providers are not required to tariff or make pricing information publicly available.

Further, service providers will be required to comply with a code of practice covering complaint handling and a redress scheme (in accordance with the Telecommunications Industry Ombudsman Scheme).

The increased statutory protection given to service providers (in the form of carrier access undertakings and arbitration procedures) should ensure that competition continues to develop in the service provider sector post 1997. At the same time service providers will need to develop internal compliance procedures and cooperate with carriers to develop industry codes of practice.

Protection for technical program protection mechanisms (hardware locks) under German law

Andreas Raubenheimer

Introduction

On 22 June 1995, in the most recent decision of a series of judgments of the Munich courts since 1993, the Munich Court of Appeals again prohibited the offering and distribution of a software program which circumvented a hardware lock. Furthermore it required the defendants who offered and distributed the circumvention program to pay damages and to list their customers and the profits made from distribution of the infringing program.

The plaintiff distributes a program equipped with a technical program protection device (also known as a hardware lock, dongle or key). This protection device ensures that simultaneous program use is possible only on the number of computers corresponding to the number of licensed programs, since the hardware lock has to be affixed to the parallel port of each computer. The program controls the hardware lock and immediately stops a further program run where the lock is found to be missing.[1]

Thus, in accordance with copyright law, a multiple parallel program use of one licensed program is excluded, whereas manufacture of unlimited numbers of copies is still technically possible. Therefore a licensee's rights under § 69d (2) UrhG (Copyright Act)[2] are not affected. That section allows the manufacture of one back-up copy for each licence to enable replacement of the original program if it is damaged or destroyed.[3] One should note that insofar as the number of copies used is neither covered by a licence nor a consent of the rightholder one can speak of illegal copies which infringe the exclusive copyright of the rightholder under § 69c No. 1 UrhG.[4] A multiple parallel program use (ie. a simultaneous use of program copies exceeding the number of licences for the program) is therefore also unauthorised (use of illegal copies) unless the rightholder gave his prior consent.

However, individuals and firms have developed ways to circumvent such program protection including by the use of a compatible hardware lock imitating the function of the original lock. Other methods are by use of a circumvention software program which deceives the original program by imitating the existence of a lock and by altering the programming of the original program responsible for the lock control. Usually these methods cost considerably less than the original program equipped with a hardware lock. Therefore the distribution of infringing programs equipped with means to circumvent the original program's protection seriously affects the business of the distributor of the original program who therefore seeks the relief of the courts to defend his rights.[5]

Technical program protections like hardware locks are protected under copyright law.[6] Their unauthorised circumvention or removal will therefore ground rightholder's claims under § 69f (2) UrhG[7] to surrender or destroy all circumvention programs or devices.[8] Furthermore those responsible for offering or distributing such programs or devices to third parties will be, under § 97 (1) UrhG, subject to the rightholder's claims to cease and desist, for damages and for information about these copyright infringements.[9]

The aforementioned claims can also be based on violation of the unfair competition rules laid down in § 1 UWG (Act Against Unfair Competition). The offering or distribution of a program or device circumventing the hardware lock of a original program is considered an illegal and unfair blocking of the market for the original program equipped with a lock.

History of the litigation

The abovementioned series of four judgments of the Munich courts deal with two different cases concerning respectively an old circumvention program distributed in 1987/1988 and

a new circumvention program distributed since 1989.

The earlier case

In the first case the defendants in both instances had always pretended that the offered circumvention program could be used for legal purposes and that it was in particular indispensable for the suppression of alleged technical problems which according to the defendants are caused by the hardware lock. The courts, however, did not accept these arguments. The Munich District Court at first instance in its decision of 6 October 1993 stated that a circumvention program does not have an independent legal purpose. The Munich Court of Appeals in its judgment of 3 November 1994 explained more precisely that suppression or correction of any technical problems caused by a hardware lock is an obligation of the distributor of the original program and that third parties do not have any rights to offer a circumvention solution for the lock. This is true even if the circumvention program or device can in fact remedy alleged technical defects.

