4 The subject-matter for film protection in Europe

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Introduction

In this article we examine the issues raised by the definition of the subject-matter for protection of audiovisual works in the European Union. This question is an important one, as copyright and authors’ rights systems have very different traditions when it comes to devising protection for audiovisual works. Countries of the authors’ rights tradition, but also certain copyright jurisdictions like the USA, protect audiovisual works as original works of expression, distinct from their recordings or other manifestations thereof. However, the definition of the subject-matter may vary, raising questions as to the protection of certain works associated with or close to audiovisual works. In contrast to this traditional approach, under modern British copyright and in the countries influenced by British law the main subject-matter for film protection is the recording of the work, irrespective of any condition of originality. In certain authors’ rights jurisdictions, this recording (the ‘first fixation of the film’ or ‘videogram’) attracts a protection under a specific neighbouring right, distinct from the copyright in the recorded audiovisual work. As a result, in these countries both the audiovisual work and its recording are protected, but under two separate intellectual property rights, a droit d’auteur on the one hand, and a neighbouring right on the other.

Both aspects were covered in the process of European harmonization of copyright laws, which consecrated a double protection through a copyright and a related right, with a different regime in terms of ownership and duration.

However, this harmonization is not complete: first, because differences subsist between Member States, and notably between countries of the copyright and of the authors’ rights traditions. Second, because there remain problems associated with the description of works protected, both at EC and at national level.

Before exposing the main problems raised by the subject-matter for film protection (Section 2), we must rapidly describe the historical developments leading to the current position of the Member States (Section 1).
1. Historical developments

IN THE EARLY DAYS OF CINEMATOGRAPHY (1896–1908): DIRECT V. INDIRECT PROTECTION

From the beginning most copyright laws in Europe experienced difficulties in characterizing film works. Faced with the first claims for protection by the fast-growing industry, lawyers hesitated in their approach to protection. A first reaction was to consider cinematograph films as mere mechanical apparatuses, not unlike phonogram cylinders, and to exclude them from copyright protection. But the analogy with photographs proved more satisfactory. The problem was that the copyright status of photographs was still being debated in most copyright and authors’ rights countries. In this respect, European countries could be classified into two main categories.

In several countries, photographs were given the same protection as other copyright works, that is, they were protected under a ‘full’ copyright. This was the case in France and in countries influenced by French law. The fact that...
photographs were protected under the generally applicable regime of copyright, and that the list of copyright works was not exhaustive under French copyright law, certainly facilitated the treatment of films as a subject-matter for protection, and avoided the technical discussions on ‘categorization’ as photographs or dramatic works that arose in the UK and Germany. In addition, the standard of originality appeared to be comprehensive enough to accommodate most films, including documentaries and newsreels.

In other countries, the protection granted to photographs was more limited (at least in duration) than the protection granted to other subject-matter. This was the case in Germany, in countries influenced by German law and, to a lesser extent, in the UK.

Hence in Germany the Act of 1901 on literary copyright did not contain any provisions on the protection of cinematograph films, or on infringement of copyright works through cinematography. Legal commentators admitted early on that literary or dramatic works could be infringed by being adapted or reproduced on cinematograph film. However, a majority of such commentators were of the opinion that films themselves could not be protected under the Law of 1901. Accordingly, the only protection available was the limited protection granted to photographic works by the German Act of 1876 and later by the Law of 1907 on artistic copyright.

In the UK, before 1911, it was widely acknowledged that, since photographs were protected under the Fine Arts Copyright Act 1862, cinematograph films

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photographs, but photographs were protected by case law when cinematography appeared. The protection granted to films was similar to that granted under French law.

In Spain, photographs were protected as artistic works under the Act on Intellectual Property of 10 January 1879 (Decree of 3 September 1880). Although the question is not documented, films were probably protectable as series of photographs.


7 In this Act photographs were protected only against mechanical reproductions, and protection was granted for five years post-publication (or after the occurrence of one of the facts enumerated in the Act in the absence of publication). In addition, the protection was subject to the performance of cumbersome registration formalities.

8 Which abolished these formalities and extended protection to ten years post-publication (or p.m.a. for unpublished photographs), without retroactive effect. In contrast, the then applicable term of protection for literary and dramatic works was thirty years p.m.a.

9 25 & 26 Vict., c. 68.
could be protected as a series of photographs. However, the formalities and the protection afforded under the Act proved ill-adapted to the new medium.

As films evolved from mere pantomimes to more elaborate dramas, more satisfactory analogies were developed with other copyright works, especially dramatic works, which in most countries was to result in protection as literary and artistic works.

But a characterization as dramatic works was not always possible. For example in the UK, protection under the heading of dramatic works was thought even more uncertain than protection as a series of photographs, due to the ruling in *Tate v. Fullbrook*, in which the Court of Appeal decided that what was protected under the Dramatic Copyright Act 1833 and the Copyright Act 1842 had to be ‘capable of being printed and published’.

**THE BERLIN CONFERENCE OF THE BERNE CONVENTION (1908): FILMS AS SERIES OF PHOTOGRAPHS AND DRAMATIC WORKS**

The Berne Convention was the first legal instrument to tackle the new invention. Cinematographic works were included in the text of the Convention after a proposal by France at the Berlin Conference in 1908. This proposal was not inspired by cinematographers, but by dramatists who complained against uses of their works through cinematography. It consisted in the inclusion of a new text in the Convention prohibiting infringement of literary and artistic works through reproduction on cinematographic films and cinematographic exhibition. The Conference decided to address the question of the protection of cinematograph films as well.

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10 *Barker Motion Co. v. Hulton* (1912) 28 TLR 496. In the US, photographs and negatives were protected under an Act of 3 March 1865 (c. 126, 13 Stat. 540); accordingly, in *Edison v. Lublin*, 122 Fed. 240 (CCA 3d 1903), it was held that films were copyrightable as series of photographs under s. 5(j) of Title 17 USC.

