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On November 19, 1992, the Commission of the European Community ("Commission") took a decisive step in the direction of increasing the protection afforded holders of audio and video recordings. The Council Directive on rental right, lending right and on certain rights related to copyright[1] provides authors, performers, and producers with an inalienable right to prevent rental of their works, or to receive an equitable remuneration should a transferee or assignee later authorize rental of the work.[2] This Directive took effect on July 1, 1994.[3]

Prior to the implementation of the Rental Rights Directive ("RRD"), the Court of Justice of the European Communities had extreme difficulty in determining how the traditional principle of exhaustion of rights should apply in the copyright[4] sphere. Culminating in the important decision of *Warner v. Christiansen*, the European Court of Justice came to recognize that the intricate and refined character of copyright law made a straight application of the exhaustion principle[5] unfeasible.[6] Without harmonization, however, there was little that the Court could do to rectify the problems which arose as a result of different levels of copyright protection afforded by the various Member States.

In the Follow-Up to the Green Paper, the Commission further emphasized the need for harmonization among Member States in certain

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1. Council Directive 92/100, 1992 O.J. (L 346) 61 [herinafter "RRD"]. Although the Rental Rights Directive provides for harmonization in various areas of copyright and neighboring rights law, this Article focuses on the Directive's treatment of rental rights.

2. *Id.* at art. 4.1.

3. *Id.* at art. 13.1.

4. Throughout this Article, the term copyright will be used to refer to the rights generally characterized as copyright and neighbouring rights.

5. *See infra* part I.B.3 for a general discussion of the exhaustion principle.

6. *See* Case 158/86, Warner Bros., Inc. & Metronome Video ApS v. Erik Viuff Christiansen, 1988 E.C.R. 2605.

areas of copyright protection.[7] Among the topics included in the Commission's report[8] was a discussion of the rental right as it applied to audio and video recordings.[9] Following the release of the Green Paper, the Council set out to develop a plan for implementing the social and policy concerns related to rental rights outlined by the Commission.[10] The end result was the Rental Rights Directive of 1992.[11] This Article discusses the above sequence of events in greater detail.

First, this Article reviews a few basic principles of copyright law, and its relation to the greater scheme of the European Community trade law — most notably, the exhaustion principle. A discussion of the RRD, its evolution, and its guiding principles will follow. In the course of this discussion, it will be critical to highlight the connection between rental rights and the overarching problem of piracy — a problem whose absence would likely vitiate any need for a rental right.

Next, and most importantly, this Article will evaluate the effectiveness of the RRD. Much of the basis for this evaluation will be rooted in an analysis of the Record Rental Amendment of 1984 of the United States Copyright Act and its legislative history.[12] The author contends that while the RRD is laudable in many respects, the Community institutions did not consider the realities of the audio and video markets to the same extent as the United States Congress. For this reason, the RRD neglects to account for the vast differences between the markets for audio and video recordings. Thus, the door is left open for potentially significant problems.

Finally, future issues pertaining to video rental in the ever-changing world of copyright will be highlighted. Particular attention will be paid to the advent of high-definition television, personal digital recording media, "digital diffusion," and the implications of these new technologies under the RRD.

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7. Follow-Up to the Green Paper — working programme of the Commission in the field of copyright and neighbouring rights, COM(90)584 final at 3 [hereinafter "Follow-Up"].

8. The other topics were piracy, audio-visual home copying, computer programs, data bases, and the role of the European Community in multilateral and bilateral external relations.

9. Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action, COM(88)172 final at 1 [hereinafter "Green Paper"].

10. RRD, *supra* note 1, at 61-62.

11. *Id.*

12. Record Rental Amendment of 1984, Pub. L. No. 98-450, 98 Stat. 1727 (codified as amended in scattered sections of 17 U.S.C.); Record Rental Amendment Extension, Pub. L. No. 100-617, 102 Stat. 3194 (1988) (extending the Record Rental Amendment of 1984 for eight years).

In assessing the RRD and the problems that it attempts to alleviate, one should consider the unique aspects of the audio and video markets as compared to other industries in which copyright plays a major role. These markets, particularly the home audio market, have been increasingly characterized by the ease of piracy — not only among professionals, but also among private users — as digital storage media and recording devices have become more widely accessible.[13] As illustrated by the Japanese example, the rental industry has been closely linked to the problem of piracy.[14] Nevertheless, various issues should be considered: Will a rental right solve, or even reduce, the underlying problem of piracy? Do technological solutions, such as Serial Copy Management System and Macrovision™,[15] present better alternatives than legal regulation to deal with piracy? If opted for, should a rental right necessarily apply to audio and video recordings in the same manner, or do differences in the market structures for compact discs and videocassettes deserve separate consideration? Finally, one must consider the fact that in Europe, all of these issues are compounded by a more fundamental dilemma: the lack of a harmonized system of copyright protection. Until the mid-1980s, the language of the European Court of Justice's decisions, as well as the communiques of the Commission and the Council, suggested that copyright protection was altogether subservient to Community trade and competition law. Recently, however, a growing respect for copyright has evolved. The RRD is the latest step in the trend toward a greater recognition of the importance of copyright in the European Community. Yet, despite the harmonization envisioned by the RRD, the bulk of copyright law remains in the hands of the individual Member States.[16] In the end, this fact could serve to undermine any benefits that the RRD might otherwise confer.

At one level, this Article is a case study of the implementation of a rental right in one particular arena — the European Community. Although the problem with Rental Rights is especially acute in the European Community because of the problems of harmonization and disparate Member State copyright laws, the problems inherent in rental rights

13. For example, digital audio tape (DAT), mini disc (MD), and digital compact cassette (DCC) all provide rather inexpensive and simple means for making virtually flawless digital copies of pre-recorded compact discs.

14. *See infra* part III.A.

15. Serial Copy Management System controls repeated digital reproduction of pre-recorded digital audio media, and Macrovision inhibits the copying of videocassettes.

16. RRD, *supra* note 1, at 62.

legislation are of universal significance. The Berne Convention[17] does not cover rental issues explicitly; thus, as GATT[18] becomes more liberal in its outlook, as free trade areas (such as the areas covered by NAFTA[19]) proliferate, and as technology permits the realization of digital diffusion networks,[20] the fundamental issues underlying rental rights legislation are certain to be at the forefront of international copyright debate.

I. BASIC COPYRIGHT PRINCIPLES AND EUROPEAN COMMUNITY LAW

A. The Purpose of Copyright

Broadly speaking, copyright law exists to further two separate, yet closely related, purposes. First, copyright seeks the promotion of cultural progress and intellectual creation for the benefit of society as a whole.[21] Second, copyright serves to protect the rights of individual authors and to ensure that they are justly compensated for their creativity.[22] Different countries balance these two factors in a number of ways. Most common law systems, such as the United States, view copyright primarily as a vehicle to "promote the Progress of Science and the useful Arts"[23] for the good of society. Countries like the United States interpret copyright as protecting the interests of authors to the extent that it provides incentives for the creation of original works of authorship. Contrarily, civil law regimes tend to place more emphasis on the rights of authors. Pleadings in a sixteenth century French case, for example, asserted the notion that "the author of a book is altogether its master and as such may freely dispose of it."[24] For this reason, in the nineteenth century many civil law

17. Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1976.

18. General Agreement on Tariffs & Trade, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

19. North American Free Trade Agreement, 1993.

20. Digital diffusion will allow individuals to order a music album or video movie via the digital optical-cable links with on line databases.

21. *See, e.g.*, 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE INT-19 (Melville B. Nimmer & Paul Geller eds., 1994). Copyrights were contemplated as incentives for authors and publishers to meet the Enlightenment goal of disseminating "works useful for public instruction." *Id.* (citation omitted).

22. *See, e.g.*, 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03[A] (1994).

23. U.S. CONST. art. 1, § 8, cl. 8.

24. NIMMER & GELLER, *supra* note 21 at INT-18 (quoting Marion in the *Muret* case before the *Parlement* of Paris, Mar. 15, 1586).

regimes, like France, began to recognize the "moral rights" or "personality rights" of the author.[25]

All copyright regimes "presuppose a work embodied in perceptible form, but only some require it to be fixed in some lasting or tangible form."[26] While the United States Copyright Act contains an express "fixation" requirement,[27] most European systems only view fixation as "satisfying evidentiary requirements or do not demand it at all."[28] Either way, the fixation requirement is inherently satisfied by all works subject to the RRD.[29]

The institutions of the European Community have increasingly come to appreciate the importance of copyright protection. This is primarily a result of the increasing economic importance of intellectual property and the development of new technologies that make it easier for "pirates" to misappropriate copyrighted works.[30] As an example, in the Follow-Up to the Green Paper, the Commission emphasized that copyright provides a basis for intellectual creation.[31] To protect copyright is to ensure that creativity is sustained and developed, in the interest of authors, the cultural industries, consumers, and ultimately of society as a whole.[32] As will be illustrated, the RRD was designed to enhance copyright protection by eliminating a common source of piracy: the rental and subsequent duplication of copyrighted audio and video recordings.[33]

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25. *Id.* at INT-21-23.

26. *Id.* at INT-30.

27. 17 U.S.C. § 102(a) (1988 & Supp. 1990). This section states in pertinent part that: "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

§ 101 states in pertinent part: "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1988 & Supp. 1994).

Thus, artistic works such as improvised, off-the-cuff comedy, choreography, or musical creations are not copyrightable.

28. NIMMER & GELLER, *supra* note 21, at INT-32.

29. To qualify for "rental," a tangible fixation of the copyrighted work must exist. An interesting question arises in the future realm of digital diffusion, in which case there is no rental of a physical object. *See infra* Part IV.

30. Green Paper, *supra* note 9, at 19-21.

31. Follow-Up, *supra* note 7, at 4.

32. *Id.*

33. RRD, *supra* note 1, at art. 1.

B. The Community Approach

The Commission defines the concept of copyright as "the broad range of rights that are perhaps more correctly referred to as copyright and neighbouring rights, that is, in addition to authors' rights, analogous rights granted to, amongst others, performers, producers of audiovisual works, and broadcasting organisations."[34] The RRD, for example, grants rights not only to the authors of a copyrighted work, but to performers, producers, and others involved in the creative process.[35] The fundamentals of copyright law, such as what counts as a "work" of authorship and the standard for infringement, are left to the individual Member States.[36] The national frameworks may not interfere, however, with the principles of the Community law.

While national copyright laws may potentially violate various provisions of the Treaty of Rome, the central provisions around which virtually all of the intellectual property cases center are those dealing with free movement of goods[37] and competition/antitrust.[38] Although antitrust issues might arise in relation to the RRD, the most significant issues with regard to both the development and the future of the RRD deal with the Treaty of Rome's provisions on free trade. It is thus valuable to review some of the key facets of Community trade law, particularly as it relates to copyrighted materials.

1. Articles 30-36

Article 30 of the Treaty of Rome provides that "[q]uantitative restrictions on imports and all measures having equivalent effect shall . . . be prohibited between Member States."[39] Article 34 sets a similar rule regarding exports.[40] These rules, however, interpreted literally, could efface national intellectual property protection. For instance, a national law prohibiting importation of goods infringing a nationally recognized copyright might constitute a measure having equivalent effect to a

34. European Update, MAIN TEXT: INTELLECTUAL PROPERTY, 1991 WL 16683, § 4.1 (D.R.T.).

35. RRD, *supra* note 1, at art. 2.1.

36. *Id.*

37. Treaty Establishing The European Community, Mar. 25, 1957, arts. 30-36 [hereinafter "Treaty of Rome"].

38. *Id.* at arts. 85-86.

39. *Id.* at art. 30.

40. *Id.* at art. 34.

quantitative restriction. Fortunately, the Treaty provides an outlet under Article 36. This Article provides:

> The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of industrial and commercial property.[41] Such prohibitions . . . shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[42]

Thus, Articles 30 and 36, in tandem, define the scope of deference to national copyright laws within the general framework of Community trade principles. These two articles, however, have given rise to a host of questions involving unique problems related to intellectual property.

2. "Existence" Versus "Exercise" of the Right: Specific Subject Matter of the Right

The European Court of Justice has created several doctrinal edifices to deal with "the Article 30/36 conundrum." This conundrum has arisen because the provision in the first sentence of Article 36 has forced the Court of Justice to undertake a excruciatingly difficult balancing act between the European Community law and intellectual property law.[43] The existence/exercise distinction[44] and the specific subject matter doctrine[45] have served to balance between Community and national interests.

In *Parke, Davis & Company v. Probel, Reese, Beintema-Interpharm & Centrafarm*,[46] the Court first distinguished between the "existence" of an intellectual property right, which is not affected by the Treaty of Rome,

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41. Although the term "copyright" never appears in the Treaty, the Court has held that the term "industrial and commercial property" includes copyright. First, in *Coditel v. S.A. Cine-Vog Films*, the Court used the general term "intellectual property" in place of "industrial and commercial property." Case 62/79, 1980 E.C.R. 881-82. Then, in the important decision of *Musik-Vertrieb Membran GmbH and K-tel Int'l v. GEMA*, the Court held that "in the application of Article 36 of the Treaty there is no reason to make a distinction between copyright and other industrial and commercial property rights. . . . [C]ommercial exploitation of copyright raises the same issues as that of any other industrial or commercial property right." Joined Cases 55 & 57/80, 1981 E.C.R. 147, 162.

