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HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING

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List of Abbreviations

AEPO-ARTIS	Association of European Performer's Organisations
AIPJ	<i>Australian Intellectual Property Journal</i>
ALAI	Association littéraire et artistique internationale
A&R	Artist and Repertoire
ARMT	Autorité de régulation des mesures techniques
AUSFTA	Australian-United States Free Trade Agreement
BC	Berne Convention for the Protection of Literary and Artistic Works
BEUC	Bureau Européen des Unions de Consommateurs
BGH	Bundesgerichtshof (Germany)
BIE	<i>Bijblad bij de Industriële Eigendom</i>
BPI	British Phonographic Industry
BSAC	British Screen Advisory Council
BTLJ	<i>Berkeley Technology Law Journal</i>
Cass.	Cour de Cassation (France, Belgium)
CFI	Court of First Instance (European Court of Justice)
CIPIL	Centre for Intellectual Property and Information Law
CLSR	<i>Computer Law & Security Report</i>
COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
CRi	<i>Computer und Recht International/Computer Review International</i>
CRMOs	Collective Rights Management Organizations
CSPLA	Conseil Supérieur de la Propriété Littéraire et Artistique
DMCA	Digital Millennium Copyright Act
EBU	European Broadcasting Union
EC	European Community

ECDR	<i>European Copyright and Design Reports</i>
ECJ	European Court of Justice
ECL	Extended Collective Licensing
ECR	<i>European Court of Justice Reporter</i>
EDRI	European Digital Rights
EIPR	<i>European Intellectual Property Review</i>
EJIL	<i>European Journal of International Law</i>
EPLA	European Patent Litigation Agreement
EU	European Union
EUConst	<i>European Constitutional Law Review</i>
GESAC	Groupement Européen des Sociétés d'Auteurs et Compositeurs
GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i>
GRUR Int.	<i>Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil</i>
HLEG	High Level Expert Group
HR	Hoge Raad (Netherlands)
ICMP	International Confederation of Music Publishers
ICT	Information and Communication Technologies
IFPI	International Federation of the Phonographic Industry
IIC	<i>International Review of Industrial Property and Copyright Law</i>
IMMF	International Music Manager's Forum
Int'l J. Comm. L. & Pol'y	<i>International Journal of Communications Law & Policy</i>
IPI	Interested Parties Information System
ISWC	International Standard Musical Works Code
IPI	International Press Institute
IPTV	Internet Protocol Television
IRDI	<i>Intellectuele rechten/Droits intellectuels</i>
JIPL	<i>Journal of Intellectual Property Law and Practice</i>
JUCPL	Japanese Unfair Competition Prevention Law
K&R	<i>Kommunikation & Recht</i>
LAB	Legal Advisory Board (of the European Commission, former DGXIII)
LG	Landesgericht (Germany)
MMR	<i>Multimedia und Recht</i>
MPI	Max-Planck-Institut für ausländisches und internationales Patent-, Urheber- und Wettbewerbsrecht
OECD	Organization for Economic Cooperation and Development
OLG	Oberlandesgericht (Germany)
PEARLE	Performing Arts Employers Associations League Europe
PPD	Price Published to Dealer
RC	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention)
RIDA	<i>Revue Internationale du Droit d'Auteur</i>

RMI	Rights Management Information
SARRA	Swiss Authors and Related Rights Act
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
SCMS	Serial Copy Management System
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande Instance (France)
TMO	Technical Measures Observatory
TPM	Technological Protection Measure
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UFITA	<i>Archiv für Urheber-und Medienrecht</i>
UNESCO	United Nations Educational, Scientific and Cultural Organization
VOSN	Vereniging Open Source Nederland
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization
ZEUP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZUM	<i>Zeitschrift für Urheber-und Medienrecht</i>



Preface

This book is about the harmonization of the law of copyright and related rights in the European Union. It reviews and critically assesses the norms of the harmonization directives in this field, identifies inconsistencies and deficiencies, and generally assesses the quality of the *acquis communautaire*. As the subtitle of this book suggests, good lawmaking at the European level is indeed a challenge, particularly in the increasingly politicized field of copyright and related rights.

The renewed Lisbon agenda aims at fostering economic prosperity, jobs, and growth, in particular by boosting the knowledge-based economy and by enhancing the quality of Community regulation ('better regulation'). Clearly, a consistent and transparent legislative framework for copyright and related rights in the information society that fosters growth of the knowledge-based economy in the European Union is a crucial element in any strategy leading towards that goal. At present seven European Community directives in the field of copyright and related rights are in place. The first, on computer programs, was adopted as early as 1991, while the most recent ones, dealing with copyright and related rights and artists' resale rights date from 2001. Whereas most of these directives have been reviewed by the European Commission, as required by specific review clauses in the directives themselves, an integral review of all directives taken together has never taken place.

There are several good reasons to do so now. In the first place, except for the Information Society Directive, most directives have been designed to harmonize only distinct aspects of copyright or related rights law, without dealing with copyright or related rights across the board. Because each directive has experienced its own legislative history, and was adopted in a different era, this has inevitably led to fragmented and sometimes inconsistent solutions. In some cases, directives have been amended and updated by later ones, but in most cases the existing *acquis* was left untouched.

A second reason for a thorough evaluation lies in the passing of time itself. The Computer Programs Directive was designed in the late 1980s, in a time when the Internet was used primarily for sending email messages among engineers and academics, and software was published and distributed on disks that were really floppy. The Rental and Lending Rights Directive, adopted in 1992, was similarly conceived with a world of 'hard copies' in mind; electronic rental and lending were, at best, futuristic scenarios. The Satellite and Cable Directive of 1993 deals with satellite transmission and cable retransmission as two distinct media deserving completely different regulatory solutions. Nowadays satellite broadcasters have evolved into 'platforms' offering retransmission services in direct competition with cable operators, whereas the latter have reinvented themselves either as content providers or as providers of digital broadband services. This ongoing process of *convergence* – the merging of formerly distinct, separately regulated media – is in itself an important reason for a thorough re-examination of the acquis.

The dynamic nature of the 'information society' (i.e., the Internet) itself presents yet another reason for review. Since the adoption of the Copyright Directive in 2001, a directive that was specifically meant to deal with the challenges of the internet, the media landscape has dramatically changed again. Based on the Green Paper of 1995 on Copyright and Related Rights in the Information Society and the World Intellectual Property Organization Treaties of 1996, the Directive was designed to respond to the legal challenges posed by the information society as they were perceived in the mid-1990s. In 'Internet time' this is light years ago. Since 1995, and even after the final adoption of the Directive in 2001, numerous important technological and economical developments have once again changed the landscape of the information society. The new millennium has seen the spectacular rise, both in popularity and in performance, of peer-to-peer communications software allowing consumers to 'share', largely illegally, vast amounts of copyrighted content (music, video, software, images, and even books). Concurrently, the rollout of 'legal' online content services, such as iTunes, and the deployment of Digital Rights Management systems that existed only in theory when the Directive was adopted, have created a real, rapidly growing, and vibrant marketplace for digital content services in Europe and elsewhere.

A related development is the increasingly important role of the consumer in the copyright equation. In 'analogue' times the primary role of copyright was to regulate relationships between authors/content producers and intermediaries/producers. Consumers were end users that acted well outside the scope of copyright law. In the digital age, the result in large part of the expansion of the reproduction right in the digital domain, the copyright paradigm has shifted. Consumers have actually become 'users' within the traditional meaning of copyright law. Concomitantly, consumers and consumer organizations have become stakeholders and are becoming increasingly vocal in copyright debates at the national and supranational level.

Yet another valid reason for a critical examination of the process of harmonization lies in the burden this process has imposed, over the years, on the legislative machinery at the European Union and national levels. The step-by-step approach

towards harmonization that the European lawmaker has applied has placed an enormous burden on this legislative apparatus. Directives are adopted only after a complicated and often protracted process of consultation between the Commission, the European Parliament, and the Member States. Implementation (transposition) requires yet another round of sometimes complex legislation at the national level. For national legislatures, the harmonization agenda of the European Union has resulted in an almost non-stop process of amending of the national laws on copyright and related rights.

This book is the combined result of two extensive studies that were commissioned by the European Commission. The Institute for Information Law completed the Study on the Recasting of Copyright for the Knowledge Economy in 2006 and the Study on the Implementation of the Information Society Directive in 2007. Although responding to calls for tender designed by the Commission, these studies were conceived and produced in complete academic independence. Indeed, as recent history has shown, the European Commission has chosen to wilfully ignore substantial parts of the Institute for Information Law of the University of Amsterdam (IViR) reports, apparently for reasons of political expediency. The present book is, however, much more than a mere 'recasting' of these reports. It integrates, consolidates, and updates the findings of both studies, while adding and further developing certain specific topics.

This book contains nine chapters. The first discusses institutional and exogenous issues relevant to the process of harmonization of copyright and related rights in Europe. Here we focus on the question of competence of the European Community legislature in the field of copyright and related rights and examine the legal instruments of harmonization and unification. The following two chapters critically review the *acquis* in a structured way, following traditional categories. Chapter 2 treats protected subject matter (works and subject matter protected by related rights), beneficiaries (authorship and ownership of rights), and terms of protection. Chapter 3 examines economic rights (rights of reproduction, communication to the public, and various related rights) and limitations. Obviously, the focus here is on the Information Society Directive that deals with rights and limitations extensively. This directive has also introduced the rules on the protection of technological protection measures and rights management information that are scrutinized in Chapter 4.

Chapters 5, 6, and 7 treat distinct current issues that are, or might soon be, featured on the European Union's legislative agenda. Chapter 5 discusses the controversial Commission proposal to extend the terms of protection for musical performances and phonograms. It examines the legal and economic arguments supporting such an extension and queries whether an extension is likely to promote the creative industries and Europe. The Term Extension initiative also proposes to harmonize the term of copyright protection of co-written musical works. Although the Term Directive in its present form provides special term calculation rules for joint works, it does not determine how to qualify, and deal with co-written musical works. As a consequence, terms of protection in respect to musical works containing lyrics ('songs') may differ from one Member State to the next. Chapter 6

queries whether there is indeed a need for amendment of the Term Directive in this respect.

Chapter 7 deals with another highly topical issue: orphan works. The emergence of the information society has created new markets for old ‘analogue’ content, such as archived newspaper articles, scientific publications and broadcast television programs. Re-use of such content often requires licenses from a multitude of rights owners. In some cases, right holders are difficult or even impossible to track and identify. Chapter 7 examines the validity of these concerns, refers to existing models in Member States and elsewhere, and proposes solutions.

Chapters 8 and 9 offer final analysis. Chapter 8 presents an overview of the main inconsistencies in the *acquis*, suggests repair where necessary, and assesses in a more general way the blessings and curses of the harmonization process. In the final chapter we will dwell on the long-term future of European copyright. Will territoriality continue to rule, or should this last frontier be finally conquered, paving the way for a truly unified European Copyright Law?

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Chapter 1

The European Concern with Copyright and Related Rights

The European Union has come a long way since the six founding Member States signed the Treaty of Rome in 1957, with the intention to achieve economic integration. It has grown to a membership of twenty-seven states, and generates an estimated 2,500 new pieces of legislation (representing some 5,000 Official Journal pages) each year.¹ Although it is not made explicit in the Treaties, European Community (EC) law has primacy over the law of Member States.²

European concern with copyright and intellectual property generally grew steadily as information became more significant as an economic commodity. It has resulted in a respectable body of case law on intellectual property in relation to the free intercommunity trade in goods and services, and in relation to the EC Treaty (TEC) rules on competition. Seven directives specifically harmonize various aspects of copyright and related rights, and copyright and related rights are also covered by the Enforcement Directive.³

1. Communication from the Commission to the European Parliament and the Council – Codification of the *acquis communautaire*, COM (2001) 645 final; for different estimates see T. Selck, M. Rhinard & F. Häge, 'The Evolution of European Legal Integration', *Eur J Law Econ* 24 (2007): 187–200, [Selck et al., 2007].
2. A declaration concerning the primacy of EC law has been annexed to the Lisbon Reform Treaty (Declaration nr. 17).
3. The Enforcement Directive also targets copyright and related rights (Directive 2004/48/EC on the enforcement of intellectual property rights, *OJ* 2004 L 195/16). The controversial Proposal for a European Parliament and Council Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (COM [2005] 276 final, amended COM [2006] 168 final) has passed the European Parliament in first reading (with substantial amendments). It has met with doubts concerning competence (and subsidiarity/proportionality) in the Council Working Party on Substantive Criminal Law. See Council document 10714/07, Outcome

This chapter presents an overview of EC policies in copyright and related rights, with a focus on the directives. It scrutinizes both the competence to harmonize national law and the way this competence has been exercised. This introductory chapter will serve as a backdrop for the detailed discussion of the *acquis communautaire* in Chapters 2 through 4 and 8, and our observations on the future of European copyright as set out in the final chapter. In addition, it will provide valuable insights for the discussion of the various problem areas on the EC's agenda, which are elaborated on in Chapters 5 through 7.⁴

1.1. A SHORT HISTORY OF HARMONIZATION

Before the onset of harmonization in the late 1980s, the intellectual property law of the Member States was affected by EC law to a fairly limited extent only, through the EC treaties' rules on competition and free movement of goods, rules that are central to the realization of the internal market.⁵ The EC Treaty (Treaty establishing the European Community (TEC)) makes an exception to the free flow of goods and services where necessary for the protection of intellectual property, including copyright and related rights.⁶ The European Court of Justice (ECJ) elaborated that although the Treaty recognizes the existence of intellectual property rights under national laws, it nonetheless affects their exercise. In this context the ECJ has also referred to Article 295 TEC, which provides that the EC Treaty does not prejudice Member States' rules on ownership of property.⁷ The exact relevance of Article 295 for *intellectual* property however remains unclear;⁸ an issue that we will return to in Chapter 8.

One important effect of primary EC law is that a Member State may not in its copyright law discriminate against citizens of other EU countries. This follows from the general non-discrimination principle of the EC Treaty. Article 7 TEC precludes a Member State from denying to authors and performers (or users for that matter) from other Member States rights it does accord to its own nationals.

proceedings 4 Jun. 2007 and press release of the 2752nd Council Meeting Justice and Home Affairs, Luxembourg, 5–6 Oct. 2006.

4. In this book, the terms European Community, European Union and Community are used interchangeably.
5. Articles 28/30 (free movement of goods), Arts 49–55 (free movement of services), and Arts 81–89 EC Treaty (rules on competition).
6. Article 30 reads 'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of . . . the protection of industrial and commercial property. . . .' In *Musik-Vertrieb Membran v. GEMA*, the ECJ clarified that industrial and commercial property includes copyright; ECJ 20 Jan. 1981, Joined Cases 55 and 57/80, *ECR* [1981] 147, (*Musik-Vertrieb Membran*).
7. Article 295 reads: 'The Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.'
8. See G. Tritton, 'Articles 30 and 36 and Intellectual Property: Is the Jurisprudence of the ECJ Now of an Ideal Standard?', *EIPR* 16 (1994): 422–428, [Tritton, 1994].

Before the ECJ ruled as much in *Phil Collins* (and later again in *Ricordi* and *Tod's Spa*),⁹ European states were of course already bound by another principle of non-discrimination, because national treatment is a leading principle in the Berne Convention and other multilateral treaties that protect intellectual property rights. The Berne Convention and other treaties do, however, allow for some exceptions to the national treatment principle (e.g., Article 7 BC on term of protection, Article 2(7) BC on copyright in designs). Member States may not exercise these in the inter-community setting.

In a string of cases the ECJ has clarified that the provisions on free movement and competition law can interfere with a Member States' intellectual property law. This is the case if the national legislation empowers right holders to exercise their intellectual property rights in a manner that adversely affects the functioning of the internal market, that is, constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. The ECJ distinguishes between the existence of an intellectual property right, which in principle is not affected by EC law, and the exercise of the right, which must be in accordance with EC law. This distinction has met with criticism.¹⁰ It is thought of as an unsatisfactory construct that does not help to clarify the relation between territorially determined national exclusive rights on the one hand, and the freedoms of the internal market and EC competition law on the other.

The application of national measures that hamper the free movement of goods or services is allowed¹¹ only in as far as is necessary for preserving the 'specific subject matter' – the essence – of the intellectual property right at issue.¹² In its landmark case on video rental, *Warner Brothers*, the ECJ labelled two such essential rights of the author, 'namely the exclusive right of performance and the exclusive right of reproduction'. In terms of the free flow of goods, the most important

9. ECJ 20 Oct. 1993, Joined Cases C-92/92 and C-326/92, *ECR* [1993] I-5145 (*Phil Collins v. Imtrat*); ECJ 6 Jun. 2002, Case C-360/00, *ECR* [2002] I-5089 (*Land Hessen v. Ricordi*); ECJ 30 Jun. 2005, Case C-28/04, *ECR* [2005] I-05781 (*Tod's v. Heyraud*).
10. See Daum, in M.M. Walter (ed.), *Europäisches Urheberrecht: Kommentar* (Vienna: Springer, 2001), 53–58, [Walter, 2001]; V. Korah, *Intellectual Property Rights and the EC Competition Rules* (Oxford: Hart Publishing, 2006), 3–4, [Korah, 2006]; W.R. Cornish & D. Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 2007), 741–743, [Cornish & Llewelyn, 2007].
11. National measures must be applied in non-discriminatory way and be proportionate (i.e., appropriate for ensuring that the aim pursued is achieved and does not go beyond what is necessary for that purpose), for an analysis of the functioning of the proportionality principle, see Jan H. Jans, 'Proportionality Revisited', *Legal Issues of Economic Integration* 27 (2000): 239–265, [Jans, 2000].
12. Article 30/36 (old) EC Treaty cases on copyright and related rights: *Deutsche Grammophon v. Metro SB*, ECJ 8 Jun. 1971, Case 78/70, *ECR* [1971] 487; *Coditel v. Ciné Vog Films*, ECJ 19 Mar. 1980, Case 62/79, *ECR* [1980] 881, *Coditel v. Ciné Vog Films (Coditel II)*, ECJ 6 Oct. 1982, Case 262/81, *ECR* [1982] 3381; *Dansk Supermarked v. Imerco*, ECJ 22 Jan. 1981, Case 58/80, *ECR* [1981] 181; *Warner Brothers*, ECJ 17 May 1988, Case 158/86, *ECR* [1988] 2605; *EMI-Electrola v. Patricia*, ECJ 24 Jan. 1989, Case 341/87, *ECR* [1989], 79; *Ministère Public v. Tournier*, ECJ 13 Jul. 1989, Case 395/87, *ECR* [1989] 2521; *Laserdisken I*, ECJ 22 Sep. 1998, Case C-61/97, *ECR* [1998] I-5171; *Musik-Vertrieb Membran*.

limitation to the exercise of territorially defined copyrights lies in the Community exhaustion doctrine. With it, the ECJ limited the possibilities to use intellectual property as an instrument to control intercommunity distribution of goods once these have been put into circulation in a Member State with the right owner's consent. Such control is not considered to come within the specific subject matter of copyright or related rights. The Community exhaustion doctrine – also referred to as first sale doctrine – has since been codified in the Information Society Directive (see Section 9.1).

The laws of Member States pass the specific subject-matter test fairly easily because the court seems to regard any (potential) form of exploitation of copyright works as falling within the specific subject matter.¹³ From that perspective, primary EC law has only a modest impact on national intellectual property systems. The real significant impact on national law is through harmonization measures. By the late 1980s, the Community initiated legislation to address various types of impediments to the free movement of goods or services in the internal market that resulted from the latitude that Articles 30 and 49 TEC allow Member States.

At present seven EC directives specific to the field of copyright and related rights are in place. The first, on computer programs, was adopted as early as 1991, while the most recent ones that brought substantive changes, dealing with copyright and related rights in the information society and artists' resale rights, respectively, date from 2001. Two Directives, the Rental Right Directive (92/100/EEC) and the Term Directive (93/98/EEC) were revoked in 2007 and replaced with consolidated versions.¹⁴ A proposal to amend the Term Directive started its journey through the institutions in the summer of 2008. The European Commission proposes to extend the term of protection for sound recordings, and to have special rules for the way in which the term of protection for co-written musical works must be calculated.¹⁵ We will discuss these issues in depth in Chapters 5 and 6.

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13. See e.g., on the rental right, *Warner Brothers* (ECJ sanctions national rental rights), and *Laserdisken I* and *Metronome Musik* (ECJ 18 Apr. 1998, Case C-200/96, *ECR* [1998] I-1953) on the harmonized rental right. Recent case law is more ambiguous: in its *SGAE v. Rafaela* ruling, the ECJ interpreted the right of communication to the public (Art. 3 Information Society Directive) in a broad manner (to be discussed in Section 3.1.2); ECJ 7 Dec. 2006, Case C-305/05, *ECR* [2005] I-05781. But in *Cassina v. Peek & Cloppenburg* (ECJ 17 Apr. 2008, Case C-456/06) it rejected an extensive interpretation of the distribution right (Art. 4 Information Society Directive). The Advocate-General expresses serious doubt as to whether a distribution right that would include the authority to prohibit the owner of a copy of a work (i.e., a design chair) to let other persons use it (i.e., in a clothing store), meets the specific subject-matter test (Opinion, Cons. 38). See Section 3.1.2.
 14. Directive 2006/115/EC of 12 Dec. 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, *OJ* 2006 L376/28 [Rental Right Directive]; Directive 2006/116/EC of 12 Dec. 2006 harmonizing the term of protection of copyright and certain related rights, *OJ* 2006 L372/12 [Term Directive].
 15. Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM (2008) 464 final, Brussels 16 Jul. 2008, [Term Extension Proposal, 2008].

1.1.1. THE GREEN PAPER ON COPYRIGHT AND THE CHALLENGE OF TECHNOLOGY

Looking at the harmonization of the law of copyright and neighbouring (related) rights in Europe over the past two decades, one can distinguish two phases, marking different approaches and ambitions of the European legislature.¹⁶

The 'first generation' directives have their roots in the Green Paper on Copyright and the Challenge of Technology that was published by the Commission in 1988.¹⁷ As stated in the Green Paper, EC intervention in the realm of copyright would be required based on four 'fundamental concerns' of the Community.

First, a need was perceived to create a single Community market for copyright goods and services. To this end legal barriers in the form of disparate copyright rules, that might lead to market fragmentation and distortion of competition, were to be removed, and measures to defeat 'audiovisual piracy' were to be introduced.

Second, the need was felt to improve the competitiveness of the economy in copyright goods and services in the Community. This required that a legal framework be established that would guarantee protection of intellectual property at a par with the law in the countries of the Community's main competitors. A third need identified concerned the protection of intellectual creations and investment produced in the Community against unfair exploitation by users in non-Member States. Fourth and last, the Commission recognized the need to limit the restrictive effects of copyright on competition, particularly in technology-related areas such as computer software and industrial design. To this end 'due regard must be paid not only to the interests of right holders but also to the interests of third parties and the public at large'.¹⁸

Already the Green Paper of 1988 acknowledged some of the copyright problems the imminent digital revolution would bring. Separate chapters were devoted to the protection of computer programs and databases, whereas an important part of the chapter on home copying focused on – then emerging, now long defunct – digital audio tape (DAT) technology. The Internet, however, was still well below the Commission's radar screen. This is not surprising because at the time the Internet was still a defence and academia affair.

In the Green Paper, the Commission identified six areas in which 'immediate action' by the EC legislature was supposedly required: (1) piracy (enforcement), (2) audiovisual home copying, (3) distribution right, exhaustion and rental right, (4) computer programs, (5) databases, and (6) multilateral and bilateral external relations.

16. J. Reinbothe, 'A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union', paper given at Tenth Annual Conference on International IP Law & Policy, Fordham University School of Law (New York, April 2002). <www.europa.eu.int/comm/internal_market/copyright/documents/2002-fordhamspeech-reinbothe_en.htm>, [Reinbothe, 2002].

17. European Commission, COM (88) 172 final, Brussels, 7 Jun. 1988 [Green Paper on Copyright and the Challenge of Technology].

18. Green Paper on Copyright and the Challenge of Technology, paras 1.3.1.–1.3.6.

In the Follow-up to the Green Paper that was published by the Commission in 1990,¹⁹ after holding extensive hearings with stakeholders, several additional areas of possible Community action were identified: duration of protection, moral rights, reprography, and resale rights. A separate chapter was devoted to broadcasting-related problems. In an Appendix to the Follow-up paper a precise agenda of Community initiatives was set out. The agenda enumerated five proposals for directives: on rental and lending and certain neighbouring rights; on home copying; on database protection; on terms of protection; and on satellite and cable. It also listed a proposed decision requiring Member States to adhere to the Berne Convention (Paris Act) and the Rome Convention on neighbouring rights.

Much of the Commission's work programme as announced in the Green Paper and its Follow-up has materialized in the course of the 1990s. In 1991 the Computer Programs Directive, the first directive in the field of copyright, was adopted. In response to the spectacular growth of the software sector, due in particular to the then emerging PC market, the Directive created a harmonized framework for the protection of computer programs as 'literary works', including economic rights and limitations, of which the controversial 'de-compilation' exception was the subject of intense lobbying and political debate.

The following year saw the adoption of the Rental Right Directive. It harmonized – and for some Member States introduced – rights of commercial rental and lending. Perhaps more importantly, the Directive established a horizontal harmonized framework for the protection by neighbouring ('related') rights of performers, phonogram producers, broadcasting organizations, and film producers at levels well exceeding the minimum norms of the Rome Convention.

Two more directives were adopted in 1993. Departing from the prevailing approach of approximation of national laws, the Satellite and Cable Directive, more ambitiously, sought to achieve an internal market for trans-frontier satellite services by applying the country-of-origin rule to acts of satellite broadcasting. The directive responded to the deployment of new technologies of transmission of broadcast programmes, by satellite or cable, that greatly facilitated broadcasting across national borders. Indeed the Directive envisioned the establishment of an internal market for broadcasting services. The Directive also introduced a scheme of mandatory collective rights management with regard to acts of cable retransmission. The Satellite and Cable Directive's unique characteristics can be traced back to its different origins – not in the Green Paper of 1988, but in an earlier Green Paper on Television without Frontiers of 1984, that dealt primarily with broadcasting regulation and eventually resulted in the Television without Frontiers Directive of 1989.²⁰

19. Follow-up to the Green Paper on Copyright and the Challenge of Technology. Working programme of the Commission in the field of copyright and neighbouring rights. COM (90) 584 final, Brussels, 17 Jan. 1991, [Follow-up Green paper, 1990].

20. European Commission, Television without Frontiers, Green Paper, COM (84) Def, Brussels, 14 Jun. 1984 [Green Paper on Television without Frontiers]. Council Directive 89/552/EEC of 3 Oct. 1989 on the coordination of certain provisions laid down by Law, Regulation, or

The year 1993 also saw the adoption of the Term Directive. It harmonized the term of protection of copyright at seventy years *post mortem auctoris*, and set the duration of neighbouring rights at fifty years, where the international minimum standard was fifty and twenty years, respectively.

In 1996 the Database Directive was adopted. The directive created a two-tier protection regime for electronic and non-electronic databases. Member States were to protect databases by copyright as intellectual creations and provide for a *sui generis* right (database right) to protect the contents of a database in which the producer has substantially invested.

A directive on home copying of sound and audiovisual recordings, as prioritized in the Follow-up to the Green Paper, was never proposed. Private copying was eventually harmonized, to a limited degree, by the Information Society Directive, but the thorny issue of levies that was already mentioned in the Green Paper of 1988, has remained on the Commission's agenda to this day.

Of the other issues mentioned, but not prioritized in the Follow-up to the Green Paper, two have eventually resulted in directives. In 2001, after barely surviving its perilous journey between the Commission, the European Parliament, and the Council (and back again), the Resale Right Directive was finally adopted. The Commission's original work programme was completed by the adoption in 2004 of the Enforcement Directive,²¹ which provided for harmonized remedies against piracy and other acts of infringement, in response to the need first identified in the 1988 Green Paper.

1.1.2. THE GREEN PAPER ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

Midway through the 1990s, while still realizing the plans from the 1988 agenda, the Commission's harmonization agenda had already become much more ambitious. The emergence of the Internet (or 'Information Society'), that promised seamless transborder services involving a broad spectrum of subject matter protected by copyright and related rights, brought a new urgency to the harmonization process, which had slowed considerably after its productive start at the beginning of the decade.

Early in 1994, work commenced on a new round of harmonization of copyright law. The European Council convened a group of experts to report on the importance of copyright in the 'global information society'. The so-called Bangemann Report of May 1994 recommended that a Community framework

Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ* 1989 L 298/23 [Television without Frontiers Directive or TWFD]. The latter has been replaced by the Audio Visual Media Services Directive or AVMSD (Directive 2007/65/EC of the European Parliament and of the Council of 11 Dec. 2007, *OJ* 2007 L 332/27).

21. Directive 2004/48/EC of the European Parliament and of the Council of 29 Apr. 2004 on the enforcement of intellectual property rights, *OJ* 2004 L 157/1 [Enforcement Directive].

for the protection of intellectual property in the digital environment be created. This eventually led to the publication of yet another Green Paper in 1995, the Green Paper on Copyright and Related Rights in the Information Society.²²

The Commission focused on ‘the application of copyright and related rights to the content of the new products and services in the information society’. A first concern – also present in the 1988 Green Paper – was that differences between national laws would cause obstacles for the free circulation of information-based goods and the freedom to provide services. Harmonization would have to curb such effects. A second concern was to strengthen intellectual property rights because these were viewed as an important instrument to stimulate artistic production and thus serve to protect European cultural heritage. The third major concern was with ensuring the competitiveness of Europe’s economy – also a concern in 1988 – especially by providing the cultural industries with proper levels of protection.²³

The Follow-up to the 1995 Green Paper²⁴ identified four priority issues for legislative action: the reproduction right, the communication to the public right, the legal protection of rights-management information and technological protection schemes, and the distribution right. These are all addressed in the Information Society Directive. Four more issues were singled out for further study. The first were broadcasting rights for performers and phonogram producers, eventually incorporated into the rules on communication to the public right. A second issue concerned applicable law and enforcement.

Although the Green Paper rightly signalled that the territorial application of copyright law is problematic in the digital environment, the Commission continued its highly territorial approach. The most recent territoriality-based approach is found in the Rome II Regulation on the law applicable to non-contractual obligations.²⁵ In deviation of its private international law rules for torts generally, it provides that infringements of intellectual property rights are exclusively governed by the law of the country for which protection is claimed. This seems to imply that, for example, in the case of use of works on the Internet, the infringement question is governed simultaneously by the local law of each country in which a communication is initiated or can be received.²⁶

22. European Commission, ‘Copyright and Related Rights in the Information Society’, Green Paper, COM (95) 382 final, Brussels, 19 Jul. 1995 [Green Paper on Copyright and Related Rights in the Information Society].

23. Green Paper on Copyright and Related Rights in the Information Society, para. 10–17.

24. European Commission, COM (96) 568 final, Brussels, 20 Nov. 1996 [Follow-up to the Green Paper on Copyright and Related Rights in the Information Society].

25. Article 8 of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the law applicable to non-contractual obligations, *OJ* 2007 L 199/40 [Rome II Regulation].

26. For a discussion of conflict rules for modern copyright, see M. van Eechoud, *Choice of Law in Copyright and Related Rights, Alternatives to the Lex Protectionis* (The Hague: Kluwer Law International, 2003); CLIP, ‘Intellectual Property and the Reform of Private International Law: Sparks from a Difficult Relationship’, *IPRax* (2007): 284; J. Drexler & A. Kur (eds), *Intellectual Property and Private International Law: Heading for the Future* (Oxford: Hart Publishing, 2005). For an analysis of different strands of territorialism in international copyright, see

The third issue, management of rights, has since become the subject of the much debated Online Music Recommendation and is also taken up in the 2008 Communication on Creative Content Online.²⁷ Neither announced specific legislative action. Moral rights was the fourth issue, but given the sensitivities, the Commission concluded the time was still not ripe for harmonization initiatives, just as it had done in the context of the Follow-up to the 1988 Green Paper.

The 1996 Follow-up stressed the importance of addressing the impact of the electronic environment on copyright at the international level. Ongoing discussions at World Intellectual Property Organization (WIPO) on a 'Protocol' to the Berne Convention initiative accelerated and led to the conclusion of the WIPO 'Internet Treaties' in 1996, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). Both treaties were signed by Member States, as well as by the EC, thereby taking on a commitment to implement the new international norms in a harmonized fashion.

Surprisingly, the scope of the Directive on Copyright and Related Rights in the Information Society, that was first proposed in 1997 and finally adopted in 2001, turned out to be considerably broader than the 'digital agenda' that it was supposed to deal with required. Although the Directive harmonizes the basic economic rights (rights of reproduction, communication to the public, and distribution) in a broad and supposedly 'Internet-proof' manner, and introduced special protection for digital rights-management systems, by far the largest part of the Directive deals with 'exceptions and limitations' – a subject incidental in the Green Papers. By contrast, the latest Commission Green Paper of 2008 deals almost exclusively with exceptions and limitations.

1.1.3. THE GREEN PAPER ON COPYRIGHT IN THE KNOWLEDGE ECONOMY

The Green Paper²⁸ of July 2008 is remarkably less ambitious than its predecessors, at least when one views its objective and the means thought able to meet these. The introduction contains the familiar – although by no means generally accepted – mantra that 'a high level of copyright protection is crucial for intellectual creation'.

G.B. Dinwoodie, 'Commitments to Territoriality in International Copyright Scholarship', in *ALAI Copyright Internet World, Studydays Neuchâtel 2002*, ed. P. Brüger (Bern: ALAI Suisse, 2003), 74–78, [Dinwoodie, 2002]. The European Max Planck Group on Conflict of Laws Principles in Intellectual Property (CLIP) will release its draft principles in the course of 2009. These principles depart from territoriality in some respects, especially where infringement via the Internet is concerned. See <www.ip.mpg.de/ww/de/pub/forschung/forschungsarbeit/cl_ip_eu/home.cfm>.

27. Commission Recommendation 2005/737/EC of 18 Oct. 2005 on collective cross-border management of copyright and related rights for legitimate online music services, *OJ* 2005 L 276/54 [Online Music Recommendation]; Communication from the Commission on Creative Content Online in the Single Market Commission, Brussels, COM (2007) 836 final, Brussels, 03 Jan. 2008 [Communication on Creative Content Online].

28. European Commission, Green Paper on Copyright in the Knowledge Economy, COM (2008) 466 final, Brussels, 16 Jul. 2008 [Green Paper on Copyright in the Knowledge Economy].

The purpose of the Green Paper is ‘to foster a debate on how knowledge for research, science, and education can best be disseminated in the online environment’.²⁹ The Commission frames this debate primarily in terms of the exceptions to copyright. It rightly observes that ‘a forward-looking analysis requires consideration of whether the balance provided by the Directive is still in line with the rapidly changing environment’.³⁰ But the Green Paper does not directly address the three key elements of the intellectual property system: the scope of exclusive rights, the delineation of protected subject matter, and the duration of protection. Rather, it is implied that the balance is between broad rights, which are there to ensure a reward ‘for past creation and investment’, and limitations, which serve ‘the future dissemination of knowledge products’.³¹

The Green Paper focuses on those exceptions that the Commission believes are the most relevant for the dissemination of knowledge, namely, the exception for the benefit of libraries and archives; the exception allowing dissemination of works for teaching and research purposes; the exception for the benefit of people with a disability; and a possible new exception for user-created content. The first three exceptions were among those ‘harmonized’ by the Information Society Directive. Chapter 3 gives an extensive analysis of the limitations of the Information Society Directive and other directives.

The Commission poses twenty-five questions. Almost all of them essentially ask stakeholders whether the previously mentioned exceptions are (still) fit for purpose. The issues raised range from the need to clarify the scope of certain exceptions, to the potential benefits of making some exceptions mandatory, to the desirability of introducing new ones. Licensing is another topic addressed. On the relationship between exceptions and contractual terms of use in general, the Commission asks whether a need is felt to promote model contracts or guidelines. Presumably these would clarify the scope of exceptions in particular cases or serve to guarantee that exceptions are not circumvented by licensing terms.

Specifically for the education and research sectors, the Commission solicits opinions on whether education and research institutions should agree to licensing schemes with (commercial) publishers, notably with a view to the promotion of distant learning and online access to materials. A similar question is asked in the light of the desire to increase online access to the collections of libraries and archives. Of course, these questions indirectly ask what the role of publishers, educational establishments, libraries, etc. should be in the digital environment. The implicit message seems to be that institutions such as universities, libraries, and archives compete with commercial publishers when they move towards making their collections available online.

In the context of the exceptions for libraries and archives, the Commission also raises the issue of orphan works. These are ‘works which are still in copyright but

29. *Ibid.*, 1.

30. *Ibid.*, 20.

31. *Ibid.*, 4.

whose owners cannot be identified or located'.³² As is detailed in Chapter 7, the orphan works problem has moved up the European agenda since it surfaced in the context of the 'i2010: Digital Libraries' initiative of DG Information Society. DG Internal Market now seeks stakeholder input to determine whether a statutory instrument is needed to address the problem, what form such an instrument should have (e.g., stand-alone, provision in the Information Society Directive), and how the inevitable cross-border problems between EU Member States and third countries could be handled. These issues are addressed in detail in Chapter 7 on orphan works.

The follow-up the Green Paper will result in was unknown at the time of writing of this book. The call for comments closed only at the end 2008. Judging from the numbers of replies that circulated shortly after the Green Paper was made public, it will draw at least as many stakeholder comments (139) as the Consultation on the review of EU legislation on copyright and related rights³³ did in 2004. This Staff Working paper was associated with the Commission's Better Regulation Action Plan. It glosses over the entire *acquis communautaire* for copyright and related rights. We will refer to the issues it raises in the relevant chapters. So far, it has resulted in the 'consolidation' of the Rental Right Directive and of the Term Directive. It also set the stage for the 2008 proposal to extend the term of protection in sound recordings to the benefit of phonogram producers and performers. This topic will be discussed in depth in Chapter 5. The Term Extension Proposal 2008 should also result in a harmonized method of calculating the duration of protection in co-written musical works, an issue we take up in Chapter 6.

1.2. LEGISLATIVE COMPETENCE OF THE EC

As can be deduced from the short history described above, the harmonization of copyright and related rights has traditionally been inspired by two principal objectives: the proper functioning of the internal market and the improvement of the competitiveness of the European economy, also in relation to the EU's trading partners.

This subsection examines more closely the mode and intensity of the measures used to attain said objectives, in relation to the legislative competence of the Community which flows from the EC Treaty. Any Community action must comply with three principles, namely, attribution, subsidiarity, and proportionality. It is the latter principle that is the most relevant for the area of copyright and related rights because it is the one likely to most affect the mode and intensity of Community harmonization.

32. *Ibid.*, 10.

33. Commission Staff Working Paper on the Review of the EC legal Framework in the Field of Copyright and Related Rights, SEC (2004) 995, Brussels, 19 Jul. 2004 [Staff Working Paper on Copyright Review].

The Lisbon Reform Treaty, signed by the Member States on 13 December 2007, brings a significant change to the competence issue. It introduces a special legal basis for community intellectual property titles, which is discussed in more detail in Chapter 9. Another aspect that warrants attention is the revised competence in the area of trade-related international agreements on intellectual property (See Section 1.2.3).

The Lisbon Reform was to take effect in 2009 at the earliest, had all Member States succeeded in ratifying it before that date.³⁴ The chances of a speedy ratification process, however, passed with the rejection of the reform treaty in the Irish referendum of June 2008. If the Lisbon reform eventually comes through, the European Union shall replace the ECs, and will have legal personality (Article 46A Lisbon = new Article 47 of the Treaty on the European Union (TEU)). The EC Treaty (TEC) will be renamed Treaty on the Functioning of the European Union (TFEU). In the following section the competence under the EC Treaty is discussed; the corresponding articles of the post-Lisbon reform are added in parentheses.³⁵

1.2.1. LEGAL BASES FOR ACTION AND THE ATTRIBUTION PRINCIPLE

The attribution or conferral principle of Article 5 EC Treaty (new Article 3b TEU) requires that the Community act only insofar as the Treaty confers it powers to do so and only to attain the EC's objectives. These objectives are laid down in Article 2 TEU. In addition to the lofty aim 'to promote peace, its values and the well-being of its peoples', the EU's objectives are still predominantly economic: to establish an internal market; work for the sustainable development of Europe based on balanced economic growth and price stability, and a highly competitive social market.

The ECJ has elaborated that the attribution principle requires a close relation between aims and content of a harmonization measure on the one hand, and the essence of the legal basis underlying that measure on the other.

Article 253 EC Treaty (Article 296 TFEU) requires that every measure with intended legal effect expressly refers to its legal basis in the EC Treaty. The Court further demands that the application of the legal basis involved be well-founded on objective grounds in the statement of reasons, particularly in regard to the aim and content of the measure.³⁶

34. The new definitions of qualified majority voting will take effect only in 2014 (at the earliest), Art. 191 Lisbon Reform Treaty.

35. The numbering of the Treaty of Lisbon itself is omitted here, as this only complicates matters. For example, Art. 95 EC Treaty on harmonization of the internal market has been renumbered Art. 94 in the Treaty of Lisbon, and will eventually become Art. 114 of the TFEU.

36. ECJ 26 Mar. 1987, Case 45/86 *ECR* [1987] 1493 (*Commission v. Council; Generalized Tariff Preferences*). See also ECJ 11 Jun. 1991, Case C-300/89 *ECR* [1991] I-2867 (*Commission v. Council; Titanium Dioxide*).

1.2.2. LEGAL BASES FOR COPYRIGHT REGULATION IN THE EC TREATY

The Treaties do not contain competence rules specific to intellectual property, with the exception of the new Article 97a TFEU, to be discussed later. Rather, copyright and related rights can be regulated at the European level on the basis of more general competences, notably Article 95 on the internal market and Article 308 on residual competence. In addition, the specific competences in the area of consumer law and culture may have an impact on copyright regulation.

Article 95 EC Treaty (Article 114 TFEU) grants power to harmonize the laws of the Member States to the extent required for the functioning of the internal market. Article 95 is a powerful legal base, and the single most important legal basis for community action in the field of copyright and related rights. It is often accompanied by Articles 47(2) TEC and 55 EC, which allow for the taking of harmonizing measures necessary for the smooth functioning of the internal market in regard to freedom of establishment and the freedom to provide services.

Some argue that the broad interpretation given to Article 95 allows for virtually any type of regulatory intervention.³⁷ For a measure (directive, regulation, etc.) to be based on Article 95 it must meet two cumulative criteria: the measure must actually harmonize national laws, or contribute to better implementation of other harmonizing measures,³⁸ and the measure must contribute to either the creation or a better functioning of the internal market.³⁹

Disparities in national copyright laws are often cited in the statements of reasons of directives as causing impediments to the internal market. The ECJ has, however, ruled that a mere finding of disparities between national rules and of the abstract risk for obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom, are not sufficient to justify the choice of Article 95 as a legal basis.⁴⁰ There must therefore be a real and noticeable effect of diverging rules on the internal market. As for laws aimed at improving competition in the internal market, the ECJ requires that 'the distortion of competition which the measure purports to eliminate is appreciable'.⁴¹ The question then becomes when such is the case (see section 1.2.4 on proportionality).

Further legal bases for action are Articles 151 and 153 (Article 167 and 169 TFEU). Article 153 instructs the Community to contribute to protecting economic

37. M. Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union', *European Law Journal* 12 (2006): 503–533, [Kumm, 2006].

38. ECJ 2 May 2006, Case C-217/04, *ECR* [2006] I-03771 (*United Kingdom v. European Parliament and Council; ENISA*).

39. See e.g., ECJ 5 Oct. 2000, Case C-376/98, *ECR* [2000], I-8419 (*Germany v. European Parliament and Council; Tobacco I*).

40. *Generalized Tariff Preferences*, para. 84. Weatherhill posits that the rulings in *Keck* and *Tobacco Advertising* testify to a trend to S. Weatherhill, 'take more seriously the importance of leaving space for diversity between national laws', in *Divergences of Property Law, an Obstacle to the Internal Market?*, ed. U. Drobnig et al. (München: Sellier 2006), 144–149.

41. *Titanium Dioxide*, para. 23.

interests of consumers, as well as to promoting their right to information and education. On the basis of Article 153(3) the Community has some legislative powers. More importantly, Article 153(2) TEC (after Lisbon: Article 12 TEU) provides that consumer protection is to be attained by integrating the interests of consumers into the definition and implementation of the other Community policies and activities, for example, when harmonizing intellectual property law on the basis of Article 95 TEC.

As has been noted, safeguarding or stimulating a European culture or the cultures of Member States is not a community goal included in the objectives of the EU that are enumerated in Article 2 EC Treaty (after Lisbon: Article 3 TEU). Article 3 TEC does however list as one of the EC's activities 'a contribution to . . . the flowering of the cultures of the Member States'. Article 151 TEC regulates Community action in the cultural sphere in more detail, inter alia by instructing the Community to 'encourage cooperation' between Member States, and if necessary 'support and supplement' their actions in the area of⁴² *artistic and literary creation* [emphasis added], including in the audiovisual sector.⁴³ Article 151(5) explicitly states that the Council has no competence to adopt harmonizing measures in the cultural sphere, although it can adopt recommendations.⁴⁴

However, from case law one would think Article 151 is in effect interpreted as a thinly disguised base for harmonization. When asked to rule on the constitutionality of the rental right for phonograms in the *Metronome Musik* case, the ECJ reasoned that the introduction of an exclusive rental right serves the interest of stimulating artistic creation (then Article 128 EC Treaty). This is a somewhat mystifying argument, not in the least when one considers that Article 151(4) instructs the EC to take cultural aspects into account in its actions under Article 95 TEC or other provisions, in particular to respect and promote the diversity of its cultures. Article 151 would therefore seem to curtail rather than strengthen the Community's possibilities of harmonizing copyright for the purpose of internal market integration.⁴⁵

The new Article 2b(5) TFEU is also explicit: legally binding acts of the Union adopted on the basis of the provisions of the treaties relating to areas where the Union only has 'supportive' competences 'shall not entail harmonization of Member States' laws or regulations'. Supportive or complementary competence exists for inter alia education and culture (Article 2 E TFEU).