11 The main problem with this indirect protection was that, under the Fine Arts Copyright Act 1862, in case of transfer of the negative, the copyright was lost unless it was either expressly reserved to the vendor or conveyed to the assignee in a writing signed by them (1862 Act, s. 1). Also, no action was sustainable, nor any penalty recoverable, in respect of anything done before registration at Stationers’ Hall (Section 4). The 1862 Act provided for a registration of each photograph taken from a different negative, but at that time photo-plays were registered only as reels of films. In consequence, some authors doubted that a registration of reels would be sufficient to trigger the protection of the 1862 Act (W. Carlyle Croasdell, *The Law of Copyright in Relation to Cinematography*, London, Ganes, 1911, p. 12). Finally, there was no performing right or ‘right of exhibition’ in relation to photographs.

12 [1908] 1 KB 821; 98 LT 706; 77 LJKB 577; 24 TLR 347; 52 SJ 276.

13 *Actes de la Conférence de Berlin 1908*, International Office, Berne, 1909, p. 190. The Paris Act of 1896 and its preparatory works were silent on the subject.
The system set up by the Convention is rather complex. Cinematographic works were not included in the list of protected works in article 2 of the Convention, but protection was granted through references made in its text.

The Convention first provided for the protection of photographic works in its article 3:

this convention shall apply to photographic works and to works produced by a process analogous to photography. The contracting countries shall be bound to make provisions for their protection.

In doing so, article 3 contained an indirect reference to cinematographic works, as ‘works produced by a process analogous to photography’. However, a direct reference to the new works is to be found in article 14 of the Convention. This article extended the rights of authors of literary and artistic works to the right to authorize the reproduction and public performance of their works by cinematography, and instituted the protection of cinematographic works under the Convention:

Authors of literary, scientific or artistic works shall have the exclusive right of authorizing the reproduction and public performance of their works by cinematography.

Cinematographic productions shall be protected as literary or artistic works, if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Without prejudice to the copyright in the original work the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

The preceding provisions apply to reproduction or production effected by any other process analogous to cinematography.

The Convention thus suggested a dual system of protection for films: as series of photographs, and, for those having a ‘personal and original character’, as dramatic works distinct from their script. This distinction is made clear in the final report of the Conference:

We have just seen the cinematograph being used for purposes of reproduction or adaptation. It can also serve to give form to a creation. The person who takes the cinematographic shots and develops the negatives will also be the person who has imagined the subject, arranged the scenes and directed the moves of the actors . . . [W]e have here a dramatic work of a particular genre which it must not be possible to appropriate with impunity . . . It is not the question of monopolising an idea or a subject but of protecting the form given the idea or the development of the subject. Judges will assess the matter in the same way as for ordinary literary and artistic works.\(^\text{14}\)

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\(^\text{14}\) Report by Louis Renault. The Berne Convention includes dramatic works in

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In addition, paragraph 3 of article 14 provided for the protection of cinematographic adaptations (reproductions of literary works) as original works of authorship.

Of course, concerning original cinematographic productions (non-adapted films), the criteria of originality set by the second paragraph was to create problems in several jurisdictions where this text was faithfully implemented, as the lack of ‘personal and original character’ would trigger the limited copyright protection sometimes granted to photographs. This created disparities and uncertainties as to the protection of documentary films and newsreels.15

THE INDIRECT PROTECTION THOUGH EXISTING SUBJECT-MATTER (1908–1950)

The Berne Convention left significant room for signatory States to tailor a new regime for audiovisual works. As a consequence, different approaches were adopted in the definition of the subject-matter, which have consequences for the current scheme for protection that go far beyond the subject-matter issue.

France adopted no specific copyright act in relation to films, and did not modify its copyright statutes in this respect until 1957. The distinction suggested in the Berne Convention between ‘dramatic’ films protected as literary works and ‘non-dramatic’ films protected as series of photographs was not really discussed by legal commentators and was not instituted by case law. In a system with an open list of protected work, cinematographic works were protected by courts as original works of authorship. Also, since photographs were protected as original works under a full copyright, the protection of documentary films and newsreels did not raise difficulties. And the absence of a requirement of fixation as a prerequisite for copyright protection facilitated the protection of television works and live television shows.

Other countries implemented indirect protection though other subject-matter.

In the United Kingdom, cinematographic works were given express protection in the 1911 Act. The protection of films was dealt with in section 35(1), which defined ‘dramatic work’ as including ‘any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character’.16 Therefore the subject-matter for the larger category of literary and artistic works. On the history of film protection under the Convention, see S. Ricketson, The Berne Convention on the Protection of Literary and Artistic Works, London, Kluwer, 1987, Chapter 10, pp. 549–89; W. Nordemann, K. Vinck and P. W. Hertin, International Copyright and Neighbouring Rights Law (trans. G. Meyer), New York, VCH, 1990, pp. 141 et seq.

15 Art. 14(2) of the Berne Convention, as amended in 1948, prevented the exclusion of documentary films and newsreels from protection as literary and artistic works.

16 Which echoes art. 14 of the Berne Convention. This definition of dramatic works in the 1911 Act did not raise special comments during the parliamentary debates.
protection was not the film strip, the recording, but the dramatic work (‘cinematograph production’) produced for and expressed through cinematography. In addition to this protection as a dramatic work, the definition of photographs in section 35 of the 1911 Act included a ‘photo-lithograph and any work produced by any process analogous to photography’, which clearly encompassed the technology inaugurated by the Kinetograph. Thus cinematograph films (or, more exactly, cinematograph film frames) could be protected as series of photographs.

The two headings of protection were cumulative, and it was held that a film which could not meet the requirement of originality for a dramatic work could still be protected as a series of photographs. Originality was a prerequisite for protection under both headings, and it appears that the emphasis put by section 35 on the originality of cinematograph productions did not set a more stringent test than for other types of works. However, there remained uncertainties as to which films could be considered as dramatic works under the Act.

The characterization of a given film as a dramatic or a non-dramatic film (the latter being protected under the sole heading of photographs) is important. Dramatic films received protection for a longer period, that is, author’s life plus fifty years, as against fifty years from their making for non-dramatic films. Also, dramatic films could be reproduced by anyone, subject to

Section 35(1) further defined ‘cinematograph’ as including ‘any work produced by a process analogous to cinematography’.