Anti-competition aspects

The Munich District Court (21st Division) in its decision of 6 October 1993 and the Munich Court of Appeals in its judgment of 3 November 1994 both found a violation of the unfair competition rules under § 1 UWG (Act against Unfair Competition).[10] The reasoning of both courts was that users, instead of acquiring the expensive original program with a hardware lock which could be run only on one CPU at a time, would buy the circumvention program instead which is significantly less expensive. According to the courts the clear consequence is that each circumvention program sold will result in the loss of a sale or licence of the original program.

Both courts took the view that offering and distributing a circumvention program or device is an illegal and unfair blocking of the market for the original program protected by a hardware lock. Furthermore offering or distributing a circumvention program or device is an illegal exploitation of another's efforts which is also unfair competition under § 1 UWG since the circumvention program or device could be sold only to users which had already acquired the original program which is protected by the hardware lock. Therefore the marketing efforts and success of the manufacturer and distributor of the original software are illegally exploited by the concurrent offering of the means of circumventing the original hardware lock. For these reasons the Munich District Court and the Munich Court of Appeals prohibited any offering and distribution of the circumvention program and required the distributor to pay damages and to render up information about its clients and profits.

This case is at present subject to an appeal to the Federal Supreme Court which has to decide on points of law filed by the distributor of the circumvention program. As this litigation concerns acts committed in 1987/88, the new copyright provisions for computer programs do not apply. Those provisions commenced operation on 24 June 1993, the effective date of the German Copyright Amendment Act[11] which implemented the EC Software Directive[12] into German copyright law. Therefore the decisions in this case do not address copyright issues.

These judgments accord with previous judgments of other appeal courts which have held that offering and distributing circumvention programs is a violation of unfair competition rules under § 1 UWG. This point of view was taken by the Courts of Appeals Stuttgart and Düsseldorf in their decisions of 10 February 1989 and 6 July 1989.[13] The distributors of the circumvention programs had argued in those cases that there are other legal purposes of the programs, such as improvement of the original program operation speed, energy savings and protection against failure of the hardware lock. However, the courts held in each case that it was obvious that the primary goals were circumvention of the original program protection and multiple parallel program use. This motivation must be assumed on the part of the purchaser of a circumvention program. Therefore both Courts, like the Munich courts in their judgments, did not accept these arguments, but found against the distributors of the circumvention programs on the grounds of unfair competition.

The latest case at first instance

In the second litigation before the Munich courts, regarding the offer and distribution of a circumvention program since 1989, the District Court Munich (7th Division) on 1 December 1994, required the distributor to cease and desist, to pay damages and to render up information about customers and profits achieved by the distribution in the past. The Court did not share the view of the defendants who argued that the distribution of their circumvention program is justified since its alleged purpose was not to enable the unauthorised use of illegal copies of the original program by circumvention of the hardware lock, but to remedy alleged technical defects caused by the lock, in particular in conjunction with the use of certain printers and other computer programs which are also protected by a hardware lock. Furthermore, the defendants argued that the hardware interface can be damaged if the hardware lock is frequently removed and affixed again which is necessary where the original program is used on different computers at different times.

Despite these allegations of the defendants the Munich District Court held that the distribution of the circumvention program is an illegal blocking of the market for the original program protected by a hardware lock and that therefore the rightholder's claims to cease and desist, for damages and information were well founded under § 1 UWG (Act against Unfair Competition). According to the

Court it is sufficient that a concrete risk of such blocking of the market can be assumed considering the circumstances and the price relation between the original program with hardware lock on the one hand and the circumvention program which is much cheaper on the other hand. Moreover, the distributor of the circumvention program knew that it could also be used to circumvent the lock for the purpose of running illegal copies. From these facts the Court concluded that it was extremely likely that the distribution of the circumvention program results in damage to the plaintiff. Although in this case the new § 69f (2) UrhG (Copyright Act) would also have been applicable, the judgment was based only on the violation of unfair competition rules. The Court pointed out that with respect to copyright claims additional evidence would have been necessary, but that the question of copyright infringement could be left open since the same legal consequences already follow from § 1 UWG.

The latest case — the arguments on appeal

Program lock circumvention as error correction

In the appeal before the Munich Court of Appeals the defendants repeated their allegations made in the first instance. In addition, they argued that there are considerable risks and dangers caused by the hardware lock where the original program with hardware lock is used on laptops and that therefore a program use without lock is necessary. The defendants furthermore claimed that the purpose of their circumvention program is to remedy alleged technical defects caused by the lock and that this is an act of error correction which conforms with the special copyright provisions for computer programs[14], in particular § 69d (1) UrhG (Copyright Act)[15] and § 69f (2) UrhG[16].