Article 151 could play a role in the way the European legislator deals with the relationship between creators and artists on the one hand and intermediaries such as

42. The Community legislature may only adopt (non-binding) recommendations and incentive measures, cf. Art. 151(5) TEC.

43. Article 151(2) TEC (emphasis added).

44. The Lisbon Reform changes little: Art. 167(5) TFEU provides that Council and European Parliament jointly decide on stimulating measures; unanimity will no longer be required for Council recommendations on culture.

45. For a more detailed analysis on the relevance of Art. 151 EC Treaty to copyright harmonization, see Würfel (2005), 130–132.

publishers, record companies, and broadcasters. It is often argued that increases in the protection of intellectual property as legislated at the EU level, benefit intermediaries more than the actual creators of content.⁴⁶ Article 151 TEC provides an additional reason for the European legislator to reflect on the effect of its actions on the actual creators.

A further legal base is to be found in Article 308 EC Treaty (Article 352 TFEU). It provides a residual competence:

If action by the Community should prove necessary to attain, in the course of the operation of the Internal market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.⁴⁷

In absence of a specific legal basis for European intellectual property titles, Article 308 has been the legal basis for the regulations on Community trademarks,⁴⁸ Community plant-variety rights,⁴⁹ and Community designs.⁵⁰ The extent to which Article 308 could be used to legislate an EC-wide 'Community copyright' in stead of harmonizing national copyrights, depends on how one rates such action in the light of especially the proportionality principle, to be discussed below in Section 1.2.4.

1.2.3. EU COPYRIGHT AND INTERNATIONAL OBLIGATIONS

In the previous subsections we have focused on the so-called internal competence of the EC to regulate copyright and related rights. The EC also has external competences, that is, it can enter into agreements with third countries. Such competence can either be explicit or implicit (flowing from internal competences of the EC Treaty such as Article 95), and can be exclusive or shared. As we shall elaborate in this subsection, the interplay between internal and external competences has consequences for Member States' ability to enter into bilateral or multilateral agreements.

46. R. Hilty, *IIC* 35 (2004): 761–762, 765, [Hilty, 2004]; R. Towse, *Copyright and Creativity: Cultural Economics for the 21st Century* (Rotterdam: Erasmus University, 2006), [Towse, 2006].

47. Article 352 TFEU no longer explicitly demands that the envisaged action is necessary for the operation of the internal market. In stead, it confers competence for actions 'necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties'. Consent of the European Parliament is in principle required, and national parliaments must be informed of proposals based on Art. 352 TFEU.

48. Council Regulation (EC) No. 40/94 of 20 Dec. 1993 on the Community Trade Mark, *OJ* 1994 L 11/1 [Community Trademark Regulation].

49. Council Regulation (EC) No. 2100/94 of 27 Jul. 1994 on Community Plant Variety Rights, *OJ* 1994 L 227/1 [Regulation on Community Plant Variety Rights].

50. Council Regulation (EC) No. 6/2002 of 12 Dec. 2001 on Community Designs, *OJ* 2002 L 003/1 [Community Designs Regulation].

Member States may also have pre-existing international obligations towards third countries, some of which may be in conflict with EC law. Article 307 TEC (Article 351 TFEU) allows Member States to honour previous obligations, but also instructs them to take all appropriate steps to eliminate any incompatibilities with EC law. In its legislative actions, the EU itself also aims to respect international obligations of Member States under existing intellectual property treaties. In the multilateral setting the primary ones are:

- The Berne Convention for the protection of Literary and Artistic Works 1886 (BC Paris Act 1971).
- The Rome Convention: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (RC).
- Geneva Convention: Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms of 1971 (GC).
- World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPs).
- WIPO Performances and Phonograms Treaty 1996 (WPPT).
- WIPO Copyright Treaty 1996 (WCT).

Under the terms of accession, new Member States must become party to these agreements. The Berne Convention has over 160 signatories and is in force in all EU Member States. The Rome Convention has over 80 signatories and is in force in all EU Member States except Malta and Cyprus. Through WTO membership, TRIPs is binding on more than 150 parties, including the EU and its Member States. The WPPT and WCT remain to be ratified by the EU and the majority of its Member States.⁵¹

The norms of intellectual property treaties are as such not part of community law. It is, however, ‘settled case-law that Community legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the Community’.⁵² This is what the ECJ did in *Peek & Cloppenburg v. Cassina*, in which it had to clarify the scope of the distribution right of Article 4 Information Society Directive. Because that article is intended to implement at Community level the Community’s obligations under the WCT and the WPPT, the ECJ interpreted the concept of distribution in the light of the definitions given in those Treaties.⁵³

51. Situation on 1 Jun. 2008. WCT and WPPT have been consented to by Decision 2000/278/EC OJ 2000 L89/6.

52. See ECJ 14 Jul. 1998, Case C-341/95, ECR [1998] I-4355 (*Bettati*), and specifically as regards copyright and the WIPO treaties: *SGAE v. Rafael Hoteles* at 35.

53. The courts of Member States must, when applying domestic law, also look to *international intellectual property norms*. In *Hermès*, the question was whether the Dutch ‘kort geding’ procedure is a provisional measure within the meaning of Art. 50 TRIPs. The measures that Art. 50 TRIPs and Art. 99 Community Trademark Regulation refer to are domestic ones.

The EU itself plays an increasingly dominant role in shaping the international law of intellectual property. Article 300 (ex 228) EC Treaty provides the default internal procedural rules for the conclusion of international agreements between the EU and third states. In principle the European Parliament must be consulted, and the conclusion of treaties requires a qualified majority vote in the Council. Article 300 does not confer substantive power to act.

EC competence in external relations can either be conferred explicitly or implicitly; the authority is either shared or exclusive. Explicit competence for intellectual property can be based on Article 133 EC Treaty on the 'Common Commercial Policy', that is: the EC's external trade policies in a broad sense.⁵⁴ It gives the EC exclusive competence to conclude international trade agreements. Agreements under the Common Commercial Policy require a qualified majority vote in the Council. The European Parliament has no role, contrary to its default position under Article 300 TEC.

The Commission especially has advocated an extensive interpretation of the provisions on the Common Commercial Policy. Originally these were limited to a common policy for the international trade in goods (e.g., import tariffs, quota, and customs). As the relative importance of services and intellectual property grew in the European economy, so did the interest in including them in international trade negotiations. The debate over the extent of the EC's competence peaked during the negotiations on the 1994 WTO Agreement on TRIPs.

The Commission sought an opinion of the ECJ, arguing its exclusive competence to negotiate TRIPs under the Common Commercial Policy article. In case Article 133 did not apply, the Commission argued it had *implicit* exclusive competence. The Court had previously concluded that implicit external competence exists where the conclusion of agreements is required to achieve internal Community objectives (so-called 'Opinion 1/76 Doctrine')⁵⁵ and also where there is internal harmonizing competence (the so-called 'AETR' or 'ERTA' Doctrine).⁵⁶

The ECJ ruled that 'since the Community is a party to the TRIPs Agreement and since that agreement applies to the Community trade mark, the courts referred to in Art. 99 of Regulation No. 40/94, when called upon to apply national rules with a view to ordering provisional measures for the protection of rights arising under a Community trade mark, are required to do so, as far as possible, in the light of the wording and purpose of Article 50 of the TRIPs Agreement'. ECJ 16 Jun. 1998, Case C-53/96, ECR [1998] I-03603 (*Hermès International v. FHT Marketing Choice BV*), para. 28.

54. The common commercial policy is not limited to traditional aspects of international trade, but may include modern aspects such as development, protection of the environment, etc. See P. Kapteyn & P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (London: Kluwer Law International, 1998), 1275 et seq.
55. Opinion 1/76 European Layin-up fund for Inland Waterway Vessels, ECR [1997] 741, [Opinion 1/76].
56. The ECJ also held that whether express powers conferred to adopt internal measures necessitate the power to enter into external obligations must be examined on a case-by-case basis. ECJ Case 22/70, ECR [1971] 263 (*Commission v. Council*). On Art. 300 and the preceding AETR doctrine of the ECJ, see J. Gundel, 'Die Europäische Gemeinschaft im Geflecht des internationalen System zum Schutz des geistigen Eigentums', *ZUM* (2007): 603–613, at 610–611.

The ECJ concluded in its WTO/TRIPs opinion⁵⁷ that the EC does not have *exclusive* competence, but only a shared competence. It reasoned, first, that the objective of TRIPs is foremost to harmonize and strengthen the protection of intellectual property at the international level. This objective does not come within the scope of the Common Commercial Policy. Only the provisions that deal with customs matters in relation to the prohibition of trade in counterfeit goods are covered by Article 133 TEC (ex 113 EC Treaty). Furthermore, for achieving an internal market with respect to intellectual property, harmonization measures need not necessarily go hand in hand with international agreements such as TRIPs. Therefore ‘Opinion 1/76 doctrine’ competence does not exist. Finally, although the EC’s internal competence to harmonize intellectual property on the basis of Article 95 TEC (ex 100a) implies competence to conclude international agreements, this authority is not exclusive. Only where intellectual property issues have been harmonized, must individual Member States refrain from entering into obligations which conflict with the harmonized rules. Harmonization thus effectively turns shared competence into exclusive competence. There is no exclusive competence for unharmonized issues, as this would allow the EC to effectively harmonize internal law without respecting the relevant normal procedures. For intellectual property, the co-decision procedure of Article 251 TEC is the most commonly followed.

Because the delineation of exclusive and shared competences is problematic where international agreements on copyright and related rights are concerned, the EC and its Member States often opt to negotiating together. The WCT and WPPT are examples of such ‘mixed agreements’, where both the EC (following the Article 300 TEC procedure) and its individual Member States are contracting parties. The ECJ has ruled – again in the WTO/TRIPs opinion – that in cases of shared competence, Member States and the EC have a duty to work closely together.

Since the WTO/TRIPs opinion, controversy has continued to exist over the exact scope of EC’s (exclusive) competence in the area of intellectual property.⁵⁸ The matter gets even more complicated due to link between copyright law and areas where the EC has very limited internal competence, namely culture and audiovisual and educational services (see Section 1.2.2 above).

57. Opinion 1/94, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property (WTO), *ECR* [1994] I-5267, [WTO Opinion 1/94].

58. S. Meunier & K. Nicolaidis, ‘Who Speaks for Europe? The Delegation of Trade Authority in the EU’, *Journal of Common Market Studies* 37 (1999): 447, [Meunier & Nicolaidis, 1999]; Meinhard Hilf, ‘The ECJ’s Opinion 1/94 on the WTO – No Surprise, but Wise?’, *EJIL* 6, no. 2 (1995): 245–259, [Hilf, 1995]. A recent controversy concerns the European Patent Litigation Agreement (EPLA). The aim of this agreement is to set up an integrated judicial system for the settlement of litigation concerning European patents granted under the Munich Patent Convention. The Legal Service of the European Parliament opinioned that individual Member States are not competent to conclude the EPLA. Legal Service document SJ-0844/06, D(2006) 65117 of 7 Feb. 2007.

Under the current Article 133(5) on the Common Commercial Policy (Article 207 TFEU, Article 2B TEU new), the EC is only exclusively competent to negotiate and conclude agreements on the *commercial* aspects of intellectual property, that is: those relating to intellectual property as part of international trade.⁵⁹ Exactly what those aspects are remains unclear. For example, would it cover the issues the EU and its principal negotiating partners the United States, Australia, Switzerland and Japan aim to include in the so-called Anti-Counterfeiting Trade Agreement (ACTA)?⁶⁰ Negotiations surrounding this agreement are clouded in secrecy, but the little information that has come out suggests ACTA would inter alia establish common enforcement practices to promote strong intellectual property protection in coordination with right holders and trading partners, ostensibly along the lines of the Enforcement Directive and the proposed Criminal Enforcement Directive, both controversial instruments in their own right.⁶¹

The Lisbon reform does not appear to bring about substantive changes in external competence. Procedure will change slightly. Where before unanimity in the Council was required to conclude trade agreements dealing with unharmonized areas of intellectual property, after the Lisbon reform qualified majority voting will in most cases apply. The European Parliament has also gained in influence: it has obtained co-decision powers for measures implementing the Common Commercial Policy (Article 207 TFEU).

1.2.4. SUBSIDIARITY AND PROPORTIONALITY

The preceding analysis of the legal bases makes clear that the EU's internal competence to regulate intellectual property is fairly broad, with Article 95 playing a pivotal role. In this section we take a closer look at how the principles of subsidiarity and proportionality frame the exercise of competence.

Under the Lisbon reform, intellectual property as such remains an area in which the EU has as a rule no exclusive internal competence. It does not feature

59. Intellectual property was first included as part of the common commercial policy in the Treaty of Nice (2000). Art. 133(7) provides that the Council, acting unanimously, may extend the application of the Common Commercial Policy procedure to international negotiations and agreements on intellectual property beyond aspects of international trade. The European Parliament must be consulted.

60. See, for example, EDRI-gram – Number 5.21, 7 Nov. 2007; M. Ermert, 'Embattled ACTA Negotiations Next Week in Geneva; US Sees Signing This Year', *Intellectual Property Watch*, 30 May 2008 <www.ip-watch.org/weblog/index.php?p=1071>, [Ermert, 2008].

61. Amended proposal for a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights, COM (2006) 168 [Proposal Criminal Enforcement Directive]. See for critical comments on the EC's competence: R. Hilty, A. Kur & A. Peukert, 'Statement of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the Proposal for a Directive of the European Parliament and of the Council on Criminal Measures Aimed at Ensuring the Enforcement of Intellectual Property Rights', *IIC* 37 (2006): 970–977, [Hilty, Kur & Peukert, 2006]; Comments by the Law Society of England and Wales (August 2006), 3–5.

in the limitative list of exclusive competences of Article 2B TFEU. Copyright will continue to be regulated under the heading of internal market, a shared competence (Article 2C TFEU). Once harmonization of a given subject matter has taken place, Member States are no longer allowed to regulate the issue internally, but could regain such competence if the EU decides to deregulate, for example, by repealing a directive.⁶² We have also seen, that the EU has (and will keep) only a supportive or complementary, non-harmonizing role in the cultural realm of ‘artistic and literary creation’.

Where there is shared competence, as is the case with intellectual property, the *principle of subsidiarity* prescribes that the Community acts only to the extent that the objectives of the proposed action, first, cannot be sufficiently achieved by the individual Member States, and second, can be better achieved by the Community.⁶³ Political and economic considerations drive the decision that there is a problem to be addressed and that this problem is best addressed at the European level. The ECJ respects this political nature by allowing the legislative institutions a wide margin of appreciation,⁶⁴ but does require that the intensity of the action undertaken does ‘not go beyond what is necessary to achieve the objective pursued’.⁶⁵

Obviously, where the characteristics of *national territorial* copyright and related rights regimes cause real obstacles to internal market integration, the Community is in a better position to successfully remove these than individual Member States are.

The *proportionality principle* primarily governs the *mode and intensity* of Community intervention in the laws and policies of the Member States. The Court of Justice has ruled that: Community action must be fit to achieve its aims; may reach no further than necessary in this respect, and that the disadvantages caused shall not be disproportionate to the aims pursued.⁶⁶ These three criteria have been elaborated on in points 6 and 7 of the Protocol on Subsidiarity and Proportionality.

The Protocol provides that where it concerns methods of harmonization, framework directives are to be preferred to detailed measures and directives to regulations. This preference for directives was already agreed on with the European Single Act of 1986.⁶⁷ However, the Lisbon Reform Treaty no longer speaks in favour of one instrument over another. Its revised Protocol on Subsidiarity and

62. This possibility is specifically noted in the ‘Declaration in relation to the delimitation of competences’, Intergovernmental Conference 18 Oct. 2007, Lisbon.

63. See the guidelines in point 5 of the Protocol on Subsidiarity and Proportionality.

64. Because it is essentially a political principle, it is argued that subsidiarity should not be depoliticized and further judicialized: T. Koopmans, ‘Subsidiarity, Politics and the Judiciary’, *EuConst* 1 (2005): 112–116.

65. ECJ 10 Dec. 2002, Case C-491/01, *ECR* [2002] I-11453, para. 184. (*Tobacco Advertising II*).

66. See e.g., ECJ 18 Nov. 1987, Case 137/85, *ECR* [1987] 4587 (*Maizena v. BALM*); ECJ 13 Nov. 1990, Case C-331/88, *ECR* [1990] I-4023 (*Fedesa*); ECJ 7 Dec. 1993, Case C-339/92, *ECR* [1993] I-6473 (*ADM Ölmühlen*); ECJ 16 Dec. 1999, Case C-101/98, *ECR* [1999] I-8841 (*Union Deutsche Lebensmittelwerke*); and ECJ 11 Jul. 2002, Case C-210/00, *ECR* [2002] I-6453 (*Käserer Champignon Hofmeister*). See also point 3 Protocol Subsidiarity and Proportionality.

67. Declaration no. 4 on Art. 95, annexed to the final act of the Single European Act.

Proportionality does not refer directly to the preferred choice of instrument. Rather, it focuses on the participation in EU legislative procedures, by national parliaments through the so-called yellow card procedure, as well as by society at large through public consultations. In addition, the Protocol stresses the need for the legislator to better substantiate why a particular legislative action is necessary. We will revisit this issue below, when discussing the role of consultations, impact assessments, and other instruments of the EU's Better Regulation approach in the development of European copyright and related rights law.

That the revised Protocol on Subsidiarity and Proportionality no longer favours directives over regulations outright does not mean such a preference no longer exists. The new Article 3b TEU provides that... the 'content and *form* [italics added] of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This implies using the least intrusive legal instrument. The choice of instrument is also influenced by Article 6 revised Protocol on Subsidiarity and Proportionality, as it instructs the European legislator to minimize the financial and administrative burden of legislative acts, including those for national and local authorities.

To date there are only directives but no regulations for copyright and related rights,⁶⁸ even though Article 95 allows the use of either instrument. As has been pointed out, in other areas of intellectual property, regulations have been adopted on the basis of Article 308 EC Treaty. These do not, however, harmonize existing national regimes, but have introduced new European titles: the Community Trade-mark, the Community Design and the Community plant-variety right.⁶⁹ These titles exist side by side with national industrial property rights. Whether such a Community title is also feasible or indeed desirable for copyright, is a question to be addressed in Chapter 9.

Directives are less 'intrusive' and more flexible instruments than regulations because they leave the individual Member State room to decide how the legal norms are integrated in the national legal system. In theory at least, there need not be a literal transposition of the directive's provisions in a (new) domestic statute, as long as the Member States law achieves the result envisaged by the directive. In practice, freedom for Member States is limited, because the ECJ has more than once required an almost literal transposition of a directive's wording.⁷⁰ The duty under Article 5 TEC to take all appropriate measures to ensure the

68. The DG Customs initiated regulations on counterfeit goods apply to industrial property as well as copyright and related rights. Council Regulation (EC) No. 1383/2003 of 22 Jul. 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, *OJ* 2003 L 196/7; Regulation (EC) No. 241/1999 of 25 Jan. 1999 amending Regulation (EC) No. 3295/94 laying down measures to prohibit the release for free circulation, export, re-export or entry for a suspensive procedure of counterfeit and pirated goods, *OJ* 1999 L 27/1.

69. See n. 48 through 50 above.

70. On the question whether the directive as a legal instrument should not be restored to its original purpose, see S. Prechal, 'Adieu à la directive?', *EuConst* 1 (2005): 481–494, [Prechal, 2005].

fulfilment of that obligation also extends to the national courts that must, as far as possible, interpret national law in the light of the wording and the purpose of the directive.⁷¹

Regulations on the other hand, have direct binding effect and result in uniform rules. In many Member States a legal act of some sort is required to give a Regulation full effect within the national system.

Apart from a choice for the least intrusive instrument, the way in which European rules are drafted requires that ‘care should be taken to respect well-established national arrangements and the organization and working of Member States’ legal systems’. This instruction is contained in point 7 of the Protocol on Subsidiarity and Proportionality, but it is no longer explicit in the Protocol as revised by the Lisbon Reform Treaty.

In *Tobacco Advertising II* and later in *Natural Health*, the Court of Justice allowed the Community legislature a wide margin of appreciation as regards the application of the proportionality principle. The Court said that ‘the legality of a measure adopted in that sphere [*protection of health*] can be affected only if the measure is manifestly inappropriate having regard to the objective that the competent institution is seeking to pursue’.⁷² The ECJ is generally thought of as inclined to strengthen European policies and integration.⁷³ It is rare for the ECJ to rule that community legislation runs afoul of the proportionality principle.⁷⁴ No doubt this is due in large measure to the fact that the assessment of the need for EC intervention, and the preferred method for such action, requires what are essentially (complex) decisions of a political nature. The ruling in *Laserdisken II* on the proportionality of a Community exhaustion right – rather than universal exhaustion – is a clear example of the discretionary power of the legislature.⁷⁵

Obviously, the more discretion the ECJ leaves to the Community institutions, the more the significance of the proportionality test lies with its dutiful application by same institutions, both prior to and during the legislative process. And yet, there is recurring criticism not just of the substantive provisions of the directives (which will be discussed in the coming chapters), but also of how European copyright law comes about. Such criticism concerns primarily the lack of transparency in agenda setting, and the quality of decision-making processes, especially in regard to proportionality. Both aspects will be discussed in the final section of this chapter, in the context of the EU’s Better Regulation Agenda.

71. See e.g., ECJ 23 Nov. 1990, Case C-106/89, *ECR* [1990] I-4135 (*Marleasing*).

72. *Tobacco Advertising II*, see in particular para. 123; ECJ 12 Jul. 2005, Joined Cases C-154/04 and C-155/04, *ECR* [2005] I-6451 (*Natural Health*).

73. G. de Búrca, ‘Limiting EU Powers’, *EuConst* 1 (2005): 92–98, at 97.

74. It has done so in ECJ 20 Feb. 1979, Case 122/78 *ECR* [1979] 677 (*Buitoni*); and ECJ 5 Jul. 1977, Case 114/76, *ECR* [1977] 1211 (*Bela-Muhle*). More recently: ECJ 6 Dec. 2005, Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ECR* [2005] I-10423 (*ABNA*).

75. ECJ 12 Sep. 2006, Case C-479/04, *ECR* [2006] I-8089, para. 52–58 (*Laserdisken II*).

1.3. FROM AMBITIONS TO LAW

The Better Regulation Agenda,⁷⁶ the roots of which lie in the early 1990s,⁷⁷ was developed to help ensure that new regulatory initiatives of the EU are of high quality, and to modernize and simplify existing legislation where necessary. The recent consolidation ('codification' in EU speak) of the Term Directive and the Rental Right Directive was part of the 'Codification rolling programme'⁷⁸ that aims to simplify EU laws.

Other focal points of the Better Regulation Agenda include the exploration of alternatives to legislation and of the room for self-regulation, the repeal of ineffective or superfluous legislation, and a reduction of the administrative burden caused by EU law. The institutions view Impact Assessments – which explore alternative policy options and their ramifications – as an important tool to achieve better regulation, and put considerable effort into improving the impact assessment system.⁷⁹

1.3.1. PROPORTIONALITY IN PRACTICE

From the 'short history of harmonization' set out above, we may conclude that the EU never lacked ambition where its copyright policy is concerned. The objectives as expressed in the Green Papers are invariably echoed in the preambles to the various directives. If one considers the preambles, it appears that the pre-eminent objective of copyright harmonization is the removal of barriers to trade in goods and to the provision of services, followed closely by the goal of ensuring competition in the internal market.⁸⁰ Not surprisingly then, to date all directives have been based primarily on Article 95 TEC (ex 100A).

Another recurring theme is the pursuance of a high level of copyright protection. Most directives claim this boosts creativity and investment in creativity, resulting not only in the growth of the European industry, but also in increased

76. European Commission, 'Better regulation for Growth and Jobs in the European Union', COM (2005) 97, Brussels 16 Mar. 2005; European Commission, 'Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment', COM (2005) 535 final, Brussels, 25 Oct. 2005; European Commission, 'Second strategic review of Better Regulation in the European Union', COM (2008) 32 final, Brussels, 30 Jan. 2008.

77. Communication from the Commission to the Council and the European Parliament, 'Simpler Legislation for the Internal Market (SLIM): A Pilot Project', COM (96) 204 final, Brussels, 8 May 1996. For an overview of associated documents, see <www.europa.eu.int/comm/internal_market/simplification/index_en.htm>.

78. SEC (2006) 1220.

79. See and the earlier Communication on Impact Assessment, COM (2002) 276 final; the European Commission Impact Assessment Guidelines of 15 Jun. 2005, SEC (2005) 97.

80. See Preamble to the Computer Programs Directive, considerations 4 and 5; Preamble to the Rental Right Directive, considerations 1–3, 6, and 9; Preamble to the Cable and Satellite Directive, considerations 5–14; Preamble to the Term Directive, consideration 2; Preamble

competitiveness in relation to EU trading partners, especially the United States. The cultural argument is also frequently raised in the context of expanding protection. The preambles of the Term Directive, Rental Right Directive, and the Information Society Directive all emphasize that a high level of harmonized copyright and related rights is important for cultural development.⁸¹

Already at the early stages of harmonization, intellectual property law scholars noted that precisely because of copyright's cultural dimension, and the EC's pre-occupation with economic objectives, there was less justification to harmonize copyright compared to industrial property rights.⁸² Since then, legal writers increasingly question the substantiation of the need for harmonization at another level: many signals that little economic analysis is done to back up the European legislator's assertions that proposed laws will actually benefit the internal market in terms of reducing obstacles to free trade or improving competitiveness.⁸³ This translates into scepticism about the need for high levels of protection that the European institutions advocate, but also about the choice of issues to be regulated. The Resale Right Directive⁸⁴ and the Database Directive are cases in point.

Another strand of criticism concerns the 'fit for purposeness' of the actual measures taken. They may go beyond what is necessary to solve a particular problem, or are not really suited to solve the problem, or are thought to encroach too much on Member States' legal systems.

We have seen in Section 1.2.4 that the proportionality principle especially seeks to ensure that a legislative measure is fit for its purpose. As will be discussed

to the Database Directive, considerations 2–3; Preamble to the Information Society Directive, considerations 3–4 and 6–7; Preamble to the Resale Right Directive, considerations 9–15.

81. Preamble to the Information Society Directive, consideration 12, Preamble to the Rental Right Directive, consideration 5, Preamble to the Term Directive, consideration 10.
82. See, F. Gotzen, 'Harmonization of Copyright in the European Union', in *Intellectual Property and Information Law*, eds G.J.H.M. Mom & J.J.C. Kabel (The Hague: Kluwer Law International, 1998), 157–173, [Gotzen, 1998]; G. Schricke, 'Zur Harmonisierung des Urheberrechts in der Europäischen Wirtschaftsgemeinschaft', in *Festschrift für Ernst Steindorff zum 70. Geburtstag am 13. März 1990*, eds J.F. Baur, K.J. Hopt & K.P. Mailänder (Berlin/New York: Walter de Gruyter, 1990), [Schricke, 1990]; H. Cohen Jehoram, 'Inleiding en epiloog tot het Groenboek van de Europese Commissie over auteursrecht', *Informatierecht/AMI* 1 (1989): 3–5, [Cohen Jehoram, 1989].
83. See, inter alia, W. Cornish et al. (2003); R. Hilty, 'Intellectual property and the European Community's Internal Market Legislation', *IIC* 35 (2004): 760, [Hilty, 2004]; M. Bonofacio, 'The Information Society and the Harmonization of Copyright and Related Rights: (Over) Stretching the Legal Basis of Article 95(100a)?', *Legal Issues of Economic Integration* 26 (1999): 1–90, [Bonofacio, 1999]. M.L. Montagnani & M. Borghi, 'Promises and Pitfalls of the European Copyright Law Harmonization Process', in *The European Union & the Culture Industries: Regulation and the Public Interest*, ed. Ward (Aldershot: Ashgate, 2008), [Montagnani & Borghi, 2008]; Cornish & Llewelyn (2007), 25.
84. See e.g., D. Booton, 'A Critical Analysis of the European Commission's Proposal for a Directive Harmonising the Droit de Suite', *Intellectual Property Quarterly* 2 (1998): 165–191; C. Ramonbordes, 'Economic Impact of the European Directive on the Artist's Resale Right or Droit de Suite', *Copyright Bulletin* 34, no. 2 (2000): 25–32; G. Gibbons, 'Droit de suite: praise for Irish minimalism?', *EIPR* 29 (2007): 163–166; Th.M. de Boer, 'Hersenschim krijgt juridisch gestalte: de invoering van het volgrecht in Nederland', *AMI* 6 (2005): 181–190.

in more detail in the coming chapters, various elements of directives have been criticized for failing precisely that test.⁸⁵ For instance, the explicit protection of technological protection measures under the Information Society directive could reinforce the ability of right owners and intermediaries (content distributors) to partition the internal market, rather than stimulate the free flow of goods and services. Although harmonization of copyright and related rights is the aim, the existing directives may in effect also contribute to the preservation and in theory even proliferation of differences between the laws of Member States. The political realities of lawmaking more often than not result in the final instrument being quite different from the Commission's initial proposal, resulting in less or even 'faux' harmonization.

For example, sometimes only a minimum level of protection is prescribed (e.g., recital 20 Rental Right Directive on Article 8), or Member States are allowed to introduce new rights (compare recital 20 Term Directive). 'Faux' harmonization takes place where, for instance, rights and limitations are phrased as optional. An example of such rights is the exclusive rights of publishers in critical editions of works in the public domain (Article 5 Term Directive). As for the limitations of Article 5 Information Society Directive, these are not really harmonized because only one of them is actually mandatory (see Section 3.2 below).

Impact Assessments are an obvious tool to help design proportionate measures. An EC's Impact Assessment is supposed to identify and assess the problem at stake and the objectives pursued. It should describe the various options for achieving the objective and analyze the impact each option has in economic and social terms. The advantages and disadvantages of each option can thus be weighed. All Commission initiatives in the field of copyright or related rights that feature on the Commission's Annual Policy Strategy or its Work Programme are subject to Impact Assessment. So far, there have only been two Impact Assessments made under the new regime. In 2005 the Commission published one on cross-border collective rights management for online music services,⁸⁶ a few days before it made public the Online Music Recommendation (an issue discussed in Chapter 3). The latest Impact Assessment came out in the spring of 2008, in support of the proposal to extend the term of protection for the related rights of performers and phonogram producers,⁸⁷ an issue covered in Chapter 5.

85. Hilty (2004): 766; P.B. Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid', *EIPR* 22 (2000): 501–502, [Hugenholtz, 2000]; L. Guibault, 'Le tir manqué de la Directive européenne sur le droit d'auteur dans la société de l'information', *Cahiers de Propriété Intellectuelle* 15 (2003): 537–573, [Guibault, 2003a].

86. Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services, SEC (2005) 1254, Brussels, 11 Oct. 2005.

87. European Commission, Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union, Brussels, SEC (2008) 2287. The Impact Assessment Board advised DG Market to 'give more balanced attention to the interests of the various stakeholders, taking into account not only the concerns of performers and main record producers, but also those of consumers (by setting out more clearly the impacts on the choice and prices of music) and of public domain record labels...'. Avis du Comité des Évaluations

Impact Assessments have been around prior to the Better Regulation Agenda, and were standardized in 2002.⁸⁸ Despite the introduction of impact assessments and other initiatives aimed at a leaner EU, there is no clear indication that the Commission has become less active in its policy and rule making.⁸⁹ It could even be argued that impact assessments seem to serve more as an ex-post justification of a predetermined policy choice, than as ex-ante substantiation of the need for action or of the proportionality of the measure proposed.⁹⁰

Closely associated with proportionality is the problem of quality of the *acquis communautaire*. The procedure of harmonization by directives has obviously had its impact on the quality – in terms of consistency and clarity – of the copyright *acquis*. Copyright and related rights harmonization on the basis of Article 95 EC Treaty suggests that the Community legislature first observes a potential or actual obstacle to the establishment or functioning of the internal market, caused by an aspect of copyright that is regulated in different ways by the Member States, and then takes action to harmonize *that specific aspect*. The Community's 'piecemeal' approach corresponds with this notion: the Community legislature acts only where the internal market is said to clearly demand so.⁹¹ However, in the context of Europe's 'better law' exercise both these points are identified as adversely affecting the quality of regulation.

The potential downside of piecemeal harmonization is of course is that the consistency of the legal framework becomes a concern, both at the level of the *acquis* and at the level of national systems of intellectual property rights. National laws on copyright and related rights still have very distinct structures, approaches and terminologies, despite the longstanding harmonizing influence of international agreements. The European legislator needs to find the common ground for the particular issue it seeks to regulate, while avoiding discrepancies between subsequent directives. Individual Member States have an interest in seeing 'their' approach followed or, alternatively, in interpreting European norms in such a way that they fit best in the national copyright or related rights law. This can easily result in inconsistencies in the *acquis*, and problems with maintaining coherence in the national copyright systems. We will return to this issue and the associated legal uncertainties in the coming chapters.

D'impact, Proposition de Directive du Parlement Europeen et du Conseil Modifiant la Directive 2006/116/CE du Parlement Europeen et du Conseil du 12 Decembre 2006 Relative à la Duree de Protection du Droit d' Auteur et de Certains Droits Voisins, SEC (2008) 2289, Bruxelles, le 9 Jul. 2008.

88. Commission Communication COM (2002) 276 of 5 Jun. 2002 on Impact Assessment.

89. de Búrca (2005), 96.

90. For an in-depth analysis of the advantages and drawbacks of impact assessments in European policy making, see A. Meuwese, *Impact Assessment in EU Law Making* (Alphen aan den Rijn: Kluwer Law International, 2008).

91. See Würfel (2005), 163 et seq.

1.3.2. AGENDA SETTING TRANSPARENCY

From the overview of the ambitions set out in the 1988 and 1995 Green papers, and the resulting seven directives, it is clear that certain issues remain unaddressed, even though the justification to harmonize them is as good (or no worse) as for other issues. One could ask, for example, why the harmonization of private copying levies, rights management, or moral rights is less needed, than say, harmonization of the right of an artist (more often: their heirs) to a share in the proceeds of the resale of his or her sculpture or painting? Although it is difficult to ascertain their exact influence, it is plausible that right holders and their representatives are successful in getting issues on the table, or off. The sudden retraction of a proposal to regulate private copying levies in December 2006 is for example attributed to pressure from collecting rights societies.⁹² Right holder groups have so far also been quite successful in their campaign against EU intervention in collective rights-management schemes.

The concern over the process of agenda setting has two intertwined aspects. On the one hand there is a perceived lack of transparency, and on the other hand it is feared that the outcome of debate on prioritized issues is too much influenced by certain stakeholders.

If the 2004 consultation on the review of the Information Society Directive is anything to go by, public input from interested parties consists for almost two thirds of organizations that represent rightholders and collective rights organizations. The music and film industries are the most heavily represented.⁹³ Not surprisingly, the share of right holders in the responses is even higher (over three quarters of responses) in the 2007 call for comments on the application of the Online Music Recommendation of 2005.⁹⁴

That rightholders pursue their interests in Brussels so actively and persistently has a number of obvious reasons. The regulation of copyright affects them most directly and in the short term and not just the long term. That makes for a strong incentive to try and influence the harmonization agenda. Furthermore, the interests of rightholders are fairly easy to communicate, allowing for the use of language

92. B. Rosenblatt, 'EC Shelves Plans for Copyright Levy Reform', *DRM Watch* 14 Dec. 2006 <www.drmwatch.com/legal/article.php/3649191>, [Rosenblatt, 2006]. A stakeholder consultation was launched in 2008.

93. The prevailing influence of the entertainment industry (and for patents, the pharmaceutical industry) on shaping international intellectual property norms has often been recorded. For example, despite warnings by economic advisors in the White House that TRIPs was not beneficial to the economies of industrialized nations (let alone developing countries), the US trade representative heavily pushed entertainment interest with WTO. See Joseph E. Stiglitz, 'Towards a Pro-development and Balanced Intellectual Property Regime', Keynote address given at the WIPO Ministerial Conference on Intellectual Property for Least Developed Countries (Seoul, 25 Oct. 2004). <www2.gsb.columbia.edu/faculty/jstiglitz/download/2004_TOWARDS_A_PRO_DEVELOPMENT.htm>.

94. Figures based on the submissions made public at <www.ec.europa.eu/internal_market/copyright/review/consultation_en.htm> and <www.circa.europa.eu/Public/irc/markt/markt_consultations/information>.

with apparent emotional appeal (such as the much used speak of ‘misappropriation’, ‘theft’ and ‘piracy’; and language evoking the ‘struggling artist’). Very important, the interests of different stakeholders on the right owners’ side are often relatively easy to align and indeed well organized, allowing for effective lobbying impact. For example, authors and publishers, or composers and music collecting societies, despite the fact that they also have diverging interests, have more shared interests than other parties whose activities are affected by copyright law. Such other stakeholders are as diverse as producers of computer hardware, appliances and storage media, telecommunications corporations, libraries, educational institutions, art auctioneers, consumers, and Internet service providers.

As Cornish et al. succinctly put it in their criticism of the proposed Enforcement Directive:⁹⁵ ‘Haste and political pressure from interest groups do not make for good counsel when it comes to regulating complex and sensitive fields like that of sanctions and procedural measures for IP protection.’

Concern over the effect of lobbying on the democratic process and on the quality of regulation exists in the area of intellectual property as it does in other policy areas. The recent introduction of a code of conduct and a register for lobbyists with the European institutions may increase transparency somewhat.⁹⁶ On the other hand, a lack of transparency seems only a minor concern compared to the sheer force of rightholders lobbies.

That being said, the unit within DG Internal Market that is primarily responsible for copyright policy appears to launch relatively many consultations compared with other parts of DG Internal Market.⁹⁷ If the concerns of parties other than rightholders do not sound through well enough, it probably is as much due to the fact that they are not voiced loud enough, rather than not heard. In recent years there seems a more diverse array of stakeholders giving their input, such as consumer groups, groups focusing on fundamental rights in the digital environment, software developers, etc. Setting consultation standards has become a part of wider transparency initiatives.⁹⁸ The standards require that clear consultation documents are presented, that the Commission consult all relevant target groups,

95. W. Cornish et al., ‘Procedures and Remedies for Enforcing IPRs: The European Commission’s Proposed Directive’, *EIPR* 25 (2003): 447–449, [Cornish et al., 2003].

96. ‘Commission’s lobby register: it’s time to sign up’ Rapid press release IP/08/988 of 23/06/2008, <www.europa.eu/rapid>. Code of Conduct for lobbyists of 27 May 2008: European Transparency Initiative: A Framework for relations with interest representatives (Register – Code of Conduct), COM (2008) 323 final.

97. Up until 2008, of the thirty-two public consultations reported for DG Internal Market, six were from the copyright unit, see <www.circa.europa.eu/Public/irc/markt/markt_consultations/library>.

98. See inter alia White Paper on a European Communication Policy, COM (2006) 35 final, Brussels 06 Feb. 2006, Commission Action Plan on Communicating Europe, SEC (2005) 985 final, Brussels 20 Jul. 2005, Green Paper European Transparency Initiative, COM (2006) 194 final, Brussels 03 May 2006.

and leave sufficient time for participation. Results should be published and feedback provided.⁹⁹

In the future, an extra countervailing power of some sort could be the national parliaments. As was noted above, the ‘upgraded’ Protocol on Subsidiarity and Proportionality annexed to the Lisbon Reform Treaty envisions a larger role for the Member States’ national parliaments.¹⁰⁰ The so-called yellow card procedure empowers national parliaments to request a review of legislative proposals – usually by the Commission. A coalition of national parliaments (one third) can force a review of draft legislation by giving a reasoned opinion why the draft does not meet the standards of subsidiarity and proportionality. The Commission can, however, press forward, if it does not get outvoted by the European Parliament or Council. It takes a majority of national parliaments to ‘appeal’ a commission decision to push forward with the Council or European Parliament. It remains to be seen whether the yellow card procedure will contribute to a more activist role of national parliaments, or more consideration for their opinion on the part of the Commission.

In the meantime, the Conference of Community and European Affairs Committees of Parliaments of the European Union (COSAC) has already agreed that national parliaments shall inform the Commission of their opinion on whether proposed legislation meets the tests of subsidiarity and proportionality.¹⁰¹

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99. See the ‘minimum’ consultation standards in COM (2002) 704 final, as reviewed in the Commission’s Follow-up to the Green Paper ‘European Transparency Initiative’, COM (2007) 127 final, Brussels 21 Mar. 2007, para. 2.2.
100. See also the Protocol on the Role of National Parliaments in the European Union that aims to secure the (timely) supply of policy information from the EU institutions to national parliaments.
101. Following this agreement, the Dutch parliament wrote commissioner Frattini on the (negative) outcome of the parliamentary subsidiarity test on COM (2006) 168 final, where it is proposed that criminal prosecution of piracy of intellectual property must be given priority by member states, and that minimum sanctions should be imposed EU wide. (Letter of 6 Jul. 2006, *Kamerstukken II* 2005–2006, 30 587, nr. F and 6).



Chapter 2

Object, Subject, and Duration of Protection

The focus of the European Community's harmonization efforts so far has been on exclusive economic rights and their duration, and not so much on the subject matter these rights pertain to, nor, for that matter, on issues of authorship, ownership, or moral rights. Consequently, the *acquis communautaire* provides a fairly comprehensive answer to the question of 'how' subject matter is to be protected, but is silent on important aspects of the 'what' and 'who' question of copyright and related rights. What exactly constitutes a copyright work? When is a work a collective work? Who qualifies as author, or who is the initial beneficiary of rights in performances?

This chapter is devoted to the *acquis communautaire* on questions of subject matter definition (Section 2.1), on initial owners of rights (Section 2.2), and on the term of protection (Section 2.3). All are analyzed in relation to the relevant international public law on copyright and related rights.

2.1. PROTECTED SUBJECT MATTER

One reason why the European Union legislator has not given subject matter and beneficiaries much attention seems to be that the harmonization of economic rights are the more pressing matter, viewed from the perspective of the internal market. Politically speaking, Member States would also find it more difficult to agree on precise common standards for creative subject matter, authorship and ownership, for a variety of reasons. One lies in the different approaches between copyright and *droit d'auteur* systems. Another lies in the close links between subject matter, moral rights of authors and performers, and (initial) ownership. That being said, especially in the field of related rights the laws of Member States are much more

similar today than they were when the EU started on the road to harmonization in the 1980s.¹⁰² The interplay between the construction of an international intellectual property system and a European one is an important factor here. Neighbouring rights only started to be harmonized at the European level when the majority of Member States had finally signed up to the Rome Convention of 1961.

Considering said interplay, it is no surprise that the European legislator seems to rely on definitions and concepts contained in the international copyright and related rights treaties. For example, the Term Directive explicitly refers to the concept of literary and artistic works as used in the Berne Convention. This is another factor that helps explain why the *acquis* contains relatively few rules on subject matter and beneficiaries.

In the following sections we will first sketch the international context and describe the relevant provisions on subject matter at the European level. We will then focus on three areas for special attention that may be problematic: the lack of a harmonized concept of ‘work of authorship’, the uncertainty surrounding the notion of ‘broadcast’ (the subject matter of a related right), and the continued existence in some Member States of special regimes for certain types of productions that have remained unharmonized.

2.1.1. THE INTERNATIONAL CONTEXT

2.1.1.1. *Copyright Works*

For copyright proper, the Berne Convention is of central importance for the delimitation of copyrighted subject matter. The Berne Convention for the Protection of Literary and Artistic Works (BC) departs from a broad notion of what constitutes a work of authorship, that is, ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression’ (Article 2(1) BC).¹⁰³ The Berne Convention repeatedly speaks of protection offered to ‘original’ works,¹⁰⁴

102. See for example the differences noted in a study for the European Commission by A. Dietz, *Copyright Law in the European Community* (Deventer: Sijthoff & Noordhoff 1978), [Dietz 1978].

103. Article 2(1) BC: ‘[...] such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works [...]; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works [...]; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science’. Art. 2(3) BC: ‘Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works [...].’ Art. 2(5) BC: ‘Collections of literary or artistic works such as encyclopaedias and anthologies that, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such [...].’

104. In Art. 2(3) on adaptations, in Art. 14*bis* on film.

but contains no further definition of the requirement of originality,¹⁰⁵ contrary to a number of European directives (see Section 2.1.2). Nor does it specify whether a work should be fixed in some material form in order to qualify for protection. TRIPS provides that 'copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such' (Article 9 TRIPS). A similar clause is contained in Article 2 WCT.

The broad definition in the Berne Convention is accompanied by a non-exhaustive list of examples. New types of works (notably, photography and film works) were added with subsequent revisions of the Berne Convention. When revision of the Berne Convention no longer seemed a viable option, the international protection of more recent information products, notably computer software and databases, was actively and successfully pursued by the EC through the TRIPs Agreement and the WCT.¹⁰⁶ Only for these two categories of works of authorship, as well as for photographs, does the *acquis communautaire* currently contain general-purpose definitions.

2.1.1.2. *Related Rights Subject Matter*

In the area of related rights, the Rome Convention and the WPPT are the primary international instruments that delineate protected subject matter. The Rome Convention is the first international convention in which related rights for the protection of performers, producers of phonograms, and broadcasting organizations have been recognized. It contains broad definitions, strictly speaking not of the subject matter, but of the type of (legal) persons it seeks to protect, that is, the performer, producer of phonograms and organization engaged in broadcasting (to be discussed in Section 2.2). TRIPS refers to the definitions of the Rome Convention (Article 1(3) TRIPS).

The WPPT also focuses on defining beneficiaries, but contains some additional definitions of the subject matter it applies to. Thus, a phonogram is 'the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or

105. On the (implicit) requirement of originality in international copyright, see for example D. Gervais, 'The Protection of Databases', *Chicago-Kent Law Review* 82, no. 3 (2007), [Gervais, 2007].

106. Article 10 TRIPS: (1) 'Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). (2). Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself'. Art. 4 WCT: 'Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression'. [underline marks difference with TRIPS Art. 10]. Art. 5 WCT: 'Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself [...]'.

other audiovisual work'. (Article 2(b) WPPT). And in turn, fixation 'means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device' (Article 2(c) WPPT). Like the Rome Convention, the WPPT does in principle not protect audiovisual performances, for example, the acting, dancing, or other performance in motion pictures, video clips or TV series. The Treaty does grant the audiovisual performer a limited right, namely, to authorize fixation or live broadcast of his or her performance. In another aspect WPPT is also broader than Rome: it protects not just the rendering of (copyright) works but also 'expressions of folklore'. However, by prescribing that performers of copyright works must be protected, Article 9 of the Rome Convention does not prevent Contracting States from protecting other types of performances such as expressions of folklore.