However, the idea of protection of the visual recording constituted by the film strip as a specific subject-matter, by analogy to sound recordings, was expressed in the Gorell Committee Report, and comparison between the two ‘recordings’ was made.

Nordisk Films Co. Ltd v. Onda [1919–24] MCC 337; also, under a similar definition, the Canadian case of Canadian Admiral Corp. Ltd v. Rediffusion Inc. (1954) 20 CPR 75; 14 Fox Pat. C. 114.


It presents a special difficulty under the 1911 Act because of the express inclusion of ‘cinematograph productions’ in the definition of dramatic works. Did it mean that cinematograph productions which could be likened to dramas were protected under the dramatic copyright, or that all cinematograph productions were to be considered as dramatic works? In the first scenario, works like newsreels or television shows would not be considered as dramatic works (even under a broad definition of ‘dramas’), and could only be protected as series of photographs; in the second, all cinematograph productions would be protected as dramatic works, provided that they met the minimum level of originality. It is submitted that the first construction is reasonable, but the question is open to debate.

1911 Act, s. 3.

Section 21.
payment of a royalty, twenty-five years after the author’s death, whereas this royalty did not apply to photographs. Another important difference between the two types of protection is constituted by the definition of the exclusive rights, in particular in relation to acts of adaptation. Another difference concerns authorship and initial ownership of copyright.

In Germany, the Literary Copyright Act of 1901 and the Artistic Copyright Act of 1907 did not contain provisions regarding films, but legal commentators considered that films could be protected as series of photographs under the Law of 1907. This situation was modified with two amendment Acts of 22 May 1910, which were to remain in force until the reform of 1965. The first amendment Act concerned literary and musical works, and the second artistic works and photographs. As a result of these amendments, cinematographic films were protected under several headings, and could be classified in two categories. Cinematographic works as such (i.e. dramatic theatrical cinematographic films) were protected by a full copyright (both as an artistic work and as a work of literature). However, a cinematographic work could also be protected as a series of photographs. Documentary films and newsreels, which could not be considered as artistic or literary works, were only afforded the limited protection granted to photographs.

THE EVOLUTION TOWARDS A SPECIFIC SUBJECT-MATTER (1925–)

Under the pressure of the industry, several European systems soon realized that the general scheme for protection, or the protection scheme for photographic and dramatic works, were ill-adapted to the new medium, notably in terms of authorship and initial ownership.

Most authors’ rights countries reacted by creating a sub-regime for audio-visual works, with specific features in terms of authorship, initial ownership and sometimes moral rights. Such adaptation, however, is not always satisfactory, as unwelcome aspects of the general scheme can always come out of the gaps in specific regulations. This explains why some legislation adopted a more radical solution and devised a specific subject-matter for films. This technique allows more certainty in the definition of the protected works, and more freedom in the tailoring of a specific regime adapted to the needs of the industry.

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24 Section 3. But this did not give a right of public performance.
25 Copyinger and Skone James on Copyright, 1915, p. 251.
26 See Kamina, op. cit., at 18.
In this respect, Italy was a pioneer. The Italian Copyright Act of 1925 adopted an original scheme for film protection. It mentioned in its article 2 cinematographic works as a specific subject-matter, distinct from dramatic works and photographs, and protected these works independently of any requirement of originality. Therefore, all films, whether original or not, whether dramatic or scientific films or simple newsreels, were protected under the Act. The Law of 22 April 1941 reinforced the originality of Italian law. As to the subject-matter for protection, article 2(6) referred to ‘works of cinematographic art, whether in silent or sound form, provided they are not mere documentaries’. As a consequence, documentary films and newsreels were protected not under the cinematographic copyright, but only as series of photographs under a specific neighbouring right for non-original photographs. This neighbouring right lasted for twenty years from the making of the negatives, compared with thirty years after making or public exhibition for cinematographic films.

But the trend towards implementation of specific subject-matter or films was reinforced from the 1950s, under the pressure of the post-World War II film industry and of new technological developments, above all television.

In the United Kingdom, the 1956 Act, which in many aspects was a modern Copyright Act, marked in relation to audiovisual works a radical departure from the previous law, and from both authors’ rights systems and US copyright. The Act expressly excluded cinematographic works from the definition of photographs and dramatic works. Instead, it introduced new subject-matter applicable to film works under the form of ‘Part II’ copyrights, that is, ‘entrepreneurial’ copyrights which did not require originality as a condition for protection. The specific subject-matter for film protection was the ‘cinematograph film’. The specific subject-matter for films, the ‘cinematograph film’, was defined in section 13(10) as:

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29 See Giannini, in Rivista Trimestrale di Diritto et Procedura Civile, June 1953, p. 496; Rivista di Diritto Commerciale, July 1953.
30 Part II, Chapter V, ‘Rights relating to photographs’.
31 Copyright Act, art. 92.
32 Ibid., art. 32.
33 Section 48. ‘photograph’ means any product of photography or of any process akin to photography, other than part of a cinematograph film. ‘dramatic work’ includes a choreographic work or entertainment in dumb show if reduced to writing in the form in which the work or entertainment is to be presented, but does not include a cinematograph film, as distinct from a scenario or script for a cinematograph film.
34 But broadcasts were equally protected under a distinct Part II copyright. The Cable and Broadcasting Act 1984 later introduced a copyright in cable programmes.
any sequence of visual images recorded on material of any description (whether translucent or not) so as to be capable, by the use of that material, (a) of being shown as a moving picture, or (b) of being recorded on other material (whether translucent or not), by the use of which it can be so shown.  

This scheme was followed in the Irish Copyright Act of 1963. During the copyright reforms of the 1950–60s, all authors’ right systems have expressly included films in their lists of protected works in order to establish a sub-regime or at least certain specific rules concerning the exploitation of film works. The Berne Convention itself will commend such a sub-regime, for example by providing, in the Stockholm Act, for a presumption of assignment of rights in ‘cinematographic works’ to the film producer.

THE NEIGHBOURING RIGHT IN THE VIDEOGRAM

Despite the implementation of specific regimes and subject-matter under authors’ rights, in authors’ rights systems the idea developed of an additional right in the audiovisual recording, possibly inspired by the UK example in relation to phonograms (in the 1911 Act).

