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From the Minister of State
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1) Mr Fletcher
2) Prime Minister

The levy may be around 10% on audio tapes and 5% on video tapes. It will be popular with artists, broadcasters and recording companies, but not with the public.

13th February 1985

I think this

Dear David,

Dub is on
14/2 own-goal
Please re-consider me

I am writing to inform you of the publication on 19 February of a Green Paper entitled "The Recording and Rental of Audio and Video Copyright Material". Its main feature will be detailed proposals for a blank tape levy scheme.

The Lord President of the Council confirmed on 31 January that the Green Paper has H Committee clearance and it has now been sent for printing in the form enclosed.

Publication will be announced by way of a written parliamentary question to be answered on 19 February. The proposed question and answer are as follows:-

Q To ask the Secretary of State for Trade and Industry what action he is taking to deal with the problem of unauthorised private recording of copyright material.

A (Mr Pattie) A Green Paper, entitled "The Recording and Rental of Audio and Video Copyright Material" is to be published this afternoon. The Paper examines in depth the problem of unauthorised home taping of copyright material and puts forward a possible solution. It also discusses the related issues of recording of broadcasts for educational purposes and rental of pre-recorded copyright material.

A press conference will be held shortly after the question has been answered to coincide with the publication at 4.00 pm on 19 February 1985.

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I am copying this letter to Janet Lewis-Jones (Lord President's Office), Murdo MacLean (Chief Whip's Office), David Morris (Lord Privy Seal's Office) and to the Office of the Chief Press Secretary at No 10.

*Yours ever,
Tim*

T P ABRAHAM
PRIVATE SECRETARY

M12/M12AES

DRAFT

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THE RECORDING AND RENTAL OF AUDIO AND VIDEO COPYRIGHT
MATERIAL

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THE RECORDING AND RENTAL OF AUDIO AND VIDEO COPYRIGHT
MATERIAL

A CONSULTATIVE DOCUMENT

1 INTRODUCTION

1.1 In 1977 a committee chaired by the Honourable Mr Justice Whitford reported on its review of copyright law ('Copyright and Designs Law'; Cmnd 6732). This was followed in 1981 by the Green Paper 'Reform of the Law relating to Copyright, Designs and Performers' Protection' (Cmnd 8302). The Government has received several hundred responses from individuals and organisations expressing views on the many issues raised. Following a detailed consideration of these views the Government intends to bring forward as soon as possible a comprehensive set of proposals for the reform of copyright and related laws.

1.2 However, on one of the issues the Government considers that a further opportunity for public comment is needed before a final decision can be taken. The Whitford Committee recommended that a levy should be applied to sales of audio and video recording equipment for private use to

compensate copyright owners for unauthorised copying of their material. In the Green Paper the Government was unconvinced of the case for such a levy, either on equipment or on blank recording tapes. The subject has subsequently received much public attention and furthermore the levy approach is increasingly being adopted or considered internationally.

- 1.3 In consequence the Government has reconsidered the issues and is now inclined to the view that a levy should be introduced on blank audio and video tape to remunerate copyright owners for private recording. Such a levy might also provide a solution to the difficulties faced by educationalists who wish to record copyright material for teaching purposes. The Government recognises that an element of inequity is inherent in such a scheme and that some who pay the levy may never use tape for copyright infringing purposes. However it knows of no realistic alternative.

- 1.4 The present document considers the factors which point to a levy, and discusses how a levy scheme might operate. Comments are invited both on the acceptability of a levy as a solution to the difficult problems posed by home taping, and on

the practicability of the mechanisms proposed. A decision to introduce a levy is dependent upon both elements, since the Government will only introduce a levy if satisfied that it is feasible in practice and that economic and fair means can be found to administer it.

1.5 The present document also considers the related question of rental of pre-recorded video and audio material. It invites comment on the need for film and record copyright owners to be given a right to control the commercial rental of their material or at least to claim remuneration from this activity.

1.6 The subjects of educational recording and rental are dealt with separately (in sections 8 and 9 respectively) following the main discussion of home taping, since they raise different issues.