2.1.2. THE ACQUIS COMMUNAUTAIRE

The subject matter covered by the seven directives pertains to:
Copyrighted subject matter, that is:

- works of authorship, including photographs, works of graphic or plastic art, software, and databases;

Semi-copyright or Related rights subject matter, that is:

- critical and scientific publications of public domain works;
- previously unpublished works of authorship in the public domain;
- *sui generis* databases;
- performances;
- phonograms;
- broadcasts;
- films (first fixations).

In the following subsection, we will first describe the *acquis* for copyrighted subject matter ('works') and thereafter for subject matter protected by related or *sui generis* rights.

2.1.2.1. Copyright Works

The notion that copyright extends only to expression and not to ideas, concepts, and procedures, etc. is generally accepted in national laws. It is also laid down in Article 9 TRIPS and Article 2 WCT. At the European level, the idea/expression dichotomy has been made explicit only for software. Article 1(2) Computer Program Directive specifies that ideas and principles that underlie any element of a computer program are not protected by copyright.

None of the directives detail how the overarching notion of a work of authorship is to be interpreted. In stead, reference is made to subject matter protected by copyright as a 'literary or artistic work within the meaning of Article 2 of the Berne

Convention',¹⁰⁷ 'copyright works',¹⁰⁸ or 'works of authorship' or simply 'work'¹⁰⁹ without further specification.

The enumerative list of Article 2 BC exemplifies that a wide array of creations qualify as works of authorship. Articles 10 of TRIPS and 4 and 5 of the WCT complement the list, declaring that software and databases are to be protected as literary works under the Berne Convention if they constitute 'intellectual creations'. For these two categories of works the Computer Programs Directive and the Database Directive stipulate that they are protected on condition that the software or database is the 'author's own intellectual creation'.

A subcategory of works of authorship that features in Article 2 BC, and in the Term Directive, is *photographs*. Recital 17 of the Term Directive qualifies as original within the meaning of the Berne Convention the photograph that is the 'author's own intellectual creation reflecting his personality'. Photographs that meet this requirement are to be treated the same as works of authorship in general are, and consequently must also enjoy the same term of protection.¹¹⁰ The definition seeks to distinguish photographs as works of authorship from 'simple' or non-original photographs, which are protected for a shorter period under the laws of, for instance, Denmark, Germany, Hungary, and Finland. The protection of simple photographs is not regulated at the European level, or at the international level for that matter.

Another class of works governed by specific provisions are *works of graphic and plastic art*, the author of which enjoys a resale right. The Resale Right Directive sets out in Article 2(1) that an original work of art for the purpose of the resale right means 'works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware, and photographs, provided they are made by the artist himself or are copies considered to be original works of art'. Not all of these examples can be found in Article 2 BC. Unlike the Berne Convention's concept of the (optional) resale right (Article 14*ter*(1) BC), the harmonized resale right does not pertain to original manuscripts of writers and composers, but EU Member States are free, however, to provide for such a right.¹¹¹

The notion 'original' in the context of the resale right does not relate to a standard of creativity, but to the uniqueness of the physical object in which the work is fixed. Art works do not, of course, necessarily come in one such unique piece; for example, the artist may create a number of prints or lithographs. Such pieces made in limited edition series, are also subject to the resale right.

107. Article 1 Term Directive.

108. Article 1(1) Rental Right Directive.

109. Article 2(1) Information Society Directive.

110. Member States may no longer avail themselves of the possibility the BC offers to protect photographs for a shorter term (but no less than twenty-five years following production) than works in general (Art. 7(4) BC).

111. The resale right of the BC is wider in scope, but is optional.

The reason behind the introduction of specific definitions of a *database* and *computer program* in the relevant directives lies in the fact that the standards of protection varied considerably across the EU. In addition, the extent to which these 'new' information products should be protected within the copyright regime was controversial. A computer program (software) is defined as a literary work within the meaning of the Berne Convention (Article 1 Computer Programs Directive). The Directive specifies that software only enjoys copyright protection if it constitutes the 'author's own intellectual creation, and that no tests as to the qualitative or aesthetic merits of the program should be applied' (recital 8). No further definition was given for fear of regulating a concept that could soon become obsolete.¹¹²

The Berne Convention requires that 'collections of literary or artistic works' be protected if the collection constitutes an intellectual creation by reason of its selection or arrangement (Article 2(5) BC). The Database Directive in Article 3, sub 1 provides that a collection of individually accessible items that are arranged in a systematic or methodical way is copyrighted if at least it constitutes the author's own intellectual creation, by reason of the selection or arrangement of the contents. The items may be independent literary works, data, or other materials. This definition is broader than the corresponding provision of the Berne Convention, because databases enjoy copyright protection irrespective of the type of content.¹¹³ On the other hand, it is more elaborate than that of Article 10(2) TRIPS and Article 5 WCT, which only require an 'intellectual creation'.

The Database Directive requires that the items in the database be 'independent' (Article 1(2)). This prevents a complete overlap with (other) works of authorship, which are also made up of various elements, for example, the frames of an audio-visual work or the chapters of a novel.

In regard to derivative works, there is no general European rule on adaptations or derivative works as protected subject matter. The Computer Programs Directive indirectly recognizes that adaptations of software can be copyrighted.¹¹⁴ We noted that the Berne Convention specifies that translations and adaptations must be granted (Article 2(3) BC).

112. The Explanatory Memorandum defines software as 'a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions', see Bently in Dreier/Hugenholtz (2006), Comment on 91/250/EEC Art. 1 at 2. According to recital 7 the term computer program also includes 'preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage'.

113. A literal reading of the BC limits the protection to databases of which the constituent elements are *copyrighted* material, unlike Art. 10(2) TRIPS and Art. 5 WCT, which speak of 'compilations of data or other material'.

114. The Computer Programs Directive specifies in Art. 4(b) that adaptation/translation requires authorization of the right holder, 'without prejudice to the rights of the person who alters the program'. The Database Directive has no equivalent clause.

2.1.2.2. *Related Rights Subject Matter*

The subject matter of related rights addressed in the *acquis* concerns what one might call the three classic categories of neighbouring rights, that is, those recognized in the Rome Convention: rights in performances, phonograms, and broadcasts. In addition, EU law protects first fixations of films. The introduction of the database right of course constituted an important addition to the copyright regime. A semi-copyright of less significance exists in critical and scientific publications of works that have entered the public domain and in first publications of works not published during the original term of protection ('previously unpublished works of authorship').

Databases are protected not only as works of authorship, but also by what has become known as the *sui generis* right, or database right. This protection applies to databases that testify to a 'qualitatively and/or quantitatively [...] substantial investment in either the obtaining, verification or presentation of the contents' (Article 7(1) Database Directive). That it is more difficult to legislate new concepts than build on the shared experience of Member States is clear from the difficulties national courts have had with the interpretation of the 'substantial investment' criterion.¹¹⁵ The ECJ has cut at least part of this Gordian knot, by ruling that this requirement excludes resources used for the creation of [pre-existing] materials that make up the contents of a database (*British Horseracing Board, Fixtures Marketing v. Svenska Spel*). In its report on the implementation of the Database Directive, the Commission notes that this interpretation was not what it had envisaged, but that this curtailment may at least pre-empt concerns that the *sui generis* right is so broad that it negatively affects competition.¹¹⁶

The Term Directive (Article 4) requires protection of *previously unpublished works of authorship* that have entered the public domain as a result of expiration of the term of protection. The publisher of such a work is to be granted exploitation rights similar to the economic rights of authors. Publishing means making available copies to the public. This right is therefore not limited to previously *unknown* works, as the work may have been performed in public.¹¹⁷ On the introduction in 1993, this right was known in some Member States (e.g., Belgium, France, Germany) but new to the law of most (e.g., Austria, Denmark, Luxembourg, the Netherlands, United Kingdom, Sweden).

The right in critical or scientific publications of public domain works (Article 5 Term Directive) is optional. Generally speaking, Member States that did not

115. For an overview of diverging case law, see IViR, 'The Database Right File', available at <www.ivir.nl>; P.B. Hugenholtz, 'The New Database Right: Early Case-Law from Europe,' paper given at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law (New York, April 2001), [Hugenholtz, 2001].

116. Report on the Database Directive, 13–14.

117. For an interpretation of what constitutes 'publication', see the German OLG Düsseldorf 16 Aug. 2005 (Case 20 U 123/05) – *Montezuma* (distribution of a small number of copies of sheet music of Vivaldi's opera qualify as publication, considering the prevalent practices at the time).

recognize the exclusive right before 1993 have not introduced it in their laws since.¹¹⁸ Consequently, true harmonization in this area has not materialized.

Of the traditional related rights in *performances*, *phonograms*, and *broadcasts*, none of the directives define the subject matter more precisely than the relevant international treaties do. Some argue that the European legislator has consciously refrained from specifying who qualifies as performer and what constitutes a performance, so as not to interfere with the definition of the Rome Convention and national definitions.¹¹⁹ And, indeed, the references to multilateral treaties in the various directives imply that the EC legislator relies on the indirect harmonizing effect of international norms.¹²⁰ We have seen, however, that the Rome Convention, WPPT and TRIPS do not contain straightforward definitions, rather they define the beneficiaries.

The laws of several Member States, such as Hungary, Belgium, and Finland, do not contain a definition of performers. Other Member States, such as Austria, Germany, Greece, and the Netherlands, do have definitions in their laws, but these are broader than Article 3(a) of the Rome Convention. Yet others, such as Poland, refer to the notion of performances instead.

Film in the Rental Right Directive is defined as ‘a cinematographic or audiovisual work or moving images, whether or not accompanied by sound’ (Article 2(1)). This definition covers television features, video clips, commercials, concert registrations, and other kinds of filmed material. Originality is not an issue¹²¹ as the definition in Article 2(1) does not refer to film as a work of authorship. Rather, it relates to the rights of the producer of the first fixation of a film, that is, rights of rental and lending (Article 2(1) Rental Right Directive) and rights of reproduction and making available (Articles 2(d) and 3(d) Information Society Directive). The definition of film is also relevant to determine the scope of the presumptions of transfer of performers’ right that operate in favour of the film producer; these are discussed below in Section 2.2.2.

Before the Rental Right Directive,¹²² very few Member States recognized specific exclusive rights for the producers of first fixations of films. Such rights

118. See the relevant overview per country in the EC commissioned study *Transposition des directives sur le droit d’auteur et les droits voisins dans la législation des Etats membres* (contract nr. ETD/99/B5-3000/E/15), Brussels 1999.

119. Krikke, in Dreier/Hugenholtz (2006), Comment on Directive 92/100/EEC Art. 2 at 3.

120. For example, the Term Directive refers to the literary works within the meaning of the BC (Art. 1(1); recital 15), and to collections protected under the BC (recital 12). The Information Society Directive (in part) serves to implement the WIPO Copyright Treaty and WPPT (recital 15 Information Society Directive). Further references to the BC, RC and other conventions are in the Resale Right Directive, Computer Programs Directive and Rental Right Directive.

121. See Krikke, in Dreier/Hugenholtz (2006), Comment on Directive 92/100/EEC Art. 2 at 5; Von Lewinski, in Walter (2001), Kommentar Vermiet-und Verleih-RL, at 21–22.

122. See the inventory in the EC commissioned study n.a. ‘*Transposition des directives sur le droit d’auteur et les droits voisins dans la législation des Etats membres*’ (contract nr. ETD/99/B5-3000/E/15), Brussels 1999, 29.

do not feature in the international treaties either. The Rental Right Directive's definition of film has no bearing on the protection of other right holders, notably the creative contributors that are considered co-authors of original audiovisual works.¹²³

2.1.3. ASSESSMENT

2.1.3.1. *Works of Authorship*

As can be concluded from the preceding description, some limited harmonization of the notion of work of authorship has been achieved, but only for three distinct categories of works. This has left the general domain of works of authorship unharmonized, albeit the 'quasi-acquis' of the Berne Convention does provide importance guidance in this respect.

Quite a number of national copyright laws of the Member States are structured along the lines of the Berne Convention: they define the types of creations that qualify for copyright by using a broad definition of works of authorship, coupled with an enumerative list.¹²⁴ Other laws do not specify by type of works, but feature a broad definition only (e.g., 'literary and artistic works').¹²⁵ Some laws first distinguish between various larger categories of intellectual creations, such as literary works, artistic works, musical works, and dramatic works, and then define these in more detail.¹²⁶

As we have seen, the *acquis* only incidentally refers to specific categories of works enumerated in Article 2 BC (e.g., photographs and software). There are no harmonized criteria that set out the exact domain of works of authorship. But this need not be problematic as such. On the contrary, it has long been recognized that the use in legislation of detailed subclasses of works is not well suited for modern (digital) information products ('multimedia'), which are not easily categorized.¹²⁷ Also, the interpretation of what belongs to the realm of artistic and literary property has gradually expanded over time, to include such functional productions as computer software and databases. It is difficult to imagine any potential 'gaps' in this respect. However, controversy remains in respect of 'creations' such as cooking

123. Under the Term Directive, at least the principal director must be considered a (co)author, Art. 2(1).

124. E.g., France, Germany, Greece, Slovenia, Portugal, the Netherlands.

125. E.g., Hungary and Belgium.

126. E.g., United Kingdom, Sweden, Estonia.

127. In Anglo-American countries particularly, there is a call to simplify the structure of copyright acts and use broad concepts in stead of the current – quite inflexible – categories of productions. See A. Christie, 'Consolidating Copyright Subject Matters and Exclusive Rights', paper given at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law (New York, April 2001), [Christie, 2001].

recipes, and creations that appeal to the lesser senses, that is, taste and smells.¹²⁸ The Dutch Supreme Court has recently held that perfume (i.e., the composition of the smell) can indeed be copyrighted.¹²⁹ Also, the status of public sector information under EU copyright law (and related rights law for that matter) remains unclear. The Directives are silent on the matter. The Berne Convention provides that contracting states are free to decide whether official documents are subject to copyright (see Section 2.3.3).

Another dimension of the concept of works of authorship that the *acquis* does not address relates to the notion of joint or collective works (see also Section 4.3). The Term Directive, Computer Programs Directive and Database Directive contain only references to the existence of such works under diverse national copyright laws, but give no further definition.¹³⁰ This is not surprising because the definition of works to which more than one person contributes in essence regulates the question of (initial) ownership, or more broadly the relations between the various parties involved in the production. Such issues have remained mostly outside the harmonization process, as is shown in Section 2.2.2 on beneficiaries.

2.1.3.1.1. Author's Own Intellectual Creation

A central – though somewhat elusive – and much deliberated criterion in copyright is that a production must be ‘original’ or creative to attract protection. It is generally accepted that the Berne Convention only protects only original productions.¹³¹ The treaty itself, however, gives no further guidance as to what originality means, other than that it is related to an ‘intellectual creation’.¹³² Because the Berne Convention only prescribes the *minimum* protection to be offered to (authors of) foreign productions, this is not a problem. But where in EC and national copyright legislation originality is a threshold for protection, its exact meaning does become relevant.

128. See S. Balana, ‘Urheberrechtsschutz für Parfüms’, *GRUR Int.* 5 (2005): 979–991, E. Glemas, ‘La protection du parfum par le droit d’auteur’, *Revue du Droit de la Propriété Intellectuelle* 82 (1997): 35–43, [Balana, 2005]; A. Laborde, ‘Les contrefacteurs de fragrances vont devoir se mettre au parfum: la fin de l’impunité?’, *Revue Lamy Droit de l’Immatériel* 14 (2006): 26–29, [Laborde, 2006]; C. Seville, ‘Copyright in Perfumes: Smelling a Rat’, *Cambridge Law Journal* 66 (2007): 49–52, [Seville 2007].

129. Hoge Raad (HR) (Dutch Supreme Court) 16 Jun. 2006, *Kecofa v. Lancôme*, Case C04/327HR, <www.rechtspraak.nl> (LJN: AU8940).

130. Article 2(1) Computer Programs Directive, Art. 4 Database Directive, Art. 1(2) Term Directive.

131. *WIPO Intellectual Property Handbook: Policy, Law and Use*. <www.wipo.int/about-ip/en/iprm/index.htm> [WIPO Handbook], at 5.171 et seq.

132. This much can be deduced from Art. 2(5) BC, which protects collections of work who ‘by their selection or arrangement constitute intellectual creations’. This definition is also used in Art. 10(2) TRIPs on the protection of databases. On originality and the BC, see: Gervais (2007); S. Ricketson & J.C. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2006). I-8.05, [Ricketson & Ginsburg, 2006].

It is therefore worthwhile to take a closer look at the definitions presently in the *acquis*.

As has been noted, there are three provisions in the *acquis* that seek to define 'original'. The earliest and most debated definition is given in the Computer Programs Directive, which speaks of 'original in the sense that it is the author's own intellectual creation' (Article 1(3)). The Database Directive uses the same wording, which is generally accepted to mean that software and databases are subject to the same standard of protection.¹³³ In the Term Directive, for photographs, the description used is 'author's own intellectual creation *reflecting his personality* [emphasis added]'. This wording seems to imply a stricter test than is laid down for software and databases.¹³⁴ It is therefore not entirely clear whether the two definitions are to be interpreted in the exact same way.

Given the different rationale of both provisions, it is likely that the criterion for photographs indeed refers to the stricter continental-European test, which requires that a creation be a 'personal expression' and not merely an own intellectual creation. Such an interpretation would comply with the stated intention of the framers of this provision, which is to clarify that the normal term of protection does not apply to 'simple' photographs (which qualify for a neighbouring right in some Member States).

The originality test of the Computer Programs Directive, on the other hand, is primarily aimed at reconciling the stricter continental test, especially as developed by German courts, with the more generous Anglo-Saxon 'skill and labour' standard. According to the Commission, as a result the *droit d'auteur* countries have had to lower their threshold for protection of software, whereas notably the United Kingdom¹³⁵ and Ireland have had to raise their standard.¹³⁶

For works of authorship other than photographs, databases, and software, national standards determine the eligibility for protection. In all continental countries originality refers to a certain amount of creativity involved in the production. Some Member States' laws are more explicit than others in this respect. For instance, the criterion of originality is not found in the laws of Belgium, Netherlands, France, and Finland, whereas it is made explicit in for example the Greek copyright act.

133. E.g., G. Karnell, 'European Originality: A Copyright Chimaera', in *Intellectual Property and Information Law*, eds J. Kabel & G. Mom (The Hague: Kluwer Law International, 1998), [Karnell, 1998]; Hugenholtz, in Dreier/Hugenholtz (2006); A. Lucas & H.-J. Lucas, *Traité de la Propriété Littéraire et Artistique* (Paris: Litec, 2001), 98, [Lucas, 2001]; L. Bently & B. Sherman, *Intellectual Property Law* (Oxford: Oxford University Press, 2004), 102–104, [Bently & Sherman, 2004].

134. See Karnell (1998), 203.

135. The United Kingdom has not laid down the new criterion expressly in its Copyright act, as it has done for databases.

136. Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, COM (2000) 199 final, Brussels, 10 Apr. 2000, 6 [Report on the Computer Programs Directive].

The originality test has dual properties: it determines both the quality as a protected work and the scope of protection. The more ‘creativity’ is involved, the stronger the resulting copyright will be in terms of protection. In continental systems, the mere fact that a production is an intellectual creation does not in and of itself imply it is original. The work must also testify of a personal vision (personal mark, *Eigenart*) of the author, which in turn is a standard interpreted differently across Member States.¹³⁷ In common law countries, originality requires that there is no copying and that in qualitative terms sufficient skill and labour are expended. Sometimes quantitative rather than qualitative investment in labour (i.e., substantial resources) also count towards originality, even if there is little *intellectual* activity involved in the production.¹³⁸ Over time, the standard of creativity required in *droit d’auteur* countries has gradually been lowered, especially because of the introduction of new categories of functional works, such as applied art and computer software, which has been largely inspired by their economic significance.¹³⁹ In the United Kingdom courts have mitigated the danger of over-protection resulting from the skill and labour criterion, by devising the ‘substantial parts’ test. Under this test, to determine if there is infringement, courts consider the quality rather than quantity of what has been taken.¹⁴⁰ There is therefore a certain ‘rap-prochement’ between copyright and *droit d’auteur* countries in terms of practical outcome, even though the conceptual methods used remain different.

Of course, how the courts interpret the criterion of originality depends on other ‘local’ factors as well, such as the availability of actions in unfair competition.¹⁴¹ The meaning of the criterion is dynamic, that is, bound by time, place, and local use;¹⁴² which has implications for any attempt to legislate a single standard for all categories of works across the EU.¹⁴³

137. In legal theory, no consensus exists as to the exact meaning of the criteria ‘intellectual creation’ and ‘personal vision’ and how they relate to each other; courts do not necessarily distinguish these elements sharply. See inter alia: Cour de Cassation (Belgium Supreme Court) 27 Apr. 1989, *Pas.* 1989 I, 908; HR (Dutch Supreme Court) 4 Jan. 1991, *Nederlandse Jurisprudentie* (NJ) 1991, 608 (*Van Dale v. Romme*), HR (Dutch Supreme Court) 30 May 2008, LJN BC2153 (*EndstraTapes*).

138. For a discussion of the UK skill and labour test, see: Bently/Sherman (2004), 88 et seq.

139. J. Deene, ‘Originaliteit in het auteursrecht’, *IRDI* (2005): 223–237, [Deene, 2005]; Lucas (2001), 76 et seq. (esp. at 98–99); J. Corbet, ‘Het oorspronkelijkheidsbeginsel in het auteursrecht en de toepassing ervan op de vormgeving van een industriële machine’, *Auteurs & Media* 2 (2006): 127–135, at 128–129, [Corbet, 2006].

140. G. Westkamp, ‘Transient Copying and Public Communications: The Creeping Evolution of Use and Access Rights in European Copyright Law’, *George Washington International Law Review* 36 (2004): 1057–1108, at 1065–1066, [Westkamp, 2004].

141. For a general analysis of originality see P. Nordell, ‘The Notion of Originality – Redundant or Not?’, ALAI Nordic Study Days 2000 Proceedings, 73 et seq., [Nordell, 2000].

142. P.B. Hugenholtz, ‘Protecting Compilations of Facts in Germany, the Netherlands’, in *Information Law towards the 21st Century*, eds Dommering & Hugenholtz (The Hague: Kluwer Law International, 1991), [Hugenholtz, 1991]; Karnell (1998), 206–208.

143. On the difficulty of defining the objects of statutory copyright protection, even though this ‘must be considered a crucial preliminary task’, C. Seville aptly observes that if ‘there is a prevailing inability to express a satisfactory definition of the creative, it is unsurprising that

A preliminary question to be answered is whether the extension of the current notions of originality in the *acquis* to all copyright works, actually is required from the perspective of completing the internal market. The practical effect of any such harmonization may be limited if the dynamic application of a harmonized criterion by national lawmakers and courts will persist.¹⁴⁴ Such a ‘homing trend’ is indeed not unlikely, especially where the common standards are laid down in directives. The flexibility of implementation that comes with legislating by directive (rather than regulation) enables Member States to mould the European standard in their existing framework, which will often result in different national standards. On the other hand, national variations may be so slight as to not cause any noticeable problem from an internal market perspective.¹⁴⁵ For example, in its evaluation of the Computer Programs Directive the Commission has not reported any problems with the originality test in practice, although many Member States have failed to literally transpose the Directive’s originality standard for software.

It should also be borne in mind that a common (double) standard for works of authorship would not preclude that productions of information failing the test(s) remain protected at the national level through quasi-copyright or related rights, as is the case with for instance typesetting (Greece, United Kingdom), ‘non-original writings’ (the Netherlands), simple photographs and/or film (e.g., Austria, Finland) or non-original graphic productions (Hungary). In that respect, subject matter will continue to be treated differently across the EU.

2.1.3.2. Persistence of Various Local Forms of Protection

The current directives do not exhaustively determine what creations or productions qualify for protection under copyright or related rights. Member States have some freedom to provide for additional protection, either because directives leave other domestic intellectual property rights and remedies under unfair competition law intact, or treat ‘harmonized’ rights in certain subject matter as optional.

The Information Society Directive is without prejudice to, *inter alia*, provisions on the protection of typefaces and unfair competition law. Unfair competition type protection is enjoyed by publishers in various countries. For instance, under Greek copyright law publishers can act against the commercial reproduction of

matters are even less clear after its translation into copyright law’. C. Seville, *The Internationalisation of Copyright Law* (Cambridge: Cambridge University Press, 2006), 306, [Seville, 2006].

144. See also H. Schack, ‘Europäisches Urheberrecht im Werden’, *ZEuP* (2000): 799–819, at 808–809, [Schack, 2000b].

145. Whether a harmonized criterion in practice stimulates the information market is difficult to ascertain. For instance, the Database Directive evaluation report does not specify whether the envisaged level playing field (because of a harmonized criterion) has actually led to a change in the relative dominance of some Member States (notably the United Kingdom) in database production.

their typesetting¹⁴⁶ or typographical arrangements; the laws of Ireland, United Kingdom, and Italy offer similar protection.

The Computer Programs Directive (Article 9) is without prejudice to alternative forms of protection for software through unfair competition law or otherwise. Article 7(4) Database Directive provides that the *sui generis* protection applies irrespective of protection under copyright (i.e., database as authors own intellectual creation as harmonized by the Directive itself) or *other rights*. Article 13 Database Directive specifies that the directive is without prejudice to provisions concerning inter alia copyright, related rights, or any other rights or obligations subsisting in the data contained in the database, as well as remedies under unfair competition law.

The *sui generis* right in databases was meant to supplant existing national regimes, but to what extent is not entirely clear.¹⁴⁷ The Nordic Member States have adapted their so-called catalogue rules to meet the requirements of the *sui generis* right. Under the old-style catalogue rule the makers of non-original compilations (collections of ‘information items’) were protected against copying, without a substantial investment being necessary. The introduction of the *sui generis* database right has however not meant the end of Dutch ‘*geschriftenbescherming*’. This is a limited quasi-copyright protection for all non-original writings, the only condition being that they are published or destined to be published. German courts provide protection for writings with a very low standard of originality (*kleine Münze*).

As we have seen, Article 5 of the Term Directive gives Member States the option to protect critical and scientific publications of works which have come into the public domain. Such related rights exist under for instance German and Estonian law,¹⁴⁸ but remain unknown in most Member States. Already mentioned is the protection of non-original *photographs*, which features in quite a number of Member States law’s (e.g., Austria, Denmark, Sweden, Finland, Italy, Germany, Hungary, Spain). Article 6 Term Directive explicitly leaves Member States the option to protect such ‘other’ (i.e., non-original) photographs.

Apart from these optional rights, some Member States recognize yet other related rights. For instance, the *organizer* of a performance is granted economic rights akin to the related rights of performers under German (Article 81) and Austrian copyright law (Article 66(5)). Italian law recognizes a remuneration right with regard to the re-use of stage scenes (theatre) where these do not qualify as or embody works of authorship (Article 86 Italian Copyright act).

These examples illustrate that there is quite a range of subject matter the protection of which is not really harmonized, because the protection is optional

146. Note that typeface is normally understood as the design of a set of letters (alphabet, numerals plus symbols), whereas typesetting refers to the layout of print work.

147. See Hugenholtz, ‘Implementing the Database Directive’, in *Intellectual Property and Information Law*, eds Jan J.C. Kabel & Gerard J.H.M. Mom (The Hague: Kluwer Law International, 1998), 183–200, [Hugenholtz, 1998].

148. Article 70 German Copyright Act, Art. 74(2) Estonian copyright act.

or not covered by the directives at all. This is not to say that rights in such productions should be removed or, conversely, be extended across the EU. These rights may have been introduced locally as a result of successful lobbies, or to cure shortcomings in unfair competition law or misappropriation doctrines, etc. Without proper study of the rationale of each of such rights, of their economic significance in the common market and of their effects on the free flow of goods or services, the necessity to harmonize them is not given.

2.1.3.3. *Definition of Broadcast as Protected Subject Matter*

Until quite recently the lack of a general definition for broadcasts as protected subject matter has caused little uncertainty as to whom or what was protected. At most there was some discussion about the circumstances in which cable operators ('cable casters') qualify as broadcasters. Traditionally, the principal business of cable operators is to simultaneously transmit by wire programmes that originate from over the air broadcasts, either terrestrial or via satellite (compare Article 6(3) Rental Right Directive).¹⁴⁹ However, cable operators also disseminate their own programme signals, in which case they may be protected as broadcasting organizations.

If the situation was relatively clear-cut in the past, it is much less so today. This is due to technological and market developments that have resulted in a diversification of the means of dissemination of broadcasts.¹⁵⁰ Broadcasting takes place via terrestrial analogue or digital television, via satellite television, via digital subscriber (telephone) lines, via cable, or via computer networks (e.g., webcast using streaming media). Essentially the same service may be supplied over different platforms. The means of transport of broadcast signals are, however, a key element of the definitions of protected subject matter in international treaties.

The Rome Convention (Article 3(f)) defines the activity of broadcasting as the 'transmission by wireless means for public reception of sounds or of images and sounds'. Consequently, a broadcaster is considered any organization that is responsible for such activity.¹⁵¹ Note that the draft WIPO Broadcasting Treaty as presented in 2006¹⁵² would apply to broadcasts over the air (via terrestrial transmitters and satellites) and via cable (cable casting), but not to broadcasts over computer networks (webcasting).

149. In terms of acts restricted by copyright (or related rights of performers and phonogram producers), Berne Convention, Rome Convention, and WPPT distinguish broadcasting (wireless) from cable transmission, see Art. 11ter BC, Art. 3(f) RC, Art. 2(f) WPPT.

150. For a more elaborate analysis, see N. Helberger, 'Report for the Council of Europe on the Neighbouring Rights Protection of Broadcasting Organizations: Current Problems and Possible Lines of Action', Amsterdam 1999 (doc. MM-S-PR (1999) 009 def), [Helberger, 1999].

151. The Rome Convention does not contain a definition of broadcasting organization. It is clear from the proceedings of the conference that to benefit from protection, an organization need not own the technical facilities for transmission. 'Generalbericht zur Rom-Konferenz (1961)', *UFITA* 40 (1963): 107.

152. Revised draft basic proposal for the WIPO Treaty on the protection of broadcasting organizations, WIPO SCCR Fifteenth Session, Geneva, 11–13 Sep. 2006.

The current technology-dependent definitions of broadcasting – and by extension, of broadcasts and broadcasting organizations – do not appear appropriate in an environment in which the means of transmission are converging and becoming increasingly interchangeable. This makes it difficult to classify services provided using newer transmission techniques. Although the transmission of programmes over computer networks is carried out through an unlimited number of point-to-point transmissions,¹⁵³ from the point of view of the provider of the service, the content is transmitted not to an individual user but to the public at large, that is, ‘broadcast’.¹⁵⁴

Given technological developments, in the mid- or long term there may only be three relevant factors left to determine what constitutes a protected broadcast: (1) the extent of programming involved, that is, is the sequencing of contents largely prescheduled or recipient driven; (2) the intended audience, that is, an indeterminate or selected group; and (3) timing of the transmission, that is, simultaneous or on-demand.¹⁵⁵ The question is of course whether if such criteria are met by an increasing number of services beyond traditional broadcasting, it is desirable to also protect them as broadcasts. Simply extending broadcast rights to cover for instance webcasts may have the unintended effect of extending protection in broadcasts beyond its original rationale, to a wide array of audiovisual content supplied via the Internet.

In this context it is important to recall that the neighbouring rights protection of broadcasters originated in a time when public broadcasting was the norm and commercial broadcasting the exception. Herzian waves were the primary mode of dissemination, while cable transmission was in its infancy. Broadcasters typically also owned the studios and other technical infrastructure necessary to transmit the broadcasts, or at least were bearing the associated investment risks. Neighbouring rights were granted chiefly to protect broadcasters against signal theft, allowing them to recoup the considerable investments required to deploy equipment, and to employ their artistically and technically skilled personnel.¹⁵⁶

What is protected then is the broadcast signal, not the content of programmes (audiovisual productions) as such, which will normally attract separate copyright and related rights protection. It would require further (economic) analysis to assess whether the investments required of webcasters and other new media are

153. The use of multicast protocols allows the server to send just one copy through each path between network routers, in stead of a separate copy for each client.

154. See G. Schricker, T. Dreier, S. von Lewinsky, *Urheberrecht auf dem Weg zur Informationsgesellschaft*, Gutachten für das Bundesministerium der Justiz (Baden-Baden, 1997), 125: ‘Problem der sukzessiven Öffentlichkeit’, [Schricker et al., 1997].

155. Compare the definition of webcasting as formerly proposed for the WIPO Broadcasting Treaty: Art. 2 SCCR/11/13: making sounds or of images or of images and sounds or of the representations thereof accessible to the public, by wire or wireless means over a computer network at substantially the same time.

156. E. Ulmer, *Der Rechtsschutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendegesellschaften in internationaler und rechtsvergleichender Sicht* (München: Beck, 1957), 11, [Ulmer, 1957].

substantially the same as those traditionally made by broadcasting organizations. Consideration should also be given to existing availability of protection against the circumvention of access controls, such as the use of unauthorized smartcards.

Rome type transmission rights were not imperative for the development of traditional television services. The United States is one of more than eighty countries that never signed the Rome Convention, but still has a highly profitable broadcasting industry. But transmission rights are likely to be quite harmful for the development of Internet-based services. Policymakers would be wise to think differently about 'parity'. The rules for TV should may be more like the rules (or lack thereof) for the Internet, rather than the other way around.

Much of the criticism that has brought work on the proposed Broadcast Treaty to a halt, at least within WIPO,¹⁵⁷ precisely concerns the potential damaging effects of a Broadcast Treaty on the development of Internet-based information services and the free flow of information. A growing number of stakeholders and states are wary of the adverse affects that would be caused by full-blown intellectual property rights in traditional broadcasts (air-to-air, satellite) and 'programmed content' delivered via computer networks. They favour a more modest 'signal-based' approach, in the shape of a treaty that focuses on the problem of piracy of signals. That is, to the extent that piracy is a problem that cannot be addressed through the exercise of existing intellectual property rights and anti-piracy laws to begin with. In 2006, WIPO's General Assembly has decided work on a treaty should progress on the basis of such a signal-based approach. It has since grinded to a halt.

2.2. AUTHORS, PERFORMERS, AND OTHER RIGHT OWNERS

When assessing what constitutes protectable subject matter, we have seen in the previous section that EC law provides only limited guidance by way of harmonized norms. Instead, the EU seems to rely on the indirect harmonizing effect of definitions in international treaties. This is even truer where beneficiaries are concerned. Especially in the field of related rights, the relevant treaties contain quite elaborate provisions on who qualifies as initial owner of exclusive rights or is otherwise entitled to protection. As was done for subject matter, we will canvass the most relevant treaty provisions, before discussing the *acquis* in more detail, for ownership of copyright subject matter and related rights subject matter, respectively.

157. See 'The broadcasting treaty resuscitated by the Council of Europe', *Edrigran* 19 Dec. 2007 <www.edri.org/edrigram/number5.24/coe-broadcasting-treaty>, [Edrigran 2007]; 'Broadcasting Treaty: Council of Europe Picks Up Where WIPO Left Off', *Intellectual Property Watch* 10 Dec. 2007, <www.ip-watch.org/weblog>. [Intellectual Property Watch 2007].

2.2.1. THE INTERNATIONAL CONTEXT

The Berne Convention says little about authorship and ownership of copyright works. Clearly, the assumption of the Berne Convention is that as a rule, the author is the initial owner of copyright and that the author is the (natural) person to whom the intellectual, creative effort can be attributed. Article 2(6) stipulates that the protection offered by the Convention ‘shall operate for the benefit of the author and his successors in title’. As we have seen, the Berne Convention does not define concepts such as joint works or collective works, nor does it prescribe who qualifies as (co)owner. For film works there is a special provision, introduced after much debate at the 1967 revision conference. It explicitly recognizes that the domestic law of contracting states determines questions of authorship/ownership, with some protection thrown in for the film producer (Article 14*bis* BC).¹⁵⁸

The Rome Convention and – in a little more detail – the WPPT specify who should benefit from related rights protection. By contrast, TRIPS merely refers to the Berne Convention, Rome Convention, and Geneva Convention for the determination of the beneficiaries of rights flowing from the obligation of national treatment (Article 1(3) TRIPS). The Geneva Convention of 1971 (also called the Phonograms Convention) defines unlawful acts that contracting parties must offer effective protection against. The objective of this convention is to protect the record industry against piracy of sound recordings. Its sole beneficiaries are phonogram producers (Article 2 GC), which are not further defined.

Both the Rome Convention and the WPPT contain a broad definition of performer: it is any person who renders literary or artistic works (Article 3(a) RC), for example by singing, dancing, and acting, or who renders expressions of folklore (Article 2(a) WPPT).¹⁵⁹ Producer of a phonogram means the person or the legal entity that takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds (Article 2d WPPT).¹⁶⁰ As was noted earlier, broadcasting organizations are those engaged in the activity of broadcasting, meaning the transmission by wireless means for public reception of sounds or of images and sounds (Article 3(f) RC).

The protection of TRIPS for performers focuses on ‘music performers’, which renders the protection granted under TRIPS significantly narrower compared to the Rome Convention (cf. Article 7(1)(b) and 7(1)(c) in conjunction with Article 3(a) RC). With respect to broadcasting organizations, the TRIPS Agreement allows countries not to grant-specific-related rights to broadcasters at all, provided

158. See Van Eechoud 2003, 64–67; Ricketson/Ginsburg 2006, s. 7.

159. Article 2(a) WPPT: ‘performers’ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore [underline marks difference with definition of] Art. 3(a) RC: ‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

160. A fixation incorporated in a cinematographic or other audiovisual work is not considered a phonogram under Art. 2b WPPT).

countries grant similar rights to copyright owners of the broadcast (see the last sentence of Article 14(3) TRIPS).¹⁶¹

2.2.2. THE ACQUIS COMMUNAUTAIRE

Harmonized rules on initial ownership of copyright and related rights are relatively few. They do not form a coherent set of rules, and the fact that they are contained in various directives does not aid transparency. In the following sections we first describe the situation for ownership of works of authorship, followed by related rights subject matter.

2.2.2.1. *Initial Ownership of Works of Authorship*

There are few provisions in the *acquis* that address authorship or ownership of copyright works in a general manner. Special rules do exist for software, databases, and film. For software, the Computer Programs Directive provides some rules for ownership of joint works, collective works, and work for hire situations. Similar provisions are contained in the Database Directive with respect to databases eligible for protection as copyright works.

Article 2 Computer Programs Directive and Article 4 Database Directive establish that in principle, initial ownership rests with the author(s). This is the natural person or group of natural persons who has created the program or database, or in other words, developers or designers and coders. However, ownership can also rest with ‘the legal person designated as the right holder’ where the laws of Member States so permit. The latter is meant to clarify that Member States may maintain or introduce work for hire type provisions, for example, granting employers the (economic) rights in databases created by employees. Although the employer will often be a legal person, this need not necessarily be.

The Computer Programs Directive provides that employers are exclusively entitled to the economic rights in software that their employees create in the course of their duties, or when following specific instructions. The employer and employee may agree otherwise (Article 2(3) Computer Programs Directive). When the Database Directive was negotiated, agreement on a similar provision

161. For a full elaboration on the differences in the level of protection between the TRIPS Agreement and the Rome Convention, see D. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 2003), 156–162, [Gervais, 2003]. In short, one of the main differences in protection lies in the fact that the TRIPS Agreement does not provide for any protection on behalf of phonogram producers and performers with respect to the broadcasting or communication to the public of a commercially published phonogram (cf. Art. 12 RC, which provides for a right to an equitable remuneration). Furthermore, with respect to the protection of performers, as far as the fixation of their performance is concerned, protection is limited to the fixation on a phonogram, thus excluding any other mode of fixation (e.g., audiovisual fixations).

for original databases was not possible. Consequently, the Database Directive does not regulate work for hire situations; recital 29 says as much.

One may therefore assume that the Database Directive respects national legislation dealing with works produced by employees or on commission, regardless of whether domestic laws designate natural or legal persons as right holder (company, State or other public sector body). Examples of laws that designate the employer as owner are Article 11(2) of the UK's Copyright Designs and Patents act, Article 12 Irish Copyright Act and Article 7 Dutch Copyright Act. Some countries have special rules on ownership of works produced by or on behalf of government, that is, Crown and Parliamentary copyright in the United Kingdom, section 191 Irish Copyright and related rights act.

The Database and Computer Programs Directives differ slightly in respect to collective works. The Database Directive provides that in case of collective works 'the economic rights shall be owned by the person holding the copyright' (Article 4(3)). It does not define collective works, nor does it require that Member States recognize such a category to begin with. For software, the right holder in collective works is defined in a more roundabout way: the person considered by Member States law to have created the work shall be deemed its author – and therefore initial right owner. The difference in wording does not seem significant; it is just that the explicit reference to economic rights in the Database Directive makes more clear that moral rights are not the object of harmonization;¹⁶² something which is only implicit in the Computer Programs Directive.¹⁶³

Software is more often than not created by various developers. For joint works, the Computer Programs Directive stipulates that the exclusive rights are owned jointly (Article 2(2)). A similar provision is laid down for databases (Article 2(2) Database Directive). One can argue that such joint ownership already follows from the principal rule: that the author is the individual or group that created the software (Article 2(1) Computer Programs Directive). Joint ownership implies that acts of exploitation – or other restricted acts – require consent of all co-owners.¹⁶⁴ It does not necessarily mean that the copyright can only be enforced through joint action.

Although the Term Directive contains rules for calculating the duration of protection for works of joint authorship – as well as for collective works and anonymous works or works published under pseudonym – it does not define these concepts. Rather, it regards the question of (joint) authorship as a factual one, to be decided by the national courts (see recital 13 Term Directive). It is unclear how this view of authorship as a matter of fact rather than law is to be reconciled with Article 1 of the Directive, which refers to Article 2 BC for the concept of authorship

162. Recital 28 to the Database directive declares that the moral rights of the natural person who created the database belong to the author. Moral rights are however outside the scope of the Directive.

163. Article 1(1) directive instructs Member States to protect computer programs as literary works in the meaning of the Berne Convention, which implies Member States must recognize moral rights in software (Art. 6*bis* BC); the Directive does not actually harmonize such moral rights. See Bently, in Dreier/Hugenholtz (2006), 214.

164. Bently, in Dreier/Hugenholtz (2006), 218.

of literary and artistic works. Clearly, the notion of literary or artistic work is a legal term. And the fact that national laws contain various provisions on authorship for cases in which several (natural or legal) persons contribute to the conception and production of one work, belies the notion that authorship is to be seen as a matter of fact rather than of law.

Besides software and databases, film is another type of production for which certain aspects of ownership are regulated. These concern the position of the director as author, and the relationship between performers (and to a lesser extent authors) and film producers. The latter issue will be discussed in the section on ownership of related rights.

As for authorship of film, initially the relevant rules were to be found in the Rental Right Directive, subsequently in the Term Directive and Satellite and Cable Directive. The Rental Right Directive requires that for films or other audiovisual works, the principal director is recognized as (co-)author (Article 2(2)). The Satellite and Cable Directive contains a similar provision (Article 1(5)), which operates only for rights laid down in the Satellite and Cable Directive itself, notably the right to communicate a work to the public by satellite or cable retransmission. The Term Directive has extended the notion of principal director as (co-)author of audiovisual works generally (Article 2(1) Term Directive); causing the earlier provisions on film authorship to become irrelevant other than for purposes of transitory law.

2.2.2.2. *Initial Ownership of Related Rights*

Previously, we discussed the lack of definitions of subject matter that exists for many of the related rights (see Section 2.1.2 above). Similarly, the *acquis* does not define in detail who should benefit from related rights. Instead, more general concepts are used, such as ‘performer’, ‘producer’, or ‘publisher’.

In addition to the four standard groups of beneficiaries – that is: the performer, phonogram producer, broadcaster, and film producer) – the *acquis* recognizes a further two groups as beneficiary of rights akin to copyright. These are the publisher of previously unpublished works of authorship in the public domain, and the maker of a *sui generis* database. As was set out in Section 2.1.2, the Term Directive provides that Member States may protect critical and scientific publications of public domain works. They are also free to determine who would benefit from such rights, because the *acquis* is silent on the matter. The same is true for ownership in non-original photographs.

The beneficiary of the *sui generis* database right is the producer or ‘maker’ of the database. The ‘maker’ is described in recital 41 Database Directive as ‘the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker’.

Article 11 specifies which database makers are eligible for protection in the EU: these are EU/EFTA citizens and companies established in the Community. A company or (other) legal person needs to have its registered office, central administration or principal place of business within the Community. The *sui generis* right in databases is not recognized in any multilateral treaty. So, unlike for the

rights of authors, phonogram producers, performers, and broadcasters, Member States need not grant these rights to non-EU database producers. Producers from outside the Community cannot benefit from protection without an international agreement to that effect, which is to be concluded by the Council.

As for publisher of previously unpublished works of authorship in the public domain, the definition is taken to be self-evident, and the Term Directive is silent on how the term should be interpreted.

Because the *acquis communautaire* is not overly concerned with defining precisely who should benefit from harmonized rights, it comes as no surprise that it regulates equally little in the realm of relations between right holders. As was noted earlier, the relations between performers and film producers are the exception, at least in respect of some exclusive rights.

The reason why there are special rules for film is that such productions tend to involve a large number of creative contributors, authors as well as performers. To facilitate easier exploitation by producers, a number of presumptions of transfer were introduced, primarily with respect to performers' rights. After successful lobbying by the film industry and at the instigation of the European Parliament, a work for hire type clause for performers was introduced in the Rental Right Directive. Article 2(5) lays down the presumption that the rental rights of performers who have agreed to contribute to a film, rest with the film producer unless contractual clauses stipulate differently. Film in this context means a cinematographic or audiovisual work or moving images with or without sound.

Performers do retain a non-waivable right to remuneration for rental (see Article 4). Member States are free to provide a similar presumption in favour of the film producer with respect to *authors* (Article 2(6) Rental Right Directive).