This idea of a right in an audiovisual recording (or in a television broadcast), without any requirement of originality, was proposed relatively late. The Italian Act of 1925 was the first copyright Act to implement this concept in relation to films and photographs. It was followed by the UK in 1956 in relation to films. In Germany, the Copyright Act 1965 introduced neighbouring rights in film recordings in favour of film producers. The German example was followed by several Member States in the context of the copyright reforms of the 1980s, in particular in France in the Copyright Amendment Act of 1985. The resulting disparity in the scheme of film protection was thought to create a distortion in the internal market. The question was raised in the harmonization programme of the Commission which led to the institution of the related right of the film producer at Community level in the EC Rental Directive, with surprisingly very little debate on the opportunity of such additional protection.

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35 This definition shows that, contrary to the general assumption and the use of the term ‘film’, the copyright was not in the visual recording, as it is under the present Act, but in the (recorded) underlying visual work (‘sequences of images . . . recorded’).
36 In its art. 14bis(2). For the implementation of this presumption by EC Member States, see Kamina, op. cit., at 159–61.
2. Problems raised within the European Union

DISTINCTION
The definition of the subject-matter for audiovisual works raises two series of questions. The first concerns the definition of the main subject-matter for protection, which, in most systems (with the notable exceptions of the UK and Ireland), is an original description of work, the audiovisual work (A). The second concerns the institution of an additional protection, under a neighbouring or related right description, of the film recording (B).

2.1 The definition of the main subject-matter for protection of audiovisual works

THE DEFINITIONS AT THE INTERNATIONAL AND REGIONAL LEVELS
The main international copyright agreements contain no real definitions of the terms ‘cinematographic’ or ‘audiovisual works’. In its article 2(1), the Berne Convention uses the term ‘cinematographic works, to which are assimilated works expressed by a process analogous to cinematography’; but the Convention gives no definition of that term. The same is true under the Universal Copyright Convention, the TRIPs Agreement and the WIPO Copyright Treaty of 1996.

In contrast, the term ‘audiovisual works’ is used in the WIPO Draft Model Provisions and in the Treaty on the International Registration of Audiovisual Works of 20 April 1989. In the WIPO Draft Model Provisions, audiovisual works are defined as works consisting of a series of related images and accompanying sounds, if any, which are intended to be shown by appropriate devices. The definition in the Treaty appears to be more restrictive: an audiovisual work is defined as:

any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible.

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37 Which also uses the term ‘cinematographic works’ (art. 1), without further specification.
38 Art. 11. Cinematographic works, without further definition.
39 Art. 7(1)(ii) and (2)(ii).
40 Section 3(1)(vi).
41 Art. 21(1).
42 Art. 2.
Possibly the broadest definition at the supranational level is given by the EC copyright directives. The Rental Directive uses the term ‘film’, but its article 2 specifies that:

for the purposes of this Directive, the term ‘film’ shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.

The same definition is used in the other copyright directives. 43 Neither cinematographic nor audiovisual works are defined further in these directives, but the reference to ‘moving images’ is broad. However, the definition of audiovisual works does not seem to be within the scope of harmonization. In this respect, Member States may probably retain a slightly different definition of the subject-matter, as long as the main objectives of harmonization are met.

These international and regional definitions raise a series of questions which are particularly relevant in the European context.

DO THESE LEGAL INSTRUMENTS REQUIRE THE INTRODUCTION OF A SPECIFIC SUBJECT-MATTER FOR AUDIOVISUAL WORK?
First, do these legal instruments require the introduction of a specific subject-matter for audiovisual work, or would a copyright Act indirectly protecting audiovisual works under other subject-matter (e.g. as dramatic works or as series of photographs) comply with their provisions?

It is submitted that nothing in the international copyright treaties or in the relevant EC copyright directives prevents the protection of films through another subject-matter. However, the creation of at least a sub-category is required in order to implement elements of the specific regime set by the EC directives in terms of duration, authorship and exclusive rights. Problems of definition are thus unavoidable.

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43 The Cable and Satellite Directive uses only the term ‘cinematographic or audiovisual work’. However, its provisions refer to the protection under the Rental Directive, and therefore the above definition should extend to ‘moving images’ as well. The Term Directive uses the same language as the Rental Directive. Art. 2 of the Term Directive is headed ‘Cinematographic or audiovisual works’, but the Directive also uses the term ‘film’ to define the right of the ‘producer of the first fixation of a film’. It further specifies in art. 3(3) that ‘the term “film” shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound’. The Directive on Copyright and Related Rights in the Information Society uses the term ‘film’, without further definition.
WOULD A SCHEME THAT PROTECTS ONLY AUDIOVISUAL RECORDINGS, WITHOUT PROVIDING A SPECIFIC PROTECTION FOR THE UNDERLYING (RECORDED) AUDIOVISUAL WORK, BE ACCEPTABLE?
This is for example the solution adopted in the United Kingdom in the 1988 Act, and in the Irish Copyright Act 2000. Although this is not stated expressly in the Berne Convention, it seems to derive from the description of the cinematographic work as an original work of authorship and from preparatory works to the Convention that the definition refers to the recorded work, not to the recording itself. However, it is submitted that such a system would meet the requirements of the Berne Convention: a protection through the recording has no effect on the minimum protection guaranteed by the Convention which, in any case, allows the requirement of a fixation as a prerequisite for copyright protection. In contrast, it is unlikely that such a system would comply with the requirements of the EC copyright directives, at least if no other protection exists in relation to the underlying work.

IS ORIGINALITY A NECESSARY REQUIREMENT FOR FILM PROTECTION?
The answer to this question appears negative, as long as under the definition of the subject-matter all ‘original’ films are protected.

According to article 14bis of the Berne Convention, ‘a cinematographic work shall be protected as an original work’, and ‘the owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work’. The absence of a requirement of originality for ‘films’ under UK copyright does not appear to contravene these provisions, since all ‘original’ films are in any case protected. The same reasoning would apply under EC law.