1.7 In order that decisions can be taken without delay, all comments should reach the Department of Trade and Industry by 30 April¹⁹⁸⁵ at the latest. They should be addressed to the Industrial Property and Copyright Department, Department of Trade and Industry, State House, High Holborn, London WC1R 4TP.

2 HOME TAPING : THE PROBLEM

2.1 There are about 25 million audio cassette recorders and 6 million video recorders in use in the UK. More than 50 million blank audio cassettes and 20 million blank video cassettes are sold annually.

2.2 A 1984 survey by British Market Research Bureau Ltd indicated that 84% of those who purchase blank audio tapes in the UK use them to record music. The remainder use short tapes and/or make recordings for non infringing purposes (eg to produce talking newspapers for blind people.) Private recordings of music are made mainly from discs (70% of private recordings) radio (21%) or pre-recorded tapes (6%). Of those who record from disc or tape, roughly equal proportions copy from originals they own themselves (eg for use in a car or a personal stereo set) and from originals borrowed from friends. The proportion of home tapers who would otherwise have bought the recording themselves cannot be determined with confidence but there can be no doubt that a significant number of record sales are lost as a result of home taping.

2.3 Although there are no comparable figures available in relation to the use of video recorders their main uses are clearly for recording television programmes and for viewing pre-recorded tapes. The sales of blank video cassettes relative to the number of recorders in use suggest that the former category of use is significant and, furthermore, that many tapes are used not only for once-only viewing at a more convenient time ("time-shifting") but also for repeated viewing and perhaps permanent retention. Unlike the audio field private copying of pre-recorded material appears not to be a significant activity at present.

2.4 Copyright underpins the livelihood of creative workers and the viability of the industries based on their work. An essential element of copyright is the right to take action against unauthorised reproduction of the subject of the copyright.

2.5 Copyright subsists in sound recordings, films and most of the content of radio and TV broadcasts. Consequently, in law, copying of any of this material requires prior authorisation. There is no exemption for private use except in relation to the copyright in a broadcast itself, as distinct from its content. Unauthorised private

copying is dealt with solely by civil law. There are also some criminal offences under copyright law, but these relate only to commercial copyright piracy.

- 2.6 In contrast with the success which has recently been achieved in combatting commercial video piracy by the combined use of civil and recently amended criminal provisions of the Copyright Act 1956, the legal right cannot in practice be enforced in relation to copying carried out in the home. Consequently, while home audio and video recorders have become commonplace, their use has generated virtually no income for the copyright holders whose work is being enjoyed. The benefits of the new technology have, in other words, accrued solely to the general public and tape and recorder manufacturers. The extent to which copyright holders have suffered actual economic harm through lost sales is disputed. But however large or small the loss, it is undeniable that a fundamental right conferred by copyright law cannot be used in present conditions for the purpose intended by the statute and that home taping is a major use of copyright material for which copyright owners receive no payment.

3. POSSIBLE SOLUTIONS

3.1 In principle there are two possible solutions open to the copyright owners themselves. The recording industry might perfect a spoiler to prevent copying, or copyright holders could collectively establish a voluntary mechanism enabling the public to obtain, for a fee, a blanket licence to copy. However both avenues have been explored and found wanting: extensive research has failed to find an acceptable technical solution and a previous voluntary licensing scheme attracted negligible participation. Home taping is now so simple and user habits so ingrained that it is hardly realistic to expect the public in any numbers to take positive action to pay copying royalties.

3.2 Any solution must therefore lie through legislation. One result might be to legalise private copying, but this would strike at the roots of the principle of copyright and would amount to encouraging the use of one person's property by another without compensation; it would also probably conflict with our obligations in international law. Another solution would be a mandatory recording licence but this would be difficult and costly to administer. The only remaining solution therefore appears to be one

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which imposes a statutory requirement for the payment of a royalty on the sale of blank tape and, perhaps, also on recording equipment. It is this solution which is discussed below.

3.3 In the Green Paper, Cmnd 8302, a number of problems associated with a levy were put forward and led the Government to the conclusion that there was no convincing evidence that the introduction of a levy would provide an acceptable solution. Developments since publication of that Paper indicate that there remain two questions of substance, namely (i) the element of rough justice inherent in a levy in that it would fall on those who use tapes to record non-copyright material, and (ii) the possibility that the administration of a levy would be too complex and expensive.