According to the defendants their circumvention program had to be considered as a tool for such error correction to which the user in their opinion is entitled under the aforementioned copyright provisions, including the act of circumventing the hardware lock of the original program. This shall also exclude a prohibition on the offering and distribution of their circumvention program according to other legal provisions, in particular under the unfair competition rules.

The defendants were furthermore of the opinion that in all cases where the use of the original software equipped with a hardware lock in conjunction with hardware and/or other software shows problems, the program with lock has a defect which authorises an error correction, including circumvention of the lock and use of their circumvention program. They alleged that they do not have an obligation to investigate whether indeed a defect caused by the hardware lock exists and actually is the cause of technical problems alleged by the user with the functioning of the original program. Moreover they claimed that their circumvention program even improves the functions of the original program protected by a hardware lock. Finally they argued that it is absolutely irrelevant whether their program is abused to run illegal copies of the original program or whether a concrete risk of such abuse existed.

The decision on appeal

On appeal the Munich Court of Appeals in its decision of 22 June 1995 confirmed the judgment of first instance. Consequently the Court prohibited the distribution of the circumvention program and required the defendants to pay damages and to render up information about the extent of distribution by listing the customers and the profits achieved with the distribution of the circumvention program.

The interaction of unfair competition law with copyright protection

The Court based the judgment on the violation of unfair competition rules under § 1 UWG (Act against Unfair Competition). The Munich Court of Appeals in its reasoning explicitly emphasised that the new provisions on computer programs inserted in the Copyright Act as of 24 June 1993 namely §§ 69a - 69g UrhG (Copyright Act) strengthen the legal protection of programs and that this intention of the legislators has to be taken into account when interpreting the respective provisions. The Court referred to § 69g (1) UrhG[17] which provides that the new copyright provisions on computer programs do not affect in any way the application of other legal provisions relating to computer programs.

For these reasons the Court of Appeals concluded that § 1 UWG (Act against Unfair Competition) can still be applied for the protection of computer programs and that the prior case law considering the distribution of circumvention programs a violation of the unfair competition rules still remains relevant despite the new copyright provisions. Therefore if an act was considered a violation of § 1 UWG before the new copyright provisions commenced it would still be prohibited even if committed after that date. It can in any case not be justified in competition law terms on the mere ground that the new copyright provisions for computer programs are applicable. The Court preferred not to address the new copyright provisions in further detail, but to base its judgment on the violation of the unfair competition rules for which it gave detailed reasons.

The Court clearly stated that the reasons why the defendants started the distribution of their circumvention program were irrelevant. The Court clarified that regardless of whether or not the allegations of the defendants that their infringing program were intended to remedy technical defects during the use of the original program equipped with hardware lock were correct, they are in any case not authorised to offer or distribute their program because it also enabled an unauthorised use of the original

program delivered with a hardware lock, namely the use of illegal copies and a multiple parallel program use through circumvention of the lock. Such use results in an illegal and unfair blocking of the market of the plaintiff. This means that even in the event that there are possibilities of a legal use of the circumvention program these do not justify its offering and distribution.

Analysis

The Munich Court of Appeals follows to a large extent the reasoning of the Munich District Court which at first instance stated that, even if one assumed that the circumvention program of the defendants can also be used to remedy alleged defects of the original program equipped with a hardware lock, this would not eliminate the significant risk of unauthorised parallel use of the original program with the help of the circumvention program.

The evidentiary burden

The Court of Appeals confirmed the essential points made in the decision of the Munich District Court. The Court of Appeals shared the view of the first instance bench that there existed a substantial danger of abuse of the circumvention program which could not be eliminated even by the signing of a declaration by customers of the defendants to respect licence agreements and statutory obligations. The Court of Appeals further explained that it is difficult for the rightholder to establish evidence of such abuse since he usually will not obtain knowledge of infringements where illegal copies are run or multiple parallel program use is enabled with the help of a circumvention program or device. The Court stated that in any event the plaintiff had furnished sufficient evidence of abuse where an unauthorised multiple parallel program use of one licence had occurred with the help of a circumvention program of the defendants.

