CHAPTER IV

LIMITATION OF COPYRIGHT

I should like to recall at first that the substance of copyright, as of any other subject law, is defined by the regulations of the law. This is an obvious fact, but nevertheless it is worth recalling it, amongst other things, to stress that the author's legal monopoly varies on the basis of particular national laws. Often the differences are quite far-reaching, even in the case of signatories of the Berne Convention or the Universal Copyright Convention. In the legislation of States linked by one or both of these conventions, however, the substance of copyright may not be less than is permitted by the conventions' principles of minimum protection. Above the convention minimum, on the other hand, individual countries may broaden the range of protection. Acting thus they are obliged to extend to citizens of other signatory countries, irrespective of the internal legislation of those countries, the same protection that is afforded to their own citizens (the principle of assimilation), unless the convention states that particular regulations are to be applied to foreigners only on the principle of material reciprocity [140].

A legal institution that has a decided influence on the limitation of copyright is that of so-called permissible public and private use. Sometimes personal use is referred to, which is distinct from private use, and permanent private use, which is essentially equivalent to public use [141]. The terminology used is of no significance, but I should like to explain that throughout the rest of this lecture I shall use the terms public and private use; for I believe that such a terminology clearly indicates the permissible areas of use in each of the realms mentioned. Their reciprocal distinction is thus essential from the point of view not only of persons making use of works protected by copyright in the realms of permissible public and private use, but also of the variety of aims that they serve and considering the varying legal instruments for making use of other people's works. For compulsory licences in particular, in other words those issued by an organ empowered to do so (e.g., a court), concern only the use of works within the bounds of public use, whereas statutory licences are the basis of the use of works in both cases of permissible use.

The definition of the substance of copyright with regard to both public and private use depends, very broadly speaking, on the possibilities of making use of another person's work, usually in the form of duplicating it (the preparation of physical media) or distributing it without the need to obtain the prior permission of the author (statutory licence) or the enforced obtention of such an agreement (compulsory licence). This use may be either unpaid or paid, although compulsory licences are usually paid. The question of payment and the limits and permissible forms of use of the work in private and public use are defined by legal regulations. As specific regulations they are not subject to a broader interpretation, in the sense of the well-known Latin phrase *exceptiones non sunt extendendae.* In other words, those making use of other people's works protected by copyright are permitted only what the regulations of the law clearly allow, and possible decisions concerning the establishment of a compulsory licence. It appears that with regard to the substance of the regulations under discussion and to the principle of their interpretation mentioned above, these regulations require far-reaching changes. This is essential with regard to new technological means of the duplication and distribution of works. This is pointed out by, amongst others, Ulmer[142] when he writes that the possibility of duplicating works by copying machines and recording them on sound tapes, phonographic records, video tapes and so on, thanks to radio, television, computerized information centres and let us add the general accessibility of materials for the making of copies and recordings, all tend to a fundamental re-analysis of the regulations of copyright. This remark concerns above all the regulations defining the limits of permissible use.

Works aimed at amending the aforementioned copyright regulations have been undertaken in the majority of countries. The state of advancement of legislative work and the extent of the proposed changes naturally vary. Thus, it would be difficult for me to describe them in the course of the present lecture. Neither can I touch on any of the issues which from a legal point of view are connected with reprography, video cassettes, cable television, satellite transmission, video texts and so on[143]. I shall restrict myself, then, to a discussion of the basic questions concerning the direction and extent of the proposed amendments to the regulations concerning permissible use. Then in the following lecture I shall devote my attention to the changes which should be introduced into the sys-

tem of the remuneration of authors to assure them payment in different conditions as regards the duplication and distribution of works.