Note, however, that the protection under the Berne Convention might not extend to those cinematographic works which are not ‘original’ according to

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44 See the General Report of the Berlin Conference, quoted supra. Final reports are thought to present an ‘authentic’ or ‘authoritative’ interpretation of the Convention (Ricketson, op. cit., at p. 137, para. 4.12). See also art. 2 of the Convention: ‘works . . . expressed by a process analogous to cinematography’; by analogy the work ‘expressed by photography’ is not the negative, but the underlying work of the photographer. See also Ricketson, ibid., p. 555, n. 3.
45 However, would a country which does not protect musical works but only sound recordings comply with the Berne Convention?
46 See p. 96.
47 And such a protection exists in the UK through the dramatic copyright, since the holding of the Court of Appeal in Norowzian v. Arks Ltd (No. 2) [2000] EMLR 67; [2000] FSR 363, CA; see paras. 54 et seq. infra and p. 92.
48 See Ricketson, op. cit., at para. 10.10, p. 557. Consider also protection as an original dramatic work as a result of the decision in Norowzian, ibid.
the criterion used in each national law. As a consequence, a limited number of ‘films’ protected under UK law could lie outside the scope of the Convention.49

THE SCOPE OF THE DEFINITION OF ‘AUDIOVISUAL WORKS’ IN NATIONAL LAWS

At present, and if we set aside for the moment the specific cases of the UK and Ireland (in particular the indirect protection offered through the ‘dramatic copyright’), it can be said that the existing national definitions of ‘audiovisual work’ are similar.

In France, article L.112-2 of the Intellectual Property Code defines audiovisual works as ‘cinematographic works and other works consisting of animated sequences of images [séquences animées d’images], with or without sound’. Accordingly, ‘cinematographic works’ are treated as a sub-category of ‘audiovisual works’.50 In this French definition of audiovisual works, emphasis is placed on the animated sequences of images. This language is broad, and carries no exclusion for documentaries, newsreels or other types of film works.

In Spain, the Copyright Act points to ‘cinematographic works and any other audiovisual works’ defined as: ‘creations expressed by means of a series of associated images, with or without incorporated sound, that are intended essentially to be shown by means of projection apparatus or any other means of communication to the public of the images and of the sound, regardless of the nature of the physical media in which the said works are embodied’.51

Similarly broad definitions are found for example in Austria,52 Bulgaria,53

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49 E.g. footage produced by security cameras. A more stringent concept of originality in a given signatory State could also exclude from the benefit of the Convention other categories of films which would otherwise be considered as ‘original’ under UK copyright (e.g. newsreels).

50 The distinction between ‘cinematographic’ and ‘audiovisual’ works has no consequences in terms of copyright protection. However, transfers of rights in cinematographic works are subject to registration requirements, which is not the case for audiovisual works. The characterization also has consequences for the administrative regime of production and broadcasting and on the applicable VAT rate. Although ‘cinematographic works’ are not further defined in the Act, the notion corresponds to audiovisual works intended for theatrical exhibition.

51 Art. 86 (WIPO translation).

52 Copyright Act, art. 4.

53 New SG. No. 28/2000: ‘audio-visual works shall stand for series of interconnected images fixed on any type of medium, with either a soundtrack or not, perceived as a mobile picture and used in any manner (…)’.
the Czech republic, Estonia, Hungary, and in the Netherlands. In Luxembourg, audiovisual work is defined as a work ‘consisting mainly in sequences of animated pictures, either with or without sound’. In contrast, ‘audiovisual work’ is not defined in the Belgian Copyright Act. However, its travaux préparatoires define such work as ‘a mixture of sounds and moving images, which once completed is destined to be shown in public’. Although this definition appears to require sound, it is generally admitted that an audiovisual work can be silent. There is no definition of audiovisual works in the copyright Acts of Greece, Portugal, Poland and of the Scandinavian Member States.

As mentioned above, the scheme for protection is slightly different in Germany and in Italy. In Germany, the Copyright Act of 9 September 1965, as amended, refers to ‘cinematographic works [Filmwerke], including works produced by processes similar to cinematography’, which is the language of article 2(1) of the Berne Convention. There is no further definition of these works.

54 Act No. 121/2000, art. 62: ‘An audiovisual work shall mean a work created by the arrangement of works used audiovisually, adapted or unadapted, constituted of a number of recorded interlinked images evoking the impression of movement, accompanied by sound or mute, perceivable by sight and, if accompanied by sound, perceivable by hearing’.

55 Art. 33 of the Copyright Act of 11 November 1992, as amended: ‘Audiovisual works are all works which consist of series of related images whether or not accompanied by sound and which are intended to be demonstrated using corresponding technical means (cinematographic films, television films, video films, etc.)’.

56 Act No. III of 1999 on Copyright, as amended, art. 64: ‘A cinematographic creation shall be taken to mean a work which is expressed by motion pictures arranged in a predetermined order and accompanied or not by sound, irrespective of what carrier the work has been fixed on. The feature film produced for movie projection, the television film, the publicity and documentary film as well as cartoons and educational films shall in particular be rated as cinematographic creations.’

57 Copyright Act, art. 45a.

58 Copyright Act (2001), art. 20. There was no definition of the audiovisual work in the 1972 Act.


60 The Copyright Act uses the term ‘audiovisual work’.

61 Art. 2 of the Code lists ‘cinematographic, television, phonographic, video and radiophonic works’ without further definition.

62 Copyright Act of 4 February 1994, art. 2 (‘audiovisual works (including visual works and sound works)’).

63 The Danish, Finnish and Swedish copyright Acts use the term ‘cinematographic work’ (art. 1).

64 Art. 2(6).
works. However, article 95 of the German Act introduces an additional subject-matter for audiovisual works, under the heading ‘moving pictures’ (Bildfolgen). It provides that most aspects of the regime of cinematographic works shall apply mutatis mutandis to ‘sequences of images and to sequences of images and sounds which are not protected as cinematographic works’.  

What audiovisual works could be considered only as Bildfolgen and not as Filmwerke is unclear. The neighbouring right in the audiovisual recording of article 94 also extends to recordings of Bildfolgen.