42. Treaty of Rome, *supra* note 37, at art. 36.

43. *See, e.g.*, Joined Cases 55 & 57/80, Musik-Vertrieb Membran GmbH and K-tel Int'l v. GEMA, 1981 E.C.R. 147.

44. Case 24/67, Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm, 1968 E.C.R. 55, 73.

45. *See, e.g.*, Case 15/74, Centrafarm BV v. Sterling Drug, Inc., 1974 E.C.R. 1147, 1162.

46. Case 24/67, 1968 E.C.R. 55.

and the "exercise" of that right, which the Treaty of Rome might curtail.[47] That case involved the question of whether a national patent law contributed to a "dominant position, the abuse of which may affect trade between Member States."[48] Although this distinction may appear artificial, in that the existence of a right is rather insignificant if the proprietor is not allowed to exercise that right, the Court has applied the distinction to uphold Community objectives on the one hand, while not destroying national intellectual property regimes on the other.[49]

The specific subject matter doctrine plays a similar role. With regard to trademark, patent, and copyright, the Court has defined the specific subject matter that the right is intended to protect; only national regulations which serve to further this specific subject matter are protected under Article 36.[50] As for copyright, the Court has indicated that the specific subject matter includes the distribution right — i.e., the right to put the work on the market for the first time and extract a monopoly rent — as well as the right of reproduction.[51] The flip-side of this right to place the work on the market for the first time is the exhaustion principle.[52] An understanding of this concept is crucial to recognizing the significance and broader implications of the RRD.

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47. *Id.* at 73.

48. *Id.* at 72. In concluding that the law in question did not necessarily constitute an abuse, the Court held that "the *existence* of the rights granted by a Member State to the holder of a patent is not affected by the prohibitions contained in Articles 85(1) and 86 of the Treaty," but that "the *exercise* of such rights cannot of itself fall either under Article 85(1), in the absence of any agreement, decision or concerted practice prohibited by that provision, or under Article 86, in the absence of any abuse of a dominant position." *Id.* at 73 (emphasis added).

49. *Id.* at 80.

50. For example, in the area of trademarks, the Court held in *Sirena S.r.l. v. Eda S.r.l.* that the specific subject matter of the trademark is the guarantee to proprietors that they have the exclusive right to use that trademark for the purpose of putting a product into circulation for the first time and therefore to protect them against competitors wishing to take advantage of the status and reputation of the trademark by selling products illegally bearing that trademark. Case 40/70, 1971 E.C.R. 69. Similarly, with regard to patents, the Court held in *Centrafarm BV v. Sterling Drug, Inc.* that the specific subject matter of the patent,

> is the guarantee that the patentee, to reward the creative effort of the inventor, has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licenses to third parties, as well as the right to oppose infringements.

Case 15/74, 1974 E.C.R. 1147, 1162.

51. Case 341/87, EMI Electrola GmbH v. Patricia Im, 1989 E.C.R. 79, 95.

52. *See infra* part I.B.3.

3. The "Exhaustion of Rights" Principle: The Community's Version of the "First Sale Doctrine"

The Community exhaustion principle is probably the most important doctrine relating to the rental-right issue. Under the exhaustion principle, "[t]he exclusive right guaranteed by the legislation on industrial and commercial property is exhausted when a product has been lawfully distributed on the market in another Member State by the actual proprietor of the right or with his consent."[53]

This principle "prevents the holder of parallel intellectual property rights in several Member States from combining the various rights to create a source of multiple benefits."[54] The exhaustion concept is essentially no different from the "First Sale Doctrine" in United States copyright law.[55] The premise underlying both doctrines is that a copyright owner should be able to extract the full monopoly rent when initially placing a work on the market. Like the European exhaustion principle,

> [t]he [United States] first sale doctrine extinguishes the distribution right once the copyright owner receives compensation for a copy because a guaranteed one-time compensation per copy is deemed by the copyright law to provide sufficient incentive to spur creation. There is, therefore, no reason to allow the copyright owner to control what the purchaser and future owners do with the work.[56]

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53. Case 50/80, Dansk Supermarked A/S v. A/S Imerco, 1981 E.C.R. 181, 193.

54. Anne Moebes, *Copyright Protection for Audiovisual Works in the European Community*, 15 HASTINGS COMM. & ENT. L.J. 399, 411 (1993). Moebes explains:

> if a copyright holder markets his product or consents to the marketing of his product in a part of the Community with less copyright protection, he gives up the possibility of relying on the copyright for that product in another part of the Community where more favorable copyright protection is available. Community exhaustion has replaced national exhaustion, whereby the exclusivity from a copyright, for example, would extend only to the first marketing of the copyrighted product in the national territory.

Id.

55. *See, e.g.*, Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154, 159 (3d Cir. 1984) ("The first sale doctrine prevents the copyright owner from controlling the future transfer of a particular copy once its material ownership has been transferred."); American Int'l Pictures, Inc. v. Foreman, 576 F.2d 661, 664 (5th Cir. 1978) ("The first sale thus extinguishes the copyright holder's ability to control the course of copies placed in the stream of commerce."). A more extensive discussion of this doctrine follows in the section dealing with the Record Rental Amendment. *See* 17 U.S.C. § 109(b)(1)(A) (1988 & Supp. 1990) and H.R. 94-1476.

56. Kenneth R. Corsello, Note, *The Computer Software Rental Amendments Act of 1990: Another Bend in the First Sale Doctrine*, 41 CATH. U. L. REV. 177, 188-89 (1991) (citation omitted).

However, the real significance of the European exhaustion principle lies in the fact that placing a product on the market *in any Member State* exhausts the proprietor's rights as to that product *in all other Member States*.[57]

In *Deutsche Grammophon*, the Court dealt with the exhaustion principle in a case involving copyright.[58] The plaintiff, a record production company in West Germany, sold records itself within that country and licensed distribution rights to various other companies in the rest of the Community.[59] When the defendant tried to sell imported goods in Germany distributed by the plaintiff's French licensee, the plaintiff sought an injunction under the West German Copyright Act, on the grounds that the plaintiff's exclusive distribution right with respect to the products in question had not been exhausted in the German market.[60] The Court ruled against the plaintiff, holding that the plaintiff's distribution right had been exhausted *throughout the entire Community* because the phonorecords in question were "placed on the market by him or with his consent in another Member State . . . ."[61]

This holding points to one important requirement of the exhaustion principle: the product must have been lawfully marketed in the first Member State with the *consent* of the proprietor. This requirement is rooted in the very definition of exhaustion by the Court, as exemplified in the passage from *Dansk Supermarked* above.[62] The principle of Community-wide exhaustion and the consent requirement will be the subjects of more in-depth focus, below, in considering the cases leading to the development of the Green Paper and the implementation of the RRD.[63]

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57. RRD, *supra* note 1, at art. 1.4.

58. Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmarkte GmbH & Co. KG, 1971 E.C.R. 487.

59. *Id.* at 489-90.

60. *Id.* at 490.

61. *Id.* at 500.

62. *See supra* note 53 and accompanying text.

63. As a prelude to the discussion below, the Commission emphasized in the first chapter of the Green Paper that:

> recently, [the European Court of Justice] has been called upon to define more clearly the limits of [the exhaustion] principle, for example, as regards the continuing possibility for right holders to rely on their rights in relation to performances of imported films and sound recordings and to the rental of video recordings.

Green Paper, *supra* note 9, at 1 (citation omitted).

II. EVOLUTION OF THE RENTAL RIGHTS DIRECTIVE

The RRD represents the culmination of the European Court of Justice decisions and the Commission reports recognizing the need for enhanced copyright protection in the Community, and the need for harmonization of certain aspects of copyright law. More fundamentally, the Directive signifies that the various Community institutions have adopted a more positive attitude toward copyright in general.[64] The Court of Justice initially viewed with skepticism any national copyright protection that functioned to inhibit free trade within the Community.[65] Gradually, the Court has begun to consider more carefully the positive social policy of copyright.[66] As will be discussed, this trend has been accompanied by the modification of the rigorous exhaustion principle, on the one hand, and subtle hints at the need for harmonization, on the other. These moves were influential in providing the impetus for the Green Paper and the RRD.

A. *The Case Law: Gradual Modification of the Exhaustion Principle*

In the early 1970s, the European Court of Justice indicated in *Deutsche Grammophon* that the exhaustion principle applies in the field of copyright.[67] In that case, however, the Court faced the rather simple situation of the sale of records in one Member State, and the attempted importation of those records into another.[68] These facts represent the quintessential exhaustion scenario. Difficulties began to surface when the Court was forced to deal with more subtle copyright problems.

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64. Peter Stone asserts:

> the constantly expanding activities of the European Community have increasingly affected copyright. Initially Community law was concerned primarily to limit the extent to which copyright could be used so as to impede trade between Member States, and to subject the activities of copyright collecting societies to controls designed to secure a measure of competition.
>
> More recently, however, the European Commission has adopted a much more positive attitude to copyright, recognizing the importance of creative endeavour to the European economy. While complete unification is not envisaged in this sphere, the Commission now contemplates the harmonization of the copyright laws of the Member States by Community Directives on important questions where the traditional international treaties have failed to establish adequate solutions.

PETER STONE, COPYRIGHT LAW IN THE UNITED KINGDOM AND THE EUROPEAN COMMUNITY ix (European Community Law Series no. 1, 1990).

65. *Deutsche Grammophon*, 1971 E.C.R. at 488.

66. *See, e.g.*, Case 62/79, Coditel v. S.A. Cine-Vog Films, 1980 E.C.R. 881.

67. *See supra* note 58 and accompanying text.

68. *Deutsche Grammophon*, 1971 E.C.R. at 490.

One fundamental shortcoming of the exhaustion doctrine as it relates to copyright law is that certain rights in the copyright bundle inherently are *not* exhausted by the first sale. For example, the rights to prevent reproduction, derivation, and public performance of a work remain with the copyright owner even after the product is lawfully placed on the market for the first time. It is this ongoing interest of the copyright owner that distinguishes the sale of copyrighted material from the sale of other tangible goods. In a sense, this problem derives from the universal distinction between copyright ownership, and ownership of the material object in which the copyrighted material is embedded.[69] Accordingly, in the case of video or audio recordings, the copyright owner has no interest in the purchaser's disposition of the physical property comprising the videocassette or compact disc; rather, the concern is with the intangible material contained therein.[70]

A second problem arises from the fact that Community law permits the licensing of copyrighted material to coincide with national boundaries. Thus, it is generally the case that different entities will hold the rights to distribute, perform, and reproduce a particular work in different Member States.[71] This arrangement has resulted in numerous difficulties regarding the exhaustion doctrine, and likely has been a motivating factor in the Commission's drive toward harmonization of national law.

In *Coditel v. S.A. Cine-Vog Films*, the Court first recognized a limit of the exhaustion principle as applied to copyrighted material.[72] That decision involved the right of public performance of a copyrighted work.[73] The French owner of the copyright in the film *Le Boucher* had transferred to the Belgian distribution company, Cine-Vog, the exclusive right to

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69. The clearest explanation of this distinction is found in § 202 of the U.S. Copyright Act. That section states:

> Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

17 U.S.C. § 202 (1988).

70. Recognition of this distinction will become even more significant over the next decade, when much copyrighted material will be "digitally diffused" by airwaves. Through these new developments, a good deal of copyrighted material will not be "sold" in the form of hard copies. The notion of "exhaustion" in such a regime will become even less appropriate.

71. *See* Case 62/79, Coditel v. S.A. Cine-Vog Films, 1980 E.C.R. 881.

72. Case 62/79, 1980 E.C.R. 881 (1980).

73. *Id.* at 884.

distribute the film in Belgium for seven years.[74] A conflict arose when a German television channel broadcast an authorized German version of the film within Germany; Coditel, a Belgian cable company, relayed the German broadcast to parts of Belgium.[75] Cine-Vog brought suit against Coditel in Belgium, because according to Belgian copyright law, Coditel needed permission from Cine-Vog to "perform" the film in Belgium.[76]

The Belgian Court referred a question to the European Court of Justice under Article 59 of the Treaty of Rome. The Court framed the issue as:

> whether Articles 59 and 60 of the Treaty prohibit an assignment, limited to the territory of a Member State, of the copyright in a film, in view of the fact that a series of such assignments might result in the partitioning of the Common Market as regards the undertaking of economic activity in the film industry.[77]

In reaching its decision that the provision of Belgian copyright law in question did not violate the Treaty of Rome, the Court probably went further than it ever had to stress the unique nature of copyright and its importance. The Court emphasized that unlike books or records, films belong to the category of artistic works "made available to the public by performances which may be infinitely repeated."[78] Furthermore, the Court stated that:

> whilst copyright entails the right to demand fees for any showing or performance, the rules of the Treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. *The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution* in a situation where television is organized in the Member States largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.[79]

The Court apparently began to appreciate that unique aspects of copyright law, combined with specific facets of the audio and video industries, might

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74. *Id.*
75. *Id.*
76. *Id.*
77. *Coditel*, 1980 E.C.R. at 902.
78. *Id.* at 902.
79. *Id.* at 903-04 (emphasis added).

require a modification of the stringent Community policy against drawing any sorts of trade boundaries along Member State lines.