I shall begin from the definition of the concepts for private use and public use. Thus, by private use is understood the use of a work directly by an interested party and by a circle of people linked with that party by personal relationship. Of decisive significance here is the subjective condition. Its interpretation, however, especially in the clarification of the concept of "personal relationship", creates many difficulties. I believe that the view may be expressed that it includes members of the family and friends. Thus, the limits of private use are not transgressed by someone, who, for example, reproduces a recorded work on sound tape not only for himself but also for his family and friends, or who shows these people someone else's work recorded in typescript, recorded tape or reproduced copy. Links with family and friends cannot, however, be extended to include people of common interests. For this reason, for example, concerts organized by music societies for their members, even if no charge is made for attendance, already exceed the bounds of private use. They may on the other hand be permissible in the realm of public use, of course only if the particular law contains the relevant regulation. The definition of the concepts and extent of public and private use is particularly significant when no obligation of payment is connected with private use, while a person making use of a work in the realm of public use is obliged to pay the appropriate charge. Such regulations, however, are to be found in the majority of laws. But I believe that the difference between the two types of use will gradually begin to disappear. This will probably happen because, in connection with the new technological means of duplication and distribution of works, their use in the realm of private use will have a mass, payable character[144]. Of course, a closer definition of the limits of private use benefits from its being compared to public use[145], and so both institutions must essentially be considered together. Before I move on to this, however, I shall turn my attention to further doubts: namely, concerning the objective limits of private use. For certain laws speak only of the duplication or reproduction of someone else's work by any technical means, thus passing by the question of its distribution, even on a small scale[146]. Despite the silence of the law, however, it is considered that private use permits both the duplication and distribution of a work, in the

circle of family and friends. This conclusion arises from the aforementioned subjective condition; for it is considered that as the bounds of private use are not overstepped by someone who makes a work he has duplicated (copied) available to other people close to him, it is obvious that he must have distributed the duplicated work to allow the aforementioned group (without payment of course) the opportunity of seeing the work[147]. Of course, much less doubt is raised by the objective limits of private (personal) use on the basis of those copyright laws which devote more detailed regulations to this institution. I am thinking about, among other things, the Federal Republic of Germany copyright law[148]. In relation to § 53 of Statute 1, in the bounds of private (personal) use it is permissible to duplicate a work that has already been published with the permission of the author, by any technical means, for example, in handwriting or typescript or by another mechanical method, understood as reprography[149]. It is accepted even that a greater number of copies may be made if they are intended for a circle of people closely linked with the person executing the duplication, court jurisdiction in the Federal Republic of Germany decided that the number of copies made may not exceed seven. The copies may be made by the interested party himself or by a person acting on his instructions[150]. This standpoint, however, raises objections; for it is stressed that reprographic practice is used ever more generally, for example by public libraries, and that as a result reprography is becoming a serious threat to publishers, infringing their justifiable interests and those of the authors[151]. It should be pointed out that the making of copies by consignees is also permissible when they are awarded payment for their action not exceeding their expenses. The copies made cannot of course be distributed publicly, and they can only be made available to persons contained in the definition of private use[152].

Special attention deserves to be paid to the exclusions foreseen in § 53 (4) and (5) of the Federal Republic of Germany's copyright law, by which private use does not include the making either of sound or of visual recordings from public performances, for example concerts, theatrical performances, and the copying of works of art and architectural plans[153]. The making of recordings from radio and television broadcasts, on the other hand, and the transference of recordings already made to other media, is in principle permissible (§ 53 (5)), and so does not require the prior permission of the

author. In accordance with current regulations the person making the recording is obliged to pay the author remuneration; nonetheless, bearing in mind the scale of the problem, the producers and importers of recording equipment such as tape – and video-recorders are obliged to send to the relevant copyright organizations part of the profits gained from the sale of the recording equipment[154]. This obligation arises only when the author makes a claim, and the total paid may not exceed 5 per cent of the profits from the sale of the given equipment. These distinctions are not, in my opinion, justifiable, for firstly they place authors who make their claims earlier in a more favourable position, and secondly they complicate the carrying-out of calculations by defining the limit at 5 per cent of the profits from the sales of all recording equipment. This question is, however, linked closely with the system of remuneration and will thus be discussed during the following lecture.

I devoted somewhat more attention to current Federal Republic of Germany copyright law because it allows a fairly exact presentation both of the nature of private use and the legal problems facing the legislator in connection with such use. It was also because the projects for the regulation of this matter are particularly well advanced in the Federal Republic of Germany, although mention should also be made of projects produced for example in France, the Netherlands, the Scandinavian countries and of Anglo-American solutions based on the concepts of fair use or of fair dealing[155].