3.4 The element of rough justice would be substantially reduced by the suggestions made later in this paper (paragraphs 7.8 and 7.9) not to apply the proposed blank tape levy to shorter tapes and to provide exemption from the levy for certain approved organisations. There would remain those who would be obliged to pay the levy on tapes to be used for non infringing purposes. Given the likely size of the levy and the relatively small number of tapes used in this

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way, the element of rough justice will be small and should not, in itself, prevent the introduction of a levy.

3.5 As to the administration of the levy, the Government seeks responses to this Paper from copyright owners or their representative organisations setting out details of collection and distribution schemes including estimates of expenses. Before it legislates in favour of a levy, the Government must be satisfied that a scheme is practicable and that its administration will not absorb a disproportionate amount of the levy income.

4. FUTURE DEVELOPMENTS

4.1 To simplify discussion this document deals in today's technology. Thus it talks of tape or cassettes, since this is overwhelmingly the medium now used for copying. The Government is of course well aware that new recording media will be developed for general private use; the optical disc is but one possibility. Consequently, if legislating for a levy, the Government would take general powers to attach the levy to any recording medium, and prescribe the particular medium by regulation. Exemptions

which depend in some way on the characteristics of the medium or the recording equipment itself, such as playing time (see paragraph 7.8), would also be defined in regulations to allow for such matters as choice of playing speed.

- 4.2 Similarly the conclusion that the present need is for a tape rather than an equipment levy (paragraph 7.1) does not rule out an equipment levy in principle. "Double-headed" recorders designed for tape to tape copying, often at high speed, are already available. In the future, digital storage capacity may so increase that recorders might function by transferring works to an internal computer-style memory rather than a separate recording medium. The Government could therefore take the necessary powers to impose an equipment levy. The decision to activate these powers and the formulation of the corresponding regulations would however be made only in the light of experience of the tape levy scheme and with regard to developments in recorder technology. The regulations could specify the categories of equipment to which a levy would apply and the size of the levy, and could deal with such questions as exemptions.

5. THE INTERNATIONAL POSITION

5.1 The Federal Republic of Germany has for some years operated a levy on the sale of recording equipment and is currently considering supplementing this with a levy on blank tape. Blank tape levies are already in operation in Austria and Hungary and are under consideration in the USA, France and Australia.

5.2 The European Commission included a recommendation for levies on both blank tape and recording equipment in its 1977 communication "Community Action in the Cultural Sector", as part of its proposals for harmonisation of copyright within the Community.

5.3 In Norway, Sweden and Finland the income from a blank tape levy is partly absorbed into general tax revenue and partly used to support cultural activities.

6. OUTLINE OF GOVERNMENT PROPOSALS

6.1 In the light of all these considerations the Government proposes the following measures:

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(i) a levy to be imposed on the sale of blank audio and video tape intended for domestic users who would in return be free to make, for personal use, video recordings in general and audio recordings of music.

(ii) the size of the levy to be subject to negotiation between beneficiaries and manufacturers/importers and to be statutorily limited to say 10% of the retail price of audio tape and say 5% of that of video tape.

(iii) audio tapes of less than 35 minutes total playing time to be exempt.

(iv) users of audio tape for non-infringing purposes, eg blind people, to be exempt subject to their obtaining the tape through Government approved representative organisations.

(v) copyright in respect of home audio recording of music, and home video recording generally, to be exercisable only through collecting societies set up to administer the levy scheme.

(vi) the collecting societies to be wholly responsible for (a) collecting and distributing the levy and (b), negotiating the rate of the levy with UK tape manufacturers and importers.

(vii) Government approval to be required for levy distribution schemes. Arbitration machinery to be provided for disputes.