Although the default rule for rental rights in film is the rebuttable presumption of Article 2(5), Member States may also opt for a non-rebuttable presumption, that by signing a production contract, the performer has authorized rental (against an equitable remuneration). This is stipulated in Article 2(7). Similar non-rebuttable presumptions are allowed for the other rights of the Rental Right Directive, that is, the exclusive right to authorize the fixation and reproduction of performances, and distribution of physical copies, but only in film producer – performer relations. Any presumptions allowed under Article 2(7) Rental Right Directive may also be applied to the exclusive rights of performers to authorize communication by satellite (Article 4 Satellite and Cable Directive).

In short, the presumptions of Article 2(5) through 2(7) apply to relations between film producer on the hand, and contributing performers and authors on the other. They appear to be exhaustive where the rental right of performers is concerned, that is, Member States can opt for either the rebuttable presumption as detailed in Article 2(5), or a non-rebuttable one on the basis of Article 2(7), but there is no room for other, work for hire type solutions.¹⁶⁵

165. See on the legislative history of the rental right presumptions: J. Reinbothe & Silke von Lewinski, *The E.C. Directive on Rental and Lending Rights and on Piracy* (London: Sweet & Maxwell, 1993), 54–62, [Reinbothe & von Lewinski, 1993].

For other related right protected subject matter, no other presumptions of transfer or similar allocation rules are harmonized. One does encounter the odd reference to national copyright contract law, for example, Article 8(2) Rental Right Directive stipulates that Member States should lay down the conditions for sharing proceeds from the right to equitable remuneration for public performance of phonograms.

2.2.3. ASSESSMENT

From the analysis above and what will follow in Section 2.3 and Chapter 3 on rights and limitations, it is clear that the question of who benefits from copyrights and related rights is among the least harmonized.¹⁶⁶ One could argue that as long as there are relatively clear international norms in this area, there is no added value to include them in secondary EU law. We will address this point first, and then turn to a second issue that leaps out: the *acquis*' presumptions of transfer, which appear increasingly out of date and of little harmonizing value.

2.2.3.1. *Lack of Precise Standards to Determine the Object and Subject of Related Rights Protection*

As we have seen,¹⁶⁷ the European legislator has not elaborated on the notion of performer or performance, but seems to rely on the 'harmonizing' effect of the Rome Convention and the WPPT.¹⁶⁸ The same apparently goes for phonograms and phonogram producers, and for broadcasts as protected subject matter. Broadcasts or broadcasting organizations are, however, not defined in any international instrument, so a definition vacuum would seem to exist here.

An international definition was in the making but is still far off, considering that the attempts to draft a WIPO Broadcast Treaty are unlikely to bear fruit anytime soon.¹⁶⁹ Having been on WIPO's agenda uninterruptedly for a decade,

166. For an analysis of differences in Member States law regarding ownership, transfer and contracts, see L. Guibault & P.B. Hugenholtz, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, (Amsterdam: Institute for Information Law 2002) (study commissioned by the EC, contract No. ETD/200/B5-3001/E/69), [Guibault & Hugenholtz, 2002].

167. See for examples of references to international treaties n. 120 above and accompanying text.

168. Also explaining what is a performer or phonogram producer by reference to the Rome Convention: Impact Assessment preceding the proposed term extension: Impact Assessment on the legal and economic situation of performers and record producers in the European Union, Commission staff working document of 23 Apr. 2008, 16.

169. The latest public draft (of September 2006, doc WIPO SCCR/15/2 rev.) defines Broadcasting organization as the 'legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission' (Art. 2(a)). 'Broadcast' is not defined separately, but described as 'the program-carrying signal constituting the transmission' by the broadcasting organization.

in the summer of 2007 parties recognized they could not even agree on the ‘non-paper’ that was to lead to a final draft treaty. The heated discussion over the draft proposals shows just how convergence of information and communication technologies make it much more difficult to differentiate in a meaningful manner between (and amongst) different types of subject matter and beneficiaries (more on this in Section 2.1.3).

Notions of what is protected (object or subject matter) and who is protected (subject or right owner) are of course key concepts in any intellectual property law system. One can argue it would be peculiar for the EC to depend on international instruments for such key concepts, for several reasons. First, international norms from treaties to which the EU is not a contracting party, do not form part of (hard) EU law. Thus, the definitions of the Rome Convention are not directly binding on the EU.¹⁷⁰ The EU will become party to the WPPT, but that does not solve the problem because the WPPT does not address the protection of broadcasters.

Second, European harmonization of related rights took place in part because the existing multilateral treaties did not provide the desired level of harmonization across Member States. Either because the minimum standards were deemed too low, or because they are optional in character (e.g., the resale right of the Berne Convention). Also, not all Member States were, or even are today, party to the intellectual property treaties.¹⁷¹ It is not obvious in such circumstances to take a harmonizing effect for granted.

Third, even where the EC are a party to multilateral treaties, as is the case with TRIPs, this has not brought along uniform, general-purpose concepts for subject matter nor initial ownership of rights. The TRIPs Agreement does refer to the definitions of the Rome Convention, but it is more limited in scope than the latter: it protects only performers of musical works, and grants phonogram producers rights against unauthorized reproduction only. Nor does TRIPs require that broadcasters are given separate rights. It can therefore not serve as a vessel to introduce the Rome Convention definitions of performer, phonogram producer, and the activity of broadcasting for the entire related rights *acquis communautaire*.

A similar problem arises with the proposed WIPO Broadcast Treaty. As things currently stand, the instrument would only regulate the protection of a limited type of activities by ‘traditional’ broadcasters and cable casters, most likely through a signal-based approach (aimed at preventing piracy of live signals). This appears to be a much narrower scope than that which was intended by the Information Society Directive. The eventual international definition may therefore not be useful to interpret the concept of ‘broadcasting organization’ that the Information Society Directive uses. In the interest of legal certainty and ensuring a balanced system, the

170. See Section 1.2.3 on European copyright and international obligations.

171. As of 1 Sep. 2008, all but two Member States (Malta and Cyprus) are party to the Rome Convention. Some Member States, such as the Netherlands, only became party to the Rome Convention following the EU’s initiative to harmonize related rights in the Rental Right Directive of 1992.

EU may need to be more specific than a WIPO treaty about both the subject matter and the beneficiaries/right holders it seeks to protect.

2.2.3.2. *The Selective Presumptions on Transfers of Rights*

As was set out in Section 2.2.2, the reason for the introduction of presumptions of transfer with respect to performer's rights in film production is that – as the film producers successfully argued – the many contributions involved warrant some harmonized regulation to facilitate exploitation by the producer. Of course, in the twenty years that have passed since the drafting of said rules, other types of productions that involve many (creative) contributors have matured. All types of software, and particular e-games, and the recent surge in peer-produced content of all kinds come to mind. As a result, the special treatment of film now appears somewhat odd in terms of the consistency and clarity for which the EU legislator purports to strive.

For another reason also, the presumptions for rental rights are outdated. The provision of filmed entertainment increasingly takes place online, through a variety of business models. The economic importance of renting out physical copies of films decreases, and with it one would expect the direct harmonizing effect of the Rental Right Directive for film exploitation to lose significance.

This is not to say that it is desirable to extend the presumption, nor for that matter to abolish it. An extension does not seem appropriate or useful, for example, much peer-produced content that is embedded in a complex fabric of standard 'public' licenses. The Better Regulation Agenda favours repeal of superfluous legislation (see Section 1.3). But to abolish the provisions would in all likelihood be merely a cosmetic act. After all, Member States can still maintain their domestic presumptions unchanged once the issue is 'de-harmonized'. Finally, it remains to be seen whether harmonized presumptions on transfer across the board would truly improve matters in terms of legal certainty or clarity, as long as especially moral rights and concepts for subject matter remain disparate.¹⁷²

2.3. DURATION OF PROTECTION

The term of protection was among the first issues harmonized at the EU level. As we shall see, the 1993 Term Directive extended the protection beyond the internationally agreed minimum standards. The rules used to calculate expiry of terms of protection derive in large part from international instruments and are finding wider application as well, as the proposal for a revision of the Term Directive shows. As was done for subject matter and beneficiaries, we will first

172. A similar observation was already made on the issue of harmonizing copyright contract law without a necessary bedrock of substantive rules on, e.g., moral rights and initial ownership, see Guibault/Hugenholtz (2002), 153.

discuss the international norms on the duration of protection, before turning to a description and assessment of the *acquis communautaire*.

2.3.1. THE INTERNATIONAL CONTEXT

Rules on the duration of copyright works are found in the Berne Convention and the TRIPS Agreement. In the field of related rights, TRIPS contains some rules on duration, but more important are the Rome Convention of 1961, and the WPPT. The Geneva Convention (1971) is the least relevant instrument.

2.3.1.1. Copyright

For copyrighted works, Article 7(1) BC prescribes that the protection for works from abroad must at a minimum be granted for the duration of the life of the author plus fifty years. The protection offered may be longer, because under the national treatment principle, authors of foreign works must in principle be granted the same term of protection as nationals. Article 7(8) BC, however, allows for a comparison of terms: the country where protection is claimed may limit the term of protection to the Berne minimum for works that in their country of origin of the work are protected for a shorter term.

The Berne Convention contains a number of special rules. Moral rights are in principle protected at least as long as economic rights. The Convention adopts a neutral line on the legal underpinnings of moral rights. Consequently, countries whose law does not recognize moral rights after the author's death or who limit their exercise, can maintain such rules (Article 6(2) BC). Some Berne Union members protect moral rights in perpetuity.

For cinematographic works, states can either follow the principal rule of fifty years *post mortem auctoris* or opt for a term of fifty years of protection from the date of publication (i.e., release with consent of the author) or for films not made public, fifty years from the date of production (compare Article 12 TRIPS).

For works published anonymously or under a pseudonym, the term of protection is fifty years from publication, unless the author makes himself or herself known, at which time the normal term of protection resumes. Photographic works and works of applied art – if protected at all – enjoy a minimum term of protection of twenty-five years after production (Article 7(4) BC). However, contracting parties to the WIPO Copyright party have since agreed not to apply the provisions of Article 7(4) BC to (original) photographs (Article 9 WCT).

Finally, Article 7*bis* provides that the term of protection for works of joint authorship is to be calculated from the death of the last surviving author.

TRIPS follows the minimum term of protection set by the Berne Convention (through Article 9(1)), but adds a baseline for works of authorship that are calculated on a basis other than the life of a natural person (e.g., work for hire type situations). For these works, the term of protection must be at least fifty years from

publication, or for unpublished works, from the date of creation. This rule does not apply to photographic works or works of applied art (Article 12 TRIPS).

2.3.1.2. *Related Rights*

Of the various treaties dealing with related rights, the Rome Convention provides for a minimum duration of protection of twenty years (Article 14). That term is to be computed from the end of the year in which (a) the fixation was made, in regard to phonograms and performances embodied thereon; or (b) the performance has taken place, as far as performances not incorporated in phonograms are concerned; or (c) the broadcast has taken place, for broadcasts.

For sound recordings, the Geneva Convention does not oblige contracting states to regulate protection against piracy by granting exclusive property like rights. However, insofar as private rights are granted, Article 4 of the Convention prescribes that the minimum term of protection shall be twenty years calculated from the end of the year of the fixation or first publication of the phonogram.

The *TRIPS Agreement* has substantially increased the minimum term of protection for performers and producers of phonograms under the Rome Convention. The extended term is fifty years computed from the end of the calendar year in which the fixation of a sound recording was made or the (musical) performance took place. The minimum term of protection for broadcasting organizations, on the other hand, has not been increased in comparison to the Rome Convention and remains at twenty years from the end of the year in which the broadcast has taken place (Article 14(5)).

As we have seen, the most recent related rights treaty, the WPPT, does not cover the rights of broadcasting organizations. Moreover, in regard to the related rights of performers in their performances, the WPPT is limited to performances fixed in phonograms. The minimum term of protection for performers is fifty years, computed from the end of the year in which the performance was fixed in a phonogram (Article 17(1)). For phonogram producers, on the other hand, the fifty-year term of protection is to be computed from the end of the year in which the phonogram was published, or failing such publication, from the end of the year in which the fixation was made (Article 17(2) WPPT).

2.3.2. THE ACQUIS COMMUNAUTAIRE

The primary source of harmonized rules on the duration of copyright and related rights is the Term Directive. It was adopted in 1993 after an uneventful passage through the EU institutions; the Commission proposal having been presented in the spring of 1992. The Term Directive has since been amended, and a consolidated version has been published as Directive 2006/116/EC. Earlier provisions on duration in the Computer Programs Directive and the Rental Right Directive have been repealed. The Term Directive is 'horizontal' in that it addresses the duration of

protection for all copyright and related rights subject matter recognized in the *acquis*. *Sui generis* databases are the exception; for these the period of protection is laid down in the Database Directive itself.

The Term Directive sets standards of protection that generally go beyond what the relevant multilateral treaties require. This policy is continued with the proposed – and controversial – extension of the term of protection for phonogram producers and performers that is scheduled for adoption in 2009. It will be discussed in more detail in Chapter 5.

2.3.2.1. Copyright

For literary and artistic works in the meaning of Article 2 BC, Member States must provide for protection for seventy years after the death of the author (Article 1(2) Term Directive). Such is the default rule, which also applies to original databases, software and photographs (Article 6 Term Directive) but not to other photographs protected under national law.¹⁷³ The argument for a seventy-year harmonized term rather than the fifty-year international standard, is that the average life span in the Community has grown longer. The drafters of the Berne Convention – or so it is claimed in the preamble to the Term Directive – intended protection for the author and the first two generations of his or her descendants (see recital 6). With the current average life span the term of fifty years would no longer be sufficient to cover two generations.¹⁷⁴ This is true of course, but a relevant question is whether in today's society there is actually a need for an author to provide for his or her (grand)children past his or her demise. What is more, in their authoritative work on the Berne Convention, Ricketson and Ginsburg convincingly argue that during the life of the Berne Convention, the drafters never clearly justified why and how the term of protection provisions came to be adopted.¹⁷⁵

The Term Directive obliges Member States to apply the reciprocity clause of the Berne Convention. This means that in case a work originates from a non-EU country within the Berne union, and this country has a shorter term of protection than that provided by the Term Directive, its authors – on condition that they are

173. See for an overview Y. Gendreau, A. Nordemann & R. Oesch (eds), *Copyright and Photographs: an International Survey* (London: Kluwer Law International, 1999), [Gendreau et al., 1999].

174. In fact, the Berne Convention's life of the author plus fifty years minimum, which was introduced in 1928, never covered two generations either. Life expectancy in Western Europe (where the Berne Convention originated) in the early 20th century was already around fifty years (Kevin G Kinsella, 'Changes in Life Expectancy', *Am. Journal of Clinical Nutrition* 1992; 55: 1196s).

175. Ricketson/Ginsburg (2006), at 9.08–9.09. The historical background to the term of protection the authors sketch gives no indication that the 'life plus two generations' argument played a role, *ibid.*, s. 9.14–9.26. Nor is this argument put forward by S. von Lewinski, *International Copyright law and Policy* (Oxford: Oxford University Press, 2008), at 5.40, [von Lewinski, 2008].

not EU citizens – enjoy only that shorter term.¹⁷⁶ Member States that were more generous towards foreign authors – that is, did not apply the reciprocity clause when the original Term Directive passed into law – may continue to do so (Article 7(3) Term Directive).

For anonymous and pseudonymous works, the EC rules mirror the provisions of the Berne Convention. Protection of such works lasts for seventy years after the work is first lawfully made available to the public (Article 1(3) Term Directive). When the identity of the author is disclosed, or not in doubt, the default rule applies. Similar rules govern collective works, and works of which legal persons are regarded as initial owners of copyright. If the latter works are made available with the creators (natural persons) being identified, the default rule applies (Article 1(4) Term Directive).

Article 1(2) clarifies that in case a work is published in issues, volumes, episodes, etc., for each part a separate term runs from the time when the part was first made lawfully available.

Audiovisual works have their special rule. As was described above in Section 2.2.2, questions of authorship are only partly harmonized, but the EC legislature nonetheless did want all film works to enjoy the same term of protection. So regardless of whether national law recognizes them as (co-)author, the term of protection is calculated from the last surviving contributor who qualifies as either principal director, screenplay author, dialogue author, or composer of music specifically written for the film. In its Term Extension Proposal of 2008, the EC plans to extend the film calculation rule to co-written musical works generally. The expiry of protection would be calculated based on the death of last surviving author, this being either the lyricist or composer (Article 1(7) proposed revised Term Directive). We will discuss the advantages and drawbacks of such a rule *in extenso* in Chapter 6 on term calculation for co-authored musical works.

If the term of protection of a copyright work cannot be determined on the basis of any of the above rules, the term expires seventy years after the year of creation of the work (Article 1(6)).

Finally, for works that have not been published during the regular term of protection and that have therefore become public domain, two special rules exist. Whoever lawfully publishes or communicates a previously unpublished work to the public, enjoys twenty-five years of exploitation rights (Article 4). Most Member States did not know such a right before the Term Directive, nor is it prescribed by the Berne Convention or other multilateral treaties. The Term Directive not only set a uniform term, but made the right itself mandatory for the entire EU.

For another type of public domain works the Term Directive merely maximized the duration of protection. Member States that recognize rights in critical or scientific editions of public domain works may grant such rights for a period no

176. To determine the country of origin of a work under the Berne Convention, the place of publication is more relevant than the nationality or habitual residence of the author. Thus, a work authored by an EU citizen may have a country of origin outside the EU (e.g., French author living and working in the United States).

longer than thirty years from publication. As we have seen, this optional form of protection seeks to reward the work of scientists who produce reconstructions or other non-original adaptations of old works. It is strictly speaking not a copyright, but a neighbouring right for editors (compare section 70 German Copyright Act, which grants the right to the ‘Verfasser’).

2.3.2.2. *Related Rights*

For the traditional related rights, that is, in performances, phonograms, and broadcasts, the original Rental Right Directive referred to the term provisions of the Rome Convention. For first fixations of film, the initial term of protection was twenty years from fixation. The current Term Directive prescribes a fixed term of fifty years for all four categories.¹⁷⁷ It is to be calculated from the 1 January following the relevant event that triggers the term; these events are not the same for the different beneficiaries.¹⁷⁸

For broadcasting organizations, the term runs from the first transmission of the broadcast. For performers, the actual performance marks the start of the fifty-year period. In practice the term often starts to run later, because if a *fixation* of the performance is lawfully published or lawfully communicated to the public within fifty years of the performance taking place, the term runs from the first publication or first communication to the public, whichever is the earlier.

For phonogram and film producers, the term expires fifty years after the fixation (recording) of the phonogram or film. In these cases, too, the lawful publication or communication to the public of the fixation causes the term to start running later. In addition, the lawful communication to the public of an *unpublished* phonogram also triggers a new fifty-year term, if at least the communication takes place within fifty years from the recording date. This last provision was introduced by the Information Society Directive to bring the Term Directive in line with the WPPT.¹⁷⁹

A consequence of this amendment is that the terms are now calculated in different ways for performers and phonogram producers. Consider, for instance, a recording from a broadcaster’s archive, originally broadcast in 1958 and first released on CD, or made available on a website in 2008. For the phonogram producer – typically it will be the broadcaster that also wears a phonogram

177. The introduction of a harmonized term has triggered various questions, some of which were put to the ECJ. For example, the question in pending Case C-240/07 (*Sony Music Entertainment v. Falcon Neue Medien*) is: does Art. 10(2) of the Term Directive require that a performance which never qualified for protection in a Member State, nonetheless be protected because the performance is protected in another Member State? (yes, according to Advocate General Ruiz Colomer in his conclusion of 22 May 2008). An earlier case on Art. 10(3) regarding previous acts of exploitation, was C-60/98, ECR [1999] I-3939 (*Butterfly Music Srl v. Carosello Edizioni Musicali e Discografiche Srl*). On transitional law and the Term Directive generally, see L.C. Ubertazzi, ‘The “Butterfly” Case or EC rules on the term of protection directive and transitional law’ *IIC* 31 (2000): 142–151, [Ubertazzi, 2000].

178. Article 3 in conjunction with Art. 8 Term Directive.

179. Recital 61 Information Society Directive.

producer's hat – the fifty-year term of protection would run from the year following publication (2008). For the performers, however, the relevant event is the initial broadcast (1958) because this is the first lawful communication to the public. Hence, the performers' rights in the recording would already be in the public domain, whereas the phonogram producer would still be protected. An example in case is the famous 'John Peel Sessions', aired in the BBC radio programme Top Gear from the 1960s into the 1970s. Many of its previously unreleased recordings have been released since the 1980s.¹⁸⁰

This discrepancy in treatment of performers and phonogram producers has been criticized and brought to the attention of the European Commission.¹⁸¹ It is, however, likely to remain, because it is not addressed in the Commission's 2008 proposal for a revision of the Term Directive. The proposal does envisage a term extension for performers and phonogram producers with forty-five years. The exceptions are performances and sound recordings that remain 'in the vaults', so to speak, for the first fifty years following performance or recording/fixation, which would not benefit from the extra years. In other aspects, the term calculation would remain the same – excepting the special rule to be introduced for co-written musical works, which will be discussed in Chapter 6. The proposal has solicited lots of serious criticism, from academia, consumer and civil liberties groups, and industry. The critics bring forward many of the arguments against extension that are set out in Chapter 5 on term extension.

2.3.2.3. *Sui Generis Databases*

The term of protection for original databases is regulated in the Term Directive, but the term for the sui generis database right is laid down in the Database Directive. The rights expire fifteen years from the first of January of the year following the date of completion (Article 10 (1) Database Directive). When the database is made available to the public within this period, the year of publication becomes the event triggering the term. In addition, updates or revisions of the database may cause a new term to start running. This requires that a substantial change or series of changes of the contents of the database make(s) up a qualitative or quantitative substantial new investment. It is therefore quite conceivable that a sui generis database never enters the public domain and that historic data are in effect locked in.

2.3.3. ASSESSMENT

The analysis in the previous section shows that EC law deals with the duration of copyright and related rights in a fairly exhaustive way. The harmonization has led to some problems of transitional law – not an issue discussed here – but otherwise

180. For a history see <www.bbc.co.uk/radio1/johnpeel/sessions/>.

181. See for example <www.soundcopyright.eu/>, and the law professors letter opposing term extension on <www.timesonline.co.uk/tol/comment/letters/article4374115.ece>.

has sparked little case law. Politically, ‘term’ is squarely on the agenda again, with the 2008 proposal for term extension subject to fierce debate. Especially the actual benefit a term extension would bring performers is questioned. From that perspective, it is interesting that the EC does not plan to even out the duration of the rights of performers and phonogram producers. Before we turn our thoughts to a solution to that problem, some more general remarks on the impact of the Term Directive are in order.

2.3.2.4. *Why Term Harmonization Is Partly Cosmetic*

Just how much of a positive effect the harmonization of the duration of protection has on the internal market is difficult to gauge. The primary cause is that in today’s society, many intellectual creations result from the efforts not of one person, but of several or even a multitude of actors. As a consequence, although the harmonized norms at first glance suggest otherwise, for an individual information product the term of protection is not necessarily identical across Member States. One and the same creation or production (e.g., a software game, piece of music) may very well be free for re-use in one Member State, while still in copyright in the next.

The rules on term are, however, not at the root of this problem. Rather, it is caused by incomplete or relatively vague definitions in the harmonized realm of subject matter and right owners, especially in copyright. Since the life of the *author* of a *work* is the basis for determining the duration of protection, any discrepancies in the interpretation of what exactly is a work (or joint work, collective work, or adaptation) and who is or are its author(s) may lead to variations in the term of protection. The Internet and the widespread availability of software for (re-)creating digital content greatly exacerbate the problem. We have entered an era in which mixing or mashing up become a normal way to interact with works – whether in the realm of fine arts or entertainment – for large groups of users. This challenges existing concepts of ‘work’ and ‘authorship’, challenges that could lead to Member States’ interpretations to grow apart further, thus undercutting any positive effect the harmonized terms of protection may currently have on the internal market.

Another phenomenon that limits the actual harmonizing effect of the Term Directive concerns the way public sector information is treated. EC law does not detail its copyright status.¹⁸² One would, therefore, assume that government information is protected as long as the relevant criteria are met. For example, a report may qualify as original literary or artistic production; images may classify as non-original photographs, and much of the government information that comes in the form of databases will qualify for *sui generis* protection.

182. In the area of related rights (including database rights), no explicit distinction is made between public sector bodies and the private sector as rightholders either, but the ECJ had been asked by the German *Bundesgerichtshof* (BGH; German Supreme Court) to shed some more light on the extent to which the Database Directive applies to government databases (pending Case C-215/07 Verlag Schawe; *OJ* 2007 C 155/13); unfortunately, the preliminary question was later withdrawn which caused removal from the register.

However, the Berne Convention leaves it to States to determine whether official documents are copyrighted (Article 2(4) BC) and to what extent speeches delivered in political or legal proceedings are public domain (Article 2*bis* BC). Not surprisingly then, the EU Member States have diverging regimes.¹⁸³ Legislation, administrative, and judicial decisions may be excluded from copyright altogether. Other types of information produced by the public sector may either fall under the default rules or be subject to a 'lighter' copyright regime. Some national copyright laws provide for exclusive rights in government information specifically, such as the UK's Copyright Act, with its provisions on so-called Crown Copyright (section 163 CDPA). Crown copyright in the United Kingdom lasts 125 years from the date the work was made or, in case of works published commercially, fifty years from publication.¹⁸⁴ A 'work' refers to the categories of the Copyright, Designs and Patents Act, that is, it includes literary, dramatic, musical, or artistic works (if original), sound recordings, films, broadcasts, cable programmes, and the typographical arrangements of published editions. Other terms of protection apply to Acts of Parliament and works falling under so-called Parliamentary copyright.

It is unclear how such national rules relate to the general rules of the Term Directive.¹⁸⁵ Is copyright in government information unharmonized, and do the provisions of the Term Directive therefore not apply to it?¹⁸⁶ Arguably, this should be true only for works that are not original in the implicit sense of the Term Directive or in the sense of the Computer Program Directive or Database Directive. That is to say, for government information that constitutes an original work, the term of protection would typically be seventy years (to be calculated from the year following creation or from the work being made available to the public; based on Articles 1(6) and 1(2) Term Directive respectively).¹⁸⁷ A similar argument can be made for related rights.

An intriguing question, though admittedly of little practical relevance, is whether Article 4 Term Directive also applies to public sector information. Can

183. See for example s. 5 German Copyright Act, s. 11 and 15b Dutch Copyright Act, s. 163 UK Copyright Act, Art. 8 Belgian Copyright Act, Art. 3 Czech Copyright Act.

184. If the work was published within 75 years of creation (s. 163(3) b CDPA).

185. Article 10(1) Term Directive provides that 'Where a term of protection which is longer than the corresponding term provided for by this Directive was already running in a Member State on 1 Jul. 1995, this Directive shall not have the effect of shortening that term of protection in that Member State'. It applies only to individual works and (harmonized) related rights subject matter that existed before 1 Jul. 1995, i.e., it does not allow countries to provide longer for productions created after said date. See Walter (2001), *Schutzdauer-RL*, s. 6–7.

186. The Explanatory Memorandum to the original proposal for the Term Directive (COM (92) 33 final, Brussels: European Commission 23 Mar. 1992, 10) says as much: '... these special provisions [on works of public authorities or international organizations, mve] ... are mentioned only for the record as they are not harmonized by this Directive'. The UK's implementing regulations expressly provide that the CPDA's revised section on literary works does not apply to Crown Copyright: s. 5, *The Duration of Copyright and Rights in Performances Regulations 1995*, Statutory Instrument 1995 No. 3297.

187. Compare the argument made in the Explanatory Memorandum to the Term Directive (p. 33) for posthumously published works: Member States are free to grant protection, but if they do so should follow the duration specified by the Term Directive.

the publisher of previously unpublished public sector information claim twenty-five years of exclusive rights? There is something odd about the notion that historic documents held in government archives may become less usable once they have finally been published.¹⁸⁸

2.3.2.5. *Method of Calculation for Performers Rights*

As we have set out above, the Information Society Directive has caused the term of protection for performers and phonogram producers with respect to the same recording, to be calculated in different ways. This discrepancy might affect the exploitation of phonograms in the Internal Market. For instance, it might cause difficulties in applying the remuneration right for the secondary use of commercial phonograms, which according to Article 8(2) Rental Right Directive is to be shared between performers and phonogram producers.¹⁸⁹ At present, however, the situation may still not be too pressing, as the discrepancy only concerns performances that are at least fifty years old. But in the long run, especially when old live performances broadcasted in the 1960s or 1970s will be first published as sound recording, the number of problematic instances may increase.

In general, this current inconsistency could simply be repaired by equating the calculation of the terms of protection for performers to that of phonogram producers. Because the WPPT has set the minimum term of protection for performers at fifty years, calculated from the first fixation of the performance, this small correction would be fully compatible with the WPPT. In effect, however, an alteration of this kind would already mean a levelling up of the terms of protection for performers, as in theory, their rights are protected for a longer period of time if the term of protection would be calculated on the basis of the first publication (within fifty years from the performance) instead of on the basis of the first communication to the public *or* the first publication (within fifty years from the performance), whichever is the earlier.¹⁹⁰

2.4. CONCLUSIONS

Where the subject matter of copyright and related rights is concerned, the approach followed by the European legislator so far has resulted in limited harmonization only. The protection of certain subject matter is often optional, or the directives lay down only minimum standards or allow for alternative protection (i.e., where it is

188. A solution would be to equate the inclusion of government information in a public archive to publication.

189. See Section 3.1.2 for a more detailed discussion of Art. 8(2) Rental Right Directive.

190. This can be illustrated by the example given in the preceding paragraph: if a performance, which was broadcasted in 1960, would be first published in 2005, the term of protection would end, in the current situation, on 1 Jan. 2011, and with the adjustment mentioned, on 1 Jan. 2056 only.

declared that the harmonized rules are without prejudice to alternative protection regimes). But even where protection of subject matter is an obligation for the Member States, as it is for works of authorship, databases, phonograms, broadcasts, performances, first fixations of films, and previously unpublished works, the lack of harmonized definitions causes disparities.

In regard to copyright, the most notable deficit in the *acquis* is the absence of a general conception of the work of authorship. The notion of 'originality' is elaborated on only for software and databases, which must be the 'author's own intellectual creation'. It is questionable whether this criterion should be extended to all works of authorship, considering it represents the middle ground between the diverging notions of *droit d'auteur* and copyright proper, for what are in essence functional information products. On the other hand, a harmonized definition of the work of authorship will inevitably have to reflect both systems. Another key issue is what the practical effect of a harmonized criterion will be, considering the dominant role national courts play in interpreting it for the very diverse categories of works, from sculpture to industrial design, from poetry to train timetables.

The *acquis* is virtually silent on derivative works (translations, adaptations), anonymous works, and collaborative works (collective works, joint works, etc.). Admittedly, these aspects are intertwined with the issue of initial ownership and authorship, and by implication with moral rights, both of which are issues that are not generally addressed in the *acquis*. It may also prove difficult to devise a coherent European view on what is copyright subject matter without addressing at the same time issues of ownership and moral rights.

In the area of related rights, it is primarily the notion of broadcast that is in need of clarification. This is due to the convergence of dissemination methods or platforms, which is not reflected in the technology-specific definitions of the Rome Convention and draft WIPO Broadcasting Treaty. On the other hand, the introduction of a European, 'technology-neutral' definition may cause an unwarranted extension of rights (e.g., to webcasters), considering the original rationale of protecting broadcasting organizations. To be sure, the economics of current and future broadcasting-type activities would have to be scrutinized before embarking on any harmonization effort in this context.

A last fact to be noted is that where protected subject matter is concerned, the EC shows a tendency towards minimum rather than maximum harmonization, that is, the European legislator allows Member States certain leeway to decide what type of information product it protects by which means. Examples include the protection of critical and scientific editions of public domain works and of non-original photographs (both optional), the unaddressed status of government information, and the fact that the Computer Program Directive leaves Member States free to provide additional protection for software – for example, under unfair competition law.

It must be concluded that where there is not a detailed or a comprehensive *acquis* for the issue of protected subject matter, the same is true for matters of ownership. We have questioned the soundness of a strategy whereby the EC seems to rely on norms of international treaties for achieving standardized concepts of

authorship and holdership of related rights. Not only do today's treaties have only a modest 'harmonizing' effect within the Community – partly because of their status in EC law – it is far from obvious that such will improve in the future. We can already witness how the ever-larger role of information in modern society, including thorny issues surrounding access to knowledge, coupled with convergence in the media and information industries, makes it harder to reach international agreement on who and what should be protected by intellectual property law. The difficult negotiations over the WIPO draft Broadcast Treaty, and the drive for a WIPO Development Agenda, are cases in point.

Certainly, where subject matter and ownership are areas much less harmonized than the body of seven directives suggests, the situation is different for the issue of term. It is safe to assume that if one were to ask the average copyright lawyer active in the EU, 'Is the term of protection harmonized?' the answer would be a resounding 'Yes'. Our analysis of the *acquis*, however, shows that the ambition of the Term Directive, 'to make terms of protection identical throughout the Community' with a view to the smooth operation of the internal market, has not materialized for copyright works. This is due to the fact that the actual term of protection for any given intellectual creation is in the end only truly identical across the EU, when the underlying concept of work and authorship are interpreted in a uniform manner. As we have seen, such is not the case.

As a result, terms of protection differ, and the number of instances will increase as multi-authored productions (think of peer-produced software, or mash-ups and other derivative-like works) become even more common. To what extent changes to the rules by which the term is calculated can bring relief will be detailed in Chapter 6, in which the case of co-written music is analyzed.

Chapter 3

Exclusive Rights and Limitations

As was noted in the previous chapter, the focus of European Union (EU) legislative action so far has been on the exclusive rights and more recently also on limitations. Not surprisingly then, the *acquis communautaire* here is fairly comprehensive compared to other areas of copyright law. As was hinted in Chapter 1, and will be elaborated on in this chapter, contrary to what one would expect, such comprehensiveness does not necessarily result in true harmonization of national rules. For example, we will see that such *faux* harmonization is apparent in the area of exemptions and limitations.

The first section of this chapter describes what the harmonized exclusive rights exactly are, set against the relevant international norms (Section 3.1), and assesses the major unclarities, inconsistencies, and gaps in the *acquis*. We then proceed with a similar treatment of exceptions and limitations (Section 3.2). After having canvassed the rights and limitations, we pause to consider the few harmonized rules on the exercise of these rights, that is, the rules on collective management of the Satellite and Cable Directive (Section 3.3). The collective management in the music sector has become a key focus of the European Commission lately, and in the remainder of the section we briefly look at the prospects for further harmonization efforts. Section 3.4 reviews the chapter's most important findings.

3.1. EXCLUSIVE RIGHTS

In its harmonization efforts so far, the European Community has had to contend with the fact that Member States' laws differ substantially in their approaches to regulating the exclusive rights that make up copyright and related rights regimes. On one end of the spectrum are national laws that contain fairly broad and abstract descriptions of the author's exclusive rights, as is the case in, for example,

Belgium, Finland, and Hungary. On the other end are national laws – such as the UK's Copyright, Designs, and Patents Act of 1988 – that set out in intricate detail the acts restricted by copyright or related rights. Each Member State also boasts its own copyright terminology. For instance, under some laws the distribution of tangible copies is part of a wider right of 'communication to the public', whereas in others it is included in the reproduction right, or dealt with separately. Similarly, 'making available' may be part of the right of 'communication to the public' (or public performance right), whereas in other countries 'making available' is the overarching term.

The directives draw upon these different national concepts, as well as on those laid down in international instruments such as the Berne and Rome Conventions. Combined with the fact that harmonization has been largely piecemeal, the way exclusive rights are structured and the way the terminology used appears, viewed from the national perspective of a Member State, at once familiar and foreign. Only in one instrument, the Database Directive, has the EC introduced truly novel terms. The right to prevent 'extraction' and 're-utilization' of the contents of a database is far removed from terms used to describe restricted acts comparable to those in other related rights and in copyright.

To help describe and analyze the *acquis* in the field of exclusive rights, it is worthwhile to categorize different classes of restricted acts. At the most general level, the common distinction is between moral rights (*droit moral*, personality rights) and economic rights (exploitation rights, *droits patrimoniaux*). Particularly in the field of copyright, rights protecting the immaterial interests of the author are well developed. They serve to guard the integrity of a work and the reputation of its creator. By comparison, the personality rights of performing artists are less developed, and were introduced at the international level only with the WPPT of 1996.

Moral rights have as of yet not been the object of harmonization,¹⁹¹ partly it would seem because the ECs' competence in the area of economic rights is more firmly established than in the realm of culture (see Section 1.2). Another reason is that moral rights are rooted much more firmly in continental systems than in the United Kingdom and Ireland, any harmonization is therefore a politically sensitive issue.¹⁹²

Economic rights can be distinguished in rights to authorize or prohibit on the one hand and remuneration rights on the other. The latter are the exception, and as will be described, the *acquis* recognizes only four of such rights, three of which are optional.¹⁹³ A further distinction between economic rights is often made as follows:

- right of reproduction (e.g., copying of works/fixation);
- right of adaptation (e.g., translation);

191. See e.g., recital 28 Database Directive, recital 21 Term Directive.

192. Already in its Follow-up to the Green Paper on Copyright and Related Rights of 20 Nov. 1996, 27–29, the Commission signalled the growing internal market relevance of moral rights in the digital environment. However, the time was not considered ripe for harmonization.

193. For broadcasting of phonograms (optional), resale of works of art, cable retransmission (strictly speaking not a mere remuneration right, but mandatory collective licensing which in practice amounts to the same), and public lending (optional under the Rental Right Directive).

- right of distribution (e.g., first sale, rental, lending, resale);
- right of communication to the public (e.g., public performance, making available, broadcasting).

In the next sections, we will first consider the international context of the exclusive rights and then describe how they are dealt with in the seven Directives. Subsequently, the major instances of legal uncertainty caused by the current framework are identified.

3.1.1. THE INTERNATIONAL CONTEXT

Whereas at the European level the exclusive rights in works of authorship and related right subject matter are increasingly legislated in a single instrument (notably the Information Society Directive), one can observe an opposite tendency at the international level. Different treaties are concluded for the various categories of protected subject matter, as the WCT, the WPPT and the draft WIPO Broadcasting Treaty illustrate.

The Geneva or Phonograms Convention of 1971 offers protection only against the making of illicit duplicates of sound recordings and the importation and distribution of such duplicates. And as we have seen, the Convention does not require the granting of specific (private) rights to phonogram producers to achieve this goal.

The TRIPS Agreement is the one horizontal treaty. It provides for the protection of authors, as well as for the related rights for performers, producers of phonograms (sound recordings), and broadcasting organizations (Article 14 BC). The scope of protection is less far-reaching than that provided for in the Rome Convention.

3.1.1.1. *Reproduction Rights*

The exclusive right to reproduce (copy) is traditionally at the heart of copyright and related rights. Article 9 Berne BC speaks of the right to authorize reproduction of works of authorship in ‘any manner or form’, while the Rome Convention considers as reproduction ‘the making of a copy or copies of a fixation’ (Article 1(e)). The Rome Convention guarantees performers only a limited possibility to prevent reproduction (Article 7(1)(c)), whereas phonogram producers enjoy a general right of direct or indirect reproduction (Article 10). Broadcasters have the exclusive right to authorize reproduction of (unauthorized) fixations of broadcasts (Article 13(c) RC). It should be noted that the Rome Convention does not prescribe that performers be granted exclusive rights. Rather, contracting states must enable performers ‘the possibility of preventing’ certain acts. This may be done through intellectual property rights, but also via criminal sanctions, unfair competition law, or otherwise.¹⁹⁴

194. Ricketson/Ginsburg (2006), 1213.

For performers, the WPPT provides a general reproduction right (direct or indirect, in any manner or form) with regard to performances fixed in phonograms (Article 7) and phonogram producers (Article 11 WPPT).¹⁹⁵ Under the controversial draft WIPO Broadcasting Treaty, broadcasters would have an exclusive right to ‘direct or indirect reproduction, in any manner or form, of fixations of their broadcasts’.¹⁹⁶ The TRIPs agreement contains an optional reproduction right for broadcasters with respect to the reproduction of fixation of their broadcasts (Article 14(3) TRIPs).

3.1.1.2. *Adaptation Rights*

A general right of adaptation is provided for in Article 12 BC for authors of artistic and literary works (adaptation, arrangement, and other alterations). In addition, Article 8 specifies that authors have the exclusive right to translate their work.¹⁹⁷ Another provision deals with the right to make cinematographic adaptations (Article 14 BC).

3.1.1.3. *Distribution Rights*

The Berne Convention acknowledges a distribution right in respect of cinematographic works, but stops short of a general distribution right.¹⁹⁸ The WCT in Article 6 does guarantee a general distribution right, which is defined as the ‘making available to the public of the original and copies of their works through sale or other transfer of ownership’. This language clearly pertains to the dissemination of copies in tangible form. During the WCT negotiations no agreement could be reached on whether to classify the dissemination of works over digital networks as distribution or communication to the public.¹⁹⁹

Neither the Berne Convention nor the Rome Convention addresses rental rights. The WCT, like TRIPs in Articles 11 and 14, only requires a rental right for computer programs (where they are the essential object of rental), works of authorship embodied in phonograms, and (conditionally) cinematographic works. Article 7(3) WCT allows remuneration rights to continue to exist in case of rental

195. An agreed statement specifies that the reproduction right fully applies in the digital environment.

196. WIPO doc SCCR/15/2, Revised Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations of 31 Jul. 2006.

197. Translations in which a very controversial issue in the earlier years of the Berne Convention, explaining their separate position (the right of translation was more limited in scope until the 1908 revision), see van Eechoud (2003), 62–63.

198. Some authors assume that the reproduction right of Art. 9 BC implies the recognition of a distribution right; see Walter (2001), 1043.

199. *WIPO Intellectual Property Handbook: Policy, Law and Use*, points 5.222–5.225.

of phonograms, as long as the rental does not materially impair the sale of physical copies. Articles 9 and 13 WPPT contain similar rules with respect to performances in phonograms.²⁰⁰ The terminology in the WIPO Treaties is somewhat tautological, as it speaks of ‘commercial rental’. This is derived from TRIPs that in Articles 11 and 14(4) requires WTO members to provide for at least an exclusive right of commercial rental of copyrighted computer programs and cinematographic works, and of phonograms, under the same conditions as the WCT and WPPT.

For works of art and (original) manuscripts, Article 14^{ter} BC provides an optional resale right.

3.1.1.4. Communication to the Public Rights

The international framework deals with a cluster of rights involving communication to the public of protected subject matter. These rights can be distinguished in rights of:

- public performance and other forms of communication to an audience that is physically present at the place of performance (display, exhibition);
- broadcasting; and
- making available to the public in a way so that members of the public can access the content at an individually chose time and place.²⁰¹

At the international level, there is no ‘general’ right of communication to the public. Rather, acts of communication are dealt with separately, depending on the subject-matter concerned, and the type of communication. An exception is Article 8 WCT that has introduced a broad right of communication to the public for authors. It does not comprise (on the spot) public performance, but does include broadcasting and making available.

3.1.1.4.1. Public Performance

The right of public performance is one of the oldest communication rights. It concerns communicating a work to the public in situ (i.e., ‘on the spot’), for example, in theatres, cinema, concert halls, and the like. At the international level it is not regulated in a general manner, but rather for different types of works and related subject matter separately. Thus Article 11 BC grants authors of musical works and dramatic works (e.g., plays) the right to authorize public performance (and the communication to the public of such performance, Article 11(2) BC (ii)). Article 11^{ter} regulates the performance rights in literary works, such as public recitation.

200. The Rome Convention does not address rental rights.

201. Although online transmission has been classified as communication to the public, WCT does leave room for states to regulate it as part of the distribution right or otherwise, see ‘The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)’, Doc. WIPO/CR/RIO/01/2, at 27.

3.1.1.4.2. Broadcasting

The broadcasting rights contained in the Berne Convention (Article 11*bis*) and Rome Convention (Articles 7, 12, 13) of authors, performers and broadcasting organizations, respectively, have been updated in the WCT (Article 8) and WPPT (Article 6(1) for live performances; Article 15 for broadcasting of phonograms). For authors, the broadcasting right now extends to (re)broadcasting whether by wire or wireless, including retransmission by cable (Article 11*bis*(1) BC, Article 8 WCT).

For performers and phonogram producers, a remuneration right exists with respect to wireless broadcasts (terrestrial or satellite), thus excluding transmission via cable (Article 1(f), Article 15 WPPT, Article 12 RC). On the basis of Article 6 WPPT performers have the exclusive right to authorize broadcasting of their unfixed performances – again, this applies only to wireless transmission (see also Article 14(1) TRIPs).

The communication to the public right laid down in the WPPT does not include broadcasting (Article 3(g)), but instead denotes any other transmission to the public by any medium. Broadcasting organizations were left out of the WPPT. Instead negotiations are still pending on a WIPO Broadcasting Treaty. Under the Rome Convention (Article 13), broadcasting organizations are protected against the simultaneous re-broadcasting of their broadcasts; but not against cable retransmission.²⁰² The latest draft proposal for the Broadcasting Treaty²⁰³ grants exclusive rights of (re)transmission of broadcasts and of fixations of broadcasts. These rights apply regardless of the means of transmission; they include re-broadcasting and retransmission by wire, by cable, or over computer networks. The envisaged beneficiaries of protection are both traditional broadcasting organizations and cable casters, that is, those legal entities that take the initiative and have the responsibility for a transmission and the assembly and scheduling of its content.²⁰⁴ Webcasting organizations are excluded from protection under the current draft.

3.1.1.4.3. Making Available

The general right of communication to the public that Article 8 WCT grants to authors includes the ‘making available to the public of their works in such a way that members of the public may access these works from a place and at a time

202. Similar protection for broadcasting organizations is not required under TRIPs, on condition that the copyright owners of the content of broadcasts are granted the exclusive right to authorize broadcasting. and TRIPs (Art. 14(3)).

203. WIPO doc. SCCR/15/2 of 31 Jul. 2006 (Revised Draft basic proposal for the WIPO Treaty on the protection of broadcasting organizations).