In *EMI Electrola GmbH v. Patricia Im- und Export*,[80] the Court further indicated the limits of the exhaustion principle in the area of copyright[81] and alluded to the community-wide problems resulting from a lack of harmonization. This case presented the aforementioned rule that an owner's rights are exhausted only if the product was marketed with his consent. Although this limitation is not unique to the field of copyright, the application of the "consent" requirement to copyrighted material has broad implications that have motivated the drive toward harmonization, as *EMI Electrola* indicates.[82] The facts of *EMI Electrola* were rather simple. Certain recordings of Cliff Richard had fallen into the public domain in Denmark, but were still protected in the Federal Republic of Germany.[83] The underlying issue was whether Articles 30 and 36 permitted the German rights owner to exercise his rights under German copyright law to prohibit the marketing, in that country, of audio recordings by the artist originating in Denmark.[84]

The Court ultimately held that the German rights owner could exercise his rights without violating the Treaty.[85] The Court concluded that no exhaustion had occurred as to the Danish goods, since they had not been marketed with the "consent" of the owner. According to the Court, "the fact that the sound recordings were lawfully marketed in another Member State is due, not to an act or the consent of the copyright owner or his

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80. Case 341/87, 1989 E.C.R. 79 (1989).

81. *See* Anna Lo Monaco, *The Role of Consent and Consumer Protection in Reconciling Articles 30 and 36 in* Hag I *and* Hag II, 15 FORDHAM INT'L L.J. 207 (1991-1992). Referring to *EMI Electrola* and *Warner v. Christiansen*, Monaco states that "[i]n the field of copyright, the Court has permitted the qualification and limitation of the role of consent to ensure an adequate return for the copyright holder." *Id.* at 217 (citation omitted).

82. The consent doctrine in copyright law generally states that:

> The rights owner will normally be able to control distribution where the article has been placed on the market without his consent e.g. where:
>
> (a) pirate copy
> (b) compulsory license
> (c) no protection in that territory
>
> but if there is consent, then it does not matter that the article was first put on the market in a territory where there is a compulsory licensing system or no protection.

DAVID LESTER, A PRACTITIONER'S OVERVIEW OF EEC AND UNITED KINGDOM COPYRIGHT LAW, (Aug. 12, 1991), § III(C) 3.3.

83. *EMI Electrola*, 1989 E.C.R. at 94-95.

84. *Id.* at 94.

85. *Id.* at 97.

licensee, but to the expiry of the protection period provided for by the legislation of that Member State."[86]

In reality, however, what was going on had nothing to do with a lack of consent, since the copyright owner, indeed, had consented to the marketing of the goods in Denmark, fully cognizant of the fact that the duration of protection in Denmark was shorter than in other Member States. If the Court had applied the "consent" requirement in its literal sense, the owner's rights would thus have been exhausted, and the German rights owner could not have prevented the importation of the Danish recordings.

However, the Court effectively twisted the notion of consent in order to correct the problem of the absence of a single duration-of-copyright period throughout the Community. The Court emphasized that:

> The problem arising thus stems from the differences between national legislation regarding the period of protection afforded by copyright and by related rights, those differences concerning either the duration of the protection itself or the details thereof, such as the time when the protection period begins to run.
>
> In that regard, it should be noted that in the present state of Community law, *which is characterized by a lack of harmonization or approximation of legislation governing the protection of literary and artistic property*, it is for the national legislatures to determine the conditions and detailed rules for such protection.[87]

Here, in a nutshell, lies the fundamental Community copyright problem: it is virtually impossible to maintain a free-trade regime of intellectual property if the various Member States offer widely divergent terms and conditions of protection. In the italicized passage above, the Court implicitly recognized that total free trade would not be possible until at least certain aspects of Member State copyright law were harmonized.

As a final predicate to the RRD, in *Warner v. Christiansen* the Court was presented with the issue of rental rights in the absence of community harmonization.[88] In this decision, the stage for the RRD was ultimately set. The European Court of Justice held that the Community exhaustion principle did not prevent the enforcement of a rental right for videocassettes under Danish law.[89] Christiansen, who managed a video shop in Den-

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86. *Id.* at 96.

87. *Id.* (emphasis added).

88. Case 158/86, Warner Bros., Inc. & Metronome Video ApS v. Christiansen, 1988 E.C.R. 2605.

89. *Id.* at 2630.

mark, purchased a videocassette of the film *Never Say Never Again* in London, and brought the video back with him to Copenhagen, where he proceeded to rent it.[90] Warner Brothers owned the copyright to the film under British and Danish law.[91] The controversy arose because Danish law provided for the exclusive right to authorize the rental of a copyrighted work, such that if a copyright owner licenses the sale of a copyrighted videocassette, but not the right to rent it, the copyright is infringed if the film is rented.[92] Contrarily, British law did not accord such a distinct right.[93] In Britain, the copyright owner could prevent the copying, broadcasting, public performance, or transmission by diffusion of the film; however, if the film were copied onto a videocassette with the consent of the copyright owner, and the cassette passed legitimately into another party's hands, the copyright owner could not subsequently prevent the rental of the videocassette.[94] In other words, British law reflected a straight application of the first sale doctrine.

The significance of the case is apparent in that the Court disagreed with the opinion of Advocate General Mancini, who essentially applied the exhaustion principle in its traditional form.[95] In its request for a preliminary ruling, the Danish Court asked the European Court of Justice to specify:

> whether, for the purposes of Articles 30 and 36 of the EEC Treaty, the owner of the exclusive rights in a video-cassette lawfully put into circulation, with his consent, in a Member State whose law does not allow the transferor to prohibit its resale or hiring-out, forfeits the right to restrain the hiring-out of that recording in another Member State into which it has been lawfully imported, where the copyright legislation of that second State allows such prohibition but does so without distinguishing between domestic and imported video-cassettes and without impeding the actual importation of video-cassettes as such.[96]

Reasoning that "although the contested provision is not concerned with the importation of cassettes, it may nevertheless obstruct their entry into Denmark,"[97] the Advocate General held that:

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90. *Id.* at 2627.
91. *Id.* at 2613.
92. *Id.* at 2627.
93. *Warner Bros.*, 1988 E.C.R. at 2619.
94. *Id.* at 2623.
95. *See* Case 158/86, 1988 E.C.R. 2605, 2618.
96. *Id.* at 2620.
97. *Id.* at 2623.

> although sale and hiring-out are different in nature (the first entailing a transfer of title in the goods and the second conferring possession for a limited time), they nonetheless have the common characteristic that they necessarily involve making the product commercially available to the consumer. It follows that any exclusive right to hire out a cassette may never nullify the effect — the free movement of the article throughout the Community — brought about by its sale in another Member State.[98]

The Advocate General thus viewed the problem as a simple one. Since Warner Brothers had consented to placing the video cassette on the market for sale in Great Britain, where no rental right existed, Community law specified that Warner Brothers' rights were exhausted. Thus, a lawful purchaser of the videocassette could proceed to dispose of the film in any way he or she chose — in any Member State — regardless of the fact that the other Member State (in this instance, Denmark) granted the copyright owner a rental right. The broad implications of this rule would be the forced harmonization of national copyright regimes at the lowest level of protection. Recognizing this consequence, the European Court of Justice chose not to follow the opinion of the Advocate General.[99]

The Court's decision is much more in tune with the realities of the videocassette market than is the Advocate General's opinion. Furthermore, the Court's reasoning in its decision to cut back on the rigorous exhaustion principle in the realm of copyright reflects a growing awareness of the importance of copyright in order to sustain artistic creation. The Court held that:

> The right to prohibit the hiring-out of a video-cassette is bound up with the essential rights of the author, namely the exclusive right of performance and the exclusive right of reproduction, which the Treaty did not intend to call in question. The right is necessary in order to guarantee to makers of films a satisfactory remuneration on the specific rental market which is distinct from the sales market and the size of which — owing to developments in technology — offers great potential as a source of revenue. The fact that an author has put video-cassettes into circulation in a Member State which does not provide specific protection for the right to hire them out should not, therefore,

98. *Id.*
99. Case 158/86, 1988 E.C.R. 2605.

> have repercussions on the right conferred on that same author by the legislation of another Member State to restrain, in that State, the hiring-out of those video-cassettes.[100]

Although the Court reasoned that the nature of the videocassette market was such that a national law preventing the rental of videocassettes would indirectly affect trade between Member States and thus constituted a measure having an effect equivalent to a quantitative restriction under Article 30, the Court held that the measure was justified under Article 36.[101] As reflected in the passage quoted directly above, the Court apparently recognized that by viewing the rights of a copyright owner solely in the context of sales, to cover both the grant of rights to private purchasers as well as to commercial renters, the law did not provide for a payment of royalties to the copyright owner commensurate with the number of rentals, ensuring the owner an adequate portion of rental revenues.

B. A Brief Illustration of Why the Traditional Exhaustion Principle Will Not Adequately Protect the Interests of a Videocassette Copyright Owner

Before proceeding with a discussion of the Green Paper and the first efforts at harmonization of Member State copyright law, it is important that the reader understand why the analysis of the court in *Warner v. Christiansen* was correct — that is, why a videocassette copyright owner cannot adequately protect its rights in a regime employing a straight application of the exhaustion principle.[102] With respect to most tangible goods, one might convincingly argue that if the manufacturer wishes to obtain compensation for rentals by subsequent purchasers, it need simply make an actuarial calculation of the number of expected rentals, and raise the initial sale price of the product accordingly. In this manner, the manufacturer will receive ex ante compensation for future rentals of the product. However, while this route might be possible either in markets where rental is virtually the exclusive method of consumer transaction, or in markets where rental is an economically insignificant method of transaction, it is not possible given the rather unique realities of the videocassette market.

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100. *Id.* at 2606.
101. *Id.* at 2620-21.
102. *See supra* part I.B.3.

The problem lies in the fact that, economically, the videocassette market is almost evenly divided between sales and rentals.[103] This is true most likely because a majority of consumers desire to view video recordings only once or a few times, and they therefore prefer to rent rather than purchase. However, a smaller number of avid viewers prefer to own their own copy. Although numerically this latter population represents a far smaller subset of the market, the return to the copyright holder from each purchase is obviously far greater than from each rental.[104] For this reason, there is virtually no way, short of an exclusive rental right or at least a right to equitable remuneration for each rental, that a copyright holder can reap its just rewards in one market without effectively destroying the other market. For example, in order to receive compensation for each rental, the copyright holder would have to raise the price of a single videocassette to account for the potentiality of approximately thirty rentals of that cassette.[105] The problem is that any price increase that would adequately compensate the copyright owner for each rental would result in the virtual elimination of a viable sales market.[106] Few private

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103. Robert Hadl, Vice-President and General Counsel for MCA has explained that:

> the business of videocassettes is as much a sell-thru business today as a rental business. Revenues to suppliers from worldwide sales and rentals of videocassettes in 1991 totalled approximately 6.8 billion dollars. Sales of videocassettes represented more than 50% of this amount, confirming a trend that now makes revenues from sell-thru copies greater than revenues from rentals. The continued improvement of videocassette sales compared with rentals suggests that, like audio, some prohibition against copying rental videocassettes must be found if the sales of videocassettes are to prosper and thrive. Otherwise, as in Japan, sales of videocassettes will not improve but will decline as consumers rent copies and make their own digital versions. New hardware will facilitate such copying of rental cassettes. Thus, there is a need for a comprehensive review of the direction legal structures are taking to determine whether some alternative to the proposed private copying regimes is warranted.

Robert D. Hadl, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights 121, *Digital Technology: A Critical Crossroad in Int'l Copyright*, (Harvard 1993).

104. Without any sort of rental right or right of equitable remuneration for each rental, the copyright holder is only compensated for rentals by the commercial establishment's initial purchase of the videocassette. Thus, while each copy of a popular film is rented on the order of thirty times, the copyright holder only receives compensation for a single purchase. Thus, for example, two private purchases of a videocassette in the sales market will give the copyright holder twice the gross revenue of thirty rentals.

105. This figure would, of course, have to be averaged against the number of cassettes expected to be purchased by private consumers.

106. The Commission recognized this problem in advocating a rental right in its Green Paper:

> one likely consequence [of the absence of a rental right,] may well then be that recorded works will tend to be sold at relatively high prices since right holders will seek to achieve a return on first sale that will reflect, if only in part, the rental use

consumers would be willing to pay $100 for a single videocassette — the *minimum* price that would compensate the copyright owner for the weighted average of thirty rentals per tape.[107] The copyright owner is therefore forced to choose between pricing-to-sell (generally in a range between $20 and $30), hoping that increased sales make up for losses in the rental premium that commercial rental outlets would have paid, or pricing-to-rent, supposing that the sales to commercial rental outlets at inflated prices (generally between $65 and $85 wholesale) will provide an adequate return to make up for lost sales in the private consumer market.