7. DETAILED CONSIDERATIONS

The Basis for the Levy

7.1 The levy would constitute a royalty collected and distributed, after administrative costs, solely on behalf of owners of copyright in material subject to private copying. It would not be a tax, but would be provided solely as a means of transferring royalties from users of copyright material to copyright owners. At least for the present it would be applied to blank tape rather than to recorders since tape sales relate more closely to the scale of copying that actually occurs. Blank tapes would be defined as those "intended for" private copying, so it would not be possible to avoid the levy simply by pre-recording trivia on the tape.

7.2 The purchaser of blank audio tape on which the levy had been paid would be free to copy music, including any associated lyrics or libretto, direct from recordings (disc or cassette) or from broadcasts for personal use. It has already been shown (paragraph 2.2) that infringement of musical copyright is the overwhelming problem in the audio field and copyright holders in this area are already collectively organised, so simplifying administration of an audio levy scheme.

7.3 A much wider range of copyright interest is affected by video taping. It includes the makers of films, videograms and recorded television programmes as well as all those whose copyright material is incorporated in these media, including of course music copyright owners. Broadcasting organisations would be entitled to a portion of the levy by virtue of their copyright in many recorded television programmes, but in deciding on levy distribution account would be taken of the fact that the copyright in a broadcast per se (as distinct from that in its contents) is not infringed by recording for private purposes. The distribution pattern would also, at least initially, have to reflect the fact that relatively few users of home video

recorders are at present able to copy pre-recorded material. Payment of the levy would nevertheless entitle the purchaser of a video tape to record any broadcast or pre-recorded material for personal use.

The Size of the Levy

- 7.4 It is intended to minimise the level of direct Government involvement in the levy scheme, including the fixing of the size of the levy. Nevertheless, there is a strong public interest element entailed, with consumers likely to bear the ultimate cost. This introduces an element which might not be taken adequately into account in any negotiation or arbitration procedure.
- 7.5 The record industry, seeing a levy as a means of compensation for lost sales, has suggested that the price of a blank audio cassette tape should be more than doubled by the imposition of a levy. The Government considers that an increase on this scale would be quite unacceptable, and in any case does not believe that 'compensation for lost sales' is a valid criterion on which to base a levy. Viewed as a royalty payment for the use of

copyright material, the levy should be much smaller.

7.6 To ensure this, and to safeguard the public, the Government proposes to set the maximum level of the levy by legislation. The rates could be, say, 10% of the retail price for audio tapes covered by the scheme and 5% for video tapes, the lower video rate reflecting the fact that the domestic use made of video copyright material for time shifting frequently (and for some users solely) amounts to no more than seeing the original broadcast at a different time and is therefore not an extra use of the material. Within these overall ceilings the levy amount, and the exact basis for calculating it, would be negotiable between, on the one hand, the collecting society representing the copyright owners (see below) and, on the other hand, the UK tape manufacturers and importers. While it is perhaps likely that the manufacturers/importers would conduct joint negotiations, individual manufacturers/importers should be free to negotiate their own agreement with the rights owners.

7.7 At rates of 10% and 5% respectively, the audio and video levies correspond to about 10p and 25p

respectively on the price of an average tape and would each raise around £5m per annum. These rates are not expected to have a significant effect on tape sales or to make illegal avoidance likely on a significant scale. Part of the revenue would go to foreign copyright owners but would be offset by the inflow from existing and future levy schemes abroad.

Exemptions

- 7.8 The need for exemptions appears greater in the audio than in the video field on the ground that greater use is made of blank tapes for non infringing purposes. Many non-infringing tape users employ shorter tapes (for dictaphones, computers or 'speaking letters') and it is not therefore proposed to apply the levy to audio tapes of less than 35 minutes playing time. Tapes intended for professional use, eg by broadcasting organisations, would also be exempted from the levy.
- 7.9 It is not administratively feasible to allow exemptions to individuals. However, there would be provision for rebate of, or exemption from, payment of the levy for non-infringing users of blank audio tape, such as the blind and other seriously handicapped people, on audio tapes

obtained through representative organisations and similar bodies. The same would apply to organisations which themselves make large-scale non-infringing use of leviable tapes. This would be subject to prior approval by the Secretary of State of an application by the organisation concerned, based on an assurance that the tapes will not be used to copy copyright music. The Government would welcome views on whether a corresponding provision would be needed in respect of video tape.