204. Broadcasting is defined as ‘transmissions by wireless means, by radio waves propagating freely in space, i.e., radio waves or Herzian wave’. This does not include transmissions by wire via cable or fixed telephone lines, but includes satellite transmission (Art. 2(a)). Cable casting organizations are protected separately, cablecasting being the transmission by wire for the reception by the public, not including transmissions over computer networks (Art. 2(b)).

individually chosen by them'. This right essentially covers the online on-demand offering of protected subject matter. For performers and phonogram producers, the making available right with respect to (their performances fixed in) phonograms is found in Article 10 and 14 WPPT. The Draft WIPO Broadcasting Treaty would give broadcasting organizations an exclusive right of authorizing (prohibiting) the making available to the public of their broadcasts from fixations or of unauthorized fixations.

3.1.2. THE ACQUIS COMMUNAUTAIRE

The three main clusters of economic rights that we distinguish – rights of reproduction, distribution and communication to the public – have been harmonized across the board for works of authorship and related subject matter by the Information Society Directive. In Chapter 1 we have seen that an important objective of the Information Society Directive was for the EC to implement the obligations it had undertaken with the WIPO 'Internet treaties' (WCT and WPPT). These treaties we have seen, build on the Berne Convention, Rome Convention and TRIPs. Earlier directives already addressed some (subspecies of) economic rights for certain categories of works, and many of these provisions have been maintained. For example, the Computer Programs Directive and the Database Directive continue to cover reproduction, distribution and communication to the public rights for copyrighted software and databases respectively. The distribution rights for performers and other right holders of related rights are still regulated by the Rental Right Directive, while their reproduction rights are now laid down in the Information Society Directive.

3.1.2.1. *Reproduction Rights*

As we have seen, despite its central importance in copyright, the WCT does not include a broad reproduction right. Although there was international agreement²⁰⁵ that, in principle, reproduction rights apply in the digital environment, there was no consensus as to its scope. A large number of countries favoured a carve-out for acts of temporary or transient reproduction, rather than a mere (optional) limitation.²⁰⁶

205. Agreed statement to WCT: 'The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.'

206. See Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, WIPO Publication 348, WIPO: Geneva 1996, docs CRNR/DC/22, CRNR/DC/53, CRNR/DC/54, CRNR/DC/56 and CRNR/DC/73 containing amendments for a carve-out on the reproduction right by Norway, Australia, a coalition of thirty African States, and a coalition of 20 Latin American States, respectively (Records Diplomatic Conference WCT/WPPT 1996).

The EC's proposal for a broad reproduction right to be included in the WCT met with strong opposition from other parties, including some EU Member States,²⁰⁷ although for obvious political reasons these did not themselves propose alternative approaches. Following the Information Society Directive, European law provides for broader protection than is required on the basis of the WCT and other international instruments to which it and/or its Member States have adhered.

At the European level, no general reproduction right for *authors* existed until the adoption of the Information Society Directive (Article 2 sub a). For authors of software and databases, reproduction rights were already laid down in the Computer Programs and Database Directives. For performers and phonogram producers, film producers, and broadcasters, a reproduction right was first introduced in the Rental Right Directive (Article 7). This has been replaced by the Information Society Directive's Article 2, sub b) through e).

An important objective of the Information Society Directive was to update the acquis to meet the requirements of the WCT and WPPT. The terminology used in the Directive, however, does not follow WPPT's definition of reproduction, but rather sweeps together terms from various treaties and directives. Also, the reproduction rights in databases and software continue to be governed by the respective directives. These contain definitions that appear to be slightly less inclusive: permanent or temporary reproduction by any means and in any form, in whole or in part (Article 4, sub a, Computer Programs Directive, Article 5(a) Database Directive).

The reproduction right of Article 2 of the Information Society Directive extends to 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'. As the Explanatory Memorandum to the 1997 Proposal explains, 'direct' reproduction means reproducing a work or other protected subject matter directly onto the same or a different medium. The term 'indirect' covers reproductions made through an intermediate stage, for example, the recording of a broadcast of a phonogram constitutes a reproduction of the phonogram. The provision is also intended to make clear that the right is not affected by the distance between the place where an original work is situated and the place where a copy of it is made.

The second element (temporary/permanent) is intended to clarify the fact that the very different types of copying that might occur in the digital environment all are acts of reproduction within the meaning of this provision. The result of a reproduction may be a tangible permanent copy, like a book, but it may just as well be a non-visible temporary copy of the work in the working memory of a computer. Both temporary and permanent copies are covered by the definition of an act of reproduction.

Already well before the codification of a broad-ranging reproduction right in the Information Society Directive, and also thereafter, scholarly pleas could be

207. Anil Samtani, 'The Right of Reproduction and the Right of Making Available and the Limits of Liability of Network Service Providers', WIPO/CR/EC/MNL/01/2 (Manila, 17 Oct. 2001), 4–5.

heard for a normative approach to the reproduction right, rather than the technical criterion that was adopted in the Information Society Directive and that also shows in the ECJ's Infopaq judgment (see Section 3.2.3).²⁰⁸

It was feared that an extensive reproduction right would encompass the transient copying that is inherent to acts of communication in digital networks, and thereby lead to untoward liabilities for notably intermediaries and (end) users. The Information Society Directive seeks to address such over-protection through the limitation of Article 5(1) on transient and incidental copying (see Section 3.2.2). It is doubtful, however, whether the combination of a very broad, technologically oriented reproduction right coupled with a limited scope for transit or cached copies of Article 5(1) provides a workable scheme for dealing with two processes at the heart of Internet communications, that is, linking and the operation of search engines. We will take up this issue in Section 3.1.3. As we shall see, the harmonization of the reproduction right and the introduction of a making available right have yet to result in the courts of Member States reaching similar decisions on the copyright status of search engines and linking.

Yet another problem has emerged from the fact that the right of reproduction is perceived as overlapping the right of communication to the public. Especially in the realm of information services akin to broadcasting, this may lead to conflicting or cumulative claims of right holders (see Section 3.1.3 below).

A strange bedfellow in the *acquis* is the *sui generis* protection of databases. Unlike copyrights and classic neighbouring rights, the database right is not framed in terms of the exclusive right to authorize reproduction, distribution, and communication. Rather, the principal restricted acts it recognizes are 'extraction' and 're-utilization'.²⁰⁹ To the extent that extraction invariably involves copying in temporary or permanent form, the extraction right could be characterized as a reproduction right. The language used in Article 7 Database Directive indicates as much, where it considers 'extraction' to mean permanent or temporary transfer of the contents of a database to another medium 'by any means or in any form'. As we have seen, no mention is made of a distinction between direct and indirect copying. The ECJ's decision in *Direct Media*, however, makes clear that Article 7

208. E.g., Reply to the Green Paper on Copyright of 20 Nov. 1996 of the LAB (Legal Advisory Board of the European Commission, formerly DGXIII), P.B. Hugenholtz (ed.), 'Adapting Copyright to the Information Superhighway', in *The Future of Copyright in a Digital Environment* (The Hague: Kluwer Law International, 1996), 81–102 at 92–93, [Hugenholtz, 1996], J.H. Spoor, 'The Copyright Approach to Copying on the Internet: (Over) Stretching the Reproduction Right?', in *The Future of Copyright in a Digital Environment*, ed. Hugenholtz (The Hague: Kluwer Law International, 1996), 67–79, [Spoor, 1996], A. Lucas, *Traité de la Propriété Littéraire et Artistique* (Paris: Litec, 2001), 210–212; G. Westkamp, 'Towards Access Control in UK Copyright Law?', *CRi* 1 (2003): 11–16, [Westkamp, 2003a]; M. Hart, 'The Copyright in the Information Society Directive; An Overview', *EIPR* 24 (2002): 58–64, [Hart, 2002]; J.-P. Triaille, 'La directive sur le droit d'auteur du 22 mai 2001 et l'acquis communautaire', *Auteurs & Media* 1 (2002): 8–13, at 11, [Triaille, 2002].

209. These rights do not cover consultation by third parties of the contents of a database if that has been made accessible to the public by or with permission of the right holder, see ECJ in *British Horseracing*, paras 54, 55.

also prohibits indirect copying.²¹⁰ The ECJ elaborated that a decisive criterion in assessing whether there is extraction is whether there is a transfer of data, meaning all or part of the contents of a database are to be found in a medium other than that of the original database, regardless of the nature and form of the mode of operation used. Consequently, *DirectMedia* had performed acts of extraction by viewing the contents of a database on-screen (in this instant: a list of the 1,100 most important poems in German literature between 1730 and 1900), individually assessing the items as to their usefulness and copying a large number of them manually.²¹¹

That the definition of extraction does not mention transfer ‘in whole or in part’ is not surprising considering that a key characteristic of the sui generis right is that it protects only against copying of *substantial* parts of the contents (or systematic copying of insubstantial parts). For this reason alone, no alignment with other related rights and copyright seems possible.

3.1.2.2. *Distribution Rights*

As with the reproduction right, it was the Information Society Directive that introduced a broad distribution right for authors in general. Article 4 provides the exclusive right to authorize ‘any distribution to the public by sale or otherwise’ of the original or copies of a work. The existing distribution right for performers, phonogram producers, film producers, and broadcasters of Article 9 Rental Right Directive has been maintained. The latter is phrased differently, as ‘the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise’. The Explanatory Memorandum to the Information Society Directive sheds no light on the reason for using different wording, but contains no indication that for works of authorship a substantive difference was intended. Most likely, the use of the term ‘making available’ was avoided to prevent confusion, as the Directive also introduces a making available right as part of the right of communication to the public.

The distribution right mentioned in Article 4, sub c, of the Computer Programs Directive and Article 5, sub c, of the Database Directive (‘any form of distribution to the public’), could be read as encompassing online transmission. The legislative history of the Computer Programs Directive²¹² does not, however, support such an interpretation. The WIPO commentary on the WCT also portrays the distribution right as ‘an indispensable corollary to the right of reproduction’.²¹³

The interpretation that the distribution right does not cover online dissemination was recently borne out by the EC judgment in *Peek & Cloppenburg v. Cassina*. It was the first case on Article 4 before the ECJ. The manufacturer of *Le Corbusier*

210. That extraction covers indirect copying was already argued by Derclaye in *The Legal Protection of Databases* (Cheltenham: Edward Elgar, 2008), 276.

211. ECJ 9 Oct. 2008, Case C-304/07 (*Directmedia Publishing v. Albert-Ludwigs-Universität Freiburg*).

212. Bently, in Dreier & Hugenholtz (2006), Comment on Directive 91/250/EEC, Art. 4 at 4.

213. WIPO Intellectual Property Handbook: Policy, Law and Use, at 5.238.

furniture claimed that the use of actual chairs in a shop – for customers to sit on, and as part of a window display – required the copyright owner’s authorization. The reasoning was that such use of chairs is a form of distribution ‘otherwise’ than by sale within the meaning of Article 4(1) Information Society Directive. In contrast to the lower German courts, the ECJ declined to interpret the distribution right so extensively as to encompass these uses. In clear language, the ECJ dismissed Cassina’s claim that the distribution right should be interpreted widely to arrive at a high level of protection.

The ECJ said that the Information Society Directive does not give ‘a sufficient explanation of the concept of distribution to the public of a work protected by copyright’ (point 29). It looked to the WCT for clarification and concluded that ‘distribution through sale or otherwise’ covers ‘acts which entail, and only acts which entail, a *transfer of the ownership of that object* [italics added] . . . As a result, neither granting to the public the right to use reproductions of a work protected by copyright nor exhibiting to the public those reproductions without actually granting a right to use them can constitute such a form of distribution’.²¹⁴

The ECJ thus confirmed that Article 4 deals only with sale and similar property constructs (e.g., donation, hire purchase) but not other types of distribution of copies of works (e.g., rental, lending). In addition, the focus on the necessity of transfer of *ownership* implies that Article 4 only comes into play where there is distribution of goods, that is, copies in tangible media. In case of online dissemination, there is no object (medium) in which ownership changes hands.

3.1.2.2.1. Rental and Lending

The harmonized rental and lending right pertains to the distribution of physical copies only.²¹⁵ It goes well beyond what the relevant international instruments require. Rental and lending are regulated by three directives. The Information Society Directive, however, brings no material changes because it is without prejudice to the two earlier directives that deal with the matter. These are the Rental Right Directive and the Computer Programs Directive (Article 1(2), recital 20, 28). The Information Society Directive reaffirms that rental and lending are part of the wider distribution right, by providing that right holders must be granted the right to control ‘any form of distribution to the public by sale *or otherwise*’ (Article 4(1) Information Society Directive).

The Rental Right Directive contains the general rule but leaves intact²¹⁶ the rental right in computer programs as provided earlier by the Computer Programs Directive. The wording of the definition is slightly different, where the Computer Programs Directive speaks of ‘making available for use, for a limited period of time and for *profit-making purposes* [italics added]’ (recital 16 Computer Programs Directive), whereas the Rental Right Directive speaks of ‘for direct or

214. *Peek & Cloppenburg v. Cassina*, point 36.

215. See Preamble to the Rental Right Directive at 12–14.

216. Article 4 Rental Right Directive.

indirect economic or commercial advantage' (Article 1(2)). Although the latter term seems broader, it is doubtful whether it reflects a substantive difference rather than a mere clarification.²¹⁷

The Rental Right Directive lists as beneficiaries of the rental right: the author, the performer in respect of the fixation of his performance, the phonogram producer in respect of his phonograms, and the producer of the first fixation of a film. As has been successfully argued by the Commission and Advocate-General in *Commission v. Portugal*, because rental and lending rights constitute barriers to the free flow of goods, Member States may not unilaterally extend the rights to other interested parties.²¹⁸ However, from the Explanatory Memorandum it can be deduced that Member States may maintain or possibly extend the rental and lending right to other groups of neighbouring right owners (related rights in non-original photographs are mentioned), but probably only where there is no (or only minor) effect on the common market.²¹⁹

The difference between rental and lending is that the latter is done on a non-profit basis by institutions accessible to the public, such as public libraries and archives, school libraries, and research libraries. Like the rental right, the right of lending does not extend to works of applied art, buildings, and databases protected under the *sui generis* right. Although the Rental Right Directive is without prejudice to the Computer Programs Directive, its rules on lending do apply to software because lending is left unregulated by the Computer Programs Directive.²²⁰ Because the lending of software is not specifically addressed in either directive, there is some uncertainty as to the scope of the lending right. Given the fact that software is routinely integrated with digital content to enable access to it (music, film, database), it stands to reason that there is only a rental or lending right for the owner of copyright in software that constitutes the essential object of rental or lending.²²¹

Lending is not fully harmonized, as Article 5 of the Rental Right Directive allows Member States a fair amount of leeway in dealing with the remuneration of authors and related rights holders. Rather than providing for an exclusive right to authorize, Member States may opt for a system of remuneration for public lending, and exempt *certain* establishments from payment thereof (Article 5 Rental Right Directive). The ECJ has ruled that 'if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories

217. Compare Krikke, in Dreier/Hugenholtz (2006), Comment on Directive 92/100/EEC, Art. 3 at 1 and Bently, in Dreier & Hugenholtz (2006), Comment on Directive 91/250/EEC, Art. 4 at f.

218. ECJ 13 Jul. 2006, Case C-61/05 (*Commission v. Portugal*), OJ [2006] C 224/18; Opinion Advocate-General of 4 Apr. 2006.

219. Explanatory Memorandum, paras 2.1.3 and 2.1.4; Reinbothe & Lewinski (1993).

220. See J. Reinbothe, 'Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft', *GRUR Int.* 8/9 (2001): 735, [Reinbothe, 2001a].

221. Article 11 TRIPS and Art. 7(2)(i) WCT demand a rental right only where software is the essential object. See Bently, in Dreier & Hugenholtz (2006).

of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned'.²²²

The controversial nature of the lending right shows in the attempts by a number of Member States to limit as much as possible its scope for public institutions. In three cases before the ECJ, against Ireland, Portugal, and Spain, the Commission has successfully argued that these countries have not implemented the Rental Right Directive correctly by effectively exempting all (or too large a number of) public libraries, archives, and educational and academic institutions from having to pay remuneration for lending.²²³ In yet another case, the ECJ ruled that Italy has not transposed the Directive correctly either, because Italy has limited in time the obligation to pay remuneration for public libraries.²²⁴

3.1.2.2.2. Exhaustion

Intrinsically linked to the distribution right is the exhaustion principle ('first sale'), which has found its codification in general terms in the Information Society for works of authorship (Article 4(2)). It limits the distribution right by excluding control over the subsequent distribution of tangible copies (or originals) within the European Economic Area (EEA) when these have been first brought on the market in EEA territory through sale or other transfer of ownership by the right holder or with his consent. The Community exhaustion rule obviously does not apply to acts of rental and lending.

No international treaty requires signatories to introduce exhaustion. TRIPs explicitly provides that it does not address exhaustion (Article 6). It is a limitation in the interest of the free flow of goods that has consistently been applied by the ECJ to intellectual and industrial property rights alike.²²⁵

Because the Information Society Directive does not pre-empt earlier directives, older exhaustion rules have remained intact for software (Article 4(c)

222. ECJ 16 Oct. 2003, Case C-433/02, *ECR* [2003] I-12191 (*Commission v. Belgium*).

223. ECJ 11 Jan. 2007, Case C-175/05, *ECR* [2007] I-00003 (*Public Lending Ireland*); ECJ 6 Jul. 2006, Case C-53/05, *ECR* [2006] I-06215 (*Public Lending Portugal*); and ECJ 26 Oct. 2006, Case C-36/05, *ECR* [2006] I-10313 (*Public Lending Spain*). The Portuguese copyright act exempted from remuneration '... public, school or university libraries, museums, public archives, public foundations and private non-profit making institutions'. The ECJ earlier declared Luxembourg has not met its obligations either, by failing to apply the provisions on public lending right, in ECJ 27 Apr. 2006, Case C-180/05, *ECR* [2006] I-00054 (*Public Lending Luxembourg*).

224. ECJ 26 Oct. 2006, Case C-198/05, *ECR* [2006] I-00107 (*Public Lending Italy*). Art. 69(1)(b) of the Italian Law No. 633/41 exempts all State book and records libraries to the extent that their lending is not subject to any authorization or remuneration after at least eighteen months from the first act of the distribution or after at least twenty-four months from the realization of those works if the right of distribution is not exercised.

225. For copyright see the judgments in *Deutsche Grammophon, Dansk Supermarked, Laserdisken* (no exhaustion with regard to rental right).

Computer Programs Directive),²²⁶ databases subject to copyright (Article 5(c) Database Directive), sui generis databases (Article 7(2), sub b, Database Directive) and performances on phonograms, phonograms, films, and broadcasts (Article 9(2) Rental Right Directive).

All of these older rules speak of exhaustion only by 'first sale', so in a literal reading they would not include other transfers of ownership, such as gift or exchange. However, considering the internal market objective of the exhaustion rule, it stands to reason that the older exhaustion rules also apply to types of distribution involving transfers of property in copies other than *sale*. Because an information good is often composed of a variety of ('multimedia') works subject to multiple intellectual property rights, such a broader interpretation would also prevent the older rules for software, databases, and related rights to effectively undermine Article 4(2) Information Society Directive.

Another inconsistency stems from the Database Directive, which specifically speaks of the right holders as having no control over 'resale' of copies (Article 5(c) and 7(2) sub b. Again, a literal reading would imply that the right owner does maintain control over subsequent exchange, gifts, and other property transfers other than through sale. For the reasons put forward earlier, this differential treatment is unwarranted.

Because for harmonized industrial property rights Community-wide rather than international exhaustion is the norm,²²⁷ this was also the approach taken for copyright and related rights in the Information Society Directive. Even though the Information Society Directive does not expressly forbid parallel imports from outside the EC, the choice made for Community exhaustion seems difficult to reconcile with a rule of international exhaustion maintained at the national level.²²⁸ The *Laserdisken II* ruling confirms that Member States which have traditionally adhered to international exhaustion have to switch to community exhaustion for works of authorship and related rights. That is, only for those categories of productions that are harmonized. Whether community-wide exhaustion will eventually yield to worldwide (universal) exhaustion remains to be seen. At the Council meeting in which final agreement was reached on the Information Society Directive, it was agreed that this is issue would have to be revisited by the European legislature in the near future.

3.1.2.2.3. Resale

Until the introduction of the Resale directive, few Member States had a working system of remunerating artists for each subsequent sale of copies of their work of

226. For a critical evaluation of the arguments against exhaustion in case of software that is distributed as downloads, see Blocher, in Walter (2001), *Kommentar Software-RL*, 171–174.

227. ECJ 16 Jul. 1998, Case C-355/96, *ECR* [1998] I-4799 (*Silhouette*), see also Art. 7(1) of First Council Directive on Trademarks, 89/104/EEC.

228. See also Staff Working Paper on Copyright Review, 17; Bechtold, in Dreier & Hugenholtz (2006), Comment on Directive 2001/29/EC Art. 4 at 3f.

graphic or plastic art (paintings, etches, sculpture and the like). A harmonized *droit de suite* is meant to ensure that artists are treated the same throughout the EU. The art markets in Member States (trade fairs, auction houses, etc.) in countries with a functioning *droit de suite* had a relative disadvantage compared to those in Member States without a resale right, causing (a fear of) displacement of art sales. The resale right directive also seeks to rectify this possible distortion and increase competitiveness in the art markets. Whether the EU-wide introduction of a resale right can actually achieve these objectives is highly debated.²²⁹

There is little to remark about the effect of the directive on the legal framework of copyright. This is due in part because the *droit de suite* is conceptually distinct from the core economic rights of reproduction, distribution and communication to the public. Also, it has not been very long since the term for implementation of the directive has expired (1 January 2006), and it will be six to eight years before the remuneration right has to be extended to the estates of deceased artists (Article 8(2) and (3) Resale Directive).

3.1.2.3. Communication to the Public Rights

In line with the interpretation it is given in the Information Society Directive, communication to the public is used here to indicate ‘any means or process other than the distribution of physical copies’ to the public.²³⁰

The general right of communication to the public with respect to all works of authorship was laid down in Article 3 Information Society Directive. Previously, a similarly broad communication right existed only for databases. Article 5(d) Database Directive defines it as ‘any communication, display or performance to the public’. As *lex specialis*, this rule trumps Article 3 Information Society Directive (see Article 2(1) Information Society Directive). Given the explicit reference to display and performance,²³¹ the rights appear to be broader for databases.

The copyright protection of software is also left unaltered by the Information Society Directive. The Computer Programs Directive contains no rules on communication to the public specifically. Rather, it frames display and transmission of software as restricted acts in the context of the reproduction right (Article 4(a) Computer Programs Directive). If the general right of communication were to be extended to software, it stands to reason that such an extension will be accompanied by a clause similar to Article 5 Computer Programs Directive, that is, the lawful user of software would not need authorization for acts of communication that constitute normal use of the software.

229. See De Boer (2005); also K.E. Heinze, ‘Das sogenannte Folgerecht (“droit de suite”) als künftige europaweite Regelung? – Zur Theorie des urheberrechtlichen Eigentums’, *GRUR* 10 (1998): 786–792, [Heinze, 1998]; J. Wuenschel, ‘Article 95 EC Revisited: Is the Artist’s Resale Right Directive a Community Act beyond EC Competence?’, *J IPL* 4 (2009) 2: 130–136, [Wuenschel, 2009].

230. Explanatory Memorandum to the Information Society Directive, Comment on Art. 1 at para. 3.

231. The practical significance of a ‘performance’ right for databases seems limited.

For related rights, neither international instruments nor EC *acquis* contain a broad communication right similar to that for works of authorship.

3.1.2.3.1. Public Performance

EC law does not recognize a general right of public performance for authors or performers. The Computer Programs Directive does mention the act of display as restricted to the extent that displaying involves a reproduction. The Database Directive's broad communication right expressly encompasses acts of display and performance to the public (Article 5(d)), without, however, elucidating how a database is to be 'performed'.

At first glance a public performance right for works of authorship may be read in Article 3 Information Society Directive. The Explanatory Memorandum to the Information Society Directive speaks of Article 3 as covering 'all public communication and all categories of work'. Recital 23, however, clarifies that it only applies to communication to 'the public not present at the place where the communication originates'.

The language of Article 3(1) has been criticized²³² because its terminology has a broader meaning in the (copyright) laws of a number of Member States, covering the communication of works of authorship both to audiences present or at a distance (e.g., *öffentliche Wiedergabe* in German law and *openbaarmaking* in Dutch law). It would have been more precise to exclude the communication of works of authorship to 'on the spot' audiences (i.e., performance) in Article 3 itself. The present terminology is particularly confusing since the remuneration right awarded to performers and phonogram producers by Article 8(2) Rental Right Directive, for the use of a phonogram 'for any communication to the public', does cover playing a phonogram in a public place and similar 'on the spot' communications.²³³

3.1.2.3.2. Broadcasting

Harmonized minimum rules on the right of broadcasting are to be found in the Rental Right Directive and the Satellite and Cable Directive. The former has introduced for performers the right to authorize broadcasts with respect to their live performances (Article 8(1) Rental Right Directive), as well as a remuneration right for phonogram producers and performers for the (wireless) broadcasting or any communication to the public of their phonograms (Article 8(2), compare Article 12 RC). In addition, broadcasters were given the right to authorize rebroadcast (wireless) and communication of their broadcasts in publicly accessible places against payment of a fee (Article 8(3)). Film producers, that is, producers of first fixations of films, do not have rights pertaining to broadcasting. However,

232. Walter (2001), *Kommentar Info-RL* at 77.

233. Krikke, in Dreier & Hugenholtz (2006), *Comment on Art. 8, Directive 92/110/EEC*, at 3.

they will normally have acquired rights from the authors that have contributed to the film.

For authors, the Satellite and Cable Directive contains the exclusive right to authorize satellite broadcasts of copyrighted works (Article 2 Satellite and Cable Directive). For owners of related rights, the Information Society Directive does not introduce additional broadcasting rights, because Article 3(2) speaks only of a right of making available.²³⁴

The Information Society Directive has, however, broadened the exclusive rights of authors to any type of broadcast (Article 3(1)), for example, via cable or webcast, although unlike the Rental Right Directive it does not deploy 'broadcast' as a separate term. The general right of communication of Article 3(1) also includes retransmission via cable, that is, the simultaneous and unaltered transmission by a cable operator of a broadcast originating from another organization. The Satellite and Cable Directive prescribed collective licensing for cable retransmission of broadcasts originating from another Member State,²³⁵ only to the extent national laws did recognize such a right in the first place. For works of authorship, a cable retransmission right was generally in place throughout the EU, as it is also included in Article 11*bis* (1), sub ii, BC.

3.1.2.3.3. Making Available

Articles 3(1) and (2) of the Information Society grants authors, performers, phonogram producers, the producers of the first fixations of films, and broadcasting organizations the exclusive right of making available to the public their works and related rights subject matter²³⁶ 'in such a way that members of the public may access them from a place and at a time individually chosen by them'. As was indicated above, for related rights the making available right is regulated separately and not as part as a broad communication to the public right, because only authors have been granted the latter (in Article 3(1) Information Society Directive).

3.1.2.4. Adaptation

Within the *acquis*, the only directive dealing explicitly with adaptation is the Computer Programs Directive. In Article 4(b) it provides for an exclusive right of adaptation, translation, or arrangement. The laws of Member States all recognize the right to adaptation, but place it differently. In most Member States,

234. Bechtold, in Dreier & Hugenholtz (2006), Comment on Art. 3, Directive 2001/29/EC.

235. See ECJ 8 Feb. 2000, Case C-293/98, *ECR* [2000] I-629 (*Egeda*): '(the Satellite and Cable directive) neither requires the Member States to introduce a specific cable retransmission right nor defines the scope of any such right. It merely imposes an obligation upon the Member States to ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed'.

236. For fixations of performances, phonograms, the original and copies of films, and fixations of broadcasts. respectively.

including the United Kingdom, Spain, Ireland, Estonia, and Greece, it is regarded as a separate restricted act. In, for instance, the Netherlands, Belgium, Finland, Sweden, and Denmark it is seen as part of a general broad-ranging reproduction right.²³⁷

The mere fact that some countries traditionally consider adaptation as a form of reproduction does not, however, imply that the broadly defined reproduction right of the Information Society Directive ('in any manner or form') includes adaptation. The adaptation right is essentially left unregulated at the EC level.²³⁸ At first sight, this may seem a striking gap in the *acquis*. On further reflection, however, it makes sense that this right has so far not been harmonized, considering that the issue has a strong moral rights undertone and, more importantly, that the criteria for protected subject matter have not been harmonized either. The question of what constitutes an adaptation, and what a new and independent work, is linked closely to the originality criterion one applies. Thus, any harmonization of the right of adaptation would ideally go hand in hand with the introduction of a harmonized concept of the work of authorship (see Section 2.2).

3.1.3. ASSESSMENT

3.1.3.1 *Scope of the Reproduction Right*

Designed as it was to respond to the legal challenges posed by the information society as they were perceived in the mid-1990s, many have warned that the Information Society Directive was destined to 'age prematurely'.²³⁹ At the time, the use of browsers was starting to take off, but the facilities for locating and selecting information on the Internet were not nearly as large scale and sophisticated as they were by the time the Directive was finally implemented. Since then, the continued rapid development of search engines and other selection-aiding services have indeed confirmed doubts about how long the existing copyright law can stand the test of Internet time.

The sweeping definition of the reproduction right causes uncertainty as to what aspects of networked communication are legally in the control of content owners and what the liabilities of users and intermediaries are. It does not provide a clear framework for dealing with two quintessential characteristics of the web, namely, linking and caching. In fact, the word *hyperlink* is not mentioned once in

237. Article 16(1) sub e and 21 UK Copyright Act, Art. 21 Spanish Copyright Act, Art. 37(1) Irish Copyright Act, Art. 3(1) sub b and c (translation and adaptation respectively) Greek Copyright Act, Art. 13(1) sub 4 and 5 (translation and adaptation respectively) Estonian Copyright act, Art. 13 Dutch Copyright Act, Art. 12 Italian Copyright act, Art. 1 Belgium Copyright Act, Art. 2 Swedish Copyright Act.

238. This also concerns the exceptions and limitations enumerated in Art. 5 of the Information Society Directive. These do not apply to the rights of adaptation granted by the Member States.

239. See M. Kretschmer, 'Digital Copyright: The End of an Era', *EIPR* 25 (2003): 333–341.

the Explanatory Memorandum that accompanied the proposal for the Information Society Directive of December 1997.

The first disputes over hyperlinking came to the courts of Member States in the late 1990s. There appeared an initial consensus that the ordinary surface linking or deep linking to protected content does not constitute acts of unauthorized reproduction.²⁴⁰ A landmark case in this respect is the *Paperboy* decision of the German *Bundesgerichtshof* (BGH).²⁴¹ Later, however, national courts went on to take different stands on the various types of linking, when in addition to ordinary surface and deep linking, they were asked to rule on the copyright status of framing or inline linking.²⁴² Some courts have found that even where the intermediary does not itself infringe copyright, the act of creating links to manifestly illegal sources of copyrighted material constitutes an unlawful act.²⁴³

Recently, disputes have arisen over image searches. Basically, as with text searches, spiders crawl the web to index webpages, but in the case of image searches, the cached index contains small-sized copies of images ('thumbnails') together with a filename or other properties. A query by a user returns as hits those images of which the file properties match the query. In Germany, lower courts have held that making such thumbnails constitutes a violation of the rights owner's exclusive reproduction right.²⁴⁴ In a surprising ruling a French court rejected

240. Early case law in France includes: Tribunal de Commerce de Paris (Commercial Court), 26 Dec. 2000, No. 26, *Communication & Commerce électronique* (2001), comment C. Caron; in the Netherlands: Pres. Rb. Rotterdam (President District Court) 22 Aug. 2000, No. 10, *Informatierecht/AMI* (2000): 207–210, comment K.J. Koelman; No. 10 *Mediaforum* (2000), comment T.W.F. Overdijk (*Kranten.com*); Rb. Leeuwarden (District Court) 30 Oct. 2003, LJN AN4570 (*Batavus*).

241. BGH 17 Jul. 2003, Case I ZR 259/00 (*Paperboy*) *MMR* (2003): 719 Anmerkung Andreas Wiebe at 724. The question before the Court was: does the provision of a web-based information service that searches the web for news items and links to the sources involve restricted acts under German Copyright Law. The Court ruled that (deep) linking is not a reproduction; nor is linking a form of communication to the public. Links that allow the display of remote information (hosted in another location) without the user having to leave the current webpage, are merely an aid to finding content that is already lawfully made available to the public.

242. For an overview, see S. Ott, 'Haftung für Hyperlinks – Eine Bestandsaufnahme nach 10 Jahren', *WRP* 52 (2006): 691–703; and S. Ott, 'Die Entwicklung des Suchmaschinen-und Hyperlink-Rechts im Jahr 2007', *WRP* 54 (2008): 393–414.

243. In Belgium: *Belgacom Skynet v. IFPI*, Hof van Beroep Brussel (Court of Appeal) 13 Feb. 2001, *ECDR* 5 (2002): claim in unfair competition; failure to block access after notice that website links to clearly unauthorized MP3 files creates liability of Internet service provider. In the Netherlands: *Brein v. Zoekmp3*, Gerechtshof Amsterdam (Court of Appeal) 15 Jun. 2006, LJN: AX7579 (claim in tort; web search engine specialized in MP3 does not infringe copyright or neighbouring rights; systematic and structural linking to unauthorized content creates liability). In Denmark: *KODA et al. v. Anders Lauritzen*, Vestre Landset (Western District High Court) 20 Apr. 2001, Case No. 346402 *ECDR* 25 (2002): linking to unauthorized MP3 files on other servers qualifies as public performance under Danish copyright act. In Norway: *TONO et al. v. Bruvik*, *CLSR* 21 (2005): 461–462.

244. LG Bielefeld, Urteil vom 08 Nov. 2005 20 S 49/05 (Schadensersatz für Urheberrechtsverletzung durch Thumbnails) *JurPC Web-Dok.* 106/2006; LG Hamburg, Urteil vom 05 September 2003, 308 O 449/03 (Thumbnails) *JurPC Web-Dok.* 146/2004.

claims for compensation by French collective rights organization for the visual arts against Google, because Google's image search service constitutes fair use under US copyright law.²⁴⁵

System caching itself has been ruled an unauthorized reproduction by the Brussels Court in *Copiepresse v. Google*. By caching the content of news websites and linking to news items on user expressed preferences, Google was held to infringe publishers' copyrights.²⁴⁶ By contrast, a Spanish district court held that Google's caching service does not infringe copyright.²⁴⁷ System caching of the type that Google practices does not seem to fit well with the criteria laid down in the exemption for transient copying of Article 5(1) Information Society Directive. Some argue because the cache is not sufficiently temporary (considering that data tend to be stored for longer periods as server capacity grows). Others claim that in addition, system caching has an independent economic significance and therefore fails the test (see Section 3.2.3).²⁴⁸

It should be noted that caching is not viewed exclusively in the context of the reproduction right, but also as a potential act of making available.²⁴⁹ Opinions differ on when exactly search engines make available,²⁵⁰ and it seems only a matter of time before the ECJ is asked to shed light on the matter.

Arguably, the Information Society Directive fails to adequately address the position of search engines and other services that help select information, such as reputation and tagging systems and suggestion services. The broad reproduction right and making available right cause legal uncertainty for intermediaries offering such services. To make matters worse, uncertainty exists not only with respect to liability for direct copyright infringement, but also with respect to the liability of information selection services for secondary infringement by their users. Here too, there are no clear EU-wide rules. The safe harbour provisions laid down in Articles 12 through 14 of the Electronic Commerce Directive – for access providers and other intermediaries whose role is limited to mere conduit, for caching and for hosting providers – were not written with search engines or

245. Tribunal de Grande Instance (TGI) Paris, 20 May 2008, *SAIF v. Google France et Google Inc* (available at <www.Juriscom.net>).

246. Rechtbank van Eerste Aanleg Brussel (District Court) 13 Feb. 2007, *Computer Law Review International* 2 (2007): 48–50.

247. Provincial Court of Barcelona, 17 Sep. 2008 (*Megakini.com*), available at <www.kluwereuipcases.com>.

248. As does J.D. Roggenkamp, 'Verstößt das Content-Caching von Suchmaschinen gegen das Urheberrecht?', *K&R* 9 (2006): 405–409, [Roggenkamp, 2006]. Focusing on whether system caching is 'temporary': S. Klein, 'Search Engines and Copyright – An Analysis of the Belgian Copiepresse Decision in Consideration of British and German Copyright Law', *IIC* 39 (2008): 451–483, [Klein, 2008].

249. In the same vein, hyperlinking could be construed as an act of making available. See: G.P. Korg, 'The Norwegian "Napster Case" – Do Hyperlinks Constitute the "Making Available to the Public" as a Main or Accessory Act?', *CLSR* 22 (2006): 73–77.

250. See the case law cited in Ott (2008) and Klein (2008).

other (automated) selection services in mind.²⁵¹ When reporting on the implementation of the E-Commerce Directive in 2003, the EC still argued 'it was not considered necessary to cover hyperlinks and search engines in the [Electronic Commerce] Directive'.²⁵² Within copyright circles, debate about the necessity to harmonize at least some safe harbour rules for selection tool services is, however, very much alive.²⁵³ In the context of the ongoing review process of the Electronic Commerce Directive, liability of search engines now is on the agenda.

Criticism against the Information Society's reproduction right has not only been levelled because of its adverse effect on search engines. In fact, this type of criticism is fairly recent. Already, years before its adoption, the broad scope of the right of reproduction as set out in Commission proposals had given rise to intense debate. Stakeholders concerned, particularly providers of telecommunications services, institutional users, and consumers, feared that a reproduction right that would encompass in principle all transient copies generated in the course of normal computing and digital transmission operations would impose undue liabilities on users, intermediaries, and end-users. These concerns were shared by many scholars, as exemplified by the early cautionary reaction of the European Commission's Legal Advisory Board (LAB) to the 1995 Green Paper on Copyright and Related Rights in the Information Society:

In the opinion of the LAB, in examining (and, possibly, redefining) these rights the European legislator should not focus on technological detail, but follow the normative approach inherent in the realm of copyright and neighbouring rights. The notions of 'reproduction' and 'communication to the public' are only fully understood if they are interpreted not as technical, but as normative (man-made) notions, i.e. they are not in a simple sense descriptive but purpose oriented and used to define and delimit existing proprietary rights in a sensible and acceptable way. Thus, if the use of a protected work transmitted over a computer network causes (parts of the work) to be intermediately stored, this technical fact does not, in itself, justify the conclusion that an exclusive reproduction right is potentially infringed.

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251. On the safe harbour provisions in relation to search engines, see J.V.J. van Hoboken, 'De aansprakelijkheid van zoekmachines. Uitzondering zonder regels of regels zonder uitzondering?', *Computerrecht* 1 (2008): 15–22, *id.*, 'Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU', *Int'l J. Comm. L. & Pol'y* Issue 13 (Winter 2009): 1–21, [Van Hoboken 2009]; B.L. Joslove & A.V. Krylov, 'Dangerous Liaisons: Liability in the European Union for Hypertext Linking and Search Engine Services', *CRi* 6, no. 2 (2005): 33–39.
252. First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 Jun. 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce). COM (2003) 702 final, Brussels, 21 Nov. 2003, 13.
253. M. Turner & D. Callaghan, 'You Can Look But Don't Touch! The Impact of the Google v Copiepresse Decision on the Future of the Internet', *EIPR* 30 (2008): 34–38, [Turner & Callaghan, 2008]; B. Allgrove & P. Ganley, 'Search Engines, Data Aggregators and UK Copyright Law: A Proposal', *EIPR* 29 (2007): 227–237, [Allgrove & Ganley, 2007].

According to the LAB, stretching the reproduction right as initially proposed by the EC would effectively create an exclusive right of digital end usage, with undesirable consequences:

In fact, the catalogue of restricted acts would be extended with a novel right of digital usage. Such a use right is antithetical to the traditional principle that copyright and neighbouring rights do not protect against acts of consumption or reception of information. Reading a book and watching television involve basic rights of privacy (Art. 8 ECHR) and freedom of reception (Art. 10 ECHR), and are therefore not considered restricted acts. In the opinion of the LAB, the same must be true for the digital environment. In consequence, the extension of traditional copyright to cover acts which amount to mere consumption of works is highly questionable.

The exemption for incidental and transient copying of Article 5(1) Information Society Directive may provide some relief for mere passive ‘transporters’ (see Section 2.4). But the broad scope of the reproduction right not only affects the activities of parties whose actions traditionally did not expose them to claims of right holders. It also multiplies the number of restricted acts performed by content providers, such as broadcasters or online distributors. This means that where before they required only one license, they may now need to acquire multiple licenses from different sources (right holders, various collective rights organizations) for what from the perspective of the content providers are unitary acts of usage. This causes unnecessary transaction costs.

The reproduction right increasingly serves as a basis for right holders to claim remuneration for online dissemination of content. Where before (commercial) users may have needed permission, or pay remuneration, for either communication to the public or reproduction and distribution, dissemination over the Internet typically involves both acts of reproduction and communication (broadcasting or making available) and therefore requires double authorization.

For new distribution models that are reminiscent of broadcasting, such concurrent application of reproduction and communication rights can seem counterintuitive. In case of podcasting, for instance, both mechanical and performance rights societies may claim rights, whereby the reproduction/mechanical license covers both the reproductions made at the beginning of the chain of communication (on the server) and the copies made at the user end of the chain (on the users equipment).²⁵⁴ Similarly, right holders have claimed remuneration for webcasting based on the argument that it not only constitutes communication to the public, but also reproduction because of the intermediate copies made during the streaming process.²⁵⁵ Some performing rights organizations representing authors and music

254. Another question is how a broad reproduction right exercised through the distributor of content relates to private copying exemptions, and the charging of levies to storage media.

255. In the United States the status of webcasting (especially of sound recordings) under the reproduction right has been the object of fierce debate and has led to diametrically opposed legislative initiatives (H.R. Bills 5469 and 5258).

publishers have taken the position that any transmission is a public performance (i.e., communication to the public), regardless of whether the purpose of the transmission is aimed at selling a copy of a work, as opposed to merely enabling an audience to listen to it.²⁵⁶ This raises the question whether the reproduction right is not in danger of being overstretched. Clearly a broad reproduction right and a broad communication to the public right, including a right of making available online, cannot coexist.

Obviously, the extension of the reproduction right to online distribution makes rights clearance more cumbersome. Even in traditional areas of collective management, notably music rights, blanket licenses for mechanical rights and performance rights are not administered by the same organization. Complicating matters is the sheer number of different right holders involved (authors, performers, music publishers, record companies, etc.). Equally, some rights may be managed collectively whereas others are managed individually.

The accumulation of rights does not contribute to a transparent system. From that perspective also it seems advisable that a normative approach be developed whereby the purpose of a reproduction determines whether there is an independent act of exploitation, or whether there is not, because the sole purpose of copying is allowing public communication for which the right holder has obtained a license.²⁵⁷

Another issue with the reproduction right is that it is not entirely clear to what extent the broad concept of reproduction includes rights of adaptation (notably in the grey area between 'technical' and 'creative', for example, computer generated translations into natural languages, summaries, etc.). This is an issue that could be addressed if a general right of adaptation were introduced in the *acquis*.

To conclude our assessment of the *acquis communautaire* for reproduction rights: a minor inconsistency concerns the different wording used to define the act of reproduction in the Computer Programs, Database and Information Society Directives. The latter is the latest and provides the broadest definition, including 'direct' or 'indirect' reproduction. It is not clear whether the legislator intended for it to have a different meaning from the definitions used in either Computer Programs or Database Directive, that do not explicitly mention indirect reproduction as being a restricted act.

3.1.3.2. *Scope of the Distribution Right*

There appear to be few discrepancies in the existing framework where the distribution right is concerned. An inconsistency of probably minor practical importance is the narrower term used for exhaustion (sale only) with regard to copyrighted

256. M. Jackson, 'From Broadcast to Webcast: Copyright Law and Streaming Media', paper given at the 30th annual Telecommunications Policy Research Conference (Alexandria, Virginia 2002), 7, [Jackson, 2002].

257. Compare the normative approach put forward in P.B. Hugenholtz & K. Koelman, 'Copyright Aspects of Caching: Digital Intellectual Property Practice Economic Report' (Amsterdam: Institute for Information Law, 1999), [Hugenholtz & Koelman, 1999].

software and databases and for related rights. There seems to be no justification for this differential treatment. This may be a reason to align the definitions on exhaustion in the Computer Programs Directive and Database Directives with that of the Information Society Directive.

Alignment could be achieved by revising the definitions in the Database and Computer Programs Directives. Alternatively, Article 4(c) Computer Programs Directive and Article 5(c) last sentence Database Directive could be repealed while Article 4(2) Information Society Directive would be revised, so that the scope of the general exhaustion clause extends to databases and software. Another alternative is to revise Article 4 Information Society Directive so as to bring under it all distribution rights pertaining to copyrighted subject matter. The drawback of this solution is that the exclusive rights pertaining to software and databases would no longer be concentrated as they are now in Articles 4 Computer Program Directive and 5 Database Directive. In sum, the first alternative seems the most suitable in terms of clarity and consistency.

3.1.3.3. *Rental and Lending Rights*

Databases more often than not contain subject matter protected by copyright or related rights. Tangible copies of the database then might indirectly become subject to rental and lending rights, even if the database as a whole is not because it is not original (thus not copyrighted) but does qualify for sui generis protection (that does not include rental and lending rights). It may be worthwhile to explore whether the solution chosen for computer software in Article 14 TRIPs and Article 7 WCT is suitable to extend to protected subject matter contained in non-original databases, that is, that rental and lending rights pertain only to subject matter that is the essential object of rental or lending.

If the lending right for software is to be made explicit to remove any doubt as to its applicability, the same condition as is laid down in 14 TRIPs and Article 7 WCT may be introduced for both rental and lending, that is, that the right exists only where software is the essential object of rental or lending

3.1.3.4. *Making Available Versus Broadcasting*

One of the more challenging aspects of the making available right is its delineation vis-à-vis broadcasting. The acquis does not provide a harmonized concept of broadcasting as an act restricted by copyright and related rights. The Rental Right Directive does deploy the term broadcasting. The Satellite and Cable Directive specifies what is to be understood as satellite broadcasting and cable retransmission, but according to the ECJ leaves the interpretation of the central notion of what is 'public' to national courts (see below). The Information Society Directive merely refers to communication to the public by wire or wireless means.