With the establishment of a rental right, the copyright owner is not forced to make such a choice between sales and rental; rather, the sales and rental markets are able to coexist peacefully. To illustrate, the copyright owner may release videocassettes from the outset at a suggested retail price of $20 to $30, and then receive remuneration for each rental by a commercial establishment.[108] This solution is ideal because it inherently

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> that may subsequently be made of their works. However, this policy is unlikely to provide a satisfactory solution from the right holders' point of view since there are other limits on the prices that may be charged on first sale, while these higher prices will nevertheless prejudice those consumers who would prefer to buy rather than rent the recordings in question.

Green Paper, *supra* note 9, at 161.

107. American film companies have resorted to what is essentially the only market solution to the absence of a rental right for video recordings: unless a film is expected to be a "major seller" (a category for which few films qualify), the studios release the videocassette at an initial manufacturer's suggested retail price range of $95 to $110. This price is maintained for the first several months of release, so that all video rental outlets must pay this higher price, which includes a "rental premium." After a few months, the price is generally lowered to a retail price range of $15 to $35, so that private consumers may more easily purchase a copy. While this solution might seem adequate, it actually harms consumers unnecessarily. A consumer wishing to purchase a videocassette should not be "forced" to wait several months until the price is lowered. Furthermore, by the time the price of the film is lowered, it is quite likely that many consumers, who would have purchased the film otherwise, will have rented it in the interim, and thus decline to purchase the film whose "novelty" has worn off. Although some critics might argue that making consumers wait a few months to purchase a videocassette is not a substantial problem, it is a problem which could be easily eliminated by modifying the exhaustion principle (or first sale doctrine) in order to allow for a rental right.

108. The Advocate General in *Warner v. Christiansen* suggested that the copyright owner may be able "to safeguard his position by inserting appropriate clauses into the contract of sale." *Warner*, 1988 E.C.R. at 2624. However, in reality, contractual protection is not a viable possibility. In the Congressional Debates over the passage of the U.S. Record Rental Amendment of 1984, Peter Nolan, Senior Counsel of Walt Disney Telecommunications and Non-Theatrical Company explained that Disney had tried to establish such a contractual system, but the effort ultimately failed:

> To prevent video retailers from renting our sale only product, we have to devise a contract which would prohibit any purchaser from renting the cassette without our permission. This means that the contract would have to bind not only video retailers but anyone else who bought it. The law requires that you have a binding,

recognizes that what a consumer is paying for, either through purchase or rental, is not the physical videocassette itself, but rather the right to view, either repeatedly or for a limited time, the underlying intellectual property embodied in the videocassette. Accordingly, the most equitable method of compensating a creator is on a per-use (or per-view) basis. The establishment of a rental right is the best method of assuring that the creator is adequately compensated.

C. The Green Paper and its Follow-Up: A Step Toward Harmonization

In 1988, the Commission announced its position in favor of harmonizing certain areas of copyright law within the European Community. In its Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action ("Green Paper"), the Commission indicated the areas in which it deemed harmonization essential to preserve copyright protection within the system of Community trade and competition law.[109] The primary areas covered include piracy, audiovisual home copying, computer programs and data bases, and rental rights.[110] The issue of rental rights is one of the most important areas of concern to the Community,[111] especially considering its inextricable relationship with the issues of piracy and home copying, that will be addressed below.[112]

The Green Paper begins with a recognition that reconciling the economic interests of authors with cultural goals, including the need for ready access to information, can be rather difficult.[113] The Commission also noted the frequently conflicting goals of preventing restrictions on free

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> preferably signed contract with each of the purchasers of your cassettes. It would not be enough, for example, to merely put contract terms on a label or package. We can monitor 4 to 5 thousand or 8 thousand contracts, but we are not in a position to monitor millions of them. . . . Although we were fully capable of binding those video retailers with whom we contracted, we could not devise a contract that would reach the activities of third parties who purchased our cassettes from Disney dealers.

Audio and Video Rental: Hearings on S. 32 & 33 Before the Subcomm. on Patents, Copyrights, & Trademarks of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 88, 90 (1983) (statement and prepared memorandum of Peter Nolan) [hereinafter *First Sale Doctrine Hearings*].

109. Green Paper, *supra* note 9, at 11. It is important to emphasize that "the Community's harmonization efforts have been piece-meal, recognizing that harmonization is not necessary for every aspect of copyright law." Moebes, *supra* note 54, at 405.

110. Green Paper, *supra* note 9, at 15.

111. *Id.* at 164.

112. *See infra* part III.C.

113. Green Paper, *supra* note 9, at 1.

movement of goods among Member States, on the one hand, and while simultaneously respecting the various national systems of copyright protection on the other.[114] More importantly, the Commission recognized the growing importance of copyright protection to industry and commerce, noting that "copyright activities generate at least 2% to 3% of [the Community's] Gross Domestic Product and probably much more."[115]

Chapter Four of the Green Paper deals specifically with the distribution right, the exhaustion principle, and the rental right.[116] The Commission's agenda in this chapter provided the impetus for the adoption of the RRD, so it is worth considering the Commission's views and explanations as to why a Community-wide rental right is necessary. The Commission recognized that video rental and audio rental pose qualitatively different policy issues.[117] But in both audio and video markets, the Commission identified the primary justification for the establishment of a rental right as the prevention or curtailment of piracy.[118]

Focusing on the proliferation of unlicensed rental establishments in Europe, the United States, Canada, and Japan, the Commission stated that the activities of such unlicensed outlets "have a negative effect on the revenue of right holders by diverting legitimate business from licensed distributors and, in addition, they tend to form the main outlet for pirate copies which produce a larger profit margin than rental of legitimate products."[119] But piracy by commercial outlets is far less significant than home piracy of rented recordings; it is this latter form of piracy that a rental right is designed to combat.[120] Specifically, the Commission stated that:

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114. *Id.*

115. *Id.* at 17 n.12.

116. *Id.* at 146-169.

117. More specifically, the Commission emphasized that:

> Lending and rental of video recordings on cassette differ from the rental of sound recordings because the predominant method of distributing video recordings to the public is rental and not sale. The reasons why video recordings are rented and not sold include the saturation effect of repeated playing of most popular video products, in particular, feature films, and the relatively high price, though now decreasing, for their purchase by comparison with their rental. Some special types of recordings undoubtedly tend to be purchased, such as instructional and children's videos, for these are likely to be used repeatedly. . . .

Green Paper, *supra* note 9, at 157. An interesting question is why the RRD treats audio and video recordings virtually identically, without addressing the differences between the two markets. This matter is addressed in greater detail in Part III.

118. Green Paper, *supra* note 9, at 157.

119. *Id.*

120. *Id.* at 161.

> Present trends in the distribution and marketing of sound and video recordings suggest that commercial rental will constitute an increasingly important means by which such recordings will be made available to the public. Furthermore, given the links between rental and the problems of piracy and private copying, this development implies significant economic consequences for those whose works and performances are recorded. In the absence of a firm legal basis for right holders to authorize the commercial exploitation of their works through rental, it seems likely that those responsible for creating recorded works will receive a much lower return for their efforts and investment than would otherwise be the case, while middlemen could profit disproportionately from the efforts of others.[121]

The Commission further noted that new technology, such as digitally recorded compact discs and digital home recording media, are likely to increase the dangers of piracy that rental might stimulate.[122]

The Commission then concluded that a rental right would serve the dual functions of: (1) Ensuring that right holders receive an adequate return on their investment for each performance of a sound or video recording; and (2) promoting the interest of purchasing consumers through lower prices.[123] Significantly, the Commission determined that the best solution would be the establishment of an exclusive rental right — a right that would allow the copyright holder to authorize or prevent rental altogether — rather than merely a right to equitable remuneration, which would not permit the right holder to prevent rentals entirely.[124]

The Commission also explained why action is required at the Community, as opposed to the national, level.[125] Specifically addressing the problem faced by the European Court of Justice in *Warner v. Christiansen*, the Commission noted the significant problems that might

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121. *Id.*; *see also*, Andre Lucas, *Copyright in the European Community: The Green Paper and the Proposal for a Directive Concerning the Legal Protection of Computer Programs*, 29 COLUM. J. TRANSNAT'L L. 145, 151 (1991) ("The Green Paper notes that this practice of renting phonograms and videograms is a new form of exploitation of intellectual property and that it has grown to troubling dimensions. This pressure has led authors and producers of phonograms and videograms, as well as performing artists, to demand with growing insistence some protection against the commercial renting of their works, such as that which would be provided by a distribution right.").

122. The Commission reiterated this concern in its Follow-Up to the Green Paper. *See* Follow-Up, *supra* note 7, at 14.

123. Green Paper, *supra* note 9, at 162.

124. *Id.* at 164.

125. *Id.*

arise if a videocassette is brought from a Member State where the author has no right to control rental into a State where a rental right exists.[126] Without specifically addressing how a Community-wide rental right would alleviate this problem, the Commission summarily stated that "the general introduction of a rental right in all Member States would ensure that artificial distortions do not arise as regards the marketing of sound and video recordings as a result of commercial rentals requiring authorization by right holders in some Member States and not in others."[127] The Commission apparently failed to realize that a community-wide rental right, in the absence of harmonization of other related areas of national copyright regimes, might not solve the problem of *Warner v. Christiansen.* In fact, the RRD merely shifts the harmonization problem to new battlegrounds.[128]

In Follow-Up to the Green Paper — working programme of the Commission in the field of copyright and neighbouring rights ("Follow-Up"),[129] the Commission further emphasized the need to increase copyright protection within the Community and presented a more specific agenda for achieving its goals. As for the need to enhance protection, the Commission referred to the growth of new technology as a double-edged sword:

> The new technologies represent both an opportunity and challenge: an opportunity, because of the scope they open up for individuals to improve their quality of life and businesses their effectiveness, by providing access to literary and artistic works . . . ; and a challenge, because of the scope for large-scale and uncontrolled copying of works, with no proper return to the holders of the rights involved.[130]

But whereas the Green Paper only laid out the problem areas requiring harmonization, the Follow-Up presented specific proposals for Community action in several of these areas.[131] The proposed initiative in the realm of rental rights mirrors the Council's Directive that was ultimately adopted.[132]

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126. *Id.* at 160.
127. *Id.* at 163.
128. *See infra* part III.
129. COM(90)584 final.
130. Follow-Up, *supra* note 7.
131. *Id.* at 4.
132. *See* Follow-Up, *supra* note 7, at 15.

D. *The Rental Rights Directive*

On November 19, 1992, the Community adopted Council Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.[133] The Directive seeks to harmonize rental rights and lending rights for audio and video recordings in all Member States. As apparent from the facts of *Warner v. Christiansen*, prior to the implementation of the RRD, laws regulating rental varied greatly in the Member States from exclusive rights to no rights. Additionally, variations existed among national laws as to who received the right (authors, producers, directors, performers, etc.).

Under the new Directive, Member States must provide a right in law for persons holding copyrights in sound or video recordings to authorize or prohibit rental and lending.[134] The right granted must be an "exclusive right" — in other words, a right permitting the right holder to prohibit altogether a third person from renting or lending, as opposed to a right merely to receive renumeration for rentals. Article 1 of the Directive specifically states that "Member States shall provide, subject to Article 5, a right to authorize or prohibit the rental and lending of originals and copies of copyright works, and other subject matter as set out in Article 2.1."[135]

Article 5 sets out a derogation from the exclusive right for public lending purposes. Pursuant to the provision, Member States are allowed to withhold an exclusive right, in favor of a system of equitable remuneration to foster libraries and other public lending of audio and video recordings.

According to Article 5, "[m]ember States may derogate from the exclusive right provided for in Article 1 in respect of public lending, 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."[136]

Article 2.1 specifies the parties who are to be accorded the new exclusive rental right; it states that the right shall belong:

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133. RRD, *supra* note 1, at 61.

134. *Id.* at art. 1.1.

135. The Directive defines "rental" as "making available for use, for an unlimited period of time and for direct or indirect economic or commercial advantage." *Id.* at art. 1.2. "Lending" is defined as "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." *Id.* at art. 1.3.

136. RRD, *supra* note 1, at art. 5.1.

—to the author in respect of the original and copies of his work,
—to the performer in respect of fixations of his performance,
—to the phonogram producer in respect of his phonograms, and
—to the producer of the first fixation of a film in respect of the original and copies of his film.[137]

And in case the matter is not inherently clear from the very nature of an exclusive rental right, the RRD explicitly states that the right "shall not be exhausted by any sale or other act of distribution of originals and copies of copyright works and other subject matter as set out in Article 2.1."[138]

Importantly, however, once the copyright owner has authorized rental in return for remuneration, the RRD does not specify the form that the remuneration system must take. While the RRD specifies that authors and performers have an inalienable right to part of the rental royalty received by the copyright owner, the implementation and administration of the remuneration system is left to national copyright law.[139] This aspect of the RRD might very well result in its undoing.[140]

Although the RRD covers the harmonization of several other aspects of copyright law,[141] this Article focuses only on the establishment of the rental right itself, in order to assess whether the problems that motivated the Commission and the Council to implement such a right are likely to be solved adequately by the RRD in its present form. Although interesting issues are raised by other provisions of the RRD, such as the specification of the parties to whom the right is granted,[142] such matters are beyond the scope of this paper.