Let us now move to a discussion of public use. It is my conviction that such use differs from private use, above all in the difference of the aims which each are to serve, for while private use serves to satisfy the personal needs of an individual, public use is to satisfy social needs recognized by the legislator as being of particular importance; for it is a question of satisfying social needs in the field of information[156], benefits to teaching, of the progress of science, of improvement in the functioning of the administration, of the needs of public libraries and so on. The subjective limit of public use is thus fairly broadly conceived, more broadly than that of private use, for it embraces schools, institutions of higher education, academic institutions, libraries, administrative departments, business enterprises, recognized unions and persons practising free professions, for example doctors and lawyers, and so on. In the interests of authors and distributors, then, it has become essential

that a different limit should exist than that with private use, above all in connection with the freedom (permissible limit) of the duplication of works. To this end, copyright statutes, as a rule, permit the reproduction only of fragments of published works and articles published in periodicals, and only on the condition of their being used for specifically defined purposes. It also permits the reproduction of whole works, but only when they are unavailable in the book trade[157]. Of course, as in the case of private use, copies made may not be distributed, for in no case may they be allowed to become a source of income for the user duplicating the work.

The use of other people's work in the field of public use often covers other forms too, such as the quotation of the contents of works published in books and periodicals, the distribution of works by the lending of copies (which on the basis of certain statutes requires a payment to be made to the author), the giving of lectures or recitals, the production of published theatrical works by amateur companies, and the performance of musical works in clubs and cultural centres or as part of festivities, and the public exhibition of works of art, with the condition, however, that those who make use of the work do not take any payment from the persons to whom they present the work[158]; for the use made of another person's work must not be a source of profit for the user and cannot go beyond a purpose recognized as particularly important for social reasons.

Thus defined, the limits of permissible public and private use demand fairly far-reaching changes; for it is rightly held that even those laws which define relatively precisely the institution of copyright under discussion are merely an expression of a subsequent stage on the way to the application of the regulations to the actual situation at present arising from technological progress[159]. The need for their being further amended arises from the ever more general use made of reprography, the practice of distributing works recorded on tape or video cassette, from the appearance of teletexts and the development of satellite and cable television, in a word, with the distribution of new media. In connection with their use the possibility of ensuring the observance of the author's legal monopoly by the persons making use of the work, and the concomitant reality of the reproduction and distribution of works being dependent on the prior permission of the author, are increasingly illusory. The doubt may be expressed, moreover, as to whether the

decision to remain with the solutions adopted in current statutes could be reconciled with social needs.

In order to present this problem against the widest possible background, it is necessary firstly to recall the principle aims and assumptions on which the system of copyright is based. Thus, there is no doubt that the aim of copyright, and at the same time the justification of recognizing the authors' copyright monopoly, was and is the advancement of creativity and the securing for the audience of the broadest possible access to its results. This is demanded by the cultural and academic progress of the whole of mankind. At the basis of copyright, then, lies the idea that we may call the concept of an information system, for its aim is to provide the audience with (make available to them) the results of the author's creative efforts[160]. The individual production of works constitutes the beginning of a chain, the next link of which is the publisher or other subject duplicating and/or distributing the work, the third and last – the receiver of the work. If, then, the role of any one of these links is altered, for example, with regard to the methods and possibilities of duplication, distribution or use made of the works, then the whole system must simultaneously undergo a change. This in turn bears on many copyright regulations.

Let us illustrate this thesis with a simple example and let us assume, as once was the rule, that the distribution of a work takes the form of printing. In this situation the second link of the chain becomes the publisher, the third the buyer of the book. The edition is produced by the publisher on the basis of a contract with the author. The author, in drawing up the publishing contract, expresses his agreement with the publication of the book in return for the publisher being obliged to print the book and pay the appropriate remuneration dependent on the size of the edition. This size is known both to the author and to the publisher, for whom the publication also constitutes a source of income[161]. The matter looks entirely different, however, when the subject making use of the book is able to eliminate the second link, the publisher, for example. This is the case when we are dealing with, for example, reprography and with the possibility of gaining access to the work through communication with computerized information centres. These methods supersede the traditional form of printing and allow the duplication, distribution and use of a work while cutting out not only the publisher, but also the author, who very often does not