The situation is also specifically dealt with in Italy. Article 2(6) of the 1941 Act, as amended, refers to: works of cinematographic art, whether in silent or sound form, provided they are not mere documentaries protected in accordance with the provisions of Chapter V of Part II (articles 87–92). Accordingly, this definition excludes documentaries or newsreels lacking originality, which may be protected as series of photographs under a specific neighbouring right in photographs under articles 87 et seq. of the Act.

Article 87 provides that:

Pictures of persons, or of aspects, elements or features of natural or social life, obtained by photographic or analogous processes, including reproductions of works of graphic art and stills of cinematographic film, shall be considered to be photographs for the purposes of the application of the provisions of this Chapter.

Under this definition, it would appear that this neighbouring right is also applicable to (non-original and possibly original) stills of original cinematographic films. This exclusive right in photographs subsists for twenty years from their making. Original television works and documentaries may, however, be protected as works of cinematographic art.

Concerning the United Kingdom, we know that since the holding of the Court of Appeal in the Norowzian case, audiovisual works, as distinct from their recordings, can be protected as original dramatic works. In this holding, Nourse LJ restated the definition of dramatic works in the following terms:

In my judgment a film can be a dramatic work for the purpose of the 1988 Act. The definition of that expression being at large, it must be given its natural and ordinary

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65 With the exclusion of the presumptions of assignment of arts. 89 (authors) and 92 (performers) of the Act. See paras. 161 and 336.
66 P. Kamina, op. cit., at 83.
68 WIPO translation.
69 Art. 92.
meaning. We were referred to several dictionary and textbook definitions. My own, substantially a distilled synthesis of those which have gone before, would be this: a dramatic work is a work of action, with or without words or music, which is capable of being performed before an audience. A film will often, though not always, be a work of action and it is capable of being performed before an audience. It can therefore fall within the expression ‘dramatic work’ in section 1(1)(a) and I disagree with the judge’s reasons for excluding it.

But what is the exact scope of this definition, applied to audiovisual works?

Under the definition of Nourse LJ, fictional cinematic works are certainly dramatic works. The work of their creators, like the work of the author of a written play or a dance or mime or a script, is a work such as is capable of being performed before an audience. This final audiovisual work cannot be reduced to the dramatic contributory work constituted by the script, since it is obvious that new elements have been added which are included in the larger dramatic work. In that case, the final cinematic work is not the mere performance of the script, but its visual translation and interpretation, that is, a new derivative work.

Also, in our opinion non-fictional works such as documentaries could still be protected as dramatic works. For example, in the case of a natural history documentary great skill and care will normally go into selecting the subject-matter and the manner in which the film is shot and then into editing the final product. The resulting film will be more than just a record of naturally occurring phenomena but will have its own ‘story’ and frequently will be designed so as to provoke sympathy or awe in the mind of the viewer.

But we doubt that most newsreels or television shows could meet the definition of drama, since in Norowzian Nourse LJ pointed in the direction of the ordinary use of language. This would restrict protection as a dramatic work to those audiovisual works which convey a story in the usual meaning. Of course, these works, once recorded, will attract protection under the non-original description of the work (the ‘film’, the audiovisual recording).

In conclusion, as regards audiovisual works in the common sense, that is, film broadcast on television or exhibited in theatres, it would seem that the range of works covered by national definitions of ‘film’ or ‘audiovisual works’ is similar. In countries where the authors’ rights tradition prevails,

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71 See *Milligan v. Broadway Cinema Production*, 1923 SLT 35; [1922–3] MCC 343, Court of Session. Suggested by Farwell J in *Tate v. Fullbrook*, quoted at para. 55 supra. Compare also the case of a ballet, protected as a composite dramatic work, constituted by the music, the story, the choreography, the scenery and the costumes (*Massine v. De Basil* [1936–45] MCC 223).

72 Laddie et al., op. cit., at pp. 7–9.

73 As did Lord Bridge in the *Green* case.
newsreels and documentaries are not excluded from protection by the definition of audiovisual works. In sum, the differences in the scope of protection will result not from the definition of audiovisual work, but from the application of the concept of originality, which has not been harmonized. This could affect the protection of certain television shows or recordings of live events.74

APPLICATION TO MULTIMEDIA WORKS, VIDEOGAMES, ETC.

Differences may subsist, however, between Member States in the treatment of works such as multimedia works and videogames.

Most definitions are broad enough to encompass displays of videogames and multimedia works, if not these works in their entirety. However, the rules triggered by characterizing such works as audiovisual works, notably in terms of authorship, ownership and contracts, can prove ill-adapted to the production and the exploitation of these works. Hence, in countries with a broad definition of audiovisual works, some courts have refused to characterize multimedia works, especially interactive works, or videogames, as audiovisual works.75

Some support for this exclusion can be found in EC law. The EC Term Directive, by setting out a list of contributors including the director, the

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74 Note that this question must not been confused with the issue of protection of television formats. The format issue does not relate to the sequence of image (the final audiovisual work), but rather to the underlying ‘dramatic’ work (and to the idea–expression dichotomy).


The main advantage of distinguishing multimedia works from audiovisual works under French law is to avoid the application of some unwelcome or unadapted aspects of the regime of film protection. For example, in Vincent v. Cuc Software, the disqualification resulted in the application of the French doctrine of ‘collective work’, which grants a legal person initial copyright in the works created by its employee (this doctrine being expressly excluded in the case of audiovisual works). This certainly accounts for the solution adopted by the court.
screenwriter, etc., for the purposes of calculating the term of copyright in the film, suggests that the works considered for protection (or at least subject to the specific provisions concerning audiovisual works – films – under EC law) do not extend beyond computer games or multimedia works. Since these duration provisions have been implemented in the definition of the regime for audiovisual works by national legislation, this could (and probably should) be construed as an implicit exclusion of videogames and multimedia works from the definition (and sub-regime) for audiovisual works.

2.2 The related right and the double protection for audiovisual works

THE REQUIREMENT OF A DOUBLE PROTECTION UNDER THE EC COPYRIGHT DIRECTIVES

A specific feature of film protection at the European level is the requirement of a double system of protection for films, inspired by the model adopted by most EU Member States in the 1980s. When it comes to the protection of audiovisual works, the main directives in the field of copyright, the Rental, Term and InfoSoc Directives, clearly target two different sets of rights, which have different terms and ‘authors’: the right of the author or authors of the film on the one hand, and the related right of the producer of the first fixation of the film, on the other hand.