The Council's goals and motivations for establishing a rental right are laid out in the RRD's preamble.[143] First, the Council asserts that the divergent levels of copyright protection in regards to rental and lending in the various national regimes constitutes a source of "barriers to trade and distortions of competition which impede the achievement and proper functioning of the internal market."[144] Second, the Council notes that rental and lending have become increasingly important for authors,

137. *Id.* at art. 2.1.
138. *Id.* at art. 1.4.
139. *Id.* at art. 4.
140. *See infra* part III.
141. This Directive also establishes a "fixation right," a "reproduction right," a "distribution right," and deals with broadcasting and communication to the public. RRD, *supra* note 1, at arts. 6-9.
142. *Id.* at art. 2.
143. *Id.* at 61-62.
144. *Id.* at 61.

performers, and producers of phonograms and films.[145] Third, the Council emphasizes that as a result of new technologies, piracy is increasingly a threat in the realm of audio and video recordings.[146] Fourth, the Council recognizes that the protection of copyright works by a rental and lending right is essential to the economic and cultural development of the Community.[147] One will recall that these four concerns are essentially the same as those that spurred the Court in *Warner v. Christiansen* to reject the opinion of the Advocate General, establishing instead, a sort of "rental exception" to the traditional exhaustion principle.[148]

The twin evils of piracy and home copying are the primary problems that the RRD seeks to alleviate. In a 1991 paper presented for discussion to the Practicing Law Institute, William F. Patry asserted:

> The commercial rental dealt with in Chapter 1 [of the RRD], particularly of compact discs and video cassettes, has been increasing steadily in the Member States for several years. In particular, compact discs are rented mainly in order to make copies for personal use and thereby to avoid making a purchase. The technical quality of a compact disc is not impaired even by its frequent use, so that rental in connection with copying is more than just financially attractive for the consumer.[149]

Patry emphasized, however, that the audio and video markets differ in the extent to which piracy and home copying present significant problems:

> Since phonogram production is targeted at the sales market, rental as such, but even more so in connection with copying, causes substantial losses which have, as a result, negative effects

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145. *Id.*

146. The significance of piracy was also emphasized during the debates of the European Parliament regarding the RRD. One Member of Parliament asserted that ". . . we also realize that this legislation was becoming absolutely essential, what with the technical progress that is creating new media for works of art and the internationalization and means of distribution that are making it possible for them to be reproduced almost *ad infinitum*." Statement of Mr. Vayssade, RRD Legislative History No. 3-414/70 (Nov. 2, 1992). Another Member of Parliament further emphasized that:

> The measures proposed by the Commission . . . aim to deal more effectively with piracy and inadvertent piracy. Need it be pointed out that one in every four recordings today is in circulation as the result of piracy, and that this situation deprived the European music industry of income amounting to about one-billion ECU in 1989, to bring home the gravity of this phenomenon?

Statement of Rapporteur Anastassopoulos, RRD Legislative History No. 3-414/67 (Nov. 2, 1992).

147. RRD, *supra* note 1, at 61.

148. *See supra* part I.B.3.

149. William F. Patry, *Developments in International Copyright from the U.S. Perspective*, Oct. 3, 1991, 318 PLI/Pat 349 (emphasis added).

> on authors and performing artists as well as phonogram producers, and thereby on the variety of supply of cultural goods and services.
>
> Rented video-cassettes are also used to make copies, *even if this is currently done to a lesser extent than in the case of compact discs*. The arrival of new digital recording media such as the video-CD will undoubtedly have the effect of increasing this phenomenon. Moreover, rental in the video sector represents a new, independent form of use which has substantial economic effects on the forms of use prevailing up to now (cinema, television, sell-through) and for which a particular right is necessary in order to make possible a sufficient and flexible market oriented exploitation of videograms.[150]

Surprisingly, the RRD does not appear to take account of any differences between the two markets, or if it does, it nevertheless proceeds to treat audio and video recordings identically in that it establishes an exclusive rental right in both media. Whether this similar treatment is the result of careful deliberation or of lack of attention to market realities is unclear. What is clear, however, is that the United States Congressional Subcommittee on Patents, Copyrights and Trademarks conducted a thorough hearing on this very issue, and determined to establish a rental right in the field of audio, but not video, recordings.[151]

As a general matter, it is significant to note that the Community decided to harmonize rental doctrine at a high level. In essence, three basic regimes are possible in the treatment of rental of copyrighted material: (1) The absence of a rental right or any form of remuneration to the copyright owner for retail rental; (2) the right to remuneration for rental, but the absence of an exclusive right to prohibit rental altogether; and (3) the establishment of an exclusive right for copyright owners to authorize or prohibit rental. The RRD adopted the third regime, that of an exclusive right, and reflects the "highest level" of harmonization. This idea was emphasized during the debates of the European Parliament:

> Let us be honest, in harmonizing we are usually obliged to adapt to the lowest common denominator. This time, however, the Commission aspires to achieve harmonization of the legislation in the Member States *at a level which is certainly high.* And perhaps it was high time, because if we want to encourage

150. *Id.* (emphasis added).
151. *See infra* part III.

> creativity in our ancient continent, there is no other way, no other route.[152]

One scholar has enthusiastically concluded that:

> harmonization will alleviate the burdens now placed on rights holders and potential users of copyrighted works as a result of the application of the exhaustion doctrine. Holders of copyrights in audiovisual works will no longer be forced to forge distribution strategies requiring an understanding of diverse copyright laws in order to avoid exhausting more protective rights in one country by distributing in a country affording lesser rights. Users will benefit by knowing how they may use the works in question with greater certainty. Finally, as competition increases, consumers, too, should benefit by greater access to a broad variety of audiovisual works at lower rates and of better quality.[153]

And yet, the harmonization achieved by the RRD is only partial. Various elements of rental doctrine have been relegated to the national legal systems. For example, the RRD requires that a performer receive equitable remuneration if the producer of the recording authorizes rental by a third party.[154] The amount of, and system for collecting this remuneration, however, is left to the discretion of the individual Member State. The broader implications of this aspect of the RRD remain to be considered.

III. CRITICAL ANALYSIS OF THE RENTAL RIGHTS DIRECTIVE

The preceding material has outlined the steps leading to the implementation of the Rental Rights Directive as well as the purposes and rationales for establishing a harmonized rental right within the European Community. But important questions regarding the efficacy of the RRD must be addressed. Does the RRD adequately respond to the problems it was envisioned to mitigate? Is an exclusive rental right the best vehicle to protect against piracy and home copying? Does the RRD adequately respond to the other purposes and rationales that stimulated it?

As a prelude to these problems, the author will begin with the most troubling theoretical issue underlying the RRD. From the face of the Directive, as well as from the scant legislative history, it appears that little

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152. Statement of Rapporteur Anastassopoulos, RRD, Legislative History No. 3-414/66 (Nov. 2, 1992) (emphasis added).

153. Moebes, *supra* note 54, at 415.

154. RRD, *supra* note 1, at art. 4.1.

thought was given to market realities; that is, sound and video recordings were treated identically, as far as the establishment of a right to authorize or prohibit rental, without considering whether differences in the market structure of the phonogram and videocassette industries might warrant different treatment of these two media. To understand why this issue is a significant one, it is instructive and enlightening to focus on the United States Record Rental Amendment of 1984 ("RRA") and its legislative history.[155] As a result of this legislation, an exclusive rental right was established for the owners of copyrights in sound recordings; however, no similar right was granted to right holders in film or video material. Upon a careful analysis of the legislative history of the RRA, it becomes apparent that market realities might weigh in favor of an exclusive rental right in the sphere of sound recordings, but against an exclusive right in the realm of videocassettes. Perhaps for video recordings, a right of equitable remuneration (i.e., a compulsory license) is preferable. In any event, the point is that audio and video recordings should not necessarily be treated identically — a fact that the United States Congress apparently recognized, whereas the European Community institutions apparently did not.

A. The American Example: The Record Rental Amendment of 1984

In 1984, Congress enacted an amendment to the U.S. Copyright Act which established an exclusive right to authorize or prohibit rental of a phonorecord of a sound recording.[156] Although this new provision marked a radical, albeit limited, departure from the First Sale Doctrine, established in 1907, the members of the Congressional Subcommittee on Patents, Copyrights and Trademarks ("Subcommittee") recognized that the time for change had arrived.[157] In his opening statement, Senator Mathias asserted that the First Sale Doctrine "is a doctrine that worked relatively

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155. 17 U.S.C. § 109(b)(1)(A) (1988).

156. The relevant provision of the Copyright Act currently states:

> Notwithstanding the provisions of subsection (a), unless authorized by the owners of copyright in the sound recording . . . the owner of a particular phonorecord . . . may [not], for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord . . . by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.

17 U.S.C. § 109(b)(1)(A) (1988).

157. *See* John M. Kernochan, *The Distribution Right in the United States of America: Review and Reflections*, 42 VAND. L. REV. 1407, 1418-20 (1989) (The prospect of organized commercial rentals of audio recordings by downstream owners triggered the Record Rental Amendment of 1984, despite the policies against restraining alienation. The threat posed by such activities, including video home-taping, to the fundamental reproduction right and to the economic returns to authors therefrom was recognized).

well before the newest revolution in technology. But today, it creates problems; tomorrow, it could seriously weaken the whole fabric of the copyright law. It could also undermine the financial viability of our creative artists."[158]

To demonstrate the severity of the problem, Mathias and virtually every other advocate of a rental right pointed to the dismal situation in Japan relating to the rental of audio recordings.[159] As a result of the proliferation of rental outlets in Japan,

> the Japanese recording industry has recently suffered its first sales decline in 25 years. Legitimate retailers have been hit especially hard. Retail record stores located near the rental shops have seen their sales plummet by 30%. Not surprisingly, the president of the Japan Phonograph Record Association fears that, because of declining sales, "the industry will . . . be made incapable of earning the funds required for creation of new recordings and finally be led to collapse."[160]

Jason Berman, President of the Recording Industry Association of America, stated that similar problems existed in European countries that permitted rental of sound recordings. "In Germany, for instance, record retailers in the vicinity of the rental shops report[ed] losses of 20-40% after the rental stores opened. In Switzerland, CD rental shops boomed within six months after they were given permission to open."[161] These serious

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158. *First Sale Doctrine Hearings*, *supra* note 108, at 1 (opening statement of Senator Charles Mathias, Jr.).

159. *Id.*, Joint Statement of AGAC/Songwriters Guild, Nat'l Ass'n of Recording Merchandisers, Nat'l Ass'n Music Publishers' Ass'n, and Recording Indus. Ass'n of Am., at 238-247. The Joint Statement noted:

> The first rental outlet opened in Japan in June of 1980, and there are now more than 1600 rental shops operating in Japan alone. . . . *[O]ver 97% of all rental shop customers surveyed in Japan acknowledged that they made home tape recordings of the rented records.* . . . A recent technological breakthrough — the development of the digital "compact disc" — promises to make record rental even more attractive. . . . Rental shops will be able to rent out each compact disc hundreds of times, while providing their customers with an untarnished master recording. Ironically, the record rental phenomenon threatens to transform the most significant innovation in recording since the development of stereophonic sound into a devastating weapon against the American music industry. Not surprisingly, one franchiser of rental shops is preparing to seek public financing so that he can open even more stores.

These were the sorts of concerns which prodded Congress to pass the RRA.

160. *Id.* at 249.

161. *Record Rental Amendment Extension Hearings: Hearings on H.R. 4310 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 50 (1988) (statement of Jason Berman) [hereinafter *Record Rental Amendment Extension Hearings*].

concerns in the audio recording market undoubtedly were determinative in the passage of the RRA and the modification of the traditional First Sale Doctrine.

Although the film industry attempted to persuade the Subcommittee that an identical rental right should be established for rights holders in video recordings, Congress declined the invitation. Contrary to the tacit assumption of the European Commission, the congressional subcommittee felt that differences in the audio and video markets called for disparate treatment.