In practice there is a need for a clear distinction that would provide legal certainty for stakeholders who need to know what rights they have acquired or have to clear. But more importantly, for (commercial) users of notably music

content, qualification of their activities as broadcasting means clearing rights is easier²⁵⁸ because the rights of authors, performers, and phonogram producers with respect to broadcasting are usually managed collectively, whereas making available rights typically are not. However, an all too narrow interpretation of the making available right would erode some right holders' exclusive rights.

The distinction between broadcasting and making available is especially relevant for related rights. As was set out in Section 3.1.2, right holders in performances, sound recordings, and films do not have a general exclusive right to prohibit the broadcasting of these productions. Rather, theirs is a claim to remuneration, claims that are typically collectively managed.

With digital distribution technology still developing, it is difficult to conceive of a precise definition of 'on-demand' distribution, that is, delivery at a time and place individually chosen by the user (i.e., through pull rather than push technology).²⁵⁹ Precisely what level of interactivity it implies is not quite clear. In practice, dissemination online is done through models along a sliding scale of interactivity.

For instance, near-on-demand music via Internet radio may be transmitted at very short intervals, consisting of multi-channel broadcasts with a highly specific content (e.g., only certain artists, or a genre, or period music) per channel, making it much like 'true' music on demand.²⁶⁰ But Internet radio also can be much less sophisticated, displaying no or hardly any interactivity. Another dissemination method that is difficult to qualify as either broadcasting or making available is podcasting. Unlike webcasting, it is not merely streaming (ephemeral, not destined to be saved) content, which signals application of the making available right. On the other hand, podcasts have characteristics of push technology because new content is often – through feeds, that is, machine-readable files containing the location of the content – automatically distributed to subscribers.

From the perspective of promoting legal certainty, it may be desirable to have a more specific test to distinguish making available from other forms of communication to the public (especially broadcasting). On the other hand, definitions should not be carved in stone, considering that particularly in the area of broadcasting the transition to new forms of transmission, distribution, and business models still is in full swing.

3.1.3.5. *Meaning of Communication to the 'Public'*

A central characteristic of the rights described in Article 3 Information Society Directive is that they concern only communication to the *public*, but the European

258. See OECD Working Party on the Information Economy, 'Digital Broadband Content: Music' OECD, 2005. <www.oecd.org/dataoecd/13/2/34995041.pdf>, [OECD, 2005].

259. According to the Explanatory Memorandum to the Information Society Directive, near video on demand, pay per view, and pay TV are not making available.

260. O. Schwenger, 'Töntrageauswertung zwischen Exklusivrecht und Sendeprivileg im Lichte von Internetradio', *GRUR Int.* 50 (2001): 722–732, [Schwenger, 2001].

legislator has chosen not to define the notion of 'public'.²⁶¹ Neither do any of the directives on copyright and related rights or the relevant international instruments define what the 'public' is, in terms of communication to the public (broadcasting or making available). Consequently, it has so far been left to Member States to determine the meaning of the word. Not surprisingly, the result is a variety of definitions and interpretations.

Already in the Green Paper on Copyright and Related Rights in the Information Society the issue was raised of how public and private communication could be distinguished. In its reply, the LAB advocated a normative approach, that is, the borderline should be drawn on the basis of economic considerations, leaving acts in the private sphere outside the reach of copyright.²⁶² Determining whether the communication is private or public could be aided by considering the commercial circumstances in which communication takes place.²⁶³ For the making available right especially, the test developed for broadcasting by the ECJ appears unsuitable.

In its 2005 *Lagardère* ruling on Article 2(a) Satellite and Cable Directive, the court observed that a limited number of persons who can receive satellite signals with professional equipment only do not qualify as 'public'. The public 'must be made up of an indeterminate number of potential listeners'. The ECJ referred to its *Multikabel* decision on the Television without Frontiers Directive, which shares its legal history with the Satellite and Cable Directive.²⁶⁴ In that decision the ECJ had held that television broadcasting is the 'initial transmission of television programmes intended for reception by the public, that is, an *indeterminate number of potential television viewers*, to whom the same images are transmitted *simultaneously*' (emphasis added).

The *Lagardère* decision provides a useful criterion for distinguishing broadcasting from other information services and in this respect could be of some use to interpret what constitutes a broadcast as species of communication to the public under Article 3 Information Society Directive. However, qualifying as 'public' only a communication to an audience of indeterminate size is of course far too broad a test to apply to the other communication rights of authors, and to the making available right of related right holders. This much became obvious in the cases on the legitimacy of hotels relaying TV signals to its rooms.

In *Egeda* the ECJ did not answer the question. Instead it ruled that the Satellite and Cable Directive does not define what constitutes an 'act of communication to the public' or 'reception by the public' in the sense of Articles 1(2)(a) and (3). It was left to national courts to decide what 'public' meant. In *SGAE/Rafael Hoteles* the ECJ was asked to revisit the issue, this time in the context of the Information Society Directive. As in *Egeda*, the question was whether relaying

261. Explanatory Memorandum to Information Society Directive, comment on Art. 3; Staff Paper on Copyright Review 2004.

262. Reply to the Green paper on Copyright of 20 Nov. 1996 of the LAB.

263. Westkamp (2003a), 13, advocates an approach more along the lines of commercial/private, rather than public/private.

264. ECJ 2 Jun. 2005, Case C-89/04, ECR [2005] I-4891, para. 30 (*Mediakabel*).

TV signals in hotels for reception in the rooms constitutes communication to the public. The ECJ held that ‘the private nature of hotel rooms does not preclude the communication of a work by means of television sets from constituting communication to the public within the meaning of Article 3(1) of Directive 2001/29’.²⁶⁵ Since the communication rights ‘must be interpreted broadly’, it included the right to authorize ‘the distribution of a signal by means of television sets by a hotel to customers staying in its rooms’.²⁶⁶

The *SGAE* standard makes clear that the nature of the physical location where communication takes place is not a decisive factor. This is of course not surprising. The nature of the relationship between user and recipient is deemed the most relevant factor in many domestic copyright laws. Whether there is communication to the public or not depends on whether the communication is limited to a private circle of recipients. This demarcation could be informed by notions of what constitutes a public or private sphere in other areas of information law, especially the right to privacy.

In many Member States a (secondary) communication is not ‘public’ when it is directed solely at a group of persons with close personal relations (typically family or friends).²⁶⁷ Recent decisions show that national courts continue to work with different standards. For example, a Greek Court of Appeal estimated that communication within either a family or immediate social circle of the user is not ‘public’. A French Court of Appeal on the other hand, ruled that the private circle can consist only of family. In contrast, the Belgian Supreme Court clarified that a small group of colleagues may also be viewed as a private circle.²⁶⁸

Arguably, these different interpretations are of only minor relevance when viewed from the perspective of the internal market. Nonetheless, now that the ECJ has taken a first stab at elaborating the concept of communication to the public in the Information Society Directive, it may in the future build on its *SGAE*’s judgment and arrive at a uniform definition for the non-public, that is, private circle.

265. *SGAE/Rafael Hoteles*, paras 48 et seq.

266. *SGAE/Rafael Hoteles*, paras 36, 47.

267. For example, under the German Copyright act, the communication is public if it is intended for a plurality of persons, unless such persons form a clearly defined group and are connected by personal relationship with each other or with the organizer (Art. 15(3) German Copyright Act). Dutch courts consider a communication for the purposes of (retransmission of) broadcasts as public if it is directed at a group wider than a ‘closed circle’ of relatives, friends or people with similar personal relations and if no entrance fee is asked of group members. The Italian copyright act (Art. 15), defines non-public wider, as the normal circle of family, a community, a school or retirement home (on condition the communication is not for profit). In Greece a stricter concept is used, limited to a narrow circle of relatives or the immediate social circle of the author (Art. 3(2) Greek Copyright Act).

268. Cases reported in Kluwer EUIP database: Court of Appeal Athens 30 Nov. 2007 (Case 7196/2007), Court of Appeal Aix-en-Provence 5 Sep. 2007 (Civil Case No. 2007/501), Supreme Court Belgium 26 Jan. 2006 (*Sabab v. British Car Center*), published in *A&M* (2006): 180.

3.1.3.6 *Exclusive Rights Left to Member States' Discretion*

As the preceding analysis has demonstrated, the *acquis* has left a number of important exclusive rights fully or partly unharmonized. At the most general level, there are the moral rights that are not regulated by existing directives. The right to authorize adaptations, which is generally recognized in Member States laws, is harmonized only for computer software and databases. A broad right to communicate works to the public has been laid down for authors, but this does not include a right to public performance. The Database Directive's communication right does include public performance, but this seems of little or no relevance in practice.

3.2. COHERENCE OF EXCEPTIONS AND LIMITATIONS

The harmonization of exceptions and limitations within the EU poses probably one of the biggest challenges to the objective of 'better regulation' in the area of copyright and related rights. The desire to remove disparities between national laws dealing with exceptions and limitations on copyright and related rights has so far been met with only limited success. If harmonization efforts at the European level have remained mostly unsuccessful, it is probably due to the fact that many limitations on copyright and related rights are intrinsically connected to the cultural and social identity of a country and that consequently, a broad, regional, consensus on the adoption of specific limitations is very difficult to achieve.

Consequently, the limitations on copyright and related rights have truly been harmonized at the European level only with respect to computer programs and databases. For all other categories of works and other subject matter, the landscape of exceptions and limitations within the EU is one characterized by diversity. In fact, despite the European legislator's good intentions, the mosaic of limitations and exceptions on copyright and related rights has taken intractable proportions following the implementation of the Information Society Directive.

This section focuses on the coherence of the European system pertaining to exceptions and limitations, with a particular emphasis on the provisions of the Information Society Directive, which represents Europe's main instrument towards harmonization in the area. Do the exceptions and limitations recognized in the *acquis communautaire* and as implemented at the national level actually offer sufficient legal certainty and a sufficient degree of harmonization to allow rights owners and users alike to know what they can and cannot do with respect to copyrighted material? To answer this question, we first place the limitations on copyright and related rights in their international context, before giving an overview of the European *acquis communautaire*. Thereafter, we assess the main challenges and inconsistencies still remaining in the European *acquis*. Note that a comprehensive review of each limitation included in the *acquis communautaire* would go far beyond the scope of this study. We therefore concentrate on the main characteristics of the limitations regime with a view to highlighting points for improvement.

3.2.1. THE INTERNATIONAL CONTEXT

Most countries around the world accept the notion that copyright and related rights law must preserve a balance between the interests of rights holders and those of users. The safeguard of fundamental rights and freedoms, more particularly the users' freedom of expression and right to privacy, and the need to promote the dissemination of knowledge and culture constitute the two main justifications for the adoption of limitations on copyright and related rights. The need to preserve a balance of interests within the copyright regime is even reflected in the Preamble to both WIPO Internet Treaties, where Contracting Parties: 'Recognize the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research, and access to information, as reflected in the Berne Convention'.²⁶⁹ Nevertheless, relatively few limitations on copyright can be found in the relevant international instruments.

The limitations listed in the Berne Convention of 1971 are in fact the result of serious compromise on the part of national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum – reached over a number of diplomatic conferences and revision exercises. The Berne Convention establishes a set of minimum standards of copyright protection for foreign right holders that Union Members must respect when adopting limitations on copyright in their national legislation. The limitations provided for under the Berne Convention permit quotation (Article 10(1)) uses for teaching purposes, (Article 10(2)), press usage (Articles 10*bis*(1) and (2)), reservations and conditions on the exercise of mechanical reproduction rights under Article 13, and conditions for the exercise of broadcasting and other rights under Article 11*bis*.²⁷⁰

One of the most important provisions introduced in the Berne Convention during the Stockholm Revision Conference of 1967 is Article 9(2), which establishes a three-step test for the recognition of limitations on the reproduction right. This norm, which was first introduced in the Berne Convention during the Stockholm Revision Conference of 1967, has become the international standard for the adoption and application of limitations on copyright and related rights. In fact, the negotiations leading to the adoption of the recent international instruments failed to result in the recognition of any new limitation other than the three-step test. Indeed, Article 13 of the TRIPS Agreement extends the application of the three-step test to all exclusive rights that the agreements sets minimum standards for. Article 10 of

269. L. Guibault, 'The Nature and Scope of Limitations and Exceptions to Copyright and Neighbouring Rights with Regard to General Interest Missions for the Transmission of Knowledge: Prospects for Their Adaptation to the Digital Environment', *UNESCO e-Copyright Bulletin*, October-December (2003), <http://portal.unesco.org/culture/en/files/17316/108747977511_guibault_en.pdf/1_guibault_en.pdf>, [Guibault, 2003].

270. WIPO Standing Committee on Copyright and Related Rights (SCCR), 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment'. WIPO Doc. SCCR/9/7 (Geneva, 2003), [WIPO Study on Limitations and Exceptions, 2003].

the WCT and 16 of the WPPT similarly apply the Berne formula to the minimum rights established by their respective texts.²⁷¹

According to this test, limitations must (a) be confined to special cases; (b) they must not conflict with normal exploitation of the protected subject matter; and (c) they must not unreasonably prejudice the legitimate interests of the author. Each element of the test raises its own problems of interpretation. Some assistance in their interpretation is provided by the decision of the WTO's dispute resolution panel that, in 2000, considered their application in the context of the TRIPS Agreement dealing with the 'home style' and business exemptions for public performances of musical works under the US Copyright Act 1976.²⁷²

According to the WTO Panel's decision, a proposed exception meets the first step if it is both clearly defined and narrow in its scope and reach.²⁷³ An exception does not conflict with the normal exploitation of the work, if it does not deprive the rights owner from a real or potential source of income that is substantive, and it does not unreasonably prejudice the legitimate interests of the author, if the prejudice to the author's interests is proportionate to the objectives underlying the limitation.²⁷⁴ Unreasonable prejudice may be avoided by the payment of equitable remuneration under a statutory license.²⁷⁵

Historically, the limitation of Article 9(2) BC has been implemented at national level to allow reproductions for private use, for preservation purposes in libraries and archives, for industrial and commercial purposes, for research and scientific purposes, for judicial and administrative purposes, for parody, and for the benefit of disabled people.²⁷⁶ Over the years, the international community has also accepted that in some situations in which exceptions to particular rights, although not expressed in the international instruments, could be nevertheless implied. The so-called 'minor reservations' or 'minor exceptions' doctrine is being referred to in respect to the right of reproduction, the right of public performance, and certain other exclusive rights.²⁷⁷ As their name 'minor reservations' indicate, these implied limitations usually concern *de minimis* uses that do not affect the copyright owner, such as use of works during religious ceremonies or use by military bands. During the Stockholm Conference on the Revision of the Berne

271. P.B. Hugenholtz & Ruth L. Okediji, *Conceiving an International Instrument on Limitations and Exceptions to Copyright*, s. 1, March 2008, study supported by the Open Society Institute, available at: <www.ivir.nl/publicaties/hugenholtz/finalreport2008.pdf>, [Hugenholtz & Okediji, 2008].

272. Report of the Panel, US – Section 110(5) Copyright Act, 15 Jun. 2000, document WT/DS/160/R.

273. Ricketson & Ginsburg (2006), 764.

274. M. Senftleben, *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-Step Test in International and EC Copyright Law* (The Hague: Kluwer Law International, 2004), 236, [Senftleben, 2004].

275. J.C. Ginsburg, 'Toward Supranational Copyright Law? The WTO Panel Decision and the "Three-Step Test" for Copyright Exceptions', *RIDA* 187 (2001), [Ginsburg, 2001].

276. Ricketson & Ginsburg (2006), 783.

277. Report of the Panel, US – Section 110(5) Copyright Act, 15 Jun. 2000, document WT/DS/160/R, para. 6.33 et seq. [WTO Panel Decision Section 110(5) US Copyright Act].

Convention, the delegations invoked the 'minor reservations' doctrine to justify the maintenance in their national laws of existing exceptions of minor importance.

With respect to related rights, Article 15 RC allows Contracting Parties to provide for limitations in respect to private use; use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research. The limitations listed therein are not as narrowly confined as the corresponding provisions of the Berne Convention. This is particularly true for the private use exemption, which under the Rome Convention is not subject to the 'three-step test'.

As a consequence of the adoption of Article 16 of the WPPT, however, the three-step test now serves as a general restriction to *all* exemptions to the conventional minimum rights, which are presently found, or to be introduced, in the copyright and related rights laws of states that have ratified that Treaty. Even if an exemption falls within one of the enumerated categories of permitted exceptions, it is still for the national legislatures (and, eventually, the courts) to determine on a case-by-case basis whether the general criteria of the three-step test are met.

The limitations set out in Article 15 RC are applicable to all three categories of beneficiaries, that is, performing artists, phonogram producers, and broadcasting organizations, but only insofar as they are implemented in national legislation.²⁷⁸ Furthermore, as evidenced by the second paragraph of the same provision, the list of possible limitations on related rights permitted under the Rome Convention is not exhaustive. This paragraph allows Contracting States to provide for exemptions other than those enumerated in the first paragraph, if their copyright laws already contain such limitations. As specified in the *WIPO Guide to the Rome Convention*, the four specific limitations in the first paragraph are those mainly used to limit authors' rights, but there may be other minor ones. Hence, the second paragraph avoids the risk that related rights owners are treated better than authors, with respect to limitations.

Apart from the extension of the three-step test to all rights covered by the different instruments on copyright and related rights, the international landscape of exceptions and limitations has remained essentially unchanged since the last revision of the Berne Convention during the Stockholm Conference in 1967. This comes in sharp contrast with the scope of protection conferred on copyright and neighbouring rights holders, which during the same period was drastically expanded in terms of both subject matter protected and scope of rights granted.

In light of this, voices are being heard increasingly more often in international forums on the need to restore the balance between the interests of rights owners and users. Within the WIPO, the delegations of Brazil, Chile, Nicaragua, and Uruguay have been calling on the Standing Committee on Copyright and Related Rights

278. WIPO, *Guide to the Rome Convention* (Geneva: WIPO), 57.

(SCCR) to examine a proposal for work related to exceptions and limitations.²⁷⁹ The objective pursued is to achieve a consensus on minimum mandatory exceptions and limitations, particularly with regard to educational activities, people with disabilities, libraries, and archives, as well as exceptions that foster technological innovation.

The proponents of this proposal firmly believe that succeeding in this task will ultimately strengthen the legitimacy of the current copyright system and facilitate its effective enforcement, while at the same time promoting creation and innovation, cultural exchange, and technology transfer. A first step in this direction has been set by carrying out a study on limitations and exceptions for libraries and archives.²⁸⁰ It will be interesting to follow the evolution of this proposal and whether a consensus will be possible on this issue.

3.2.2. THE ACQUIS COMMUNAUTAIRE

At the European level, the limitations on copyright and related rights are regulated in four of the seven directives adopted in the field of copyright law (not counting the Enforcement Directive), namely, the Computer Programs Directive, the Rental Right Directive, the Database Directive, and the Information Society Directive. Of the four directives containing limitations on rights, the Information Society Directive has by far the broadest scope, for its limitations in principle apply to subject matter protected by copyright and related rights in general, with the exception of software and databases.

The decision of the Community legislator to address the issue of limitations on copyright and related rights in the Information Society Directive came as a surprise to many commentators.²⁸¹ Let us recall that the original aim of the Directive was twofold. First, to bring the laws on copyright and related rights in the EU in line with the WIPO Internet Treaties, to set the stage for joint ratification of the Treaties by the Member States and the EC. The second, largely unrelated goal of the Directive was to harmonize certain aspects of substantive copyright law across the board; a departure from the Commission's previous policy of piecemeal approximation. In the Commission's Green Paper of July 1995, which set the stage for the Information Society Directive, copyright limitations were an issue mentioned only incidentally.

The harmonization of limitations proved to be a highly controversial issue, that explains in large part the delay experienced not only in the adoption of the

279. WIPO, Proposal by Chile on the Analysis of Exceptions and Limitations, Standing Committee on Copyright and Related Rights, SCCR/13/5, 2 Nov. 2005; and WIPO, Standing Committee on Copyright and Related Rights, Sixteenth Session, SCCR/16/2, 17 Jul. 2008.

280. K. Crews, 'Study on Limitations and Exceptions for Libraries and Archives', Doc. SCCR/17/2 (Geneva: WIPO, 2008), [Crews, 2008].

281. Hugenholtz (2000), 501; Guibault (2002), 540; H. Cohen Jehoram, 'Some Principles of Exceptions to Copyright', in *Urheberrecht – Gestern – Heute – Morgen*, eds P. Ganeva, C. Heath & G. Schricker (Munich: Beck 2001), 381–388, 387, [Cohen Jehoram, 2001].

Directive itself, but also in its implementation by the Member States. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States proved to be a daunting task for the drafters of the Information Society Directive.²⁸² Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the number of admissible limitations went from seven to twenty.

The European legislator could rely only on the six express limitations contained in the Berne Convention and on the open norm of the three-step test. Indeed, the existing *acquis communautaire* with respect to limitations offered little additional concrete hold on which the Commission could base new limitations. There were only the limitations on neighbouring rights in the Rental Right Directive, which follow the international norms set by the Rome and the Berne Conventions, and the specific limitations included in the Computer Programs and Database Directives.

The limitations listed in the Information Society Directive apply to all categories of works and are modelled either on the provisions of the Berne Convention or on the provisions found in the legislation of many Member States. Article 5 of the Information Society Directive contains a detailed list of limitations on the exclusive rights granted under Articles 2 to 4 of the Directive, namely, the reproduction right, the right of communication to the public, and the distribution right.

Hence, Member States are allowed to adopt limitations on the rights of reproduction and communication to the public in respect of the use of public speeches (Article 5(3)(f)), for quotation purposes (Article 5(3)(d)), for teaching and scientific research purposes (Article 5(3)(a)), and for press usage (Article 5(3)(c)), as well as a limitation on the reproduction right in respect of ephemeral recordings of works made by broadcasting organizations (Article 5(2)(d)). Other limitations in the Directive are inspired by the internationally recognized limitations based on Article 9(2) BC that already existed in the national legislation of the Member States. This is the case of the limitations permitting reproductions by means of reprography (Article 5(2)(a)), for private purposes (Article 5(2)(b)), for preservation purposes in libraries and archives (Article 5(2)(c)), as well as uses for the benefit of people with a disability (Article 5(3)(b)), for judicial and administrative purposes (Article 5(3)(e)), or for purpose of caricature, parody or pastiche (Article 5(3)(k)).

Only a very small number of limitations included in the Directive seem to be the result of a conscious effort to adapt the system of limitations to the digital environment. Among them are the limits put on the private use exception (Article 5(2)(b)), according to which such reproductions may only be 'made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation that takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned'.

282. Explanatory Memorandum to the Information Society Directive, 35.

Another restriction established with a view to taking account of the impact of limitations on the rights owners' interests is the fact that the library and archive exception (Article 5(2)(c)) applies only with respect to the right of reproduction and not to the right of communication to the public. Yet another limitation apparently incorporated in the Directive to meet the needs of the digital environment deals with the use of works or other subject matter by communication or making available, for the purpose of research or private study, by individual members of the public by dedicated terminals on the premises of publicly accessible establishments (Article 5(3)(n)).

In view of the wide scope of application of the Information Society Directive, the relationship of this Directive to previous directives had to be clearly regulated to avoid conflicts or overlap. The solution put forward by the European legislator appears at Article 1(2) of the Information Society Directive, which states that unless provided otherwise in this Directive the provisions of all five previous directives are left intact. Although this solution also applies to limitations on copyright and related rights, it has not necessarily contributed to clarifying how the respective limitations regimes of the different directives must coexist.

In the case of computer programs, it has been argued that many of the limitations of the Information Society Directive cannot be applied because of the particular nature of computer programs. The same holds true for databases, considering that in the European Commission's own admission, the list of limitations found in the Database Directive is exhaustive.²⁸³

In the case of limitations on related rights, since Article 10(2) of the Rental Right Directive allows Member States to provide for the same kinds of limitations with regard to related rights as they provide with regard to copyright, the limitations of Article 5 of the Information Society Directive apply in addition to the limitations of Article 10(1) of the Rental Right Directive. There may be some overlap between the two lists, however. Furthermore, because the reproduction right provided for under the Rental Right Directive has been replaced by that of Article 2 of the Information Society Directive, the logical consequence is that the limitations of Article 5 of the latter directive are applicable to related rights owners.²⁸⁴

Finally, it goes without saying that the limitations of the Information Society Directive relate only to the rights granted therein. The limitations listed in the Directive do not extend to rights that have been harmonized through previous directives or that have yet to be harmonized at the European level, such as the author's moral rights or the right of adaptation or public performance.²⁸⁵ This may give rise to some tension where the exercise of certain specific limitations included in the Information Society Directive may actually involve the making of an adaptation of a work rather than just a reproduction. This would be the case, for example, for the making of a parody and an incidental use.

283. Staff Working Paper on Copyright Review 2004, 7.

284. Bechtold in Dreier & Hugenholtz (2006), 370.

285. See Section 2.3 above.

Within three years of the coming into force of the Information Society Directive, the European Commission was required, pursuant to Article 12 of the Directive, to start a review process on the application of Articles 5, 6, and 8 of the Directive in the light of the development of the digital market. The IViR Study on the impact of the implementation and effect in Member States' laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society represented the first step in this process.²⁸⁶ Following this, the European Commission released a Staff Working Document²⁸⁷ that gave a succinct overview of some jurisprudential developments that had occurred within the EU pertaining to a selected number of provisions contained in Articles 5, 6, and 8 of the Directive.

The Staff Working Document led the way to the publication of the July 2008 Green Paper on Copyright in the Knowledge Economy. As we have seen in Section 1.1.3, it focuses on the role of copyright in fostering dissemination of knowledge for research, science, and education. The second part of the Green Paper deals with specific issues related to the exceptions and limitations that are supposedly the most relevant for the dissemination of knowledge in the digital environment.

Among the specific issues considered are the limitations for libraries and archives, the exception for the benefit of people with a disability, the dissemination of works for teaching and research purposes, and the possible introduction of an exception for user-created content. Why the EC chose to concentrate only on issues related to the dissemination of knowledge for research, science, and education and not to tackle the inconsistencies in the European *acquis* from a more general perspective is unclear. Whereas some of the questions put to the stakeholders in the first part of the Green Paper are formulated in broad terms, there is hope that the most pressing problems arising from the implementation of the Information Society Directive will be addressed during the consultation process.

3.2.3. ASSESSMENT

The current landscape of limitations on copyright and related rights in Europe suffers from several inconsistencies and faces important challenges with respect to the proper functioning of the copyright system in a digital knowledge economy. The main source of legal uncertainty derives not only from the structure and content of the Information Society Directive, but also from the coexistence of this Directive with the previous directives adopted in the field of copyright and

286. L. Guibault, et al., 'Study on the Implementation and Effect In Member States' Laws of Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society', Report by IViR to the European Commission (DG Internal Market) (Brussels: European Commission, 2007), [IViR Study on Implementation of Information Society Directive, 2007].

287. European Commission, Report on the application of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Brussels, 30 Nov. 2007 SEC (2007), 1556, [Report on Application Information Society Directive, 2007].

related rights. The implementation of the Information Society Directive has hardly led to the harmonization of the exceptions and limitations in the national laws of the Member States.

Moreover, the concurrent application of different regimes of limitations with distinct requirements is bound to lead to incompatibilities, inconsistencies, and gaps between directives. In the pages below, the following elements come under review: the exhaustive character of exceptions and limitations; the optional character of most limitations; the lack of clear guidelines regarding the contractual overridability of limitations; the question of transient and incidental copies; the three-step test; the notion of lawful acquirer/ user; and the discrepancies regarding the private copy exception.

3.2.3.1. *Exhaustive List of Limitations*

A first source of uncertainty lies in the question whether the system of limitations on copyright and related rights as laid down in the four European directives is open or closed. In other words, does the system of limitations on copyright and related rights allow Member States to adopt other limitations in their national legal order than those mentioned in the directives? Neither the texts of the directives nor the intention of the Community legislator is entirely clear on this point. Moreover, opinions in the literature are strongly divided. Some firmly believe that the regime of limitations set out in the European legislation indeed forms a closed system,²⁸⁸ while others see a possibility for Member States to adopt, either through legislation or by judicial interpretation, other limitations that do not appear in the texts of the directives.

The Computer Programs Directive requires Member States to recognize that certain specified persons may use computer programs in particular ways without infringing copyright. The exact relationship between these exceptions and those provided for in national law is left unclear. The last Recital of the Computer Programs Directive states that the Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive. According to Bently, where the limits of legitimate uses have been carefully defined in the Directive, Member States should not maintain broader exemptions.²⁸⁹ On the other hand, this Recital could also be interpreted as allowing Member States to apply other limitations with respect to rights in computer programs, as long as these limitations are not covered by the Directive. One could think, for example, of a limitation allowing the use of computer programs for the sole purpose of illustration for teaching or scientific research, of a limitation for the purpose of public security, or of a limitation in connection with the demonstration or repair of equipment.

A clear example of an open-ended provision regarding limitations can be found in Article 10(2) of the Rental Right Directive, which permits Member States

288. Cohen Jehoram (2001), 388.

289. Bently, in Dreier & Hugenholtz (2006), 226.

to provide for the same kinds of limitations with regard to the protection of related rights, as it provides for in connection with the protection of copyright. This provision finds its source in Article 15(2) RC and is meant to ensure that neighbouring rights holders are not treated more favourably than copyright owners in respect to their works. This Article also reflects the ongoing practice in Member States of declaring, by reference, the limitations on copyright in their national act applicable to the related rights. In principle, nothing in the Rental Right Directive precludes Member States from adopting new limitations on copyright and, thereafter, from declaring them applicable to related rights. Any such action would be subject to the provisions of the Information Society Directive, however.

The open or closed character of the list of limitations on copyright in databases is less obvious. Recital 35 of the Database Directive declares that 'whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database'. Article 6(2) allows Member States to adopt limitations in respect to acts of reproduction for private purposes of a non-electronic database; of the use of a database for the sole purpose of illustration for teaching or scientific research; and for the purposes of public security for the purposes of an administrative or judicial procedure. However, in view of its wording, Article 6(2)(d) of the Database Directive has generally been interpreted as preventing Member States from going beyond the limits set in paragraphs a to c.²⁹⁰ This interpretation of Article 6(2)(d) of the Database Directive essentially takes all practical meaning away from recital 35.

Similarly, the Information Society Directive does not unequivocally provide for a closed list of limitations. Although recital 32 of the Information Society Directive specifies that the list of limitations on copyright and related rights provided in Article 5 is exhaustive, Member States are allowed, pursuant to Article 5(3)(o), to provide for limitations for certain uses of minor importance where limitations already exist under national law, provided that they concern only analogue uses and do not affect the free circulation of goods and services within the Community. Clearly, the 'grand-father clause' of Article 5(3) o reflects the principles of subsidiarity and proportionality, and removes some of the rigidity inherent to an exhaustive list of limitations.²⁹¹

The European legislator's apparent decision to restrict the limitations to those cases enumerated in Article 5 of the Information Society Directive has given rise to severe criticism in the literature. At least three reasons may be advanced cautioning the use of an exhaustive list. First, as the LAB already pointed out early on,

290. Hugenholtz, in Dreier & Hugenholtz (2006), 326; von Lewinski, in Walter (2001), 751; Gaster (1999), 105.

291. Walter (2001), 1065.

harmonization does not necessarily mean uniformity.²⁹² According to the LAB, rules at EC level should allow distinctive features found in national legislations to subsist, as long as they do not hinder the internal market.

Second, previous efforts at the international level to come up with an exhaustive catalogue of limitations on copyright and related right have consistently failed. The Berne Convention provides a clear illustration of such unsuccessful efforts, for the possibility of introducing a complete and exhaustive list of exemptions into the Berne Convention had been considered at the Stockholm Conference. The proposal was rejected for two main reasons. First, because in order to encompass all the principal exemptions existing in national laws, such a list would have had to be very lengthy, and it would still not have been comprehensive. Second, because not every country recognized all the possible exemptions, or recognized them only subject to the payment of remuneration, experts feared that by including an exhaustive list of limitations, States would be tempted to adopt all of the limitations allowed and abolish the right to remuneration, which would have been more prejudicial to the rights owners.²⁹³

A third, and probably decisive argument against an exhaustive list of limitations, is that a fixed list of limitations lacks sufficient flexibility to take into account future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework that allows new and socially valuable uses that do not affect the normal exploitation of copyright works to develop without the copyright owners' permission and without having to resort to a constant updating of the Directive that might take years to complete.²⁹⁴

3.2.3.2. *Optional Character of the Limitations*

Just as most limitations in the Rental Right Directive and the Database Directive, the vast majority of the limitations listed in Article 5 of the Information Society Directive is optional. Although Member States arguably may not provide for any exceptions other than those enumerated in Article 5, one can have serious doubts as to the harmonizing effect of an optional list of limitations on copyright and related rights, from which Member States may pick and choose at will.²⁹⁵ Although some measure of harmonization has been achieved, because lawmakers in some Member States selected limitations from the European menu that they would not otherwise have considered, the harmonizing effect is very modest at best.

In practice, not only are Member States free to implement the limitations they want from the list, they are also free to decide how they will implement each limitation. In addition, Articles 5(2) to 5(5) of the Directive contain two types of norms: one set of specific, but broadly worded limitations, within the boundaries

292. Reply to the Follow-up to the Green Paper on Copyright of 20 Nov. 1996 of the LAB, § 9A. <<http://europa.eu.int/ISPO/legal/en/ipr/ipr.html>>, [LAB, 1996].

293. Ginsburg & Ricketson (2006), 761.

294. Hugenholtz (2000), 502.

295. Guibault (2003), 558; Bechtold, in Dreier & Hugenholtz (2006), 370.

of which Member States may elect to legislate; and one set of general categories of situations for which Member States may adopt limitations. In other words, the Directive generally lacks concrete guidelines that Member States are to follow to determine the scope and conditions of application of the limitations. In many cases, simply reproducing the wording of the Directive was not an option; thus, most Member States have chosen to interpret the limitations contained in the Directive according to their own traditions. As a consequence, stakeholders are confronted, in respect to similar situations, with different norms applicable across the Member States.

The European legislator's decision to opt for a list of broad-worded optional limitations is all the more surprising that the possible consequences of a lack of harmonization for the functioning of the Internal Market were already known. The provision allowing Member States to permit the reproduction by reprographic means is but one example of this paradox (Article 5(2)(a)). In the Explanatory Memorandum, the Commission stressed that the exemption allowing the implementation of reprography regimes was left as an option in the Proposal, 'despite existing differences between Member States that provide for such exemptions, as their effects are in practice rather similar'. The Commission then went on to say that 'the Internal Market is far less affected by these minor differences than by the existence of schemes in some Member States and their inexistence in others' and that 'those Member States that already provide for a remuneration should remain free to maintain it, but this proposal does not oblige other Member States to follow this approach'.²⁹⁶ As could be expected, the Member States that did not have a reprography regime before the adoption of the Directive have not put one in place since then, and the existing regimes in the majority of other Member States have not been streamlined.

The result is that Member States have implemented Articles 5(2) and 5(3) very differently, selecting such exceptions as they saw fit, and implementing specific categories in diverse ways. In some Member States' laws, the limitations on copyright have received a much narrower scope than those of the Information Society Directive. This can be explained by the 'homing' tendency of the Member States' legislatures when translating provisions of the Directive into national law, preserving as much as possible the old formulations and adding further specifications.²⁹⁷ Moreover, even where a specific limitation has been implemented in roughly similar terms in the different Member States, there is a risk that the national courts will give this limitation a diverging interpretation, thereby contributing to the legal uncertainty in respect of the use of copyright-protected works and other subject matter.

The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the EC, could ultimately constitute a serious impediment to the

296. Explanatory Memorandum to the Information Society Directive, 36.

297. See: IViR Recasting Study 2006, 38; M. Favale, 'Publication Review – Copyright Exceptions: The Digital Impact', *EIPR* 28 (2006): 505–506, [Favale, 2008].

establishment of cross-border services. The level of knowledge required for the conclusion of the necessary licensing agreements per territory is too high and costly to make the effort worthwhile. Moreover, the diversity of ways that each limitation has been transposed in the Member States is bound to give rise to differences in treatment between citizens of different countries, which could be contrary to the principle of non-discrimination laid down in the EC Treaty. For example, a person suffering from a wide range of disabilities would benefit from a limitation on copyright and related rights in France, but certainly not in the United Kingdom, where only the visually impaired may invoke the benefit of a limitation.

In view of the undeniable lack of harmonization ensuing from the implementation of the list of optional limitations included in Article 5 of the Information Society Directive, the EC in its recent Green Paper on Copyright in the Knowledge Economy invited stakeholders to discuss whether an approach based on a list of non-mandatory exceptions is adequate in the light of evolving Internet technologies and the prevalent economic and social expectations.²⁹⁸

3.2.3.3. *Contractual Overridability of Limitations*

An increasing number of works of all kinds are now being distributed to the mass market under conditions set by contractual agreements, particularly in the online environment. The digital network's interactive nature has created the perfect pre-conditions for the development of a contractual culture. Through the application of technical access and copy-control mechanisms, rights owners are capable of effectively subjecting the use of any work made available in the digital environment to a set of particular conditions of use.²⁹⁹ There exists very little *acquis communautaire* in the area of licensing contracts for the end-use of copyright-protected material. The absence of specific rules on this topic may be explained partly by the fact that contract law is traditionally perceived as a matter falling under the competence of the individual Member States and that the mass-marketing of copyright-protected works subject to the terms of a license of use is a relatively recent phenomenon.

The lawmakers of the EU intervened for the first time in contractual relations between rights owners and end-users, with the adoption in 1991 of the Computer Programs Directive. Article 9(1) of the Directive expressly provides that 'any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void'.³⁰⁰ Aside from the growing practice of

298. Green Paper on Copyright in the Knowledge Economy, 6.

299. P.B. Hugenholtz, 'Copyright, Contract and Code: What Will Remain of the Public Domain?', *Brooklyn Journal of International Law* 26 (2000): 77–90, 79, [Hugenholtz, 2000a]; P. Goldstein, 'Copyright and Its Substitutes', *Wisconsin Law Review* (1997): 865–871, 867, [Goldstein, 1997].

300. See also recital 26 of the Directive: 'Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exemptions provided for in Article 5(2) and (3) should be null and void.'

licensing computer programs to users, no significant contractual practice concerning the use of other copyrighted material had developed at that time to justify a clarification as to the imperative character of other limitations. In view of the growing practice of marketing mass-market databases subject to contractual terms of use, however, the EC adopted a similar provision under the Database Directive.

The Information Society Directive contains very few provisions referring to the conclusion of contractual licenses as a means to determine the conditions of use of copyright-protected works and other subject matter. At most, the Directive contains a few statements encouraging parties to conclude contracts for certain uses of protected material. Recital 45 declares that 'The exceptions and limitations referred to in Article 5(2), (3), and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the right holders insofar as permitted by national law.' The text of this Recital gives rise to interpretation. Some commentators believe that, according to recital 45, the limitations of Articles 5(2) to 5(4) can be overridden by contractual agreements.³⁰¹ Others consider that, pursuant to this Recital, the ability to perform legitimate uses that do not require the authorization of rights holders is a factor that can be considered in the context of contractual agreements about the price. Whether the requirement that a contractual agreement must have the goal to secure the fair compensation of rights holders means that contractual agreements with the purpose to override legitimate uses are impermissible is, according to these authors, questionable.³⁰²

In the specific case of the limitations adopted in favour of non-profit making establishments such as publicly accessible libraries and archives, recital 40 specifies that such limitations should 'not cover uses made in the context of online delivery of protected works or other subject matter. Therefore, the conclusion of specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve'. As the Explanatory Memorandum to the Proposal for a Directive specifies, this does not mean that libraries and equivalent institutions should not engage in online service delivery. However, it is the Commission's opinion that 'such uses can and should be managed on a contractual basis, whether individually or on the basis of collective agreements'.³⁰³

Recital 53 and Article 6(4) of the Directive both deal with the use of technological measures to ensure a secure environment for the provision of interactive on-demand services. The first paragraph of Article 6(4) also encourages the development of a contractual practice between rights holders and users when it states that 'in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States shall take appropriate measures to ensure that right holders make available to the beneficiary of an exception or limitation provided for in national law (. . .)'. In view of the wording of Article 6(4), the EC seems to put the emphasis on the negotiation of

301. Bechtold, in Hugenholtz & Dreier (2006), 371.

302. Walter (2001), 1064–1065.

303. Information Society Directive Proposal, 39.

agreements between rights owners and parties concerned as a means to achieve its objective of encouraging rights owners to provide the means to exercise certain specific limitations on copyright.

But the way to contractual negotiations is realistic only when users are easily identifiable, such as libraries and archives, broadcasting organizations, social institutions, educational institutions, groups of disabled persons, and public entities. However, this is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to Article 6(4), such as private individuals who wish to make a private copy.

The emphasis put by the European legislator on the conclusion of contracts as an instrument to set the conditions of use of protected works is particularly evident when reading Article 6(4), fourth paragraph, of the Directive. This article states that 'the provisions of the first and second subparagraphs shall not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them'. The term 'agreed contractual terms' in this provision could be interpreted as requiring the negotiation of a license of use. However, this interpretation may not reflect reality because standard form contracts, rather than negotiated contracts, actually govern the vast majority of transactions relating to information in the digital networked environment.

While Article 6(4), fourth paragraph, of the Directive establishes a rule of precedence between the use of contractual arrangements and the application of technological protection measures, no rule has been established anywhere in the Directive concerning the priority between contractual arrangements and the exercise of limitations on rights. The absence of any such rule was considered briefly during the legislative process leading to the adoption of the Directive. In second reading of the Proposal for a Directive, amendment 156 was tabled for the introduction of a new Article 5(6) to the effect that 'No contractual measures may conflict with the exceptions or limitations incorporated into national law pursuant to Article 5'.³⁰⁴ This amendment was rejected by the Commission, however, and therefore never made it into the Common Position. As a result, nothing in the Information Society Directive seems to preclude rights owners from setting aside by contract the limitations on copyright and related rights.

In our opinion, the widespread use of restrictive standard form contracts in the online environment risks posing a threat to some of the basic objectives of European copyright policy. If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licenses. The LAB in its *Reply to the Green Paper* warned that 'there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property will be derived from contract law'.³⁰⁵

304. European Parliament, Committee on Legal Affairs and the Internal Market, 17 Jan. 2001, PE 298.368/5-197.

305. Reply to the Green Paper on Copyright of 20 Nov. 1996 of the LAB, § 9A.

In fact, the use of DRM systems in combination with online standard form contracts may accentuate information asymmetries, indirect network effects, high switching costs, and lock-ins, leading to market failures and thereby preventing well-functioning competition.³⁰⁶ Absent certain limits to the freedom of contract, lawful end-users may be forced to forego some of the privileges recognized by law, to be able to use protected material. In view of the silence of the Information Society Directive on this point, the only remedies currently available against abusive contractual clauses are to be found in the general rules of law, such as competition law or consumer protection law, which are, at present, poorly suited to meet the needs of users of copyrighted material in the digital networked environment.

The question posed by European Commission in the 2008 Green Paper on Copyright in the Knowledge Economy as to whether there should be encouragement or guidelines for contractual arrangements between right holders and users for the implementation of copyright exceptions should, in our opinion, receive a positive answer. To restore the balance of interests inside online contractual agreements, some limitations on copyright and related rights should be declared imperative, knowing that whenever the European legislator has deemed it appropriate to limit the scope of copyright protection to take account of the public interest, private parties should be prevented from unilaterally derogating from the legislator's intent.

This sort of measure is not unprecedented. At the European level, the Computer Programs Directive and the Database Directive both specify that exemptions provided therein may not be circumvented by contractual agreement. At the national level, Portugal has adopted a measure to prevent the use of standard form contracts excluding the exercise of limitations on copyright to the detriment of the user. Following these models, a provision could be introduced in the copyright legislation according to which any unilateral contractual clause deviating from the limitations on copyright and related rights would be declared null and void.

3.2.3.4. *Transient and Incidental Acts of Reproduction*

Article 5(1) of the Information Society Directive sets out the only mandatory limitation that all Member States must implement in their national legislation. The limitation relates to temporary acts of reproduction that are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable either a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject matter to be made, and which have no independent economic significance.

According to recital 33 of the Directive, this limitation is meant to cover such acts as browsing and caching on the Internet. The Community legislator felt the

306. Bechtold (2004), 362.

need to introduce this rather technical limitation in view of the very broad definition given to the right of reproduction in Article 2 of the Information Society Directive, which – as we have set out in Section 3.1.2 – encompasses any temporary or permanent reproduction by any means and in any form, in whole or in part.

A first question that arises in relation to this mandatory limitation is whether it is absolutely necessary to specify that transient or incidental acts of reproduction are exempted from the right of reproduction provided for in Article 2 of the Directive and, if so, whether this exemption should be introduced as a limitation on rights or as a restriction of the concept of reproduction.

Before the adoption of the Information Society Directive, the scope of the reproduction right in the digital networked environment had in fact been the object of intense debate at the WIPO during the negotiations and discussions leading to the adoption of the WCT and WPPT in 1996. The Basic Proposal for the future WCT initially contained a provision covering the right of reproduction, including a second paragraph that was in many respects comparable to Article 5(1) of the Information Society Directive. Although a majority of delegations agreed that Article 9(1) BC was broad and flexible enough to encompass the (temporary) storage of a work in any electronic medium, the delegations could not agree on the text of an appropriate limitation with respect to transient and incidental acts of reproduction.

As was noted in Section 3.1.1, this very issue became so contentious that the negotiations almost stranded. In the end, the entire provision was deleted from the final text of the WCT. By contrast, the WPPT does grant performers and phonogram producers an exclusive right of reproduction because, contrary to authors who benefit from Article 9 BC, these related rights owners did not enjoy an exclusive right of reproduction under the Rome Convention. However, the provision of the WPPT contains no restriction or limitation on the right of reproduction.