Operation of the Scheme

(a) The Collecting Society

- 7.10 Legislation would stipulate that copyright in respect of home taping could only be exercised through a collecting society (the 'Society') representing the copyright owners concerned. The Society would be empowered to negotiate the rate of the levy with UK tape manufacturers and importers, to collect the levy, and to distribute the levy proceeds, after deducting administration expenses, to the copyright owners on a basis to be approved by the Secretary of State.
- 7.11 The Society would be required to publish an annual report of its activities, showing sums collected and distributed, and administrative

costs. The question of administration costs is a key one to the viability of the whole levy proposal since it would be unacceptable for a major part of the new funds generated by the levy to be swallowed up by administration.

(b) Collection of the Levy

- 7.12 The Society would be empowered to collect levy proceeds at an agreed or arbitrated rate from UK importers and manufacturers of blank tape. The point at which the levy would become due would be on the first sale in the UK of blank tape in a form suitable for use by the domestic consumer. This would ensure that bulk supplies of tape intended for commercial use would not be caught.
- 7.13 Refusal by a tape manufacturer/importer to pay the levy at the agreed or arbitrated rate would be actionable in the civil courts at the suit of the Society. By analogy with the general principle in existing copyright law that trading in infringing articles is a criminal offence as well as a civil infringement, non-compliance with the levy requirements by a manufacturer/importer would also be a summary criminal offence, subject to a fine of up to level 5 on the standard scale (currently £2000). This seems appropriate in

view of the possibility that illegal importers may attempt to evade the levy altogether.

7.14 It has been argued that there should be a statutory right for the Society to audit the tape manufacturers/importers' operations. The Government believes this would be an unnecessary intrusion, especially given that illegal tapes could be identified by the absence of a stamp - see next paragraph. It is considered sufficient that, if the Society initiates a civil action against an importer/manufacturer for non-compliance with the levy requirements, the court would have the usual powers to order the defendant to allow the plaintiff to inspect his books. The rejection of statutory powers of audit would not, of course, preclude the possibility that the appropriate measure of auditing by the Society might be undertaken by agreement.

7.15 To ensure that unlicensed tapes could be identified at point of sale an adhesive stamp, or, by agreement, a printed facsimile of the stamp, should be affixed to all blank tapes on which the levy has been paid. This is similar to the arrangement that currently operates to show

that copyright royalties have been paid on imported sound recordings. Any sale or other commercial supply within the UK, wholesale or retail, of a tape to which the levy applies but which did not carry a stamp would be actionable in the civil courts by the Society, and would also be a summary offence carrying a maximum fine of level 5. To apply a stamp to a blank tape on which the levy had not been paid would also be both actionable in the civil courts and, if done for commercial ends, a summary offence. Use of an unstamped blank tape to make a private recording of copyright music would continue to be an infringement of copyright, but would not be a criminal offence. It should be stressed that since the proposed audio levy covers only music, it would continue to be an infringement to record non-music copyright material (for example talking books or computer software) on to audio tape without permission, even using a stamped tape. Similarly, it would be an infringement of copyright to use an unstamped blank video tape to make a private recording of any copyright material other than a live television broadcast having no copyright content.

(c) Distribution of the Levy

7.16 Having collected the levy proceeds, the Society's function would be to distribute it equitably among the copyright owners affected. Unlike the situation in other areas of copyright, the Society would have a statutory monopoly over levy funds, since the only way that individual copyright owners could exercise their rights in respect of home taping would be through the Society. It is therefore necessary to provide safeguards and channels of appeal for individual rights owners.

7.17 The Government proposes that this should be achieved by requiring the Society to submit for the Secretary of State's approval a scheme for the distribution of the levy proceeds ('the Scheme'). The Scheme would comprise two main elements:

- i) the division of the levy among the main beneficiary groups; and
- ii) the basis for calculating the distribution of the levy among the members of each group.