One senator went so far as to emphasize the "wisdom in dealing with the right of first sale as it relates to phonograph records and video tapes as separate and distinct pieces of legislation. Here again, the similarities between the two issues lie more on the surface than beneath. We are dealing with quite different industries. . . ."[162]

Similarly, Ralph Oman, then Register of Copyrights, asserted during the Congressional hearings that:

> it has been my experience that over the years we have seen a very different market in the audio and video side. On the audio side, you genrally [sic] don't have someone who wants to rent a record, listen to it, and then return it. When they rent it, they want to copy it.
>
> On the video side, it has become the common practice — and I think it is explainable because of the format — that someone really would want to rent a movie, watch it once, and return it. They do not necessarily want to watch it again and again and again the way you would with a favorite music album.[163]

A critical difference between the audio and video markets is apparent from the rather disparate roles which a rental right is expected to play in each of the markets. In the audio market, a rental right is primarily geared to prevent unlawful home copying — that is, to prohibit consumers from obtaining a permanent use while paying only for a temporary use. In the video market, contrarily, given that the film industry most likely has no intention of eliminating the rental market altogether, a rental right serves to allow for the preservation of a distinct sales and rental market — that is, to allow the film industry to sell videocassettes for a lower price to private consumers, and for a higher price to retail rental establishments. One will

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162. *First Sale Doctrine Hearings*, *supra* note 108, at 7.

163. *Record Rental Amendment Extension Hearings*, *supra* note 161, at 33.

readily note that the situation in the audio industry requires an exclusive right to prohibit rental, whereas the situation in the video industry would be aptly served with a right of equitable remuneration.

Congress apparently accepted the above consideration, as well as certain other explanations as to why an exclusive rental right was more imperative in the audio market than in the video market. First, a greater number of people possess the equipment to duplicate audio recordings than video recordings. Second, through copy protection schemes such as Macrovision™, it is easier and less expensive to curb piracy and home copying by technological means in the video realm than in the audio realm. Third, unlike the case with video rentals, "the customer usually rents the album because he wants to make his own copy of it — not just to listen to the album during the one or two-day rental period."[164] But perhaps the most persuasive argument explaining the difference between the audio and video markets and why a rental right should not be established for videocassettes was made by the Consumers Union. The argument began with an analogy:

> While the [film] industry may prefer a sale to a rental market because that would increase their sales volume, it does not follow that the demand side of any market owes it to an industry to prefer sales to rentals.
>
> For example, a person who ordinarily does not travel in automotive luxury, but who four or five times in a year wishes to ride in a limousine, can reasonably be expected to rent the limousine. If, despite such occasional use, that person instead chooses to own the limousine, it is nonetheless reasonable to expect its purchase price to exceed many times the price of its rental. On the other hand, if reasonable economic behavior prevails and that consumer chooses to rent, neither limousine manufacturers nor new limousine dealers have a right to demand the consumer's purchase of a limousine.
>
> Similarly, it is hardly surprising to find that the cost of purchasing a video cassette feature length movie may be, according to the motion picture industry, twenty times more than the cost of rental. *That fact merely reflects that most consumers will view a copy of most films infrequently, perhaps only once.*

164. *First Sale Doctrine Hearings*, *supra* note 108, at 286 (statement of Robert Pitfosky, *The Record Rental Amendment: An Analysis of its Consistency with the First Sale Doctrine and Principles of Fair Competition*).

> Neither the copyright owner nor retailers who make outright sales of cassettes have a right to a market structured to require that a consumer who will make only occasional use of an item must purchase it instead of sharing its cost and use with others. And the consumer who wishes to build a library of items that receive only occasional use has no right to expect that the purchase price approach the rental price.
>
> . . . .
>
> What copyright owners should not be permitted to do is to structure the market artificially so that they reap the benefits of both the sale value of their property and the rental value made possible by the investments and risks of others.
>
> The net effect to consumers of the enactment of [a video rental right] would be to increase the price of rentals, *the form of use by far more popular with consumers*, in exchange for lowering the cost of purchase, the far less popular form of use. This clearly would benefit the copyright holder and those relatively few consumers who prefer to build their own libraries instead of renting, at the expense of the great majority of consumers who prefer the more economical rental transaction.[165]

Such a detailed portrait of market realities is exactly the kind of analysis that is lacking in the sparse legislative history of the RRD. The powerful argument made by the Consumers Union is likely premised on the generally accepted assumption that while most consumers use audio recordings repeatedly, the average consumer will watch a videocassette of a given film only once. This assumption, in turn, may be premised on the tacit recognition that copyright is increasingly becoming a use right in the modern world. In other words, what the right holder is seeking compensation for, and all that it deserves compensation for, is the particular number of viewings or listenings by the consumer. It is simply wrong to think of a compact disc or a videocassette as a unitary physical object for purposes of copyright protection; rather, each of these tangible media must be considered as a source of *potential* multiple uses. Since the average consumer listens to a compact disc many times, it is altogether justifiable that the right holder be compensated for an expectation of repeated uses. Accordingly, prohibition of CD rental is based on the reasonable notion

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165. *First Sale Doctrine Hearings*, *supra* note 108, at 318 (statement of Mark Silbergeld, Director, Washington Office, Consumers Union) (emphasis added).

that since the renter will most likely copy the disc for later repeat uses, he or she should be required to purchase the CD in the first place, and thus *pay* for repeated usage. With video recordings, however, the nature of the medium and the market suggests that most people desire only *one* viewing. It is therefore only reasonable that the copyright holder in a motion picture videocassette is entitled to compensation for *one* viewing, not repeated viewings, which is what a purchase-only regime would entail.

While the above argument contains certain force, it fails to account for the fact that, particularly with the advent of laser videodiscs, growing numbers of consumers do wish to purchase rather than rent films. Given that distinct sales and rental markets are likely to proliferate, the best solution to the purchase/rental conundrum in the videocassette market is a right of equitable remuneration rather than an exclusive rental right. Under such a regime, the film industry would be able to maintain both sales and rental markets, since they would be able to price all videocassettes at "sell-through prices," and then collect additional royalties from rental dealers. Such royalties could either be paid up front, on an actuarial basis, or on a per rental basis. Although the latter system would result in a more accurate royalty figure, the former system is likely more administrable.

A right of equitable remuneration for videocassette rental would mark a halfway point between the United States status quo and the situation in the European Community under the RRD. Even in the context of the RRD, the film industry has indicated that unlike the audio industry, it will not eliminate rental entirely; rather, the industry will use one of the methods described above for obtaining a royalty based on each rental of a copyrighted videocassette.[166] Nevertheless, an exclusive rental right provides the already powerful motion picture studios with a potent tool over local video retail and rental outlets. If a retailer refuses to comply with whatever royalty the studios establish, his right to rent could be cut off altogether. Perhaps this fear factored into Congress's reflection of a video rental right.

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166. In the U.S. debates, Former Register of Copyrights David Ladd stated that:

> Our support for [a video rental right] is premised upon the assumption that the video retail market will continue to expand; that the video retailers themselves will continue; and that the economic interests of the copyright owners will be to negotiate and establish correct business practices so that the retail method of lending of motion pictures will continue.
>
> If the result of the legislation were to destroy the video retail rental business, then I believe Congress should reconsider the issue. But I don't think that that's likely to occur.

First Sale Doctrine Hearings, *supra* note 108, at 11. If this view is generally accepted, then why is an exclusive rental right better than a right of equitable remuneration without a right to prohibit rental entirely?

Unlike the less centralized music industry, Hollywood has tended to be a far more monolithic, and a potentially monopolistic force. As for the establishment of a video rental right as opposed to a right of equitable remuneration, one economic scholar has pointed out that:

> [t]he essence of the proposed change is that those who wish to rent out videocassettes as a business must obtain the permission of the copyright holder before they can do so. Thus, movie companies would be able to attach more conditions than just royalty payments as a condition of allowing rentals. In particular, movie companies might try to prohibit dealers from renting for less than a certain price, and they might deny permission to rent at all until some time after the cassette has been available for sale. Moreover, they might also insist on rental dealers carrying a full line of their titles in order to obtain permission to rent the titles they wanted to offer.[167]

Although in the European Community context, such practices might run afoul of antitrust principles, it seems as though the possibility for such problems could be avoided in the first place by limiting the right in the context of videocassettes to a right of equitable remuneration. Under such a system, the level of remuneration would be set at a statutory level based on negotiations between the film studios, retailers, and consumer advocates. Although an exclusive rental right would best serve the interests of the artist class, any fundamental change in the traditional exhaustion principle should entail negotiations among all interested parties.[168]

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167. *First Sale Doctrine Hearings*, *supra* note 108, at 170 (statement of Nina W. Cornell, *Economic Impacts of Repealing the First Sale Doctrine for Audiovisual Works*). Similarly, a professor of antitrust law at New York University Law School stated that:

> By permitting retail price fixing, [a video rental right] would not only raise the price of videocassettes to consumers, but would also facilitate horizontal price fixing agreements. The suppression of the rental market would eliminate a major source of price competition for the sale of videocassettes resulting in higher sale prices. It would also transform a vigorously competitive retail market into a mirror of the movie companies' oligopoly and consumers would thereby suffer. Tying arrangements such as block booking and full line forcing would eliminate a retailer's ability to exercise free choice in buying video tapes. There is no justification for permitting a movie company from using the market power it has in "E.T." to force local retailers to purchase "The Return of the Slug."

First Sale Doctrine Hearings, *supra* note 108, at 181 (statement of Harry First).

168. Interestingly, the film industry has seemed rather complacent with the absence of a video rental right under U.S. copyright law. At the hearings on the extension of the Record Rental Amendment in 1988, four years after Congress voted down a video rental right, one Congressman stated that "I am not aware of any particular pressures for us to extend this modification of the first sale doctrine to cover videos — the last couple of years anyway." *Record Rental Amendment Extension Hearings*, *supra* note 161, at 34. Additionally, according

B. *Does the RRD Solve the Harmonization Problems of Warner v. Christiansen?*

As discussed earlier, the impetus for the RRD arose from the recognition of the harmonization problem in *Warner v. Christiansen*.[169] The Green Paper explicitly discussed this decision in outlining the need for a rental right. Possibly one of the great ironies of the RRD, and one that has not been examined in legal literature, is that the RRD might not completely resolve the harmonization problems faced by the Oestre Landsret[170] in the *Warner* situation.[171] The dilemma lies in the fact that the RRD represents only a partial effort to harmonize certain facets of Community copyright law, while most of the basic principles and rules remain in the hands of the individual Member States. Of course, total harmonization is not always desirable, most notably because it removes legislative control from the hands of the individual Member States, often undermining the Member States' ability to determine important cultural, social, and political prerogatives.

The RRD leaves open to Member States the regulation of how the author or performer is to be compensated by the copyright owner if the copyright owner chooses to authorize rental and obtain a royalty:

> Article 3 leaves the Member States the greatest possible freedom not only with a view to theoretical questions in respect of national law, but also in respect of how they may shape the right under Article 3.
>
> In relation to the case where authors and performing artists assign their rental and lending rights to the producer and thereafter the producer authorizes rental or lending by a third person, a case at which Article 3 is primarily aimed, the following possibilities in particular exist.
>
> Since every right owner has a right to obtain an adequate part of the payment under Article 3, it is possible that the third person (e.g. licensee, rental shop) directly pays to every right owner his respective adequate part. However, it would be easier and less expensive if the licensee were simply to pay the whole

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to the United States Commerce Department, "[f]ilm company revenues from video business [rentals] has for years surpassed revenue from domestic theatrical exhibitions." U.S. DEPT. OF COMMERCE, U.S. INDUS. OUTLOOK 32-5 (1991).

169. Case 158/86, 1988 E.C.R. 2605.

170. The Oestre Landsret is the Eastern division of the high court. *Id.* at 2627.

171. *Id.* at 2618.

> amount only to one or several collecting societies or similar organizations which thereafter could satisfy by way of distribution the individual claims to obtain such adequate part. However, if the producer, for example, is not a member of a collecting society, the licensee may possibly also directly pay the respective shares to the producer on the one hand and to the collecting societies of authors and performing artists on the other hand.[172]

The RRD thus allows Member States to determine how much of the royalties the film company or the producer must pay the author and performers. The Member State might also choose to provide that only a collective management society may collect royalties, and that the society will then distribute adequate portions to the copyright owner, the author, and the performers.

Additionally, the Member State is free to allocate that percentage of the remuneration royalty that must be paid to the author, performer, director, or any other party involved. It is important to point out, however, that this issue is likely to arise only in the video sector, since audio rental is almost certain to be prohibited outright.[173] Nevertheless, if two different systems for remuneration are implemented in two different Member States, complying with the remuneration scheme in one of the Member States might not allow one to rent out the video in the other. In this sense, certain new problems could arise in a "replay" of the *Warner v. Christiansen* scenario.

As an illustration of the potential problems that might arise if the identical problem in *Warner* were to occur following the implementation of the RRD, the reader should consider the following hypothetical. Suppose Christiansen purchases the videocassette in Britain (which is now bound by the RRD), and pays the (hypothetical) up front rental royalty established by the British collective management society. He then returns to Denmark, where the royalty system is (hypothetically) computed on a per rental basis. Christiansen refuses to pay any further royalties under the Danish system, arguing that he has already paid the royalty in Britain. He asserts that the imposition of an additional royalty in Denmark would amount to a measure having an equivalent effect of a quantitative restriction in violation of Article 30 of the Treaty of Rome. What is the result? The answer is not to be found in the RRD.

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172. Patry, *supra* note 149.