even know by whom and to what extent his work has been duplicated. This throws an entirely new light on the question both of private and of public use. Certain authors even tend to the view that it is necessary to promulgate a statute devoted to information law, which would replace the classic copyright law[162]. Of course, such far-reaching propositions cannot be endorsed; nevertheless, it is undeniable that copyright regulations must be applied to the new phenomena under discussion. This view is expressed by amongst others Schricker. He dismisses the standpoint of the proponents of "information law" who regard copyright as the proverbial fifth wheel on the cart, merely hindering the development and progress of contemporary information media. He declares himself, however, in favour of a modification of copyright regulations[163]. Schricker believes that to this end it is necessary firstly to seek solutions that will allow informational needs (postulates) to be included in the copyright system, secondly to find a solution allowing a sufficient flow of information on an international scale (and in connection with this, to change convention regulations accordingly), and thirdly to consider any new ways of transmitting and seeking information, taking into consideration among other things the problem of satellite transmission, cable television, broadcasting videotex and texts received by telephonic communications (interactive videotex). The same postulates are presented by Kolle[164] when he writes that the most important task presently facing lawyers is the production of a system which would in a sensible fashion reconcile the interests of the producers of information (the authors) and its distributors (for example, publishers or radio and television stations) with the interests of the receivers of information. To achieve this aim it is possible to confine oneself to the concept of exclusive copyright, which leaves decisions concerning the distribution of works in the hands of the authors or their legal heirs, but the weight of the whole issue must be shifted to the problem of the remuneration of the authors, simultaneously decreeing an unlimited freedom to duplicate (reproduce) works. If this does not occur, then, in Kolle's opinion, an ever-growing divergence between copyright law and the reality it is to regulate is unavoidable[165]. This then is a postulate aimed at a far-reaching change in the regulations governing the permissible public and private use with the emphasis on the non-contracted, payable use of other people's works.

Let us now consider the direction taken by legislators in regard

to a solution of the problem that interests us. Here we can distinguish two principal directions. The first of them is represented by concepts proposed in the United States, based on the rule of "fair use". According to this concept, the unpaid duplication of works for "non-profit purposes"[166] would be permissible; whereas the duplication of works for financial or industrial purposes would be permissible only on condition of payment of the relevant costs. In my opinion this system is neither practical nor profitable for the authors. The proof, for example, that a work is duplicated for financial or industrial purposes is surely uncommonly difficult, while to deprive the author of payment in the case of the duplication of works for non-financial purposes is also unjustifiable, particularly if we bear in mind the scale of the phenomenon and its adverse effects for the authors[167]. The second movement, which predominates in continental European law, aims at a considerable broadening of the freedom to duplicate works in the sphere both of public and of private use, though on condition of costs paid to the authors and publishers. I believe that such a solution to the problem is the right and proper one to be recommended, at least until a better system has been produced. It is, however, worth evaluating, on the basis of experience, the suitability of the solutions I have just been talking about.

As far as individual countries are concerned, the problem of the duplication of works with the aid of duplicating machines has neither fully been solved nor even uniformly formulated[168]. Nevertheless, it is possible to speak of a general tendency to broaden the limits of public use, particularly in favour of the purposes of teaching, the development of academic research, the supplementing of library collections, the creation of archive resources, the satisfaction of judicial needs and the rapid transfer of information about current issues. Such provisions, with various limits as to the permissible number of copies that may be made and the range of material copied (the whole of a publication or only fragments) are to be found in the legislation of the Netherlands[169], and in Sweden[170], and in projects for new laws in the Scandinavian countries[171], the Federal Republic of Germany[172], Austria[173], Switzerland[174], the USA, Australia and many other countries. Neither has the problem of private use escaped the attention of lawyers, although in my opinion correct solutions are still not being proposed if in the question of reprography the obligation to pay remuneration to the author is ignored.

Considerably more progress has been made with legislative amendments and solutions concerning the recording of other people's work on sound taped and video cassettes, for in this case legal regulations in many countries oblige the producers or importers of tape- and video-recorders, and other material used in the recording, and possibly the copying of radio and television programmes, to set aside part of the profit from sales for the benefit of the authors and distributors of the work.

I regard this solution as a good one. I also agree with Ulmer that a system of "taxing" tapes and other materials used in recording is more just than one of taxing only recording apparatus[175], about which it is never known how often and to what purposes it will be used[176]. Thus, one must welcome the government draft in the Federal Republic of Germany[177] in which, as well as payments from each item of recording apparatus, there is also provision for payments from materials used in the making of recordings, using a rate of calculation of one hour of recording.

Of course, the question of reprography and of aural and visual recordings does not exhaust the entire problem of new technological media and their influence on copyright; and here two other issues should be mentioned.

The first concerns the concept of the distribution of a work, the second the phenomenon which, by way of analogy with the laws governing inventions, I shall call the exhaustion of copyright, and which is defined as a postulate to avoid so-called double remuneration.