7.18 The Secretary of State would have powers to refer particular questions arising from the submitted

Scheme to a Copyright Tribunal (see below) for advice, eg on whether particular aspects were fair to all copyright owners. The final decision on whether to approve the Scheme or to require modifications would, however, rest with him. Any proposals by the Society to modify the Scheme once it had been approved would also have to be approved by the Secretary of State, again with reference of particular questions to the Tribunal if necessary.

7.19 The first element of the Scheme should both specify the percentage split and identify the representative bodies to which the Society would distribute levy proceeds. It is likely that the interests would reach agreement on the percentage split, but if, in submitting the Scheme, the Society indicated that agreement had not been reached on this point, the Secretary of State should have powers to refer the question to the Tribunal for binding arbitration.

7.20 The second element of the Scheme - the basis for distribution to individual copyright owners - involves an activity which is well developed in the audio but not in the video field. Indeed, with respect to music copyright the Society would in practice perhaps pass the appropriate levy

portions to existing societies representing the two groups affected (probably the Mechanical Copyright Protection Society - MCPS - for the composers/lyricists, and Phonographic Performance Ltd - PPL - for the record companies), who would carry out the final distribution. These societies already have considerable experience in operating royalty distribution on the basis of 'opportunities to record', taking into account record sales and radio exposure. Nevertheless, the Government considers that overall responsibility for distribution should rest with the Society, and that the basis for this second stage of distribution should be included as part of the Scheme submitted to the Secretary of State.

- 7.21 Although Video Performance Limited has recently been set up to administer public performance, broadcasting and diffusion rights in videograms, video rights owners are not in general already organised into collecting societies in the same way as the recipients of the proposed audio levy, and there are therefore no established mechanisms in place to distribute royalties. Similarly it is far less clear for video than for audio what basis could be used to sub-divide the levy proceeds among the main groups of beneficiaries,

and within each group. One possibility might be for the film proceeds to be diverted to a central fund to be used in the film industry to support production. It follows that the establishment of a 'Scheme' for the video levy is likely to be a far more complex and, at least initially, more administratively expensive process than for the audio levy. Before reaching a final decision to introduce a video levy the Government will have to be convinced that a fair basis, consistent with copyright criteria, can be devised for sub-division of the proceeds, and that an economic and effective administrative organisation can be established.

- (d) Settling disputes: the Copyright Tribunal
- 7.22 Disputes over the size of the levy (including cases where a tape manufacturer/importer refused to negotiate) would be settled by a Copyright Tribunal, based on the existing Performing Right Tribunal, and it would be part of the Tribunal's function to ensure that the settlement did not exceed the overall ceiling set by legislation. The 1981 Copyright Green Paper has already proposed an increased role for the Tribunal, extending its activities into all areas where copyright is collectively administered, and its proposed functions in relation to the levy would

be part of this expanded jurisdiction. Since it is possible, at least in principle, that the rights owners and one or more tape manufacturers/importers might voluntarily settle on a formula which results in a sum exceeding the statutory maximum, the Secretary of State should have powers to refer to the Tribunal the question of whether the formula would in fact have this result.

- 7.23 Two different types of complaint about distribution of the levy proceeds could arise from individual copyright owners. First, there could be complaints about the fairness of the Scheme itself, as it concerns the second stage of distribution to individuals. Since the Scheme would have been approved by the Secretary of State such complaints would have to be referred to him for consideration, and again he should have powers to refer specific questions to the Tribunal for advice. Since, however, modification of the Scheme on the basis of such individual complaints could affect the distribution to thousands of other copyright owners, it would be expected that it would in practice occur only in most exceptional circumstances. The Secretary of State should

have powers to reconsider his approval of the Scheme at any time.

7.24 A second type of complaint could be that, within a generally fair Scheme, an individual copyright owner felt he was receiving too small a proportion of the levy income considering the use made of his material. Most complaints of this nature could no doubt be settled between the individual and, eg, the MCPS or PPL, but the Government considers that the individual should be entitled to appeal to the umbrella Society if he is not satisfied, and that the Society should have powers to require the particular representative collecting society to remedy any inequity that they discover on investigation. Failing this the individual should have the right to take his complaint to the Tribunal for binding arbitration.