173. This distinction demonstrates that the Community should have considered audio and video rental as distinct.

Thus, even with the implementation of the RRD, a fundamental dilemma remains: must a retail renter pay a rental royalty and comply with the established procedures in *each Member State* in which he chooses to rent out the video? Or is paying the royalty and complying with the established procedures in the Member State where the video was initially purchased adequate? If, as suspected, the retail renter must comply with the procedures in each Member State, then it would seem that the RRD merely shifts the harmonization problem seen in *Warner* to the realm of remuneration schemes.

Although this problem may not be on the same scale as that presented in the actual case, where a Community-wide rental right was absent, it still presents a legal dilemma unresolved by the RRD. Although total harmonization might be undesirable for various reasons, the example of the RRD raises significant doubts as to whether disparate national copyright laws are able to peacefully coexist within the greater framework of the European Community and its free trade principles.

What would the Court of Justice likely decide were the above hypothetical case to appear before it? If Christiansen were to refuse to pay the remuneration fee in Denmark, Denmark would argue that its visions of copyright policies would be undermined. That is, if by purchasing the videocassette in the United Kingdom, a retail renter is able to avoid the Danish remuneration scheme, then the particular percentages that Denmark decides to allocate to each party involved in the creative process (copyright owner, producer, performer, etc.) will not be respected. Rather, Britain will effectively be able to "set" the Danish remuneration percentages, despite the fact that the consumer rents out the videocassette in Denmark.

Given the remarks of the European Court of Justice in *Warner*, and the growing Community recognition of and respect for national copyright laws and the policies underlying them, the Court would likely allow Denmark to prohibit rental in this hypothetical, just as it did in the actual case. Otherwise, Member States could potentially lose their prerogatives to remunerate different participants in the creative process as they see fit. Primarily for this reason, the Court would be justified in allowing Denmark to prohibit rental if Christiansen does not comply with the Danish remuneration scheme. But obviously, this result would serve to undermine the harmonization efforts allegedly reflected in the RRD.

How might the Community remedy this problem? While total harmonization of Community copyright law would provide an extreme solution, such a monumental step would even further diminish the ability of Member States to determine their own cultural policies. A more limited, and appropriate, solution might be to harmonize the system of remuneration

throughout the Community, rather than leaving the issue in the hands of the individual Member States, as Articles 2 and 4 of the RRD permit. Nevertheless, as with the RRD itself, policy makers will be faced with the difficult choice between promoting the individual determination of Member States on the one hand, and the protection of Community trade principles on the other. Although the interests of the individual Member States play an important role, the concerns of copyright owners and the creative classes would be best served through a harmonized community remuneration system. Such a regime, stopping short of total harmonization, would at least solve the problem presented by the above hypothetical reenactment of the *Warner* scenario.

C. The Problems of Piracy and Home Copying: Does the RRD Help?

Both the Green Paper and the RRD itself envision the rental right as a regulatory weapon against piracy and home copying. The idea is that if the rental market — a major source of obtaining copyrighted works without purchasing them — is legally abolished, then individuals who previously copied rented material will no longer be able to do so, or at least not as easily. From this perspective, the RRD is little more than a procedural method of dealing with a substantive inadequacy of copyright law resulting from new technology. In other words, the anti-piracy rationale assumes that the reason for giving copyright owners the right to prevent rental is to prevent otherwise undetectable illegal copying:

> Using equipment available to most consumers, it is now easy to make accurate duplicates of works . . . at a fraction of the work's retail cost. The only barriers to duplication are the public's knowledge of and respect for copyright law and a lack of physical access to a copy of the desired work. Rental removes this latter barrier by affording cheap, easy and well-publicized access to copyrighted works.[174]

Given the widespread accessibility of the necessary equipment, the monitoring of home copying and certain sorts of piracy has become extremely difficult. In this modern arena, the RRD serves as a safeguard, making it more difficult for would-be pirates to obtain a copyrighted work in the first place without purchasing it outright.

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174. Corsello, *supra* note 56, at 179.

This pure anti-piracy rationale is instantly vulnerable to attack from all sides. First, as a number of scholars in the United States have pointed out:

> The root difficulty in this area, and for copyright generally, remains private copying, particularly home-taping. The Record Rental Amendment addresses only one facet of this difficulty: the spread of commercial rental outlets to assist home-taping. Home-taping continues in any case on an ever-broadening scale in the United States, using other sources, including phonorecords loaned by exempted libraries, broadcasts, and borrowed privately owned recordings. This problem is the most damaging to authors.[175]

While the RRD will remove one significant source of access to copyrighted works, the elimination of rental markets will not altogether thwart home copying. In fact, such a strategy might even stimulate piracy in that many individuals who might otherwise have rented a copyrighted work may now refuse to pay full retail prices for the work in the sales market. Recognizing this phenomena, audio and video pirates might take advantage of the new "market niche" and sell unauthorized bootleg or pirated copies of popular titles at a fraction of retail costs. The proliferation of such copies might even attract buyers who *would* have paid full retail. In this scenario, a rental right might actually undercut the sales market — exactly the opposite result intended.

Legal regulation may not be the best route to combat piracy. An alternative approach might involve enforced technological copy protection systems that prevent duplication. Protection schemes such as Macrovision,™ which inhibits the copying of videocassettes, and Serial Copy Management System ("SCMS"), which controls repeated digital reproduction of pre-recorded digital audio media, have already been implemented. Nevertheless, these systems are not fool-proof, and in many cases are not desirable. For instance, under most conceptions of fair use, the lawful owner of a copyrighted work should be able to make copies of that work for his or her own personal use. As an example, copyright law should not preclude the owner of a collection of rock videos on videocassette from creating a "mix" or compilation of his or her favorite videos. Macrovision,™ however, inhibits all copies, regardless of their purpose. In this sense, technological solutions are often *overprotective*.

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175. Kernochan, *supra* note 157, at 1419.

In other cases, technological solutions may be *underprotective*. SCMS provides a good example. SCMS is a computerized protection scheme contained in the hardware of digital audio tape recorders, mini-disc digital recorders, and digital compact cassette recorders. Through an encryption process, the user is prevented from making a second generation digital copy. In other words, once the user makes a digital copy of a compact disc or any other digital source, SCMS prevents further digital duplication of the first copy. SCMS does *not*, however, prevent the creation of multiple copies from the original digital source. Thus, by purchasing a single compact disc, even with SCMS, one may successfully make infinite copies from that original disc. Consequently, SCMS does little to stop the tide of home copying.[176]

Another frequently suggested solution to the piracy problem is the establishment of a blank-tape levy or a recording-equipment levy. Under such a regime, every blank tape and/or digital recording device sold contains in its retail price a tax that is pooled and divided among all copyright owners, much like the distribution of royalties by copyright management societies such as GEMA, ASCAP, and BMI. The problem with levies is twofold: First, administratively, the collection of the tax and the distribution to the many thousands of copyright owners creates a bureaucratic nightmare. Second, and more significantly, such a levy penalizes consumers who are using the equipment for purposes other than the unlawful copying of copyrighted material.[177]

The point of the above discussion is to illustrate the tenuous connection between the piracy problem and the establishment of a rental right. It is wrong to think of a rental right in general, and the RRD in

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176. *See* Nicholas Garnett, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, *International Federation of the Phonographic Industry, London, The Music Industry: Electronic Delivery and Copyright* (Harvard 1993). Garnett explains that:

> The SCMS system in essence reads and writes in the space provided in the subcode of a digital recording information determining whether or not a further generation of copies can be made from that source. . . . Suffice it to say that so far it has proved effective as a response to serial digital copying. What must be fully understood, however, is that *it does not, and was never intended to, address the problems of the first generation private copy.*

Id. at 108 (emphasis added).

177. The United States, after prolonged negotiations between the recording industry and the manufacturers of home digital audio recorders has implemented a protection scheme in the realm of sound recordings that combines a blank tape levy on digital audio tapes with an SCMS requirement for all digital recording equipment. *See* Morton D. Goldberg & Jesse M. Feder, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, *Copyright and Technology: The Analog, the Digital and the Analogy* (Harvard 1993).

particular, as a tool for combating piracy. The greater significance of the RRD lies in its recognition of the changing nature of copyright in the modern era. As one scholar stated, "I believe it is right to increase copyright control over use in an era when technology has made obsolete or unworkable in many areas the author's traditional reliance on control over copying and its analogues to secure compensation for, and earn a livelihood from, his or her work."[178]

More specifically, even though a rental right may not eliminate, or even significantly reduce, the level of piracy and home taping in the European Community, the RRD is a first step toward replacing the notion of copyright as an "access" right with the notion of copyright as a "use" right. In the modern era, consumers are able, via the Internet, to download documents onto their personal computers to glance at only briefly; they may rent films on videocassette to view only once, and soon, they may order a song or an album over a digital information system to listen to "on-command." Lawmakers must come to understand the changing nature of the copyright arena in the information age. If copyrighted works are more frequently used for brief periods rather than on repeated basis, it seems only equitable that the copyright owner be compensated by a stream of income determined by level of use. It is through this perspective that the RRD derives its critical significance. In comparison, the Community Institutions focus primarily on the problem of piracy and view the RRD as a tool with which to combat this problem. The principle significance of the RRD is its commitment to compensating artists on a per use basis. While technological copy-protection schemes and recording equipment levies may serve to reduce the twin problems of home copying and piracy, the RRD should be viewed as a systemic achievement geared toward reconstituting the concept of copyright to accord with modern technology and market realities.

IV. FUTURE PROBLEMS

Possibly the most fascinating issues surrounding the European Community's establishment of a rental right involve the advent of future technology. On one level, as discussed above, the RRD is visionary in that it treats copyright more like a use right, entitling rights owners to compensation on a stream-of-income basis. In this sense, the RRD reflects, and will help foster, a new age in home audio and video technology. In certain other respects as well, the RRD may play a positive role.

178. Kernochan, *supra* note 157, at 1417.

Nevertheless, given the imminent technological changes on the copyright horizon, the RRD may have to be modified in order to account for new access and retrieval methods exemplified by digital diffusion and the information superhighway.

As the digital age approaches, artistic works are more frequently stored electronically than in printed form.[179] The compact disc is the most popular example of a digital storage medium for artistic works. On the one hand, digital technology is a boon for the music industry, increasing the quality of audio fidelity and stimulating retail sales. On the other hand, digital sources provide excellent masters for pirates and home copyists, since they may be reproduced with virtually no loss in sound quality. This problem will only be compounded by the commercialization of digital home recording media, such as digital audio tape, mini-disc, and digital compact cassette.[180] Even before the new media established themselves in the market,

> [s]ales of phonograms around the world have been restricted over the past 25 years by the market distortion caused by piracy and by the phenomenon of private copying. Given the ready availability of professional CD production facilities and domestic digital reproduction equipment, digital technology has by now taken a firm hold in both these problem areas. Losses to the phonographic industry in 1991 from piracy worldwide are estimated at US $ 1.5 billion; the picture is a depressing one.[181]

Considering the increasing dominance of digital technology in the music industry, and the likely future development of digital video technology for the private market, the RRD becomes an even more important achievement. Piracy and home copying will become even more problematic as digital technology allows copyists to create flawless duplicates of original recordings. While it is probably true that the RRD is not the most efficient method for handling the growing problems of piracy and home copying, the concerns that motivated the RRD indicate an

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179. *See* Philip Elmer-Dewitt, *The World On a Screen*, TIME, Oct. 21, 1991, at 80.

180. Ralph Oman, U.S. Register of Copyrights, emphasized:

> The introduction of DAT machines has made rental protection that much more crucial. Without it, people who are serious about music — these are the ones who buy records, tapes, and CDs — these people can get perfect copies free or for a nominal rental fee. So the Copyright Office supports the extension of the Record Rental Amendment of 1984.

Record Rental Amendment Extension Hearings, *supra* note 161, at 5.

181. Garnett, *supra* note 176, at 102.

increasing sensitivity on the part of the Community toward the dangers. While the RRD will not solve the problem of illegal reproduction altogether, it does represent a thoughtful and significant first step in the direction of strengthening the position of rights holders in a world in which illegitimate copying is becoming easier, and the detection of copyright infringement is becoming increasingly difficult.

Turning to the video industry, the RRD may have an equally profound impact in the near future with the implementation of High Definition Television ("HDTV") technology. Currently, no uniform international standard exists for video equipment. Rather, three different standards are used in different parts of the world: NTSC, PAL, and SECAM. An explanation of the technical differences among the three standards is beyond the scope of this Article, but the crucial point is that video equipment made to comply with one standard is completely incompatible with equipment using another standard. Thus, for example, if one purchases a television set, video recorder, or camcorder in an NTSC country, the equipment will not operate properly in a country utilizing either PAL or SECAM. The United States video industry utilizes NTSC, while the Member States of the European Community have adopted either the PAL or the SECAM standard.