In the opinion of the Munich Court of Appeals usually the circumvention program of the defendants is used in an unauthorised manner for the run of illegal copies of the original program distributed with a hardware lock. The Court inferred this from the fact that the defendants do not control whether technical problems alleged by their customers really exist. Moreover the Court stated that the defendants even indicate that a multiple parallel program use is possible through use of their circumvention program. The Court concluded that the abuse of the circumvention program is the rule, not the exception. However, the Court also further clarified that it is irrelevant whether such abuse occurs in the majority or minority of cases and whether or not it was the intention of the defendants to encourage such abuse. In the Court's view, it is unavoidable for the defendants to affect the distribution of the original program with hardware lock protection when offering and distributing their circumvention program.

Error correction on appeal

With respect to the user's right to error correction under § 69d (1) UrhG (Copyright Act)[18] the Court held that the use and consequently also the distribution of a circumvention program could be permissible in the case of a defective hardware lock provided that there are no contractual agreements stipulating to the contrary.

Furthermore, such use and distribution of a circumvention program or device would be justified only if the use of the circumvention program or device was necessary for error correction. According to the Court the term "necessary" as used in § 69d (9) UrhG must be interpreted in favour of the rightholder. This means that the delivery of a circumvention program or device is necessary only where the plaintiff is not willing to change a defective hardware lock. In no case, however, could an offering and distribution of a circumvention program or device be justified without any actual need. Therefore, the Court held - contrary to the reasoning of the defendants - that the danger of abuse or even actual abuse is relevant and that substantial danger of such abuse existed (although its actual extent was irrelevant).

The Court also held that offering and distributing a circumvention program or device would also be prohibited if one argued that a defective hardware lock does not constitute a program defect. However, in the absence of such program defect the right to error correction under § 69d (1) UrhG would not be activated and therefore offering and distributing a circumvention program could not be based on this exceptional permission granted to the user.

Remedies

As to the information claim the Court rejected the petition of the defendants to give the names and addresses of their customers only to a public accountant on a confidential basis instead of providing the information directly to the plaintiff. The Court says that only with full information will the plaintiff be able to calculate his damage which consisted of the loss of licence fees. Furthermore the Court confirmed that it is in the discretion of the rightholder to decide if and to what extent it asserts claims against the customers of the defendants because of potential infringements committed by those customers.

Conclusions

There are two important points about the judgments rendered in the second case by the Munich District Court on 1 December 1994 and by the Munich Court of Appeals on 22 June 1995. First, that the well-established principles of the unfair competition rules are still applicable in addition to the new copyright provisions for computer programs and their program protection devices. This is a consequence of the so-called principle of coexistence laid down in § 69g (1) UrhG.[19] Second, that a concrete risk of illegal blocking of the market will be regarded as sufficient for claims under the Act against Unfair

Competition regardless of whether or not evidence for a concrete case is available where a circumvention program or device was indeed used to run illegal copies or to enable multiple parallel use of the original program by circumventing the hardware lock of that program.

These cases, however, are not finalised yet. The respective defendants have each filed appeals on points of law against the judgments rendered by the Munich Court of Appeals on 3 November 1994 in the first case and on 22 June 1995 in the latest case. Therefore, the Federal Supreme Court will be called upon to finally decide each case. It would, however, be astonishing if the Supreme Court takes a different position on the well-established principles developed under the unfair competition rules. The second case where the new special copyright provisions for computer programs are applicable the Federal Supreme Court on 9 November 1995 in a provisional decision[20] held that the defendants are liable for unfair competition even according to the facts alleged by themselves. The abovementioned judgments stand in line with the reasoning of German Courts in the Pay-TV-cases where also "program protection", namely the decoder for program reception of the Pay-TV, is circumvented[1]. Very effective protection for technical program protection mechanisms like hardware locks can be achieved through preliminary injunctions as shown by respective decisions of the District Courts Mannheim and Munich and the Court of Appeals Karlsruhe[2].

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1 For more details on technical program protections cf. in particular Raubenheimer, *Germany Implements Copyright Protection For Computer Software*, The International Computer Lawyer, December 1993, p. 17, 18 et seq.; cf. further Raubenheimer, *Copyright Protection for Computer Software Under German Law* The International Computer Lawyer, October 1994, p. 9, 18 et seq. with further references; of as well the detailed analysis by Raubenheimer, "Beseitigung/Umgehung eines technischen Programmschuters nach UrhG and UhG:, 1996 CR 69.