By the distribution of a work is understood traditionally that it is made available to an audience, for example, in the form of printed matter, a radio or television broadcast, a theatrical performance, a concert, a recital, an exhibition, etc.[178] There is talk of a distributed work, and also a duplicated one, when conditions have been created to allow the audience to come into contact with the work in a form suitable for perception. Thus the stages preparatory to the work's being recorded in the form in which the receiver will encounter it, for example, the printer's galleys, are not regarded as duplication. Of course such activities, if undertaken independently, are an infringement of copyright or at least threaten such an infringement and so are not permissible. The problem under discussion is at present of particular interest in connection with the storing of whole works or abstracts of works in computers. This practice is

found in many countries, particularly in connection with academic literature. This then is a problem which the lawyer cannot ignore. He must decide in particular whether the introduction of a work into the computer's memory itself constitutes distribution, or whether this occurs only when the codified information is received. In legal literature opinions are divided on this issue; but the predominant view[179], to which I adhere, that is that the introduction of a work into the computer's memory already constitutes a form of duplication. I believe that this standpoint is entirely in accordance with Article 9 of Statute 1 of the Berne Convention and with Article IV*a* of Statute 1 of the Universal Copyright Convention revised in Paris in 1971. At present these Conventions declare that an author enjoys the exclusive right to duplicate his work, regardless of what form it is duplicated in. There are no legal obstacles, then, to regarding the introduction (storage) of a work into a computer as a particular form of distribution. Some authors, however, consider that one can speak of distribution only when there is a physical manifestation, such as a readout of the work stored in the computer's memory. I believe that this is an erroneous view. I take the standpoint that one should also speak of the distribution of a work when the work may be encountered by playing it on a magnetic tape or showing it on a television screen. With regard to the possibility of making use of new technological means, the traditional understanding of the concept of the duplication of a work as the making of a physical manifestation of it is not very useful. For this reason, in my opinion, the "distribution" of a work should always be spoken of when the possibility is created of becoming acquainted with the work. This direction should also be taken by a broader interpretation of Article 9 of Statute 1 of the Berne Convention and Article IV*a* of the Universal Copyright Convention[180].

The view I have taken is also supported by practical considerations, for it is considerably easier to control the making of recordings than the execution of a reading. The interested author, or someone acting on his instructions, can easily ascertain whether his work has been stored in the computer. The control of readings, on the other hand, particularly ascertaining how many times they have taken place, is practically impossible, especially taking into consideration the possibility of individual reception with the aid of interactive video text[181].

In connection with the problem of the storage in a computer's memory of other people's works there appear many further matters essential to copyright. Ulmer[182] distinguishes two special situations. Firstly, he writes about so-called "one-use input". We have such a situation when the work stored in the computer's memory permits only limited information to be obtained, for example a specific answer to a question concerning the syntax, vocabulary or concepts used by the author and so on. The work then serves only as material used in independent literary, linguistic, syntactic or semantic research, for example. It must also be said that this method of making use of a work in no way infringes the author's interests and cannot be seen as the distribution of his work. We are faced with a similar but not identical situation when a work is codified for the purposes of being translated into a foreign language. The receiver cannot then "read" the original, but only a foreign translation. This certainly enters the realm of copyright; and thus the storage of a work in the memory of a computer should be considered to be duplication[183]. This is undoubtedly a proper view, since according to almost all universally current copyright regulations, works translated into another language constitute an object of the rights of the author of the work, not just of the translator. The latter enjoys so-called subordinate copyright, which he may apply independently, but without prejudice to the rights of the author of the original. I shall add that in this case, too, the concept of the three levels of composition of a work is in my opinion particularly applicable, for it allows a clarification of the relationship between the original work and the translation and between the copyright enjoyed by the author and that enjoyed by the translator.

Secondly, in Ulmer's opinion, we are faced with a different situation when the "reader" does not receive the whole work or even part of it, but may obtain such information as would discourage him and many other people from buying the work[184]. One encoded copy of a work may thus replace hundreds and even thousands of copies in private and public libraries. A decrease in the need for printed books is to the detriment of authors and publishers and for this reason this means of codifying works must be considered as entering the sphere of interests protected by copyright. Thus Ulmer believes that the storage in a computer of information allowing the work to be replaced must be recognized as duplication[185]. The same should apply in such cases concerning the coding of abs-

tracts often constituting not only the first information about the work, but often serving to advertise the book or replacing to a large extent reference to the whole book.