8 RECORDING FOR EDUCATIONAL PURPOSES

8.1 Recording for educational purposes raises different problems from those arising in relation to home taping. A few specially designated educational programmes may legally be recorded off-air by schools and colleges at present, subject to certain conditions. In addition

licensing schemes have been established to enable the recording of Open University programmes and certain television programmes on Channel 4 for educational and training purposes. There are however many other radio and television programmes of great educational potential. Teachers have frequently expressed the wish to be able to record them for replaying at a suitable time. Programmes of special merit may well warrant preserving in a library for showing to successive groups of students. However, so many different rights owners are involved that it has not in general been possible in practice to obtain the necessary copyright clearances, and it may be that in this area the right to prevent reproduction is operating too onerously.

- 8.2 Although the blank audio and video tape levies proposed in this paper are intended primarily to overcome the problem of unauthorised home taping, the Government considers that they should also deal with the question of educational use. Schools and other educational establishments would pay the levy at the rates discussed above on all blank audio and video tapes purchased, and in return would be entitled to make recordings of all broadcast material for replaying in the course of teaching and learning processes at any

time, and for indefinite retention. The use of the recordings so made would be restricted to such educational purposes, and in particular any commercial exploitation by the copier, for example by way of sale to other schools, would be prohibited.

- 8.3 The Government is concerned that teachers and other educationalists should have available to them any educationally valuable material that appears on radio and television, but that this should be done in a way which will fairly reward copyright owners for the use of their material. The Government is therefore inclined to legalise educational as well as private audio and video recording subject to payment of the levy. Comment on this proposal would be particularly welcome.

9 RENTAL OF FILMS AND SOUND RECORDINGS

The Problem

- 9.1 Most of the pre-recorded videograms that are viewed in people's homes have been rented, rather than bought. It was estimated in 1982 that 1.25 million video cassettes were rented each week in the UK, amounting to some 65 million transactions a year. Although rental of sound recordings has not yet developed to anything approaching this

scale in the UK there is a strong move towards record rental in some countries abroad, and it can be predicted that the legalising of home-taping by the introduction of a blank tape levy here, as proposed in this document, would encourage the spread of record rental. It would become a very attractive proposition for a would-be home taper to rent a recording at much less than its purchase price, and to make his own copy legally on a blank tape on which the levy had been paid. The rental and recording of compact discs could be even more attractive, since not only is the quality of reproduction on compact discs very high, but they are also far less susceptible to damage by constant re-use than traditional discs or pre-recorded cassettes.

- 9.2 Under present law the only way that a copyright owner in a videogram or sound recording can obtain any control over or reward from the use of his product in a rental scheme is by means of contract. He can stipulate, as a condition of his sale of the product, that it should not be rented out to the public, or he can include a contractual provision whereby he obtains payment based on the income from rental.

9.3 Copyright owners are not however satisfied that contract gives them sufficient control in practice. They point to the difficulty of tracing and enforcing contractual obligation in the often long chain of transactions between the copyright holders and the rental operator. They seek instead a right that can be enforced against the rental operator directly.

International Situation

9.4 None of the international copyright conventions contain provisions relating to a right to control commercial rental, although WIPO (World Intellectual Property Organisation) and UNESCO are undertaking a study of the subject. At present the issue is handled abroad in different ways. New laws have just come into force in the USA and Japan giving copyright owners in sound recordings the right to authorise commercial rental of their recordings. A video rental right is still under consideration in the USA. A group of countries, including Austria, Italy and Switzerland, give copyright owners a right to control the distribution of their material, but this is subject to exhaustion by sale. The Federal Republic of Germany also has a similar distribution right, but in addition there is a right to equitable remuneration in respect of

video or record rental. In France, Belgium and Spain, although there are no rights of such a specific nature, it appears to be possible for copyright owners to control rental through more general copyright provisions. In some Nordic countries there is an effective rental right, provided through the distribution right, in some circumstances. Various other countries are considering introducing rental rights.