2 § 69d (2) UrhG (Copyright Act) reads as follows: *"The making of a back-up copy by a person having a right to use the computer program may not be prohibited by contract insofar as it is necessary to ensure future use."*
Cf. further Raubenheimer, 1996 CR69, 72.

3 Cf. Raubenheimer, *Germany Implements Copyright Protection For Computer Software*, The International Computer Lawyer, December 1993, p. 17, 18 et seq.; cf. further Raubenheimer, *Copyright Protection for Computer Software Under German Law* The International Computer Lawyer, October 1994, p. 9, 17 with further references; see also Raubenheimer, 1996 CR69, 72.

4 § 69c UrhG (Copyright Act) stipulating copyright (No. 1), adaptation right (No. 2) and distribution right (No. 3) as rightholder's exclusive rights reads as follows:
"The rightholder has the exclusive right to do or to authorise the following acts:
1. *the permanent or temporary reproduction of a computer program by any means in any form, in part or in whole. Insofar as loading, displaying, running, transmission, or storage of the computer program necessitate such reproduction, such acts shall be subject to authorisation by the rightholder;*
2. *the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof. The rights of the persons who adapt the program remain unaffected;*
3. *any form of distribution, including the rental, of the original of a computer program or of copies thereof. If a copy of a computer program is put into circulation within the European Community by the means of sale, with the consent of the rightholder, then the distribution right in relation to that copy shall be exhausted, with the exception of the rental right."*

5 For a complete and detailed survey as to software protection under German law eg. the Chapters *"Copyright Protection for Computer Software"* and *"The Legal Protection of Software Through Means Other Than Copyright"* of: Raubenheimer, *Computer Law in Germany* in IT Law Group/ Europe (editor), *European Computer Law* which will be published in Spring 1996 and where several authors will address international and national aspects of computer law in Europe. The IT Law Group/Europe consists at present of a network of different law firms specialised in computer law in 16 European states across the European Union, Norway, Switzerland and Eastern Europe, each firm representing one or more European states. Cf. further the decisions of the Munich courts addressed in the following and the edecisions mentioned below in notes 20, 21 and 22.

6 Cf. Raubenheimer, *Germany Implements Copyright Protection For Computer Software*, The International Computer Lawyer, December 1993, p. 17, 18.

[7] § 69f UrhG (Copyright Act) reads as follows:
"(1) The rightholder can require from the owner or proprietor that all copies unlawfully manufactured, distributed or that are intended for unlawful distribution be destroyed. Sect. 98 paras. 2 and 3 UrhG (Copyright Act) shall be applied mutatis mutandis.
(2) The above paragraph 1 shall be applied mutatis mutandis to any means the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device applied in order to protect a computer program."

[8] For details on the destruction claims under § 69f UrhG cf. in particular Raubenheimer, *Germany Implements Copyright Protection For Computer Software*, The International Computer Lawyer, December 1993, p. 17 (para. 1), 19 et seq. (para. 2); Raubenheimer 1996 CR69, 71 et seq; Raubenheimer, "Der Vernichtungsamspruch nach S69 f UrhG, 1994 CR 129.

[9] For more details cf. Raubenheimer, *Copyright Protection for Computer Software Under German Law* The International Computer Lawyer, October 1994, p. 9, 19; Raubenheimer, *Germany Implements Copyright Protection For Computer Software*, The International Computer Lawyer, December 1993, p. 17, 21 both with further references; cf as well Raubenheimer 1996 CR 69, 76 et seq. for a complete survey on these claims under copyright law, including preliminary injunctions, and recent case law.

[10] § 1 of the Act against Unfair Competition (UWG = Gesetz gegen den unlauteren Wettbewerb) of June 7, 1909 in its wording, which is valid at present, states:
"If someone in the course of business activities and for the purpose of competition commits acts which are contrary to public policy (against good morals/ contra bonos mores) he has to face claims to cease and desist and for damages."
§ 1 UWG (Act against Unfair Competition) is the so-called general clause. There exists abundant case law which has developed numerous categories that are considered as a violation of the unfair competition rules laid down in this general clause. Illegal and unfair blocking of the market of a concurrent product and illegal exploitation of another's efforts are the relevant categories which lead to claims under § 1 UWG in the case of offering and distribution of means for the circumvention of the hardware lock of the original program.