Here, however, three different situations should be distinguished. Firstly, the abstract may be written by the author of the work. In such a case, the abstract should be considered as an original work along with all the consequences of such a classification in the realm of copyright, including storage in a computer memory [186]. Secondly, abstracts are often composed not by the author but by another person. Here the problem appears as to whether the storage and distribution of such an abstract as an independent work requires the permission of the author of the original work. The answer to this question depends on whether the abstract is based on the original work or whether it is an independent work or a text that simply does not fulfil the conditions of a work. If it is based on the work, and so may be evaluated *a casu ad casum,* the codifying of the abstract must be treated as a work based on another, with full respect for the rights of the author of the original pre-existing work [187]. If on the other hand the abstract is recognized as an independent, original work, only the author of the abstract enjoys copyright over his own work [188]. And if the abstract constitutes a work not enjoying copyright protection, because it is, for example, simple bibliographical information, the problem of copyright protection ceases to exist. The situation is essentially the same when an abstract is produced directly by the computer, for normally such extracts contain brief bibliographical and reference information, which of course does not constitute the duplication of the work and so does not require the author's permission (authorization) or the payment of remuneration to the author. If, however, alongside the summaries and information I have mentioned, the computer abstract contains important parts (excerpts) from the work, we should then be dealing with the duplication and distribution of the work. For as the computer production of abstracts usually involves the quotation of parts of the text in machine language, it appears accordingly that one should speak of an encroachment on the rights of the author of the original even more frequently in this situation than when the abstract is composed by another person [189].

The next problem to which attention should be devoted before drawing conclusions in the matter of the postulated limits of public and private use is the question of what I have called the "exhaus-

tion" of copyright. This problem has a fundamental significance for authors and receivers. It is connected with the considerable rise in the number of intermediary distributors in the transmission of a work to the receiver. A classic example of this rise is cable television, and I believe that fairly similar problems may also arise in connection with the transmission of television programmes with the aid of video cassettes.

To present the questions mentioned against a background of the principles of copyright it should be recalled at the outset that the author enjoys the exclusive right to decisions concerning the distribution of a work and the right to receive a separate payment for the duplication and distribution of the work in any exploitational field. This principle, to be sure, is not exactly expressed in statutes[190], but it arises either from practice or from the entirety of legal regulations, above all those in the aforementioned statutes, which regulate the particular rules of the use made of works[191]. These apparently unambiguous regulations, obliging the distributors to pay the authors for every form of use of the work, raise doubts above all in relation to the phenomenon of so-called cascade transmission[192]. This phenomenon occurs in the case of the mediation by a number of distributors in the transfer of the work to its audience[193]. The number of intermediaries however does not determine the occurrence of the above-mentioned phenomenon. Individual links in the information chain in the shape of distributors may be placed in different exploitational fields or in the same one. Thus, for example, a radio broadcast of a novel usually requires reference to a published book, which is used by the reader as he reads the work broadcast by radio. The transfer of information thus embraces two separate occurrences, both with legal consequences, namely: (1) the duplication of the work in the form of a book, and (2) the radio broadcast of the work. At the root of both occurrences lies the author's permission, which empowers the publisher to publish the book, and the radio station to make the programme. The circle of receivers of the work in two separate exploitational fields is – or at least should be – different. Thus the publisher pays for the publication of the work in book form while the radio station pays for the broadcast, but not of course for the use made of the book, and the listeners for reception of the programme[194]. The situation looks the same in the case of music broadcast by radio from records or magnetic tapes bought by the radio company: the

radio company and the listeners pay only for the programme, while the producer pays the author for the edition of records. In both cases mentioned it is a question of distinguishing exploitational fields and two separate distributors. For this reason this is not a case of cascade transmission.

We meet quite a different situation, on the other hand, when two or more distributors are operating in the same exploitational field. This is the case for example when a radio or television programme may be received direct from the aerial and when it is intended for the general public, but with the aim of improving its quality or possibly for technical reasons, including the location of the receiver[195], it is also transmitted by use of a cable network. If then the viewpoint universally accepted in the study of copyright is shared, that the justification of copyright monopoly is equivalent to allowing communication with the work to a specified circle of people in a defined exploitational field[196], then in consequence it must be said that the receiver should not be obliged to bear the cost for the better quality of reception of the programme, for which he has already paid once when he paid his licence. Thus, such a viewpoint is shared by many lawyers[197] and the jurisdiction of many countries[198], for it is considered that claims by authors or copyright agencies for additional remuneration for the distribution of the same work and in principle for the same audience, would be an abuse of the law based on an entirely erroneous interpretation of the principles and assumptions of copyright and the intention of the legislator. The number of technical means used in the cascade chain (for it concerns the same exploitational field) of information transmission cannot in any way change the principle of copyright or lead to a double remuneration of the authors. For always one should take into consideration and protect the interests of the receivers who constitute the final link in the information chain.