A provision in the law exempting acts of transient and incidental reproductions from the scope of the right of reproduction was probably not needed. Some commentators have argued that a common-sense judicial interpretation of the reproduction right would have been sufficient, if not much better.³⁰⁷ Other commentators have suggested that transient and incidental acts of reproduction would hardly ever amount to a problem, because rights holders are sensible enough to avoid unnecessary and counterproductive lawsuits over temporary copying.³⁰⁸

Nevertheless, although the EC had no international obligation to fulfil in this sense, it chose to introduce Article 5(1) in the Information Society Directive for fear that Member States may give diverging interpretation of the reproduction right.

Arguably, because transient and incidental acts of reproduction primarily concern the interpretation of the concept of reproduction,³⁰⁹ the provision should

307. Hugenholtz (2000), 502.

308. M.F. Hansen & A.N. Dixon, 'The Berne Convention Enters the Digital Age', *EIPR* 18 (1996): 609, [Hansen & Dixon, 1996].

309. See the Explanatory Memorandum to the Information Society Directive.

have been adopted as a restriction of the concept itself, rather than as a limitation on the right. The definition of the reproduction right should therefore follow a normative approach: not all technically possible acts of reproduction necessarily constitute a reproduction in the sense of the copyright act. In other words, acts of short-lived copying that are mere by-products of a technical communication process should not qualify as acts of reproduction.³¹⁰ This is in fact the view adopted by the Parliament of the Netherlands, where Article 5(1) of the Information Society Directive was transposed in the Dutch Copyright Act as a carve-out of the right of reproduction rather than as a limitation on that right.

Besides the persisting uncertainty about the place of this new provision in relation to the exclusive rights, Article 5(1) of the Information Society Directive has introduced in the *acquis communautaire* several vague and unfamiliar terms, with which lawmakers, judges, rights owners, and users alike are now struggling. More specifically, the meaning of ‘transient’, ‘integral and essential part of a technological process’, ‘lawful use’, and ‘independent economic significance’ would need some clarification.

In response to a reference for preliminary ruling from the Supreme Court of Denmark, the ECJ has recently interpreted Article 5(1) of the Directive.³¹¹ In this case Danish newspapers publishers had sued information vendor Infopaq for copyright infringement for, *inter alia*, using a process of ‘data capture’ to extract eleven-word sequences of words from scanned newspapers, as part of an indexing operation. The main question before the ECJ was whether this process amounted to reproduction within the meaning of Article 2 of the Directive, and if so, whether the transient copying exemption of Article 5(1) would apply to the process of ‘data capture’.

The European Court of Justice opined, first, that the expansive wording of Article 2 and the recitals accompanying it suggested that ‘the protection conferred by Article 2 of Directive 2001/29 must be given a broad interpretation’ (§ 43). The Court went on to hold that ‘the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises eleven consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination’ (§ 48).

As to Article 5(1) the ECJ the Court first reminded that the conditions of that provision must be satisfied cumulatively (§ 55), and that a provision such as Article 5(1) that derogates from a general principle established by a directive must be interpreted strictly (§§ 55–56). ‘This is all the more so given that the exemption must be interpreted in the light of Article 5(5) of Directive 2001/29, under which

310. Hugenholtz (1996), 89.

311. *Infopaq International A/S tegen Danske Dagblades Forening*, European Court of Justice, 16 Jul. 2009, Case C-5/08 (not yet reported).

that exemption is to be applied only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder'. (§ 58). The Court concluded that Article 5(1) probably does not apply to the 'data capture' process at issue. '[T]he Court finds that an act can be held to be 'transient' within the meaning of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end.' In other words, the exemption applies only to data capture whereby incidental copies are deleted automatically. This is for the national courts to determine.

In our opinion, the requirement in Article 5(1), according to which a transient copy must be devoid of any 'independent economic significance', generally makes the line between infringing and non-infringing activities unpredictable. One might argue that, for all practical purposes, the 'no economic significance' criterion supersedes all other conditions of Article 5(1).³¹² Even though a temporary copy meets all other hurdles of Article 5(1), it can still remain within the scope of the reproduction right insofar as it has economic significance. Neither the Information Society Directive nor its preparatory works elaborate on the meaning of this criterion, and the assessment of economic significance must to a large extent depend upon external factors. This renders the assessment, and hence, the boundary between infringing and non-infringing conduct, uncertain and unpredictable. The current provision further hides the following danger: in an attempt to exert greater control over the use of their works, rights holders may try to take advantage of the emphasis put on the 'no economic significance' criterion and assert economic significance with respect to any temporary reproduction that otherwise satisfies the conditions of the provision. This arguably threatens to undermine the entire exception rule.

Finally, on a more practical note, the question arises whether the mandatory limitation of Article 5(1) of the Directive should also apply to computer programs and databases. Let us recall that pursuant to Article 1(2) of the Information Society Directive, unless provided otherwise in this Directive, the provisions of all five previous directives are left intact. On the basis of this latter provision, it is safe to assume that Article 5(1) of the Directive does not apply to computer programs, especially since Articles 4 to 6 of the Computer Programs Directive create a comprehensive framework for reproducing computer programs, which does not cover the situation described in Article 5(1) of the Information Society Directive. The same remark holds true with respect to databases. However, in view of the ongoing process of digital convergence that has resulted in multimedia products and services incorporating both 'normal' works, software and databases, there is an

312. See Westkamp (2004), 1097; Hart (2002), 59.

obvious need for alignment here, as the EC already suggested in its Staff Working Paper on Copyright Review of 2004.³¹³

3.2.3.5. *Three-Step Test*

The rule known as the three-step test has become an international standard with which limitations on rights must comply, both at the national and the European level. The three-step test is now incorporated in all four European directives dealing with limitations on copyright and related rights. Although all explicitly or implicitly refer to the test laid down in Article 9(2) BC, the four provisions in the European directives show significant differences among them, which may ultimately give rise to legal uncertainty.

Paragraph 6(3) of the Computer Programs Directive on de-compilation states that ‘in accordance with the provisions of the Berne Convention (. . .), the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner that unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the computer program’. The question does arise as to why the European legislator has chosen a different formulation for the three-step test than under the Berne Convention³¹⁴ and why this test applies only to acts of de-compilation and not to acts covered by other limitations under the Directive.

The wording of Article 6(3) of the Database Directive closely resembles that of Article 6(3) of the Computer Programs Directive, except that the restriction of the three-step test applies to all limitations listed in the Database Directive. By contrast, Article 5(5) of the Information Society Directive provides that ‘the exceptions and limitations provided for in paragraphs 1, 2, 3, and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the right holder’. Through Article 10(3), the Rental Right Directive now contains a three-step test applicable to limitations on related rights that is phrased in essentially the same terms as Article 5(5) of the Information Society Directive.

Not only is there a certain inconsistency in the scope and formulation of the test throughout the directives, but there is also a definite uncertainty with respect to the intended addressee of the test. Although the Computer Programs and Database Directives speak of the ‘interpretation’ of the limitations in such a way as not to unreasonably prejudice the rights holder’s legitimate interests or to conflict with the normal exploitation of the work, the Rental Right and the Information Society Directives restrict the ‘application’ of the limitations to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. Does this distinction point

313. Staff Working Paper on Copyright Review 2004, 7; Walter (2001), 1062.

314. Blocher, in Walter (2001), 231.

to the fact that the provision is addressed to different entities – in the former case to the judge and in the latter case to the legislator?³¹⁵

With respect to the Information Society Directive, the argument has been made that the legislator is required to take the test into account when implementing the limitations listed in Articles 5(1) to 5(4). At the time of implementing the Directive, the question arose with respect to the three-step test as to whether the Member States were required to transpose it in their national legislation. If so, the test would not only bind the national legislator during the implementation process, but also the court interpreting a national provision that constitutes an implementation of one of the limitations listed in the Directive.³¹⁶ Because the true addressee of the test could not be inferred from either the text or the legislative history of the Directive, the Member States came to varying conclusions.³¹⁷

Ten Member States have expressly incorporated the test into substantive law.³¹⁸ Likewise, even if their national law does not specifically mandate the courts to apply it, the test was referred to and applied by courts in Austria, Belgium, Finland, and the Netherlands. According to these findings, half of the Member States recognize implicitly or explicitly that the three-step test constitutes a norm to be applied by the courts in the interpretation of the limitations on copyright recognized in their national copyright law.³¹⁹ As a result, it is fair to say that the question of the true addressee of the three-step test remains uncertain and, thereby, that the role of the three-step test either as a guideline for legislative action or as a rule of interpretation also remains undecided.³²⁰

3.2.3.6. *Lawful Acquirer or User?*

With the coexistence of four directives containing provisions dealing with limitations on copyrights and related rights, it is almost inevitable to come across certain drafting inconsistencies between directives with respect to identical or substantially similar concepts. One example of such a difference in drafting language relates to the notions of ‘lawful acquirer’, ‘lawful user’, and ‘lawful use’. These concepts are primarily invoked in relation to the use of digital works and are therefore to be found in the Computer Programs Directive, the Database Directive, and the Information Society Directive, respectively. In view of the differences in terminology used in the three directives, the question arises as to whether these differences bear any substantive meaning or if they merely denote an inadvertent oversight on the part of the European legislator.

315. Hart (1998), 61.

316. Hart (2002), 61.

317. See Senftleben (2004), 279.

318. IViR Study on Implementation of Information Society Directive 2007, 57. The Member States are the Czech Republic, France, Greece, Hungary, Italy, Luxembourg, Malta, Poland, Portugal and Slovakia.

319. See K.J. Koelman, ‘Fixing the Three-Step Test’, *EIPR* 28 (2006): 407–412, at 408, [Koelman, 2006].

320. See Senftleben (2004), 279.

Article 5(1) of the Computer Programs Directive grants the 'lawful acquirer' of a computer program minimum rights of use. This wording differs from that of Articles 5(2) and 5(3) of the same Directive, which refer to the 'person having a right to use' a copy of a computer program. Who is a 'lawful acquirer' of a computer program? How must one interpret the 'lawful' character of the acquisition? Must the 'lawfulness' be assessed in relation to the authorization to use the software granted under license by the copyright holder, or in relation to the acquisition of the copy of the software, where the lawfulness is considered from a perspective of property law? In the first case, a user who acquires in good faith an infringing copy of the software would not be considered a 'lawful' acquirer of the program in the sense of the Directive, whereas it could be true in the second case.

Following the majority opinion,³²¹ the concept of 'lawful acquirer' is understood to cover a purchaser, renter, licensee from the right holder, as well as persons who purchase copies legitimately in circulation. According to Bently, 'the notion of "lawful acquirer" may be broader in some important respects than these other provisions, because legality is assessed only in relation to acquisition rather than conditions of use. A purchaser of a computer program in Japan will be a lawful acquirer under UK law even if the licence accompanying the sale purports only to permit use of the program in Japan'.³²²

By contrast, Article 6(1) of the Database Directive uses the expression 'lawful user'. Despite its importance, there is no definition of the expression in the text of the Directive, nor in the recitals. Again, the question arises as to who may be considered a lawful user. Is it the person who uses the database according to a contract or the law, or can a database only be lawfully used if it has been legitimately acquired? Recital 34 of the Directive describes the 'lawful user' as a 'person having acquired a right to use the database'. This definition fails to explain how a person acquires the right to use the database. In any case, the lawful user of a database can be understood as any person using the database within the limits drawn by a contract from the right holder of the database. This will include users implicitly licensed, as will be the case for most websites offered freely on the Internet. But the term most likely also applies to persons having legally acquired copies of the database, such as the purchaser of a database in paper form or on CD-ROM.³²³

Would the notion of 'lawful user' extend to a person using a database within the limits drawn by the law? In copyright law, it is traditionally accepted that a contract is not always needed to make a lawful use of a copyright-protected work. Whenever a user does not have a license setting out the conditions of use, he or

321. See L. Guibault & O. van Daalen, *Unravelling the Myth Around Open Source Licences: An Analysis from a Dutch and European Law Perspective* (The Hague: T.M.C. Asser Press, 2006), [Guibault & van Daalen, 2006], 72; Walter (2001), 185.

322. Bently, in Dreier & Hugenoltz (2006), 237; European Commission, Report on the Computer Programs Directive, 12.

323. Hugenoltz, in Dreier & Hugenoltz (2006), 324; Von Lewinski, in Walter (2001), 746.

she may be still allowed to make use of the protected work within the bounds of the exceptions provided for in the national copyright act. However, because of the formulation of the provision, this argument remains circular: one cannot become a lawful user by relying on the exceptions, because these are only provided for lawful users.³²⁴

Article 5(1) of the Information Society Directive exempts temporary and transient or incidental copies, the sole purpose of which is to enable a lawful use, such as browsing and caching. Contrary to the provisions of the Computer Programs and Database Directives, the Information Society Directive does not refer to the person of the user, but to the actual use of the work. The 'lawfulness' must be assessed therefore not in relation to the status of the user, but rather to the purpose of the act of reproduction.³²⁵ Recital 33 of the Information Society Directive declares that a 'use should be considered lawful where it is authorized by the right holder or not restricted by law'. This definition of a 'lawful use' would therefore cover uses that are expressly or implicitly authorized by the right holder. Offering a protected work on a website without any restrictions could be interpreted as a form of implicit consent of the right holder to download his work.

Whether the expression 'lawful use' in the Information Society Directive extends to uses relying on the limitations is still unclear. It could be argued that a transient copy made to enable a user to benefit from a limitation in national law implementing one of those listed in Articles 5(2) and 5(3) of the Information Society Directive would not violate the right of reproduction, because the copy is not restricted by law. In this regard, Article 5(1) b ensures that the right of reproduction cannot be used by right holders to undermine the copyright limitations listed in Articles 5(2) and (3) of the Directive.³²⁶ Note that this precision would not be necessary if the exemption covered by Article 5(1) were adopted as a restriction on the concept of reproduction rather than as a limitation. Within too long, the ECJ should shed some light on the issue for it has been asked in the context of its preliminary ruling in the *Infopaq* case to clarify whether a 'lawful use' in the sense of Article 5(1) of the Directive includes any form of use that does not require the copyright holder's consent.

Clearly, there is some inconsistency in the similar terms used in the three directives. The legal uncertainty that is likely to arise from this inconsistency may have important practical consequences for both right holders and users, when trying to establish who is a lawful acquirer or user, in the case of computer programs and databases, and what constitutes a lawful use under the Information Society Directive.

324. V. Vanovermeire, 'The Concept of the Lawful User in the Database Directive', *JIC* 31 (2000): 63–81, at 68.

325. S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique* (Brussels: Larcier, 2005), 449.

326. Bechtold, in Dreier & Hugenholtz (2006), 373.

3.2.3.7. Private Copying

The harmonization of the private copying exception is perhaps one of the most illustrative examples of the challenges posed to the objective of 'better lawmaking' in the area of copyright and related rights. Not only is this exception plagued with inconsistencies between the four directives, but it also suffers from most the problems identified above. The result is that, after three rounds of public consultations in a four year period, no harmonization has been achieved and legal uncertainty persists.

The main inconsistencies lie with the fact that the wording and scope of private copying exemptions differ substantially from one directive to another. For instance, the Computer Programs Directive expressly precludes the adoption of any limitation that would allow the making of a copy of a computer program for private purposes. The Database Directive restricts the possibility of making a private copy only to non-electronic databases without providing for fair compensation as in other cases where private copying is regulated. The last sentence of recital 35 of the Database Directive states that 'a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment'. By contrast, Article 5(2)(b) of the Information Society Directive allows Member States to adopt a limitation on the right of reproduction in respect of reproductions of all other categories of works (except computer programs and databases) on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation.

The provision makes no distinction between analogue and digital copies made for private purposes, although its obligation to phase-out levies as technical measures become available is clearly geared towards digital private copying. The difference in treatment of the private copying exemption depending on the category of work involved may need to be reassessed, particularly in the light of digital convergence. Increasingly, digital information ('multimedia') products incorporate a variety of types of works, including sound, images, databases and software applications. Clearly, such products should become subject to a single rule of private copying.

The biggest uncertainty with respect to the private copying exception comes from the wording of Article 5(2)(b) of the Information Society Directive, however. Article 5(2)(b) of the Directive finally gives Member States the possibility to adopt an exception or limitation to the reproduction right:

In respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rights holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned.

At least three areas of uncertainties emerge in connection with this provision. First, since the implementation of this provision was left at the discretion of the Member States, not all of them have chosen to transpose it into their national legal order. Hence, the United Kingdom and Ireland currently admit in their copyright law only a very narrow private copying exception for purposes of time-shifting of broadcasting programmes.³²⁷ All other forms of private copying in these countries are subject to the authorization of the rights owner.

Second, in countries where 5(2)(b) of the Directive has been implemented, the Directive requires that 'fair compensation' be paid to rights holders for acts of private copying.³²⁸ To the exception of recital 35,³²⁹ the Directive itself provides little guidance in interpreting this notion. By introducing the concept of 'fair compensation' the framers of the Directive have attempted to bridge the gap between those (continental-European) Member States having a levy system that provides for 'equitable remuneration', and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether. In practice, Member States have set up widely diverging levy regimes, making any harmonizing effort extremely complex.

Third, the Directive prescribes that the level of fair compensation should take full account of the degree of use of technological protection measures. This implies that compensation would be wholly unjustified in cases in which private copying has been made technically impossible, or at least practically infeasible, as in the case of DVDs. The Directive gives no indication, however, regarding the manner in which account must be taken of the use of technical protection measures.³³⁰ To this date, opinions are divided on the issue of the possible phase-out of private copying levies in the digital environment.

327. 'Gowers Review of Intellectual Property'. Norwich: HMSO, November 2006. <www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf>, 62, [Gowers Review, 2006].

328. P.B. Hugenholtz, L. Guibault & S. van Geffen, 'The Future of Copyright Levies in a Digital Environment', report commissioned by the Business Software Alliance (Amsterdam: Institute for Information Law 2003), 37, [Hugenholtz et al., 2003].

329. Information Society Directive, recital 35, which reads as follows: 'In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the act in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise.'

330. Hugenholtz et al. (2003), Ch. 6.

3.3. COLLECTIVE RIGHTS MANAGEMENT

Collective rights management is a typical characteristic of copyright and related rights law, compared to, for example, trademark or patent law. Virtually all Member States accommodate, or prescribe, collective management systems of one type or the other. These range from blanket licensing of rights to publicly perform music, to levies on blank media and copying equipment. Yet it is an area where little is harmonized.

The creation at the European level of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the Green Paper of 1995.³³¹ In recent years, discussions have intensified, as evidenced by the European Parliament's Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights³³² and the EC's Communication on the Management of Copyright and Related Rights in the internal market.³³³ Consequently, the establishment of a regulatory framework for collective management societies was included in the Commission's Work Programme for 2005.³³⁴

In this context, the Commission published a comprehensive study on the cross-border collective management of legitimate online music services setting out the possible options for regulation,³³⁵ as well as an impact assessment. However, the broad-ranging directive that the Communication seemed to promise has not materialized. Instead, the Commission has opted for the less ambitious instrument of a Recommendation to deal with what it perceives as the most urgent issue: the management of online rights in musical works and related subject matter.³³⁶

As will be described in Section 3.3.1, there are few European rules on collective rights management. The issue is however firmly on the agenda since the European Commission's 2005 Online Music Recommendation, and certainly since its recent decisions ordering collective rights-management organizations to

331. Guibault & Van Gompel (2006); J. Reinbothe, 'Die kollektive Wahrnehmung von Rechten in der Europäischen Gemeinschaft', in *Urheberrecht – Gestern – Heute – Morgen*, eds Ganea, Heath & Schrickler (Munich: Beck, 2001), 526–528, [Reinbothe, 2001b]; Deloitte & Touche, 'Étude sur la gestion collective des droits d'auteurs dans l'Union Européenne' (Brussels, 2000).

332. European Parliament Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights (2002/2274(INI)), Brussels 15 Jan. 2004.

333. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'The Management of Copyright and Related Rights in the Internal Market', COM (2004) 261 final, Brussels, 16 Apr. 2004 [Communication on the Management of Copyright and Related Rights in the Internal Market].

334. Commission of the European Communities, Commission Work Programme for 2005 – Communication from the President in agreement with Vice-President Wallström, COM (2005) 15 final, Brussels, 26 Jan. 2005.

335. Commission Staff Working Document, 'Study on a Community Initiative on the Cross-Border Collective Management of Copyright,' Brussels, 7 Jul. 2005 [Staff Working Document on Cross-Border Collective Management of Copyright].

336. Online Music Recommendation 2005.

abandon practices that Commission officials view as infringe the EC treaty. Considerable turmoil has arisen, especially among right holders and incumbent collective rights organizations of whom the Commission asks to essentially give up their tried and tested ways of dealing with cross-border exploitation of national rights.

For the time being, national rules governing the collective management of rights remain largely unharmonized, albeit a measure of control is exercised by the EC by virtue of the Treaty rules on competition. Over time, the ECJ and the EC have developed an impressive body of decisions and case law, putting the allegedly anti-competitive behaviour of collective management societies to the test of Articles 81 and 82 of the EC Treaty.³³⁷

The international treaties in the field of copyright and related rights are also mostly silent on the issue of collective rights management, except for Articles 11*bis*(2) and 13(1) BC and Article 12 RC. These provisions implicitly refer to collective rights management by stating that Contracting Parties may determine the conditions under which certain rights are exercised.³³⁸

Nevertheless, the harmonization directives in the field of copyright and related rights do contain rules relating to the issue, the most of important of which are found in the Satellite and Cable Directive's chapter on cable retransmission. In this section, these provisions will be summarized, and thereafter tested for their consistency.

3.3.1. COMPULSORY COLLECTIVE MANAGEMENT OF CABLE RETRANSMISSION RIGHTS

The most far-reaching rules relating to collective rights management found in any directive are surely those on cable retransmission of the Satellite and Cable Directive. Like the chapter on satellite broadcasting, the cable provisions seek to foster a 'European audiovisual space', that is, a common market for audiovisual (television) services. But its means are entirely different. Whereas the satellite provisions provide for a Community-wide 'injection right' that pre-empts territorial rights of satellite broadcasting in the countries of reception, the cable rules provide for a system of compulsory management of territorial rights of cable retransmission, to facilitate the free flow of television services across the Europe. This regime of mandatory collective rights management, which does not exist elsewhere in European copyright law, seeks to ensure that cable operators are in a position to acquire all rights necessary to allow cable retransmission of broadcast programmes. Its particular aim is to avoid that right holders in parts of broadcast programmes that are not represented by a collecting society enforce their exclusive

337. See, inter alia, ECJ 30 Jan. 1974, Case 127/73, *ECR* [1974] 51 (*SABAM II*); ECJ 2 Mar. 1983, Case 7/82, *ECR* [1983] 483, (*GVL v. Commission*); *Musik-Vertrieb Membran*; *GVL*; *IFPI Simulcasting*.

338. Communication on the Management of Copyright and Related Rights in the Internal Market, 6.

rights individually vis-à-vis cable operators, thereby causing 'blackouts' in retransmitted programmes.³³⁹

The main justification for such a far-reaching limitation to the right holders' freedom of contract lies in the peculiarities of cable television. Cable operators retransmitting radio or television programmes are normally not in a position to negotiate all necessary licenses before the initial act of broadcasting. Usually, a cable operator will have only a few days' notice of the programmes to be broadcast. National broadcasting law often imposes on cable operators the obligation to retransmit programmes simultaneously and without abridgement; thus, cable operators have only a very limited freedom to actually negotiate with the right owners concerned.

Moreover, cable operators would have to trace, and deal with, a multitude of right holders in each programme to be retransmitted: broadcasting organizations, film producers, freelance authors, performing artists, musical and mechanical rights organizations, etc. This structural problem of rights management is exacerbated by the fact that not all owners of rights in broadcast programmes will be represented by a collecting society. Contracts concluded with collecting societies will, therefore, never guarantee that retransmission rights are cleared completely. Indemnifications provided by collecting societies will protect cable operators against claims for damages, but not against injunctions.

In this respect, the problems the Directive intends to solve are somewhat related to the 'orphan works' issue that will be discussed in Chapter 7 of this study. However, it must be borne in mind that although cable operators are often under a statutory or economic obligation to retransmit broadcast programmes simultaneously and integrally, and thereby unable to engage in negotiations with individual right holders or to undertake extensive rights clearance exercises, those users wishing to re-use pre-existing works in other circumstances, such as making available online an entire film or television archive, are under no similar constraint.

The unique legal mechanism of the Satellite and Cable Directive replaces the statutory license scheme that was originally envisaged by the European Commission in its Green Paper on Television without Frontiers. In principle, Article 9(1) leaves the authorization right intact³⁴⁰ and therefore does not qualify as a statutory or compulsory license that Article 8 expressly prohibits. A collecting society may still deny permission to cable operators to retransmit certain works represented by the society, albeit that Article 12 prohibits bad faith refusals to license. Blackouts, therefore, may still occur in practice. Indeed, contracts between collecting societies and cable operators often contain special clauses allowing for blackouts under special circumstances. Nevertheless, viewed from the angle of the individual right owner, the mandatory collective exercise of rights does somewhat resemble

339. European Commission, 'Broadcasting and copyright in the internal market'. Discussion paper, Doc. III/F/5263/90-EN (Brussels, November 1990), para. 3.29 et seq.; recital 28 Satellite and Cable Directive.

340. Recital 28 Satellite and Cable Directive.

a compulsory license.³⁴¹ An individual film producer, for instance, will not be able to control cable retransmission in a foreign market, once he has licensed the film for television broadcasting.

Article 1(4) of the Satellite and Cable Directive provides a definition of 'collecting society'. The definition is very broad, encompassing 'any organization which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes'. It includes collecting societies of all sorts, whether unregulated or operating under a statutory license or monopoly. In addition, it includes other organizations, such as trade unions, that engage in the collective rights management of their members.³⁴² A literal reading would even allow organizations dealing with *individual* rights management, such as music publishers or agents, to qualify as 'collecting societies'.

Article 9 (1) is the centrepiece of the Directive's rules on cable retransmission. The right of cable retransmission may not be exercised by right owners individually, but only through a collecting society. In practice, even before the Directive was adopted, collective management of cable rights had already become normal practice in many Member States. But Article 9(1) does not prevent right holders from individually assigning (transferring) their cable retransmission rights to other parties,³⁴³ for instance, to broadcasting organizations wishing to clear cable rights in advance, so they can offer their programmes to cable operators as 'clean products'. As an exception to the general rule of Article 9(1), Article 10 of the Directive specifically allows broadcasters to exercise retransmission rights on an individual basis. Excepted cable retransmission rights are rights that are initially owned by the broadcasters themselves, such as related rights in the transmissions or copyrights in programmes produced by the broadcasters themselves. Excepted rights also include rights that have been 'transferred' to the broadcaster. The term 'transfer' is not defined, leaving room for considerable uncertainty as to its scope. It obviously refers to the assignment of rights, but is probably broad enough to encompass exclusive licenses as well. This terminological unclarity is directly related to the undefined status of the 'right holder' in the directives.³⁴⁴

Another novelty that was introduced by the Satellite and Cable Directive is a system of mediation between right holders and cable operators, with the goal of reducing the risk that negotiations between right holders and cable operators collapse or not even take place. This has become a particularly urgent and difficult problem in several Member States in recent years. In some countries, negotiations between right holders and cable operators have been dragging on for years.

The mediation system that the Directive prescribes does not really solve these problems. As the Commission acknowledges in its report, the current system relies

341. Dillenz, in Walter (2001), 800.

342. Dreier, 'Satelliten- und Kabel-RL 1993' in Walter (2001), 429, para. 37.

343. Recital 28 Satellite and Cable Directive.

344. See Bechtold, in Dreier & Hugenholz (2006), Information Society Directive Art. 1, n. 3.

too much on voluntary cooperation of the parties concerned, does not impose deadlines on unwilling parties, and allows those endless legal battles that we are seeing in the court rooms today. The Commission suggests to 'upgrade' the mediation system, inter alia by imposing negotiation deadlines on the parties concerned. This proposal deserves serious consideration. Clearly, to solve the current stalemate between right holders and cable operators, some form of binding arbitration, such as the system provided under the German law on collective rights management (*Urheberrechtswahrnehmungsgesetz*), is in order. Another model to consider is the Copyright Tribunal of the United Kingdom. Where parties cannot agree, the Tribunal unilaterally sets the terms and conditions of licenses offered by collective rights organizations.

3.3.2. OTHER HARMONIZED RULES ON COLLECTIVE RIGHTS MANAGEMENT

Except for the rules on cable retransmission found in the Satellite and Cable Directive, direct references to collective administration of rights in the seven directives are relatively scarce.

Article 4(3) of the Rental Right Directive provides that the authors' and performers' (unwaivable) right of equitable remuneration for rental 'may be entrusted to collecting societies representing authors and performers'. More importantly, Article 4(4) provides: 'Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.' In other words, the remuneration right can be subjected to compulsory collective management, as indeed is the case in many Member States.

Besides its rules on cable retransmission, the Satellite and Cable Directive also deals with collective rights management in the context of satellite broadcasting. According to Article 3(2) of the Directive, the system of 'extended' collective licensing that already existed in the Nordic countries before the adoption of the Directive, may be applied to the right of communication to the public by satellite, but only in the case of simulcasting by satellite of a terrestrial broadcast. According to paragraph 2 unrepresented right holders (so-called outsiders) must be allowed to withdraw their works from the extended license at any time. Rights in cinematographic works are excluded from extended licensing altogether. Member States concerned must inform the EC to which broadcasting organizations the extended license applies.

The Information Society Directive does not expressly deal with collective rights management, but does contain several relevant references in its recitals. The most important of these is probably recital 18: 'This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.' Presumably, this Recital leaves Member States broad discretion to provide for limitations of exclusive rights insofar as these are framed as 'arrangements [...] concerning the management of

rights'. Arguably, this could even permit the introduction at the national level of a system of statutory licensing of P2P file sharing between non-commercial users.³⁴⁵

Recital 26 of the Information Society Directive seeks to encourage collective licensing arrangements to facilitate right clearance with regard to on-demand services provided by radio or television broadcasters that incorporate music from commercial phonograms. The recital is intended to provide a measure of comfort to broadcasters not used to being confronted with exclusive rights of phonogram producers. In addition, its complicated recitals on existing 'remuneration schemes' for private copying in recitals 35 to 39 clearly refer to the levy schemes that currently exist in many Member States and are administrated collectively.

Recital 17 admonishes that the operations of collecting societies become more rational and transparent, particularly in the light of requirements of the digital environment. The Resale Right Directive contains similar language in recital 28. Article 6(2) of the Resale Right Directive allows Member States to 'provide for compulsory or optional collective management of the [resale] royalty', but leaves the modalities of such collective management to the discretion of the Member States. The Directive also leaves Member States free to make arrangements for the collection and distribution of royalties, but in any case they must ensure that sums intended for authors who are nationals of other Member States are collected and distributed (recital 28).³⁴⁶

3.3.3. ASSESSMENT

As will be discussed in more detail in Chapter 9, the 'media-specific' norms of the Satellite and Cable Directive are highly vulnerable to the ongoing process of convergence. Several convergence-related problems concerning the Directive's regime of compulsory collective management of cable retransmission rights can be pointed out.

In its review of the Directive, the Commission queries whether the system of compulsory collective management should be extended to satellite retransmission. This was a possibility not contemplated when the Directive was adopted in 1993. However, in recent years satellite services offering 'bouquets' of repackaged programmes, much like cable networks, have emerged all over Europe. Why not subject these satellite providers to a similar system of collective management of rights? Indeed, some market players have advocated such an extension, which would then create a level playing field between providers of satellite and cable

345. See C. Bernault & A. Lebois, 'Peer-to-Peer File Sharing and Literary and Artistic Property. A Feasibility Study Regarding a System of Compensation for the Exchange of Works via the Internet', University of Nantes, June 2005, <www.alliance.bugweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf> [Bernault & Lesbois, 2005].

346. Vanhees, in Dreier & Hugenholtz (2006), Resale Dir. Art. 6, n. 2.

services and similar content aggregators, such as providers of IPTV (Internet Protocol Television).³⁴⁷

Rather surprisingly, the Commission does not endorse such an extension. On the contrary, in its review of the Directive it raises various objections that seem to indicate that the Commission no longer really believes in the system of compulsive collective management of rights it devised in 1993.³⁴⁸ Admittedly, many of the arguments mentioned by the Commission (loss of control by right holders; undermining the 'media chronology' of film exploitation) are valid, but do they not apply equally to cable retransmission? Also, the Commission appears to have forgotten that the 'injection right' it introduced in 1993 was precisely designed to prevent the partitioning of national markets for reasons of 'media chronology', that it now considers so important.

The Commission's review fails to address another convergence-related issue: copyright liability. The Satellite and Cable Directive presumes full (direct) copyright liability for cable operators. Although the provisions of the Directive do not state so specifically, its system of collective management of retransmission rights is based on the assumption that cable retransmission constitutes a restricted act, as is illustrated by its recital 27.³⁴⁹ Indeed, before the adoption of the Directive, many national courts had produced case law to this effect. The Information Society Directive confirms that cable retransmission falls within the ambit of 'communication to the public', as clarified in recital 23.³⁵⁰

In marked contrast to the full copyright liability imposed upon cable operators, the Information Society Directive states in recital 27 that 'the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive'. Obviously, these words were meant to apply primarily to Internet service providers (ISPs). But the Directive's language is not limited to ISPs, so the question arises: what about cable retransmission? Is that *not* a case of 'mere provision of physical facilities for enabling or making a communication', especially in situations in which the cable operator is subjected to a contractual or statutory must-carry obligation? Moreover, now that cable operators are migrating to the IP protocol and gradually transforming themselves into becoming broadband video providers, how to make the distinction?

347. See the discussion in WIPO SCCR/11/3. Consolidated text for a treaty on the protection broadcasting organizations, 29 Feb. 2004.

348. Report on the Satellite and Cable Directive, 14–15.

349. Recital 27 reads as follows: 'Whereas the cable retransmission of programmes from other Member States is an act subject to copyright (...); whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; (...).'

350. Recital 23 reads as follows: 'This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.'

Another question inspired by digital convergence is whether ‘simulcasting’ broadcast programmes over the Internet is subject to the Directive’s rules on mandatory collective management. Article 1(3) defines the act of ‘cable retransmission’, a notion that is central to the cable chapter of the Directive, as ‘the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public’. When adopted in 1993, the Directive clearly could not take into account the use of the Internet as a programme-carrying medium. Whether the term ‘cable or microwave system’ is to be interpreted as to encompass the Internet is another unanswered question that might merit clarification.

Yet another convergence-induced issue relates to the evolving role of cable operators. In countries such as Belgium and the Netherlands, where cable penetration is close to 100%, traditional terrestrial broadcasting is (soon to be) terminated as a public service.³⁵¹ Already broadcast signals are injected directly into cable systems, as is happening on a smaller scale with ADSL-based distribution networks (IPTV). In other words, the end of old-fashioned ‘cable retransmission’ is rapidly approaching. In the very near future, a broadcast signal will be distributed concurrently by an array of competing content aggregators employing parallel or overlapping infrastructures, such as cable, satellite television, Internet, and mobile networks. This would make it artificial to treat retransmission via cable different from similar acts of communication to the public via IPTV and similar networks.³⁵²

From a legal perspective, this development will mean that increasing numbers of cable operators will fall outside the scope of the Satellite and Cable Directive regime of compulsory collective rights management and will need to seek voluntary contractual arrangements with the right holders concerned. Whether a need for legislative intervention will once again arise remains to be seen.

3.4. CONCLUSIONS

3.4.1. RIGHTS AND LIMITATIONS

Our findings with respect to the *acquis* of exclusive rights and limitations may be summarized as follows. At a general level, one may conclude that although the core economic rights of authors and owners of related rights are regulated by the current Directives, there are substantial areas in which national laws remain

351. See <www.signaalopdigitaal.nl>.

352. A. van Loon, ‘The End of the Broadcasting Era’, *Tolley’s Communications Law* 9, no. 5 (2004): 172–186, [van Loon, 2004]; Solon, Economic Impact of Copyright for Cable Operators in Europe. Report for Cable Europe (formerly: ECCA), May 2006. <www.cableurope.eu>, [Solon, 2006].

unharmonized. The reason is not only that certain matters are still squarely or fairly outside the *acquis* (e.g., moral rights, right of adaptation, public performance). The aim of existing directives is often not maximum or full harmonization. Sometimes only a minimum level of protection is provided for, leaving Member States room to extend exclusive rights to other groups of right holders (e.g., Article 2 Information Society Directive) or provide for more or broader exclusive rights (e.g., Article 8 Rental Right Directive). Also, Member States may have a choice as to the type of right they introduce, for example, an exclusive right or a right of remuneration for public lending (Article 5 Rental Right Directive).

There appear to be only minor inconsistencies in the *acquis*. One concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction, which although it is described more broadly in the Information Society Directive, does not seem to have a different meaning from the definitions used in either Computer Programs or Database Directive.

Where it concerns legal uncertainties, the important ones are closely linked to the difficulties that arise with categorizing certain acts of exploitation or distribution methods in terms of the acts currently restricted by the relevant directives. This is caused by the convergence of platforms and media and the transition of traditional exploitation models to new business models.

The advent of new (online) dissemination models that share the characteristics of broadcasting and on-demand delivery, cause uncertainty whether they come under the broadcasting or making available right. For purposes of rights clearance this is, however, a relevant distinction to make. However, precisely because particularly in the area of broadcasting the transition to new forms of transmission, distribution, and business models is in full swing, it seems advisable to opt for the most flexible solution, that is, to leave the interpretation to the courts of Member States and ultimately to the ECJ.

Another issue that has come to the fore because of developments in distribution methods concerns the definition of what constitutes a 'public' for the purpose of the rights of communication as laid down in Article 3 Information Society Directive. Possibly a distinction between commercial (for economic gain) versus private use can be helpful to distinguish private from public communication,³⁵³ in combination with a qualitative rather than quantitative test, that is, whereby the presence of personal relationships is relevant rather than the number of persons that (potentially) may be reached.

Where the reproduction right is concerned (especially Article 2 Information Society Directive), there may be a need to clarify the exact scope of the limitation for temporary reproduction as laid down in Article 5(1) Information Society Directive. On a more general note, the various definitions of the reproduction right in the *acquis* give the impression of a quite technical approach to

353. This is in effect a relevant criterion in UK law before the Information Society Directive, see Westkamp (2003a), 12–13.

reproduction. A more normative approach would do more justice to the legitimate interests of right holders and users, that is, whereby the purpose of a copying is taken into account to determine whether there is a relevant act of reproduction.

Such a normative approach, when extended to the right of communications as well, would also be enormously useful to flesh out the liabilities of intermediaries offering selection services (from search engines to suggestion services) for direct copyright infringement. Their position is currently clouded in legal uncertainty, not only with regard to especially linking and caching as potential direct infringements, but also in regard to liability for infringing actions of third parties. Neither the copyright directives nor the E-commerce Directive provides clear answers. Obviously, it is to be preferred that liabilities for both direct and secondary infringement are addressed together in a coherent manner, although it need not necessarily be in the same regulatory instrument.

As for the limitations and exemptions, clearly this area is one of 'faux' harmonization. In view of the inconsistencies remaining between the directives and in view of the shortcomings of Article 5 of the Information Society Directive, the aim of harmonization of exceptions and limitations has hardly been achieved throughout the EU. The assessment of the boundary between infringing and non-infringing conduct remains highly uncertain and unpredictable. The fact that Member States have implemented the same limitation differently, giving rise to a variety of different rules applicable to a single situation across the EC could ultimately constitute a serious impediment to the growth of the information society.

The lack of harmonization with respect to limitations on copyright and related rights could be remedied through the adoption of a two-tiered approach, which would take into account the principles of subsidiarity and proportionality. First, because a list of optional and broadly worded limitations has led to such a mosaic of different limitations across the Member, the Community legislator could consider declaring a small number of strictly worded limitations mandatory for transposition in all Member States. These limitations, no longer optional as under the Information Society Directive, should reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, principles that are part of Community law. In addition, a list of mandatory limitations should include those that have a noticeable impact on the Internal Market or concern the rights of European consumers. In the proposed model, these mandatory limitations should be reformulated in very specific terms leaving little room for interpretation by the national legislators. Only then, would the rules concerning the limitations on copyright and related rights be sufficiently clear to incite rights owners and other content providers to invest in cross-border services.

Among the limitations contained in Article 5 of the Directive that could be given mandatory status based on the safeguard of fundamental rights are the following:

- use for quotations for purposes such as criticism and review (Article 5(3)(d));

- use of political speeches as well as extracts of public lectures (Article 5(3)(f));
- use for the purpose of caricature, parody, or pastiche (Article 5(3)(k));
- use for educational and scientific purposes (Article 5(3)(a));
- use by disabled persons (Article 5(3)(b)); and
- use for news reporting and press reviews (Article 5(3)(c)).

Among the limitations contained in Article 5 of the Directive that could be given mandatory status based on their potential or actual impact on the Internal Market are the following:

- transient copies (assuming this would not be converted into a carve-out of the economic rights) (Article 5(1));
- reprographic reproductions (Article 5(2)(a));
- private copying (Article 5(2)(b));
- reproductions by libraries, archives, and museums (Article 5(2)(c));
- use of works for research and private study (Article 5(3)(n)); and
- ephemeral recordings by broadcasting organizations (Article 5(2)(d)).

To make sure that these limitations would be implemented in the same way across all Member States, the Community legislator should consider adopting a strictly worded text for each limitation that Member States would transpose integrally in their national order. Other non-mandatory limitations would be left to the discretion of the national legislator, according to the subsidiarity principle. Among the non-mandatory exceptions and limitations currently contained in Article 5 of the Directive that should be left to the discretion of each Member State are the following: Article 5(2)e, 5(3)g, h, j, l, m, and o. Because most of these limitations have a *de minimis* effect on the interests of the rights holder and are unlikely to find any meaningful application in the digital environment or to have any impact on the Internal Market, Article 5(3) o would probably have been broad and flexible enough to encompass them all. In sum, almost half of the limitations included in Articles 5(2) and 5(3) are not likely to be relevant for the deployment of the information society or have an impact on the Internal Market.

The second tier of our proposal would be to adopt an open norm, leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the Internal Market. The European legislator could also consider the introduction of an open norm, either on the model of the American *fair use* defence, on the model of the civil law norm of '*redelijkheid en billijkheid*', '*Treu und Glauben*', '*bonne foi*', etc. The introduction of an open norm, against which circumstances not falling under a specified exception would be tested, would ensure that the European exceptions and limitations regime would not be too rigid and would allow some flexibility to take account of unforeseen technical and socio-economic developments. In other words, such an open norm would allow Member States to adopt ad hoc solutions in answer to pressing situations, unforeseen by the Community legislator.

3.4.2. COLLECTIVE RIGHTS MANAGEMENT

In the field of collective rights management there is not much 'acquis' to report or scrutinize. Now that the promise of a harmonization directive on transparency and governance has failed to materialize, the most important sources of community law in this field are the ad hoc decisions of the Commission and subsequent ECJ decisions applying the rules of EC competition law, the Online Music Recommendation, and subsequent Commission Decisions.

And then there is the Satellite and Cable Directive and its system of compulsory collective management of cable retransmission rights. As we have seen, the provisions of the Directive give rise to questions that could be answered by the Commission in the form of an interpretative communication. Such a communication might serve to clarify a number of issues.

In the first place, there is a need for clarification of the term 'transfer' used in Article 10 of the Directive. It is submitted here that 'transfer' should include exclusive licenses, but not encompass non-exclusive grants. Second, thought should be given to means for making the mediation system that the Directive imposes on the Member States, without providing any detail, operational, for instance, by imposing mandatory negotiation deadlines on the parties concerned. Third, the scope of the notion of 'cable retransmission' needs to be established; it should also be clarified whether it covers simulcasting via the Internet.

This brings us to the Achilles' heel of the Satellite and Cable Directive. The Directive's legal instruments are geared towards media (satellite broadcasting and cable retransmission) that have become increasingly difficult to distinguish from other media providing similar services. More than any other directive, the Satellite and Cable Directive appears to be a victim of convergence. In this context, several problems need mentioning, including the interface between the Directive's presumption of full (direct) liability for cable retransmission and the presumption of immunity found in the Information Society and E-Commerce Directives. Now that cable operators are converging into broadband ISP's this distinction will be very difficult to maintain in legal practice. This issue, however, exceeds the scope of the present research.

In the long run, the future of the Satellite and Cable Directive looks bleak. The collapse of its satellite broadcasting rules (see Chapter 9), will eventually be followed by the gradual becoming irrelevant of its rules on cable retransmission. In several Member States, terrestrial public broadcasting will cease to exist in the immediate future. As a consequence, cable operators will gradually become primary distributors of radio and television programmes. In the end, they may have nothing left to 'retransmit' in a traditional sense. Already, the roles of cable operators, Internet-based content providers, and satellite aggregators are rapidly converging. Consequently, rules that are currently applicable only to cable operators should be extended to other aggregators or be completely lifted. In the light of the limited practical importance that the cable retransmission rules of the Satellite and Cable Directive have had since their adoption in 1993, the latter scenario appears the more likely.

Chapter 4

Rights Management Information and Technological Protection Measures

The two previous chapters focused on the part of the *acquis communautaire* that deals with the heart of copyright and related rights law: its subject matter and the scope of exclusive exploitation rights. This chapter focuses on two relatively new additions to the copyright system, namely, the protection against the circumvention of technological protection measures (TPMs), and the protection against the knowing removal or alteration of electronic rights management information (RMI). Both forms of legal protection derive from the WIPO 'Internet Treaties', and were implemented in the European Union (EU) by the Information Society Directive. After a short introduction to TPMs and RMI, the first section briefly describes the nature and scope of the protection regime established for RMI, and the second section gives a thorough account of the difficulties encountered when implementing the provision of the WIPO Treaties regarding the protection of TPMs. The last section draws conclusions.