What does all of this technical hullabaloo have to do with rental rights? The answer lies in the fact that with the advent of HDTV, the three standards currently used will be relegated to the history books, and international video standards most likely will become uniform. Although for consumers this standardization will be much welcomed, for Hollywood, it could prove extremely problematic. The American film industry generally releases a feature film domestically prior to its international release. Similarly, releases on videocassette in the United States generally precede international releases — sometimes by as long as one year. Because the United States currently utilizes a different video standard than the European Community, it is not a simple matter to purchase videocassettes in the United States for European viewing.

With HDTV, however, European and American systems may become completely compatible. Consequently, European retail establishments may theoretically be able to obtain videocassettes from United States distributors and sell or rent them in Europe — often before these films even reach European theaters. Obviously, this phenomenon could prove quite detrimental to the European theater industry, not to mention Hollywood revenues. Though the RRD will not completely eradicate this problem, it will provide the United States motion picture studios with the ability to prevent rental of these videocassettes in Europe until they deem it

appropriate. The RRD will not, however, prevent retail stores from selling such videocassettes. Consequently, with the advent of HDTV, the Community may be pressured to enact regulations preventing the importation or further distribution of pre-recorded videocassettes from abroad. If such steps are not taken, a major trade debate is likely to ensue along the lines of that between the United States and China. Such legislation will be needed to protect the interests of foreign motion picture copyright owners, ensuring that Community retailers do not exploit films before their theater-runs have expired or even begun. This issue will have to be addressed, and solved, at the international level. In this respect, the move to HDTV highlights the globalization of copyright issues.

Finally, and perhaps most significantly, one must address the issue of digital diffusion. Digital diffusion is likely to be for the next decade what compact discs were for the last. Through this new technology, constituting one lane of the much-anticipated "information superhighway," users will be able to order the music album or video movie of their choice instantly, via satellite or digital optical-cable links with on-line databases. Most likely, the album or video will be loaded into a computer receiver in the consumer's home, at which point the individual might be able to view or listen to the program immediately, access it at a later time, or possibly even copy the program for permanent use.[182] When one considers that the

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182. Jason Berman, President of the Recording Industry Association of America described the impact of digital diffusion on the audio market as follows:

> Audio on demand is the crystallization of the "celestial jukebox" concept. It will permit consumers to separately access, and to download if they so choose, recorded music without regard to third party broadcasting decisions and scheduling. In essence, it is a record library in which copies are delivered through electronic means. It is also conceivable, that if access is sufficiently user-friendly and efficient, that copies will not be made by the consumer given the limitless ability to listen to the music of your choice — in effect the consumer already owns all of the records in the library and decides what to play by accessing the library.
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> . . . .
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> No one would propose that an individual who acquires a compact disc should be able to manufacture copies using that disc subject only to an obligation to pay remuneration based on his profits, yet many legislators have not had so easy a time in arriving at the same solution when that individual, rather than making copies himself, simply makes the original available through a commercial service for others to do the copying.
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> . . . .
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> [Nevertheless, i]f future "sales" are to occur via acts of "broadcasting" we clearly need to rethink existing legislation as it relates to such acts.
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> . . . .
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> [D]igital transmissions of recorded music give new meaning to the idea of technology bringing "the concert into the living room but not the box office." Just as the first sale doctrine was not intended to facilitate the creation of a rental market, nor was it intended to create a legal shield for the unauthorized digital transmission of music. We must quickly close the gaps in national legislation and

information is digital, just like the music information recorded on a compact disc, it becomes apparent that virtually flawless copies may be made — just as if the individual had rented and copied a compact disc or digital videocassette recording.[183] On a more theoretical level, digital diffusion represents the use concept taken to its extreme. That is, if diffusion becomes the only method of obtaining audio and video recordings, neither a sales market nor a rental market will exist any longer. Rather, an all-encompassing use market will become the norm, and most likely, copyright owners will be compensated on a stream of income basis, determined according to actual or predicted level of use.

The connection between digital diffusion and rental rights thus becomes fairly obvious. Digital diffusion will, in effect, be the video (and possibly audio) rental business of the future. Consumers have to get in their cars and drive to the video store, only to find to their consternation that all copies of the film of their choice have been rented. Through digital diffusion, not only will consumers be able to access *any* movie or album from their homes, but they will be able to do so at *any* time they choose. This latter ability distinguishes "on-demand" systems from current pay-per-view technology. But the big question is: Will copyright owners be able to prevent the placement of their works on the digital diffusion network? In other words, is digital diffusion more akin to broadcasting, which music copyright owners cannot prevent, or to rental?

Digital diffusion and rental are indistinguishable. As discussed earlier, the tangible shell of the videocassette and the physical compact disc are of no concern to the copyright owner; rather, the subject of interest is the intellectual property contained therein. The consumer accessing the digital diffusion network will be getting precisely that which the CD or videocassette renter is getting today — that is, the temporary use *on command* of the copyrighted work. Moreover, the consumer accessing the digital diffusion network, unlike the consumer accessing television or radio broadcasts, will receive a flawless, uninterrupted broadcast that will be in every respect identical to the original master recording.

> international treaties that permit a party who has merely acquired a copy of a sound recording from thereafter transmitting the sounds contained therein without the authorization of the copyright owner. Failure to do so, and to do so quickly, may have dramatic consequences not just for those interested in copyright, but for society at large.

Jason S. Berman, WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights 94-98, *The Music Industry and Technological Development: Are We Winning the War?* (Harvard 1993).

183. Although digital video is not yet available at the consumer level, the technology has been developed, and will likely play a prominent role after the adoption of HDTV.

Does the RRD apply to digital diffusion? In other words, does the RRD grant copyright owners a "digital diffusion right," or more specifically, a right to prevent digital diffusion? Several scholars have concluded that the language of the RRD in Article 1 appears only to apply to the rental of physical, tangible objects, and thus does not cover diffusion:

> The Commission makes it clear that rental and lending always refer to material objects only. Accordingly, the making available for use of a film by way of electronic data transmission (downloading) is not covered because this form of use is considered to be a public performance in most Member States and therefore would have to be harmonized in the context of an eventual harmonization of the right of public performance.[184]

Although the RRD will not likely be interpreted as creating a digital diffusion right, digital diffusion should not be deemed akin to a public performance. Consider again the concept of diffusion: the consumer is able to call up the album or film of his choice "*on-command.*" This process cannot be considered a public performance any more than the rental of the CD or videocassette can be considered a public performance. No other household will receive the same transmission at the same time. Legislators must break free from the traditional concepts of material objects, public performances and broadcasts because new technologies are collapsing many of these categories and distinctions.

If it is true that the RRD does not apply to digital diffusion and other forms of electronic data transmission, and that diffusion will soon take the place of rental in the marketplace, then a new Directive, or an amendment to the existing one, will have to be enacted at the appropriate time so as not to completely neutralize the policies underlying the RRD. On a broader theoretical level, the development of diffusion technology will heighten the need to move toward a "use-based" vision of copyright. Once the material medium is done away with altogether, it will become easier for legislators, consumers, and copyright owners alike to envision copyright as the right to a stream of income based on level of use rather than a one time compensation for the purchase of a material object.

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184. Silke von Lewinski, *Rental Right, Lending Right and Certain Neighbouring Rights: The EC Commission's Proposal for a Council Directive*, 13 EUR. INTELL. PROP. REV. 117, 119 (1991). *See also* Patry, *supra* note 149. ("The making available for use within the meaning of paragraph 2 [of Article 1] always refers to material objects only; this result is sufficiently supported by Article 2 paragraph 1. Therefore, the making available for use of, for example, a film by way of electronic data transmission (downloading) is not covered by this Directive.")

V. CONCLUSION

Throughout the previous discussion, the author has emphasized four major themes. The first and most encompassing theme is the need for a more modern notion of copyright based on a concept of use rather than access. The second theme is the material and important distinctions between the audio and video markets and the necessity to consider each market separately in regard to the desirability of an exclusive rental right. The third theme involves the complex question of harmonization, and presents two fundamental questions: First, does the limited degree of harmonization achieved by the RRD solve the underlying problems related to the Articles 30-36 conundrum? Second, if partial harmonization does not provide a satisfactory solution, is a more encompassing regime of harmonization desirable? The fourth and final theme involves the overarching issues of piracy and home copying, and how they are best handled.

As for the first theme, the need for a use-based concept of copyright, it is the author's contention that the RRD represents a significant step in the right direction. Although the idea of separate rental and sales markets is somewhat at odds with a pure use-based regime, the RRD and the concerns that motivated it indicate a growing awareness that the tangible medium is irrelevant. What the copyright owner must be remunerated for is the level of use of the intellectual property contained within the medium. As digital diffusion gradually engulfs both the sales and rental markets, tangible media may become relics of the past, and a pure use-based copyright regime may be thrust upon us. Nevertheless, the recognition by the Community Institutions that the copyright owner should be granted a right to control (or at least to be compensated for) the type and level of usage indicates a heightened sensitivity to the unique problems presented by copyrighted works. More importantly, the RRD constitutes an awareness that if the policies underlying the traditional exhaustion principle are to be fulfilled in the copyright arena, the legal shape of the principle must undergo certain modifications. In this sense, the European Court of Justice's decision in *Warner v. Christiansen* may be seen not as a radical departure from the prior regime, but as a conservative measure, in that the Court was trying to protect the very rights of the copyright owner that the exhaustion principle was originally designed to protect.

The second theme dealing with the distinctions between the markets for audio and video recordings is somewhat more theoretical than the other themes, but it has important practical implications. The United States'

treatment of the rental right issue suggests that Congress perceived fundamental differences between the audio and video markets — so much so that Congress established an exclusive rental right for owners of audio-recording copyrights, while no right at all was accorded owners of video recording copyrights. The author believes that Congress erred in disallowing copyright owners of video recordings from obtaining any sort of remuneration based on level of use from rental. The result has been the artificial price inflation during the first three or four months of a videocassette's release. This system only serves to undermine the interests of both private consumers and the copyright owners, and does not benefit the rental establishments at all. Nevertheless, it is arguable that an exclusive right to prevent rental might place too much power in the hands of Hollywood and the international film industry, who have already indicated, with respect to Europe, that they will continue to allow rental of videocassettes after the RRD is implemented. Thus, the author asserts that a right of equitable remuneration would give the film industry all it needs to protect its rights, and would avoid the possibility of any abuses of a dominant position. More importantly, however, the author emphasizes the significance of viewing the audio and video markets as two distinct entities in order that in the future, when legislation is developed regarding digital diffusion and other emerging issues, the Community recognize that the two markets should be dealt with individually.

As for the third theme, involving the issue of harmonization, it is important to remember from the outset that harmonization problems always entail a delicate balance: weighing the benefits that might arise from complete harmonization against the potential undermining of Member State cultural, social, economic, and political interests that are likely to result therefrom. The author contends that the RRD might not solve the harmonization problems seen in *Warner v. Christiansen*, but might instead shift the problems to other non-harmonized areas. This does not mean, however, that the RRD is ineffective. It is true that Member States remain free, for example, to establish their own systems of remuneration under the RRD, and that conflicting systems might present problems when goods are purchased in one Member State and rented in another. However, on a more fundamental level, through its establishment of a Community-wide rental right, the RRD ensures that throughout the Community, audio and video copyright owners will be compensated for the use of their works. By choosing to harmonize at a high level — establishing an exclusive right — the Community has indeed made a significant commitment to the policies of copyright law and the protection of the interests of the creators of artistic works. This commitment is made at the expense of those Member States

that had previously chosen not to implement a rental right. Nevertheless, it remains unclear whether a totally free market in copyrighted works can exist given the absence of a uniform Community copyright law. It is well beyond the scope of this paper to suggest that total harmonization is the only way to go, but the realization of the magnitude of the step represented by the RRD, compounded with the fact that the RRD still leaves certain problems unresolved, leaves the author uncertain as to the perplexing question of "How much less than total harmonization is enough?"

Finally, as for the fourth theme regarding the problems of piracy and home copying, the author believes that the RRD is a step in the wrong direction. Particularly in the realm of video recordings, since the film industry has indicated its intention to continue to allow rental, it cannot be too concerned with the problem of illegitimate home copying of rented videocassettes. In the audio realm, while the abolition of the rental market might limit access to copyrighted works, it still does nothing to prevent copying albums legitimately purchased. Additionally, because Article 5 of the RRD permits Member States to derogate from the exclusive right for the purposes of public lending by libraries, the RRD suggests that access to artistic works by those who cannot afford to purchase them may in some cases outweigh the interests of the copyright owner and artist in preventing copying. Possibly the only way to prevent piracy and copying altogether would be the establishment of fool-proof technological safeguards, if such systems exist. Nevertheless, such systems would have the undesired effect of preventing legitimate copying by rightful purchasers for their own personal uses. Neither do blank tape and recording equipment levies solve the problem of piracy; rather, they serve to spread the costs among all consumers. In this sense, such levies force law abiders to subsidize the costs of wrongdoers. It is possible that no perfect solution to the twin problems of piracy and home copying exists. This conclusion, however, does not negate the significance of the RRD. The main contribution of the RRD lies in its dedication to a new use-based understanding of copyright. The Directive marks an important step toward the reconciliation of law and technology in an area where the law usually lags far behind the real world.