In article 2(1), the Rental Directive provides that the rental and lending right shall belong:

(a) to the author in respect of the original and copies of his work,
(b) to the performer in respect of fixations of his performance,
(c) to the phonogram producer in respect of his phonograms, and
(d) to the producer of the first fixation of a film in respect of the original and copies of his film.

The Directive thus makes a distinction between rights of authors, rights of performers and rights of phonogram and film producers. Article 2(2) further specifies that, for the purpose of this Directive, ‘the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors’. Accordingly, by this reference to the ‘author’, the right of the film director falls within the first category. In contrast, the right of the producer of the first fixation of a film is addressed in Chapter II of the Directive, dedicated to ‘rights related to copyrights’.

The Term Directive adopts this distinction between authors’ rights and related rights.76 As a general rule, recital 11 and article 1 state that the duration

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76 In its title, recitals and in arts. 1 and 3. Related rights are also referred to as neighbouring rights in recital 10.
of the ‘author’s right’ is extended to seventy years after the death of the author. Article 2, titled ‘Cinematographic or audiovisual works’, provides that the principal director of a film shall be considered as its author or one of its authors, and adapts the seventy-year duration to films. In contrast, article 3, titled ‘Duration of related rights’, specifies that the ‘rights of producers of the first fixation of a film’ shall expire fifty years after the fixation, publication or communication to the public, as the case may be. Therefore, by setting different terms for protection, the Term Directive leaves no doubt that the right of the author of the film and the right of the film producer are distinct.

The InfoSoc Directive repeats this distinction.

Even if no proper definition of these elements is given, the copyright directives clearly equate the ‘film’ and its synonym, the ‘cinematographic or audiovisual work’, with the underlying audiovisual work, and not with the visual recording.\(^{77}\)

In contrast, nothing requires formally that the right of the producer of the first fixation of the film be a right on this fixation; it could well be a perfectly overlapping right on the underlying audiovisual work (without the requirement of originality). However, the absence of a fixation right for film producers in the Rental Directive would appear to indicate that the right is on the recording itself, rather than on the underlying sequence of images. In addition, this right corresponds to the right of the ‘videogram’ producer, which is defined in the relevant Member States as the right of the audiovisual recording.\(^{77}\)

**DOES THE UNITED KINGDOM COMPLY WITH THESE REQUIREMENTS?**

The question could be asked before the Norowzian case under the provisions of the CDPA 1988.

We saw that the choice made in the UK Copyright Act 1956 in relation to film works was to adopt a new and specific subject-matter under a Part II (entrepreneurial) copyright. The 1988 Act continues to treat audiovisual works as specific descriptions of works which do not have to satisfy any requirement of originality. In that respect, the main difference from the previous law is that, under the new Act, the specific subject-matter for audiovisual works, the ‘film’, is defined in section 5 as the visual recording itself, and not as the underlying sequence of images.\(^{78}\) Therefore it could be said that in the 1988 Act cinematographic and audiovisual works were not given protection as such, but only through their recordings.

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\(^{77}\) The Directive talks about the ‘first fixation of a film’. How can one fixate a recording?

\(^{78}\) “‘Film’ means a recording on any medium from which a moving image may by any means be produced’ (originally s. 5(1), now s. 5B(1) of the Act).
On this basis the answer to our question would be negative: implementing one form of protection only instead of the two forms required is certainly an incorrect implementation of the directives.

But the 1988 Act also differs from the 1956 Act in that it reopened the possibility of additional or residual protection of audiovisual works as dramatic works. This was confirmed by the Court of Appeal in *Norowzian v. Arks Ltd*, with important consequences for the scheme of copyright protection for films.

As a result of this decision, it is now clear that audiovisual works can be protected in the UK as dramatic works. Therefore, the scheme for film protection would be close to that in relation to musical recordings, with two copyrights, one in the recording (sound recording/‘film’), and one in the work embodied in this recording (musical work/audiovisual work). As a consequence, it is submitted that the actual scheme of protection in the UK complies with the Community requirement of a double protection for audiovisual works.

Of course, it is not clear whether such reasoning is applicable under Irish Copyright, or in other jurisdictions inspired by the British scheme for protection, like Cyprus. Note also that the present situation in the United Kingdom still raises issues of compatibility with EC law concerning the calculation of duration. We know that under the Term Directive the ‘author’s right’ in the ‘cinematograph or audiovisual work’ and the ‘related right’ have different terms. The problem is that the implementing regulations in the United Kingdom extended the right in the ‘film’, which is the right in the recording,

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79 In contrast with the previous Act, in the 1988 Act, audiovisual works are no longer excluded from the definition of dramatic works. In addition, the specific subject-matter for film protection, the ‘film’, is the visual recording, and is thus distinct from this underlying work. Moreover, it is now clear that a dramatic work can attract protection when it is fixated in film form only (CDPA 1988, ss. 3 and 178). Accordingly, certain commentators suggested that audiovisual works could be protected both as films, through their recording, and as (recorded) dramatic works.

80 See p. 92.

81 In Cyprus, art. 2 of the Copyright Law No. 59, of 3 December 1976, as amended, defines ‘cinematograph film’ as ‘the recording by any means from which moving images may be reproduced by any means’. Malta seems to implement the double protection as required by the EC Directive. Its Copyright Act of 25 April 2000 defines ‘audiovisual work’ as ‘a work that consists of a series of related images which impart the impression of motion, with or without accompanying sounds, susceptible of being made visible and, where accompanied by sounds, susceptible of being made audible’; and first fixation of films is protected under a related right.


83 Arts. 2(2) and 3(3).
to seventy years after the death of the last contributor listed for this purpose, which went further than the term provided for this class of work in the Directive, which must be fifty years from making or publication. This extension would have had no consequence in the absence of protection for the underlying audiovisual work. However, we saw that some of these works are likely to be protected as dramatic works. And the duration of the (audiovisual) dramatic copyright in the United Kingdom has been extended to seventy years p.m.a.\(^84\) Thus it can be said that UK producers will sometimes obtain two rights lasting for seventy years p.m.a. (or p.m. contributors for the ‘film’) whereas their continental counterparts benefit only from a fifty-year neighbouring right in the film recording in addition to the (specific) seventy years’ p.m. copyright in the audiovisual work. The fact that in practice film producers hold both these rights certainly limits the consequences of such an over-extension, but there could well be litigation on that subject.