I shall now move on to a discussion of the next question, which has already been mentioned. Without going for the moment into a closer discussion of the legal problem of video cassettes, I wish to touch on a problem which appears in connection with their use in the chain transmission of programmes. In this case I shall make use of an issue known to me from a claim which in Poland was taken to court. It was a claim issued by the copyright agency ZAIKS against the shipping line PLO for payment of copyright remuneration for recordings on video cassettes of television programmes previously

broadcast in Poland. These cassettes were shown to the ships' crews, who played them in the course of long-distance voyages. At the time they were unable to receive television programmes direct from the aerial due to the limited range of the transmission stations. Against this factual background there arose the question, as the "mediation" of video cassettes constituted the only possibility of receiving a television programme, and so it was an indispensable link in the cascade transmission of a television broadcast, paid for by the television licence held by members of the crew, and since the reception took place in the country in which the television station was situated[199], whether we are dealing with the transmission of a television broadcast or with a separate form and exploitational field of the work[200]. The first standpoint is supported by the following: (1) the fact that the work is the same, (2) the identical nature of its television form despite the use of additional apparatus in the form of a video-recorder, (3) the circle of receivers, who could have received the programme straight from the aerial had they been in the country. For at the root of the concept that creating the possibility of contact with a work *(Werkgenuss)* constitutes the basis of remuneration under copyright, it is possible in my opinion to defend the viewpoint that a separate payment of remuneration for the reception of a television programme through the medium of a video-recorder would lead to the double remuneration of the authors. We try, quite rightly, to avoid this.

The second standpoint, however, is supported by the fact that the work has been recorded in another medium than would have been the case with a television broadcast or a broadcast by cable network. Without making a decision on the question presented here[201], I should like only to point out that such problems amongst others appear in connection with the new technological means of the transmission of works. They force a new look at many issues previously fairly unambiguously evaluated on the basis of copyright regulations. Amongst these problems special attention is deserved by the definition of separate exploitational fields and the concomitant concept of the information chain. In the case of the latter it is primarily a question of an evaluation of cascade transmission, which depends on the participation of several intermediaries co-operating in the same exploitational field and possibly using various technological media with the aim of improving transmission or reaching receivers who have already paid once for

the possibility of access to the work in a defined form (e.g., television).

Concluding this consideration of the limits of public and private use in the light of new technological means of the duplication and distribution of works, I shall formulate a few – in my opinion basic – conclusions.

(1) It seems that the difference between public and private use will become less and less sharply defined. I believe that this will be because the new technological means (copying machines, tape recorders, video recorders, computers, communication with information centres) are more and more universally to be found in the possession of individuals who make their own decisions concerning the duplication and use made of works. The situation then recalls one which in the realm of information tends to replace the concept of means of mass communication with the concept of new means of communication.

(2) I believe that the author's right to decide about the use of his work in each separate exploitational field will diminish more and more, of course with the exception of the decision about first publication, for that must lie with the author. I believe that this will particularly be the case where the duplication and distribution of works depends on the will of individuals operating new technological means and where effective control by the authors is quite illusory.

(3) I am convinced that with regard to the circumstances raised above, regulations concerning permissible use ought, to a broad extent, enjoy the institution of statutory licence allowing anyone to duplicate and distribute the work for his own (public) or personal (private) use, without the need to seek prior permission from the author, but with no right to distribute the work further or draw material profits from this activity.

(4) I have no doubt that the weight of economic rights forming the pecuniary component of copyright is moving in the direction of the right to seek appropriate remuneration. I believe that it will be necessary to determine that each use should entail the payment of remuneration for the benefit of the author and of those distributors who are linked to the author by contracts and whose economic interests rights are infringed in connection with activities by persons making use of the work on the basis of a statutory licence. The group of subjects obliged to pay a remuneration must also in-

clude producers of equipment allowing the uncontrolled duplication and distribution of works.

(5) I believe that a fundamental problem demanding a resolution in copyright statutes is and shall remain the promulgation of a suitable system for the remuneration of authors and distributors. I shall consider this question in the following lecture.