[11] Zweites Gesetz zur Änderung des UrhG dated June 9, 1993: BGBI. (Bundesgesetzblatt, Official Journal of the Federal Republic of Germany) part I, p. 910 et seq.

[12] EC Council Directive (91/250/EEC) of May 14, 1991 on the Legal Protection of Computer Programs (Software Directive), Official Journal (OJ) of the EC of May 17, 1991, No. L 122/42 = 1991 IIC 677.

[13] Courts of Appeals Stuttgart 1989 CR 685, 686 and Dusseldorf 1991 CR 352, 353; see also Raubenheimer, *Non-Copyright Protection for Software In Germany* The International Computer Lawyer, February 1995, p. 12, 17 with respective references on case law and literature, in particular in not 79; Raubenheimer, 1996 CR 69, 78 et seq. comments these judgments as well as the decisions of the Courts of Appeals Munich (1992 WRP 661) and Frankfurt (1195 CR 533) with respect to the similar cases of circumvention/removal of decoders for the Pay-TV.

[14] For a complete and detailed survey as to software protection under German law cf. the Chapters *"Copyright Protection for Computer Software"* and *"The Legal Protection of Software Through Means Other Than Copyright"* of: Raubenheimer, *Computer Law in Germany* in IT Law Group/Europe (editor), *European Computer Law* which will be published in Spring 1996 and where several authors will address international and national aspects of computer law in Europe. The IT Law Group/Europe consists at present of a network of different law firms specialised in computer law in 16 European states across the European Union, Norway, Switzerland and Eastern Europe, each firm representing one or more European states.

[15] § 69d (1) UrhG (Copyright Act) stipulates with respect to the exclusive rights of the rightholder under § 69c Nos. 1 and 2 UrhG (copyright and adaptation right - for the wording of these provisions cf. above note 4):
"In the absence of specific contractual provisions, the acts referred to in Sect. 69c Nos. 1 and 2 shall not require authorisation by the rightholder where they are necessary for the use of the computer program by any person entitled to use a copy of the program in accordance with its intended purpose, including for error correction."
For details as to the interpretation of this provision cf. in particular Raubenheimer, *Copyright Protection for Computer Software Under German Law* The International Computer Lawyer, October 1994, p. 9, 16 et seq.; Raubenheimer, *Die neuen urheberrechtlichen Vorschriften zum Schutz von Computerprogrammen*, 1994 Mitt. 309, 318 et seq. both with further references; of as well Raubenheimer, 1996 CR 69, 72 et seq. who in detail points out that as a rule removal/ circumvention of ahardware lock can not be justified by error correction under S69 of (1) UrhG.

[16] Cf. above notes 7 and 8 for the wording of Sect. 69f UrhG and for more details regarding this provision.

[17] § 69g (1) UrhG (Copyright Act) stipulates with respect to the special provisions for computer programs (§§ 69a - 69g UrhG), inserted as of June 24, 1993 as additional Chapter 7 in Part 1 of the German Copyright Act:
"The provisions of this chapter do not affect the application of other legal provisions to computer programs, in particular provisions on the protection of inventions, topographies of semiconductor products, trademarks, and those on protection against unfair competition including protection of trade and industrial secrets, in addition to agreements governed by the law of obligations."

[18] Cf. above note 15 for details on S69d(9) UrhG.

[19] Cf. above note 17; for more details and references cf. Raubenheimer, *Die neuen urheberrechtlichen Vorschriften des UWG*, 1994 CR 264, 269.

[20] Case No. I ER 220/95.

[21] Cf. Courts of Appeals Munich, 1992 WRP661, and Frankfurt 1995CR 533; Raubenheimer, 1996 CR69, 78 et seq.

[22] District Courts Mannheim, 6 October 1995 (Case No. 7 0 289/95) and Munich, 6 December 1995 (Cas No. 7 0 22756/95); Court of Appeals Karlsruhe, 10 January 1996 (Case No. 6U 40 / 95); cf. further Raubenheimer, 1996 CR69, 77, 79.