**IS SUCH A SYSTEM ACCEPTABLE?**\(^85\)

What are the consequences of such double protection?

The cumulation of copyright is commonplace in relation to audiovisual works; the pre-existing works, the various scripts and the final audiovisual works can attract separate protection as derivative works. In that situation, the derivative work is a work of original authorship, which often involves different contributors. Economists justify such protection by citing the need to encourage the production of works based on other works, which sometimes requires considerable investment or effort.\(^86\) This seems consistent with the incentive rationale behind copyright protection. However, here we are faced with a second type of cumulation, which involves the same work or works

\(^84\) Which is not a correct implementation of the Directive either. For example, under UK copyright law, the composer of specially commissioned music cannot be co-author of a dramatic work including his musical work (see para. 127). However, according to the Directive, his or her life must be taken into account in the calculation of the duration of the copyright in the underlying audiovisual work (which, arguably, is the dramatic copyright under present UK law).


\(^86\) W. M. Landes and R. Posner, ‘An Economic Analysis of Copyright Law’ (1989) *Journal of Legal Studies* 325 at 354–5; see also J. Ginsburg, ‘Creation and Commercial Value: Copyright Protection of Works of Information’ (1990) 90 *Columbia Law Review* 1865 at 1910, who suggests that another reason for the protection of derivative works is to provide incentives to produce the initial work, since potential exploitation of derivative works is often considered as part of the decision to create the initial work.
which cannot be separated on originality grounds. For an audiovisual dramatic work, the ‘film’, the visual recording, is nothing but a copy.

Where implemented, this double protection for films is always justified in economic terms (usually without any serious empirical analysis) and by analogy to the protection of sound recordings. The problem is that the analogy to sound recordings is in truth an incomplete one. In contrast to sound recording producers, in most cases film producers obtain the copyright in the audiovisual and contributory works embodied in the recording, and thus do not need another copyright title to protect their investments in infringement actions. Another difference is the possibility of likening sound recordings to original works of authorship, or at least considering that there is a specific and distinct investment in the production of such recordings. In contrast, the work involved in the recording of an audiovisual work is difficult to separate from the work involved in the creation of the audiovisual work itself. It can therefore be questioned whether such double copyright protection is needed to encourage film producers to produce films.

Moreover, this scheme not only appears pointless in terms of incentives, it can have negative economic consequences. Where it operates, the cumulation has no effect if the producer has control of both rights. However, if a copyright interest is retained by the creative authors, or if the rights are granted to separate licensing bodies, users (including further authors and producers) will bear higher costs in order to exploit audiovisual works. In some instances, they will have to obtain, and bargain for, two authorizations instead of one. In that situation there is no doubt that the cumulation increases the cost of using these works. Multimedia producers on the continent already experience such difficulties.

Incidentally, it is important to recall that this scheme is designed to remedy two problems that are specific to continental systems of protection. In several droit d’auteur countries, authors of audiovisual works retain certain rights in their works or assign them to collecting societies, which weakens the title of film producers in infringement proceedings. Also, higher standards in relation to ‘originality’ might leave valuable works unprotected. These problems either are unknown or cause fewer difficulties in copyright systems.

PROBLEMS ASSOCIATED WITH THE NATIONAL DEFINITIONS OF ‘VIDEGRAMS’
The definition of continental ‘videograms’ and of British and Irish ‘films’ are very similar. In France, the ‘videogram’, the object of the related right of the film producer is defined as ‘the initial fixation of a sequence of images,

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87 Except maybe in relation to film soundtracks involving substantial studio recording work (thus justifying their protection as sound recordings).
whether accompanied by sounds or not. A similar definition is adopted in other Member States with an authors’ rights tradition. In section 5B(1) of the British 1988 Act, a ‘film’ is defined as ‘a recording on any medium from which a moving image may by any means be produced’.

These definitions are very broad, and may lead to an extension of protection to the recording of software and videogames. The fact that the related right is the right of the ‘film producer’ could lead to a restrictive construction of the scope of the related right. But this construction is left to national courts, as nothing in EC law seems to prevent a broader scope of the right under national law.

But beyond this question of scope, technical questions arise. Some are very specific and technical, and concern the protection of individual film frames under the neighbouring right (which would then protect non-original film frames!), or the characterization of soundtracks as part of the film or as sound recordings. Others are more general. For example, the introduction of a non-original description of work raises interesting questions about the line that can be drawn between what is a mere copy and new recording derived from a previous recording.

Under copyright and authors’ rights laws, the standard test for the existence and the protection of a derivative work is the test of originality. In the absence of such a requirement, what test should be applied? For example, does a colorized version of a film, or a new cut (e.g. a director’s cut), or a digitally enhanced or restored print, or even a release under another screen format (e.g. on videotape) constitute a mere copy of the film, or does it create a new derivative ‘film’, and thus a new film copyright? The question could be asked about sound recordings, concerning for example digitally enhanced tracks.

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90 Art. 5(1) in the original 1988 text. The Duration of Copyright and Rights in Performances Regulations 1995 (SI 1995 No. 3297) added two new paragraphs (s. 5B(2) and (3)) concerning film soundtracks.
91 And the introduction of new neighbouring rights by Member States.
92 Point discussed in Kamina, op. cit., at 77 (UK law).
94 See discussion in Kamina, op. cit., at 80.
Against this solution, one may observe that the Rental and Term Directives describe the right of the film producer as the right in the ‘first fixation’ of the film. Such wording might exclude the possibility of a new right arising in relation to a second fixation, even after substantial processing or modification. The point, however, is not free from doubt, and it appears that the question has not been raised in foreign systems with a similar definition.

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95 Which is the language used in several continental Acts (e.g. the French Intellectual Property Code, art. L.215-1).