Discussion

- 9.5 The Government feels that the scale and the precise nature of the problem need to be clarified. While for example copyright owners are clearly entitled to a fair reward for their creativity or investment from this major new market, rental in itself can generate sales, at least in the video field, and the price on first sale for rental purposes can in principle be fixed to reflect the likely popularity of the work in the rental market. Unexpected popularity will presumably be reflected in further orders since new retailers will wish to deal in the work and existing retailers will wish to maximise profits by renting in parallel. There may in any case be a need to replace worn copies of popular works. Nor is it clear why, if existing distribution chains make legal rights

unenforceable, they cannot be tightened up at the initiative of the producers; in the record and video market unlike, say, parts of the domestic goods sector, suppliers appear in a strong bargaining position relative to retailers.

9.6 Nevertheless if copyright owners can provide clear evidence that they are in fact unable to derive proper benefit from rental the Government would be sympathetic to the idea of using copyright law to correct the situation. However such evidence would in itself only justify the creation of a right to equitable remuneration from rental, as opposed to an exclusive right to authorise rental.

9.7 The creation of an exclusive right would enable rights holders not merely to increase their rewards from rental but to control more effectively than at present what is available for rental as opposed to sale. It has to be assumed that those calling for such a right, as distinct from a remuneration right, intended to use it to prevent the renting of particular works and, perhaps, whole categories of products such as compact discs.

9.8 The Government is not as yet convinced that further legal powers are necessary to control the rental market. Experience to date is limited to the video area where it is arguable that the present market situation has arisen less as a result of failure of contract law than as the response of an industry, which itself would rather sell its products, to an overwhelming consumer preference for renting.

9.9 However the situation may well be different where the rental product can readily be copied, and particularly when it is a work that the consumer is likely to want to retain. In these circumstances there is a stronger argument for giving rights holders effective means of preventing the rental of such products. Without it there is perhaps a risk that, where recording quality is not the overriding consideration, public purchases of, say, compact discs might be largely or completely replaced by a single rental and transfer to tape. This would be legal under the levy proposals. A significantly higher price could of course be charged to the rental operator than to the private purchaser, but there would be obvious possibilities for avoidance of the higher rate. The ultimate consequence could be that the compact disc would become largely a rental-only

product, like present video, with a limited range of discs available at high price for minority interests.

- 9.10 The foregoing arguments all relate to commercial rental. The Government does not consider that free lending by, for example, public libraries warrants any change in the law, and if new provisions on rental are introduced, they will not cover this activity.

Conclusions

- 9.11 The critical question is whether commercial rental of particular products and works can effectively be prevented contractually. If not the argument for an exclusive rental right seems strong, given the likelihood of copying. An exclusive right would also ensure equitable remuneration.
- 9.12 If contract can be relied on to prevent rental but not to ensure equitable remuneration then it would be possible to create a remuneration right and allow copyright holders to elect to include individual works in it or not. The Government would, however, need to be satisfied, and it is not satisfied of this on current evidence, that the problem is substantial and cannot be resolved

in other ways and that a new right of this kind would not unduly complicate existing leasing and distribution arrangements.

10 SUMMARY

10.1 This document concludes that copyright owners are entitled to payment for the home taping of their material and that a levy on blank audio and video tape is the only practicable way of providing such payment (paragraph 3.2). Comment on these propositions is invited.

10.2 The Government's proposals are outlined in Section 6 and Section 7 deals with some detailed matters which an acceptable levy scheme would need to accommodate. They include the establishment of statutory maximum rates of levy; exemptions for certain uses of blank tape; the requirement for collective administration of the scheme by the rights owners themselves; the need for the scheme to be approved by the Secretary of State; and provision for the arbitration of disputes (paragraphs 7.4 to 7.24). The Government will welcome comment on any and all of these aspects.

- 10.3 Comment is also invited on the suggestion that powers might be taken to impose a levy on recording equipment (paragraph 4.2).
- 10.4 Recording of broadcasts for educational purposes is discussed in Section 8 where it is proposed, subject to comment, to legalise such recording on payment of the appropriate blank tape levy (paragraph 8.3).
- 10.5 Finally, the separate question of how far the rental of copyright material poses a real and substantial threat to the economic interests of copyright owners is discussed in Section 9. The Government requires further evidence before it will consider enacting new rights to control this activity (paragraph 9.13).