immediately catch what he or she wants.

121. Under Scandinavian law, the protection for sound radio or television broadcasts apply regardless of whether *a terrestrial transmitter is used or a satellite* and it comprises both *emissions over the air and emissions by wire.*

122. The *owner of the rights* under the provision is the organization where the act is undertaken which is relevant from a copyright point of view; this means in practice the organization which has taken the decision to carry out the transmission. As regards satellite transmissions special provisions were inserted in the law concerning the liability for such transmissions corresponding to Article 1.2 of the Satellite and Cable Directive (see above).

123. As mentioned above, the rights include the right to control:

- the fixation/recording of the broadcasts; and

- the rebroadcasting (both when this is direct and when it is made on the basis of a recording), and, in addition;

- their communication to the public in places where the public has access against a fee. Previously the right applied only the communication to the public in cinemas and similar places but because of the implementation of the Rental and Lending Directive the provision was amended so as to cover all places where people have access against the payment of an entrance fee (it must be an entrance fee and not, as in pubs and restaurants, where the fee is more for eating and drinking than really for the entrance. Furthermore the right includes;

- the reproduction of recordings made of broadcasts; and

- the distribution of such recordings to the public (the right of distribution). This latter right was introduced following from the implementation of the Rental and Lending Directive and, in accordance with the provisions in that Directive, the right is, according to the fourth paragraph of the Article, exhausted at the regional level (Regional Community exhaustion only and not international exhaustion).

124. The rights are then subject to basically the same *limitations* as in respect of copyright; this follows from the various references in the third paragraph of the Article.

125. The *term of protection* was previously 25 years but was in 1986 (before the Directive came) extended to 50 years. The policy consideration in this context was that that the different categories of owners of neighboring rights should as far as possible be treated in the same way.

126. The fifth paragraph in the Article contains a provision which relates to *cable retransmission.* For such transmissions the Swedish Copyright Act contains provisions on so-called extended collective agreement effect meaning that such retransmissions may be carried out on the basis of a collective agreement between the authors, performers etc. concerned which agreement is then under the law given effect also in relation to rightowners who are not members of the contracting organization. One condition in this context is that the claims from the various categories of rightowners have to be made at the same time. The provision on the extended effect of collective agreements does not apply to broadcasters, the reason being that they are comparatively few and it is easy to conclude individual contracts with them. In order to make it easier for the cable operators, it is prescribed in the fifth paragraph of this Article that the broadcasters´ claims shall be forwarded at the same time as the claims on the basis of other rightowners´ claims under a collective agreement.

[Annex follows
(transparency sheets)]

ANNEX

PROTECTION STANDARDS FOR BROADCASTING ORGANIZATIONS

COMMUNITY DIRECTIVES

– **Directive on Rental and Lending Right and on Certain Rights Related to Copyright (November 19, 1992)**

  Main issue: introduction of an exclusive rental right in the copyright and neighboring rights field

– **Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicabe to Satellite Broadcasting and Cable Retransmission (September 27, 1992)**

  Main issue: satellite broadcasting and cable retransmission to be carried out on the basis of exclusive rights

– **Directive Harmonizing the Term of Protection of Copyright and Certain Related Rigths (October 29, 1993)**

  Main issue: term of protection 70 years for authors and 50 years for neighboring right holders

[End of Annex and of document]