4.1. NATURE AND FUNCTION OF TPMs AND RMI

The advent of digital technology bore the promise of facilitating the management of copyright and related rights and the control of acts of piracy in the online environment. Combining TPMs and electronic RMI, automated digital rights management (DRM) systems are able to provide a fast and easy tool for users to secure licenses for the use of particular content, and for rights owners to collect information about such usage. Indeed, TPMs, like copy-control mechanisms and other types of encryption tools, have been developed to monitor and restrict the access to and use of digital works. Essentially four categories of technological measures can be applied to protect a digital work: those that control *access* to a work;

measures that control particular *uses* of a work, such as further copying, printing, transmitting etc.; technology that protects the *integrity* of the work, by preventing modifications of the work; and measures that *meter* access to a use of a work.³⁵⁴

Since their appearance on the market, however, TPMs have been met with strong distrust and resistance on the part of end-users.³⁵⁵ The reason for this negative response mainly lies in the fact that TPMs are often used to control the users' behaviour and confine their actions within strict boundaries that do not always coincide with the breadth of actions normally permitted under copyright law.

By contrast, RMI does not directly influence the users' conduct; techniques such as watermarking and fingerprinting are merely passive systems used to embed individual information about the work and the rights owner to make it identifiable in case of infringing uses. Such information contributes to the proper identification of the rights owners and the licensing conditions, which is particularly important in the case of multiple ownership of rights. The application of RMI to digital works is also likely to reduce the occurrence of problems associated with the phenomenon of orphan works – which are discussed in Chapter 7 – to the benefit of both rights owners and users.

Such technological features are not infallible, however, because they are vulnerable to circumvention, mutilation, and even removal. The rights owners' vibrant call for the recognition of legal protection against the unlawful circumvention and removal of TPMs and RMIs became the main item on the agenda of the discussions leading to the adoption of the WIPO 'Internet Treaties' in 1996. As a result, the Treaties introduced two new provisions in the international copyright order: Article 11 requires that Contracting Parties provide adequate legal protection and effective legal remedies against the circumvention of TPMs; Article 12 requires that Contracting Parties provide effective legal remedies against the knowing removal or alteration of electronic RMI.³⁵⁶ The transposition of these provisions into Community law formed one of the primary objectives behind the adoption of the European Information Society Directive. As complex and controversial the implementation of the protection against the circumvention of TPMs was, at both the European and the Member State levels, so straightforward was the transposition of the protection against the knowing removal or alteration of electronic RMI.

354. K. Koelman & N. Helberger, 'Protection of Technological Measures', in *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*, ed. P.B. Hugenholtz (The Hague: Kluwer Law International, 2000), 166–169, [Koelman & Helberger, 2000].

355. L. Guibault, 'Accommodating the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment', *Journal of Consumer Policy* 31 (2008): 409, [Guibault, 2008].

356. M. Ficsor, 'The WIPO "Internet Treaties": The United States as the Driver; the United States as the Main Source of Obstruction – As Seen By an Antirevolutionary Central European', *J. Marshall Rev. Intell. Prop. L.* 6 (2006): 17, at 26, [Ficsor, 2006b].

4.2. RIGHTS MANAGEMENT INFORMATION

RMI is increasingly relevant and important for the online management of copyrights and related rights. The technological tools used for the implementation of RMI are constantly improving thanks to the growing sophistication in metadata schemes and development of standards. RMI constitutes the basis for new licensing systems because it serves to certify the integrity and authenticity of works. Combined with other technology, they also prove to be a powerful tool against copyright infringements. RMI often takes the form of an electronic watermark placed in protected content. RMI is vulnerable to manipulation and removal, so any tampering with the information can lead consumers to draw wrong conclusions about permitted uses, and thus can have an economic effect equivalent to common fraud.³⁵⁷

Before the adoption of the WIPO Treaties, no other international instrument in the field of copyright and neighbouring rights contained a provision on the protection of RMI. These provisions of the WIPO Treaties, therefore, introduce an entirely new set of rules in the international copyright order. Pursuant to Article 12 of the WCT and Article 19 of the WPPT, Contracting Parties must protect electronic 'RMI' against knowing removal or alteration. Article 12 of the WCT provides:

- (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
 - (i) to remove or alter any electronic rights management information without authority;
 - (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.
- (2) As used in this Article, 'rights management information' means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Electronic information protected pursuant to the two Internet Treaties consists of information identifying the work, its author, and the rights holders, as well as any information relating to the terms of use of the work.³⁵⁸ This information must be either physically 'attached to a copy of the work', for instance, on the packaging

357. IFPI, 'The WIPO Treaties: Protection of Rights Management Information' (London, March 2003), <www.ifpi.org/content/library/wipo-treaties-rights-management-information.pdf>, [IFPI, 2003].

358. Ricketson & Ginsburg (2006), vol. II, 986.

of a CD-ROM, or appear 'in connection with the communication of a work to the public', for instance, embedded in a file or made available through a website. To trigger the application of the provision, the removal or alteration of the information requires three layers of knowledge conditions. First, the person who tampers with an RMI should know that he or she performs one of the acts mentioned in items (i) and (ii). Therefore, mere accidental or inadvertent acts are not covered by Article 12. Second, this person should know or have reasonable grounds to know that the act performed 'will induce, enable, facilitate or conceal an infringement'. Third, if a defendant engages in conduct under 12(1)(ii), he or she should also know that the RMI has been removed or altered without authority.³⁵⁹

Whereas evidence of the first element of knowledge is rather straightforward, proof of the second and third elements may raise some difficulty.³⁶⁰ Indeed, it may not always be apparent for a user that the removal or alteration of the RMI has occurred without authority or that it will induce, enable, facilitate, or conceal an infringement. With respect to the evidence in civil proceedings that the removal or alteration of the RMI will result in a consequential infringement, the notion of negligence may serve as a point of reference.³⁶¹

Article 7 of the European Community (EC) Information Society Directive effectively transposed all elements of Article 12 WCT, with modifications to the wording and adapted in a way appropriate to the EC legislation. Article 7 of the Directive reads as follows:

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:
 - (a) the removal or alteration of any electronic rights-management information;
 - (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.
2. For the purposes of this Directive, the expression 'rights-management information' means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of

359. M. Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (Oxford: Oxford University Press, 2001), 564, [Ficsor, 2001].

360. Ricketson & Ginsburg (2006), 988.

361. M. Senftleben, 'WIPO Copyright Treaty', in Dreier & Hugenholtz (2006), 116, [Senftleben, 2006].

the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

The vast majority of Member States have implemented this provision of the Information Society Directive virtually word for word in their national law. Only in the implementation laws of France and Poland show some deviations in the wording. Under Article 6.12 of the Polish law, the definition of 'RMI' neglects to mention that the right holder must provide this information, but this difference is minor.³⁶² In addition, the definition fails to include neighbouring rights and *sui generis* database rights among the rights covered by the provision. More importantly, Article 79 of the Polish Law, which provides that in case of removal or alteration of RMI, the same civil remedies will be applied as in the case of circumvention of TPMs. This implementation conflicts with Article 7.1 of the Directive in three ways. First, the Polish law does not require that the removal or alteration of the information is done knowingly. Second, it does not refer to the element of 'inducement, enablement, facilitation or concealment of an infringement'. Third, it does not cover the *sui generis* database right.

In France, Article L. 335-3-2 of the French Intellectual Property Code prohibits the 'suppression and modification of the information on the rights management, for the purpose of infringing a copyright, of hiding or facilitating such an infringement'. However, the provision specifies that the removal or alteration takes place only in the case of a personal intervention and without a technological application, device, or component. This wording thus significantly reduces the scope of the prohibition provided by the Directive. Conversely, the French Code extends prohibited activities by requiring the prohibition of the distribution of RMI-suppression devices. Another disparity between the French Code and the European Directive relates to the fact that Article L. 335-4-2 expressly carves out from the scope of protection the knowing removal or alteration of RMI, where such removal or alteration is accomplished for computer security or research purposes, where the latter has been interpreted as meaning scientific research on cryptography, provided that it does not prejudice the rights owners' interests.³⁶³ The attempt of the French legislature to carve-out from the provision acts of knowing removal or alteration of RMI for purposes of interoperability was invalidated by the

362. G. Westkamp, 'Study on the Implementation and Effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, Part II: Implementation of Directive 2001/29/EC in the Member States'. (Brussels: European Commission, February 2007), [Westkamp, 2007].

363. Constitutional Council of France, Decision No. 2006-540 DC of 27 Jul. 2006, ORF No. 178 of 3 Aug. 2006, 11541, text No. 2, para. 62.

Constitutional Council of France as being too imprecise in the context of penal sanctions and, therefore, as contrary to the French Constitution.³⁶⁴

4.3. TECHNOLOGICAL PROTECTION MEASURES

A lot has been written on the provisions of the WIPO Internet Treaties pertaining to the legal protection of TPMs, especially because they have been seen as conferring an extra layer of protection on rights owners, in addition to the protection granted under copyright law and the one secured through the application of the TPMs themselves.³⁶⁵ What are the obligations under the WIPO Internet Treaties in respect of the protection of TPMs? What is the nature and scope of this legal protection? How does this new legal protection bear on the copyright rules in general and on the limitations on copyright in particular?

The following section attempts to provide an answer to these questions: the first subsection sets the provisions on the legal protection of TPMs in their international context by analyzing the obligations flowing from the WIPO Internet Treaties and examining the implementation laws of Europe's main commercial partners, namely the United States, Australia, Japan, and Switzerland. The second subsection takes a close look at Article 6 of the Information Society Directive, giving particular attention to the unique provisions of paragraph 4 of the same article on the intersection between TPMs and limitations on copyright. This analysis will show that despite the European lawmaker's good intentions, the implementation of the international obligations with respect to TPMs has not been conducive to a harmonized regime across the Member States. Much legal uncertainty remains, for both rights owners and users of protected material. A third subsection briefly touches on the desirability of introducing an agency entrusted with the task of monitoring technological developments and mediating disputes between rights owners and beneficiaries of limitations on copyright.

4.3.1. THE INTERNATIONAL CONTEXT

The emergence of the digital network environment as a commercially viable platform for the distribution of copyright-protected content sparked, in the early 1990s, the need on the part of rights holders to increase legal protection to safeguard content from unauthorized access and use. At the international level, the call for the recognition of legal protection for TPMs became particularly vibrant during the last phase of the negotiations leading to the adoption of the WIPO Internet Treaties

364. Constitutional Council of France, Decision No. 2006-540 DC of 27 Jul. 2006, ORF No. 178 of 3 Aug. 2006, 11541, text No. 2, paras 58–61.

365. K. Koelman, 'De derde laag: bescherming van technische voorzieningen', *Auteurs & Media* 1 (2001): 82–89, [Koelman, 2001].

in December 1996.³⁶⁶ The delegations at the Diplomatic Conference for the adoption of the WIPO Internet Treaties agreed to the introduction of a key provision in both instruments aimed at guaranteeing the application of those kinds of technological means that are ‘indispensable for the protection, exercise and enforcement of copyright in the digital, networked environment’.³⁶⁷ This WCT, together with the WIPO Performers and Phonograms Treaty, introduced a new form of protection to the benefit of rights holders by establishing, for the first time in an international copyright instrument, that technological measures used by authors and related right holders to protect their works or related subject matter enjoy independent protection.³⁶⁸ The norm laid down in Article 11 of the WCT requires Contracting Parties to provide:

adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 18 of the WPPT contains a similar provision with respect to performances and phonograms. These broad provisions give Contracting Parties substantial leeway in determining how to implement these obligations, for they do not specify the particular means of achieving the desired result. Contracting Parties are merely required to ensure that the implementation is adequate and effective to protect technological measures.³⁶⁹ Moreover, the WIPO Internet Treaties do not define what technological measures are because ‘rapid technological advancements and the need for new adaptations in response to the repeated attempts by “hackers” and “crackers” to break the protection and develop means to circumvent it’ make it practically impossible to provide a substantive definition of the protective technologies that would endure over time.³⁷⁰

The broad wording of Article 11 of the WCT and Article 18 of the WPPT, according to which Contracting Parties must provide ‘adequate legal protection and effective legal remedies against the circumvention of effective technological measures’, offers several options to the national lawmakers. Among the most obvious

366. Ricketson & Ginsburg (2006), 976.

367. K.J. Koelman, *Auteursrecht en technische voorzieningen: juridische en rechtseconomische aspecten van de bescherming van technische voorzieningen* (The Hague: Sdu Uitgevers, 2003), 57 et seq., [Koelman, 2003]; Ficsor (2002), 544.

368. U. Gasser, ‘Legal Framework and Technological Protection of Digital Content: Moving Forward Towards a Best Practice Model’, *Fordham Intell. Prop. Media & Ent. L.J.* 17 (2006): 39–113, 45, [Gasser, 2006].

369. S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique: droits et exceptions à la lumière des dispositifs de verrouillage des œuvres* (Brussels: Larcier 2005), 69, [Dussollier, 2005]; N. Braun, ‘The Interface between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community’, *EIPR* 25 (2003): 496–503, 396, [Braun, 2003].

370. Gasser (2006), 45.

options available was the adoption of a prohibition on acts of circumvention, or a prohibition of preparatory acts of circumvention, or a combination of the two. The vague formulation of the WIPO provision also left the question open of the type of TPMs covered by the legal protection: does this form of legal protection extend to all kinds of TPMs, including those that prevent the access to digital works or only those that control the use of works?

Moreover, the question of the appropriate characterization of the rights created by anti-circumvention legislation remains unsettled. In some countries, the legal protection of TPMs has been given the status of an exclusive right, on equal footing as the author's exclusive right of reproduction and communication to the public. In most countries, however, the legal protection of TPMs is seen as merely an adjunct form of protection, one that complements the rights granted under copyright law. The wording of Article 11 of the WCT requires protection only of a technological measure that restricts an act not permitted by law, and, therefore, 'the scope of the protection of technological measures seems to coincide with the scope of copyright'.³⁷¹ This view, however, has not been clearly translated into national laws giving effect to Article 11. As a result, the latitude left to the Contracting Parties with respect to the implementation of the Treaties led, as one might expect, to a range of different national solutions.

In view of the formulation of Articles 11 WCT and 18 WPPT, it is clear, however, that the delegates to the Diplomatic Conference wanted to achieve a balance between the application of TPMs by rights holders and the exercise of limitations on copyright by users. Indeed, not all acts of circumvention amount to a violation of copyright or related rights. Some people may circumvent a TPM to gain access to or copy a work in the public domain, whereas others may circumvent to exercise a statutory limitation on copyright. The difficulty in elaborating an anti-circumvention rule that takes account of this reality essentially lies in the fact that a prohibition that sweeps too broadly may have several negative effects on the market. It can hinder the manufacture and dissemination of devices or services that have legitimate uses other than to circumvent access or copy controls on works; it may frustrate otherwise legitimate activities that the devices permit; and, more importantly, it may prevent the development of useful new technologies. On the other hand, an anti-circumvention rule that would allow the distribution of any device as long as it is capable of being put to use for non-infringing purposes would render the prohibition virtually meaningless.³⁷² As shown in more detail in the following section, finding the correct balance between the legal protection of TPMs and the exercise of limitations on copyright has proven to be a monumental challenge for Contracting Parties.

371. K. Koelman, 'A Hard Nut to Crack: The Protection of Technological Measures,' *EIPR* 22 (2000): 272, [Koelman, 2000].

372. Ricketson & Ginsburg (2006), 977.

4.3.1.1. *United States*

As one of the first countries to implement the WIPO Internet Treaties, the United States enacted the Digital Millennium Copyright Act (DMCA) in 1998. The DMCA introduced anti-circumvention provisions by adding a new section 1201 to the US Copyright Act.³⁷³ Section 1201 is built on a basic distinction between access and rights controls. Both are protected, but to different extents. Protected access controls are defined as TPMs that: ‘in the ordinary course of [their] operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work’.³⁷⁴ Protected rights controls are defined as measures that, in the ordinary course of their operation, prevent, restrict, or otherwise limit the exercise of a right of a copyright owner.³⁷⁵

Section 1201(a)(1) of the DMCA contains a general prohibition against circumvention of access controls, the scope of which is very broad because even non-infringing acts of access control circumvention are forbidden.³⁷⁶ Circumvention of rights controls is, on the other hand, not prohibited. In addition, sections 1201(a)(2) and 1201(b)(1) of the Act contain anti-trafficking provisions that apply to both access and rights controls and target both devices and services. Acts covered are ‘the manufacture, import, offer to the public, provide, or otherwise traffic’, insofar as it:

- (a) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
- (b) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
- (c) is marketed by that person or another acting in concert with that person with that person’s knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

The DMCA therefore prohibits tools that can be used for circumvention purposes based on their primary design or production, regardless of whether they can or will be used for non-infringing purposes. Uncertainty remains, however, regarding the exact meaning of the criterion ‘primarily designed or produced’.³⁷⁷

One of the concessions made to users under the DMCA is the fact that the Act does not prohibit circumvention of rights controls. Apart from this accommodation,

373. 17 U.S.C. On the US implementation see: Gasser (2006), 62 et seq.; C.D. Kruger, ‘Passing the Global Test: DMCA § 1201 as an International Model for Transitioning Copyright Law into the Digital Age’, *Houston Journal of International Law* 28 (2006): 281–322, [Kruger, 2006]; J.P. Cunard, K. Hill & C. Barlas, ‘Current Developments in The Field of Digital Rights Management’, SCCR/10/2 Rev. (Geneva: WIPO, 2004), 45–69, [Cunard et al., 2004].

374. 17 U.S.C. § 1201(a)(3)(B).

375. 17 U.S.C. § 1201(b)(2)(B).

376. 17 U.S.C. § 1201(a)(1)(A).

377. Gasser (2006), 19.

the DMCA includes a list of statutory exemptions allowing the circumvention of access control mechanisms. The exemptions are generally very narrowly worded and subject to specific and very detailed criteria.³⁷⁸ They all relate to the prohibition of circumventing access control mechanisms. Some of them also relate to the prohibition of trafficking in access control circumvention devices (cf. § 1201(a)(2)), or to the prohibition of trafficking in rights control circumvention devices (cf. § 1201(b)), or both. The exemptions cover:

- non-profit libraries, archives, and educational institutions so that they can decide whether to acquire a work;
- law enforcement, intelligence, and other government activities;
- reverse engineering of computer programs for the purpose of achieving interoperability with other programs;
- encryption research;
- protection of minors;
- circumvention to counterwork the collection by the TPM of personally identifying information; and
- security testing.³⁷⁹

The DMCA further provides for an administrative rulemaking procedure,³⁸⁰ through which additional exemptions from the prohibition on circumvention can be created. The rulemaking relates only to the prohibition on circumventing access controls in § 1201(a)(1)(A); it does not affect potential liability under the anti-device/service provisions in § 1201(a)(2) and § 1201(b)(1). Nor can the rulemaking or any created exception give relief from liability for copyright infringement. The power to create exemptions under the proceedings is delegated to the Library of Congress. Proceedings follow a triennial cycle³⁸¹ and must determine whether users of any particular class of copyrighted works are, or in the next three years are likely to be, adversely affected by the said prohibition in their ability to make non-infringing uses of copyrighted works.³⁸²

The question of the exact scope of ‘a particular class of copyrighted works’, in the sense of § 1201, is an issue that has been hotly debated and to which we will return later. The exemptions are not permanent, but must be re-considered every

378. J. Besek, ‘Anti-circumvention Laws and Copyright: A Report from the Kernochan Center for Law, Media and the Arts’, *Columbia Journal of Law & the Arts* 27 (2004): 385–519, 397, [Besek, 2004].

379. 17 U.S.C. § 1201(d) to (j) – also relates to § 1201(a)(2).

380. See 17 U.S.C. § 1201(a)(1)(B)–(E).

381. The first rulemaking was, according to the mandate of 17 U.S.C. § 1201(a)(1)(C), delayed with two years from the enactment of the DMCA. The purpose of the delay was ‘to allow the development of a sufficient record as to how the implementation of [DRM technologies] is affecting availability of works in the marketplace for lawful uses’ (see H.R. Rep. No. 105–551, pt. 2 (1998), 38 [House Commerce Report]). The first rulemaking was published 27 Oct. 2000, the day before the prohibition against circumventing access controls took effect (see 17 U.S.C. § 1201(a)(1)(C) cf. § 1201(a)(1)(A)). Thereafter, the rulemaking has been subject to its ordinary triennial cycle (17 U.S.C. § 1201(a)(1)(c)).

382. 17 U.S.C. § 1201(a)(1)(C).

three years to reflect possible changes in the market situation for copyrighted materials. If exceptions are not re-established, they expire.³⁸³

The Library of Congress' decisions are based on the recommendations of the Register of Copyrights, who, in turn, must consult with the Assistant Secretary for Communications and Information of the Department of Commerce. Factors to be taken into consideration as part of the inquiry are (i) the availability for use of copyrighted works; (ii) the availability for use of works for non-profit archival, preservation, and educational purposes; (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research; (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and (v) such other factors as the Library considers appropriate.³⁸⁴

Three rulemaking proceedings have been held since the enactment of the DMCA, in 2000, 2003, and 2006, respectively. Despite the fact that the list of exempted classes increases from one rulemaking process to the next, recent academic commentaries³⁸⁵ seem to indicate a growing consensus that rulemaking proceedings of § 1201 is inadequate in achieving its intended purpose. The argument has been put forward that § 1201 creates a system that is unable to provide legitimate users with the proper venue to adequately address the issue of the right to make fair uses of works in the digital context.³⁸⁶ Concerning the confines of the rulemaking mechanism, three main points have been raised.

First, critique was expressed in relation to the limited mandate of the rulemaking procedure, particularly regarding the fact that the rulemaking cannot create exceptions to the anti-trafficking provisions of § 1201(a)(2) or § 1201(b). The main argument in this respect is that because average users do not possess the skills needed to circumvent increasingly sophisticated DRM technologies, the impossibility of gaining relief from anti-trafficking liability – and the resulting lack of availability of circumvention tools in the market – leaves the user unable to enjoy any 'right to circumvent' that the rulemaking might produce. In effect, this renders the rulemaking meaningless.³⁸⁷

Second, an exemption can be created only for 'a particular class of works'. Accordingly, the Library of Congress does not have the authority to create any exemptions defined by reference, for example, to the intended use or users of the works. A large number of proposals were dismissed during the first two proceedings for failure to properly define a class of works according to the quoted

383. T. Foged, 'US v EU Anti-Circumvention Legislation: Preserving the Public's Privileges in the Digital Age', *EIPR* 24 (2002): 525–542, [Foged, 2002].

384. 17 U.S.C. § 1201(a)(1)(C).

385. See e.g., B.D. Herman & O.H. Gandy, 'Catch 1201: A Legislative History and Content Analysis of the DMCA Exemption Proceedings', *Cardozo Arts & Ent. L.J.* 24 (2006): 121–190, at 124, [Herman & Gandy, 2006]; W.N. Hartzog, 'Falling on Deaf Ears: Is the "Fail-Safe" Triennial Exemption Provision in the Digital Millennium Copyright Act Effective in Protecting Fair Use', *J. Intell. Prop. L.* 12 (2005): 309–350, [Harzog, 2004].

386. Herman & Gandy (2006), 188.

387. Hartzog (2005), 344 et seq.

standards.³⁸⁸ For instance, exemptions were required by making reference to ‘material that cannot be archived or preserved’ or to ‘works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof’.

A third limitation to the rulemaking process concerns the burden of proving the need for an exemption. The statutory text does not place this burden explicitly on any of the parties. However, during the first rulemaking proceeding, it was made clear that it rests on the proponent of a new or renewed exemption.³⁸⁹ All in all, the criticism raised against the DMCA rulemaking system seems to find its origin in the specific statutory restrictions to the powers delegated to the Library of Congress and the manner in which those criteria have been interpreted by the actors involved in the rulemaking.

4.3.1.2. *Australia*

Australia implemented the obligations flowing from the WIPO Treaties through the Copyright Amendment (Digital Agenda) Act 2000, which modified the Copyright Act of 1968.³⁹⁰ To receive protection under the Act, a TPM must be a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter by either or both of the following means: (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling, or other transformation of the work or other subject matter) with the authority of the owner or exclusive licensee of the copyright; (b) through a copy-control mechanisms.

In the *Stevens v. Sony* case,³⁹¹ the Australian High Court found that the TPMs used in Sony’s PlayStation consoles, which prevented the playing of unauthorized copies, but not the actual copying of PlayStation games, did not satisfy the statutory requirement that the measure must ‘prevent or inhibit the infringement of copyright’. Sony’s TPMs were, therefore, not regarded as protectable TPMs within the definition of the Act. The reasoning of the High Court was that the measure did not prevent copyright infringement per se, but it prevented access only after infringement had already occurred.³⁹²

Pursuant to the (Digital Agenda) Act 2000, neither the circumvention of TPMs by an individual or the use of circumvention devices was prohibited, but only the

388. Herman & Gandy (2006), 175.

389. Letter from Marybeth Peters, Register of Copyrights, to James H. Billington, Librarian of Congress (27 Oct. 2003), available at <www.copyright.gov/1201/docs/registers-recommendation.pdf>, 10.

390. Copyright Amendment (Digital Agenda) Act 2000, No. 110 of 2000, entered into force on 4 Mar. 2001.

391. *Stevens v. Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

392. David J. Brennan, ‘What Can It Mean “to Prevent or Inhibit the Infringement of Copyright”?’ A critique on *Stevens v Sony*, *AIPJ* 17 (2006): 81–97, [Brennan, 2006].

trafficking in circumvention devices and services.³⁹³ According to the relevant provision it was illegal to make, sell, let for hire, advertise, market, distribute for purpose of trade, exhibit, import circumvention devices for any purposes mentioned in the Act, or make circumvention devices available online in a way that prejudicially affects the rights holder.³⁹⁴ Similarly it was also illegal to provide, advertise, or market circumvention services.³⁹⁵ However, circumvention devices and services were prohibited only if they had 'only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure'. Moreover, because the act of circumvention of a TPM was itself not prohibited, the Australian regime needed to provide only a limited exception in relation to the supply of a circumvention device or a circumvention service to a person for use for a 'permitted purpose', as defined in the Act.

This regime remained in force until the implementation of the *Australian-United States Free Trade Agreement* (AUSFTA). Pursuant to this agreement, Australia is obliged to implement additional amendments to its copyright law. Those amendments include amendment of the TPM provisions, which must be implemented by 1 January 2007. Consequently, the anti-circumvention rules have been modified to provide for tighter controls on the circumvention of TPMs, in line with the provisions in force in the United States under the DMCA. The Copyright (TPMs) Amendment Act 2006 received royal assent on 11 December 2006.³⁹⁶ The Act changed the existing Australian regime in (at least) three important respects: the definitions of protected TPMs; the targeted conduct; and the correlation with exceptions.

The Act 2006 introduced completely new definitions for several key elements of the anti-circumvention rules.³⁹⁷ The Act now defines 'access control TPM' as any device, product, technology, or component (including a computer program) that is used in Australia or a qualifying country by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter; and in connection with the exercise of the copyright; and in the normal course of its operation, controls access to the work or other subject matter.³⁹⁸

Although the definition has been completely re-written, it is uncertain whether the modification will change the scope of the protection. Indeed, the judicial test applied in *Sony vs. Stevens* required that an access control prevent or inhibit copyright infringement per se.³⁹⁹ According to the new definition, access controls must be designed to prevent or inhibit the doing of an act that is covered by

393. Copyright Act of 1968, § 116A.

394. *Ibid.*, § 116A(1)(b), (i)–(vi).

395. *Ibid.*, § 116A(1)(b)(vii).

396. See the Copyright Amendment (Technological Protection Measures) Act 2006, available at: <www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/>.

397. M. de Zwart, 'Technological Enclosure of Copyright: The End of Fair Dealing?', *AIPJ* 18 (2007): 7, [de Zwart, 2007].

398. Copyright Act of 1968, § 10(1).

399. Brennan (2006), 81–97.

copyright and that would infringe copyright. The definition requires causality between the blocking of access and the prevention or inhibition of such acts. Consequently, the two definitions appear to be quite similar with respect to the inclusion of access controls within the scope of the protection.

Through separate provisions, the Act targets the different acts of circumvention,⁴⁰⁰ trafficking in circumvention devices,⁴⁰¹ and trafficking in circumvention services.⁴⁰² The ban on circumvention relates to access control TPMs only, whereas the other two prohibitions relate to TPMs in general (including access controls).

The test applying to a circumvention device or service is whether it (i) is promoted, advertised, or marketed as having the purpose of circumventing; (ii) has only a limited commercial significant purpose or use, no such purpose, or use other than the circumvention of; or (iii) is primary or solely designed or produced for the purpose of enabling or facilitating the circumvention of, a TPM.⁴⁰³ For more certainty, a TPM does not include a device, product, technology, component, or service to the extent that it controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject matter acquired outside Australia, where the work or other subject matter is a cinematograph film or computer program (including a computer game), or restricts the use of goods (other than the work) or services in relation to the machine or device, where the work is a computer program that is embodied in a machine or device.

Where the TPMs Act of 2006 substantially expanded the scope of the prohibited acts, it also had to introduce a new exception scheme, aimed at protecting the user rights recognized in copyright law. Acts that can form the basis of a lawful circumvention pursuant to statutory exceptions relate to the following:

- interoperability of computer programs;
- encryption research;
- computer security testing;
- online privacy;
- law enforcement and national security; and
- libraries for making acquisition decisions.

In addition, the Act of 2006 provides that the prohibition against acts of circumvention does not apply to a person who circumvents the access control TPM to enable her to do an act prescribed by the regulations, provided that such act does not infringe the copyright in a work or other subject matter. The instrument of regulations was chosen because it ‘provides greater flexibility and improves the

400. Australian Copyright Act, § 116AN.

401. *Ibid.*, § 116AO.

402. *Ibid.*, § 116AP.

403. *Ibid.*, § 10(1).

responsiveness of the scheme to changes in technology'.⁴⁰⁴ Such regulations are to be adopted by the Governor General on recommendation from the Minister, following a consultation process during which submissions are admissible from persons who are or are likely to be adversely affected in their doing of the act in question.⁴⁰⁵

With respect to the prohibition against circumvention of an access control mechanism, the Act foresees a procedure whereby additional exemptions can be created. Like the US rulemaking proceedings, the Australian mechanism does not allow the creation of exemptions to the anti-trafficking provisions. Submissions by affected parties must be confined to 'a particular class of works or other subject matter'. According to the Act, the Minister must make a decision in regard to any submission within four years from receiving it. This provision allows the establishment of a double-tracked system, including both general periodical reviews and consecutive ad hoc reviews.

4.3.1.3. *Japan*

Japan has a twofold anti-circumvention regime. Following the implementation of the WIPO Treaties in 1999, the Japanese Copyright Law ('JCL')⁴⁰⁶ contains provisions targeting acts of trafficking in certain circumvention devices and programmes, and acts of circumventing as a business in response to a request from the public.⁴⁰⁷ Additionally, the Japanese Unfair Competition Prevention Law (JUCPL)⁴⁰⁸ also contains rules targeting acts of trafficking in circumvention devices, where such acts are regarded as unfair competition.

The JUCPL provisions were enacted at the same time as the implementation of the WIPO Treaties under the Copyright Law. However, the general opinion seems to be that they mainly fall outside the scope of the WIPO requirements, which are regarded as fully satisfied through the JCL provisions.⁴⁰⁹ Japan chose to implement such a twofold system for the following reason: since the grant of anti-circumvention

404. Media release 'Exposure Draft – Copyright Amendment (Technological Protection Measures) Bill 2006', <www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP04FC63D41045DEA5CA2571DF0021BCA3> [the TPM Bill Media Release].

405. Australian Copyright Act, § 249.

406. Law No. 48, promulgated on 6 May 1970 as amended by Law No. 77, of 15 Jun. 1999. An unofficial English translation of the statute is available at <www.cas.go.jp/jp/seisaku/hourei/data/CA.pdf>.

407. Before the implementation of the WIPO treaties, anti-circumvention protection was an unknown concept in Japanese copyright. See T. Koshida, *A Law Partly Amending the Copyright Act* (Tokyo: Japan Copyright Office/Ministry of Cultural Affairs, 1999) <www.cric.or.jp/cric_e/cuj/cuj99/cuj99_5.html> [Koshida, 1999], 2: 'Measures to protect rights through technology to protect such rights rather than the rights relationships themselves have never previously been seen in the copyright protection legislation of Japan, so these amendments are characterized as a new step in the protection of copyright in Japan.'

408. Law No. 47, promulgated on 19 May 1993, <www.cas.go.jp/jp/seisaku/hourei/data/ucpa.pdf>.

409. See e.g., Koshida (1999): 'With these amendments, Japan has met the conditions for ratification of the WIPO Copyright Treaty'. See also: M. Katoh, 'Intellectual Property and the

protection is mandatory under the WIPO Treaties only to the extent that technological measures regulate acts governed by copyright, a prohibition on the circumvention of access control technology does not belong in the JCL, because ‘access’ to works is not a copyright-relevant act.⁴¹⁰

4.3.1.3.1. Japanese Copyright Law

According to the statutory definition,⁴¹¹ to be protected under the Copyright Act, a TPM must (i) be a measure to prevent or deter (by electromagnetic means) such acts as constitute infringements on copyright; (ii) be used at the will of the copyright holder; and (iii) adopt a system of recording or transmitting such signals as having specific effects on machines together with works.⁴¹²

The first requirement essentially limits the protection to TPMs regulating acts covered by copyright. In practice, this includes copy controls and possible future measures to regulate the making available of works (to the public). On the other hand, access controls, such as measures that restrict viewing or listening of a work, fall outside the protection of JCL.⁴¹³ Whether the Act protects dual-purpose measures is unclear. The definition requires measures to ‘prevent or deter’ copyright-restricted acts.⁴¹⁴ The term ‘prevent’, in this relation, means to stop such acts that constitute an infringement on copyright. For instance, a Serial Copy Management System (SCMS), which stops audio recording, falls within this group of measures.⁴¹⁵ The term ‘deter’, in this relation, refers to deterring such acts that constitute an infringement on copyright by causing considerable obstruction to the results of such acts, although the act itself is not stopped. For example, the false synch pulse system, which causes a recorded picture to be disarranged and hence unbearable to watch, falls within this group of measures. Outside the definition are measures that merely warn the user not to make an illegal reproduction. Although the anti-circumvention provisions of the JCL were initially drafted to cover both

Internet: A Japanese Perspective’, *U. Ill. J.L. Tech. & Pol’y* (2002/2003): 333, 338: ‘The Copyright Law Amendments prohibit the distribution of devices that circumvent technological measures that protect copyright and related rights (copy-control measures). Additionally, the Japanese Government went beyond the treaties’ requirements by adopting amendments to the Unfair Competition Prevention Law (“UCPL”) that prohibit the distribution of devices that circumvent access control measures’, [Katoh, 2002/2003].

410. See Koshida (1999), 5. See also: J. de Werra, ‘The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws’, in *Adjuncts and Alternatives to Copyright*, ed. ALAI-USA (New York: Columbia Law School, 2001), 198–237, 230, <www.alai-usa.org/2001_conference/1_program_en.htm>; Y. Noguchi, *Toward Better-Balanced Copyright Regulations in the Digital and Networked Era: Law, Technology, and the Market in the U.S. and Japan*, PhD Thesis (Stanford University, 2006), 190.

411. JCL Art. 2(xx).

412. Koshida (1999), 4–5.

413. Koshida (1999), 5; de Werra (2001), 233; Noguchi (2006), 190.

414. JCL Art. 2(xx).

415. Koshida (1999), 5.

current and future technologies, one commentator reports that the Japanese Copyright Council is currently considering expanding the JCL definition of 'TPMs' to also include access controls.⁴¹⁶

Article 120*bis* (i) of the Act generally bans acts of trafficking in circumvention devices:

any person who transfers to the public the ownership of, or lends to the public, manufactures, imports or possesses for transfer of ownership or lending to the public, or offers for the use by the public, a device having a principal function for the circumvention of technological protection measures (such a device includes such a set of parts of a device as can be easily assembled) or copies of a program having a principal function for circumvention of technological protection measures, or transmits publicly or makes transmittable such program.⁴¹⁷

Accordingly, circumvention devices are prohibited if their principal function is the circumvention of TPMs. This requirement means that, to fall under the prohibition, a device may have only a limited practically significant function other than the circumvention of technological measures. General-purpose devices, such as PCs, fall outside this definition.

Acts of manufacturing or importing or possession of circumvention devices or programmes for one's own personal use are not targeted by the prohibition.⁴¹⁸ This confinement of the anti-circumvention protection not only benefits private users, but also seems to relieve non-profit organizations, such as libraries or schools, from liability.

Moreover, devices falling outside the TPM definition of the JCL, such as measures blocking access, can lawfully be offered to the public, as long as the conduct is not commercially motivated. Article 120*bis* (i) of the JCL also prohibits circumventing TPMs 'as a business [...] in response to a request from the public'.⁴¹⁹ This provision targets, for example, the act of obtaining an encrypted movie from a customer, circumventing technological measures and then returning it.⁴²⁰ The reason for this prohibition is that such conduct, akin to a circumvention service, is considered to have the same detrimental effect as transfer of ownership of a circumvention device to the public.

A violation of the JCL anti-circumvention provisions gives rise to criminal liability.⁴²¹ Contrary to acts of copyright infringement, civil remedies are not available. The underlying rationale is that:

whereas in Copyright Law, the right to petition for an injunction is thought to be applicable in cases where there is a clear danger of the infringement of a

416. See Noguchi (2006), 196, et seq.

417. Article 120*bis*(i).

418. *Ibid.*, at 9.

419. Article 120*bis*(ii).

420. Koshida (1999), 9.

421. JCL Art. 120(2).

specified copyright, in the case of the transfer of ownership of a circumvention device to the public, etc. it is not clear generally at the time of its transfer of ownership to the public, etc. what copyright the device or the program is being used to infringe.⁴²²

Because the JCL establishes a direct connection between the scope of the copyright protection and the protection of technological measures, only TPMs that prevent copyright infringement benefit from the protection of the law.

Note that although the act of circumvention itself is not prohibited, the making of a private copy from a work, the technological protection of which has been circumvented, constitutes an infringement of copyright. With respect to the private copying exemption, Article 30(1)(ii) provides that:

(1) It shall be permissible for a user to reproduce by himself a work forming the subject matter of copyright (hereinafter in this Subsection referred to as a 'work') for the purpose of his personal use, family use or other similar uses within a limited circle (hereinafter referred to as 'private use'), except in the case:

- (ii) where such reproduction is made by a person who knows that such reproduction becomes possible by the circumvention of technological protection measures or it ceases to cause obstruction, by such circumvention, to the results of acts deterred by such measures ('circumvention' means to enable to do acts prevented by technological protection measures or to stop causing obstruction to the results of acts deterred by such measures, by removal or alteration of signals used for such measures; the same shall apply in Article 120bis, items (i) and (ii)) ('removal' or 'alteration' does not include such removal or alteration as is conditional upon technology involved in the conversion of recording or transmission systems).⁴²³

The same rule applies when the person who makes the copy did not personally circumvent the TPM, but had reason to know that the TPM was removed to allow the making of such a copy.⁴²⁴ In other words, circumvention of usage control results in a loss of the private copying privilege set forth in Article 30 and may result in liability for copyright infringement that is enabled by such circumvention.

4.3.1.3.2. Japanese Unfair Competition Law

The anti-circumvention provisions of the JUCPL should be seen as a response to the threats to fair competition in a digital, networked society. A general goal of Japanese unfair competition law is to 'protect private interests in the form of entrepreneurial business interests, and the public interest, that is maintenance of

422. Koshida (1999), 10.

423. Copyright Law of Japan, Art. 30(1)(ii) available at <www.cric.or.jp/cric_e/clj/clj.html>.

424. Koelman (2003), 126.

fair competition order'.⁴²⁵ This goal can be achieved among others by putting restrictions on 'imitation goods without creativity, such as counterfeit products and pirated goods'.⁴²⁶ The anti-circumvention provisions are intended to 'prevent transactions of detour devices and programmes that might endanger the existence of the specialized data industry'; the assumption being that using works without permission 'damages the specialized data industry and might endanger the industry's infrastructure'.⁴²⁷ The JUCPL identifies certain circumvention-related acts that are to be regarded as unfair competition.⁴²⁸ The Law was modified in 1999 with the addition, in the list of unfair acts, of acts pertaining to the circumvention of commercially employed copy⁴²⁹ and access control technologies.⁴³⁰ The purpose of this amendment was to protect the interests of the rapidly growing digital content industry.⁴³¹

The general purpose of the JUCPL is to ensure fair competition in the market; thus, its application is not limited to copyrighted works; technology that protects content not subject to copyright protection is also covered, including public domain works.⁴³² On the same grounds, the definition of protected TPMs is not limited to technology controlling the acts covered by copyright. The protected technology is often translated as 'technical restriction means', defined in Article 2(5) of the Act as: 'a means for restricting playing of vision or audio or executing of programs, or recording thereof, by electromagnetic method [...]'. Interestingly, the definition is media specific and confined to measures protecting images, sounds, and computer programs. It is also technology specific because it requires that the measures work by electromagnetic method. The JUCPL does not prohibit the act of circumvention itself.⁴³³

The anti-trafficking provisions are divided into two subparagraphs, Article 2(1) (x) and (xi) JUCPL. The two provisions in principle protect both access and copy controls, in different contexts.⁴³⁴ Certainly, the assertion that item (xi) also protects copy controls is true only to the extent that one accepts that blocking initial access is a way of controlling unauthorized reproduction, an assumption the JUCPL seems to adopt. In view of the general applicability of unfair competition law, and given its statutory purpose of ensuring fair competition among entrepreneurs,⁴³⁵ the JUCPL targets only acts that are commercially motivated. Under both subparagraphs, the test applying to circumvention devices is that they 'only have

425. M. Ishida, *Outline and Practices of Japanese Unfair Competition Prevention Law* (Tokyo: Japan Patent Office, 2003), 8. <www.apic.jiii.or.jp/p_f/text/text/2-10.pdf>.

426. *Ibid.*, at 1.

427. *Ibid.*, at 22.

428. See e.g., Besek (2004), at 432; De Werra (2001), 232 (n. 159).

429. JUCPL, Art. 2(1)(x).

430. *Ibid.*, Art. 2(1)(xi).

431. Ishida (2003), 4.

432. See Noguchi (2006), 203.

433. Besek (2004), 435.

434. See e.g., De Werra (2001), 230; Katoh (2002), 338.

435. Cf. Art. 1.

the function of preventing the effect of a technical restriction means [...]'.⁴³⁶ This has further been interpreted as requiring that the circumventing technology be 'exclusively' functioning to the invalidation of technical restriction means 'and having no other functions than invalidating in view of economic and commerce'. As one commentator points out, '[t]his limitation is even more restrictive than the WCT, which protects all kinds of effective technological measures'.⁴³⁷ Any commercially motivated circumvention of 'technical restriction means' in violation of the JUCPL can be sanctioned through civil remedies.⁴³⁸ The only exemption permitted under the Law concerns the circumvention for purposes of testing or research regarding TPMs.⁴³⁹

4.3.1.4. Switzerland

In 2000, the Swiss legislator initiated a consultation process aimed at implementing the WIPO Internet Treaties.⁴⁴⁰ After years of debate, the Swiss Parliament adopted in October 2007 modifications to the Swiss Authors and Related Rights Act (SARRA)⁴⁴¹ as well as a Federal Decree on the approval of the two Treaties of the WIPO and on the modification of the Authors' Rights Act. The two instruments came in force on 1 July 2008.⁴⁴²

The specific provisions of Article 11 of the WCT and 18 of the WPPT are transposed in the federal decree, which provides for the incorporation in the SARRA of Title 3a on the protection of technological measures and RMI. In accordance with the WIPO Internet Treaties, the Swiss anti-circumvention provisions protect only TPMs applied to works or other subject matter protected by copyright or relevant neighbouring rights.⁴⁴³ A further requirement derives from the definition of effective TPMs in Article 39a(2) of the SARRA, according to which the technologies and devices such as access controls, copy protection, encryption, scrambling, and other mechanisms that are designed and fit to prevent or restrict unauthorized use of works and other subject matter are considered as effective, pursuant to paragraph 1.

According to Article 39a(1) and (3) of the SARRA, both circumvention and trafficking in circumvention devices and services are prohibited. Targeted

436. Ishida (2003), 23–24.

437. R.L.-D. Wang, 'DMCA Anti-circumvention Provisions in a Different Light', *AIPLA Q.J.* 34 (2006): 217–250, at 234, [Wang, 2006].

438. Noguchi (2006), 208.

439. UCPL Art. 11(1)(7).

440. B. Lindner, 'Demolishing Copyright: The Implementation of the WIPO Internet Treaties in Switzerland', *EIPR* 27 (2005): 481–488, at 481, [Lindner, 2005].

441. FF 2007, 6753.

442. Federal Decree of 5 Oct. 2007, in force since 1 Jul. 2008 (RO 2008 2497), Art. 2.

443. Article 39a(1) cf. Botschaft, 3424. Explanations on the modifications of the Revised Authors' Rights Order (ODAu) RS 231.11. Both contained in the document: *Message concerning the Federal Decree on the approval of the two Treaties of the World Intellectual Property Organization and on the modification of the Authors' Rights Act*, Federal Council, 10 Mar. 2006, FF 2006 3263, available at <www.admin.ch/ch/f/ff/2006/3263.pdf>.

trafficking activities are the manufacturing, importing, offering, selling, or in other way distributing, letting for rent, lending, advertising, or possessing for commercial gain, circumvention devices and the provision of circumvention services. The supply of devices, products, or components and the provision of services are unlawful if they have the following characteristics:

- (a) they are being promoted, advertised, or marketed designed to circumvent effective technological measures;
- (b) they have, other than the circumvention of effective technological measures, only a limited purpose or commercial utility;
- (c) they are primarily designed, produced, adapted, or performed for the purpose of enabling or facilitating the circumvention of effective technological measures.

Any violation of the anti-circumvention rules may give rise to civil remedies or criminal sanctions.⁴⁴⁴ However, the protection against circumvention of technical measures is limited to preventing the unauthorized use of works or performances protected. In the light of Articles 11 WCT and 18 WPPT, this is understood as those uses that the law reserves to rights holders. This restriction means in particular that the limitations on copyright prevail over the legal protection of technological measures. The prohibition against the circumvention of TPMs is regarded merely as a supporting measure, which complements the rights granted by copyright law. This added legal protection cannot be absolute and should not prevent uses that the legislature has provided for the community by limiting the duration of protection and restricting rights.

Confirming the legislature's intention to align anti-circumvention protection with material copyright law, Article 39a(4) provides that the prohibition on acts of circumvention does not apply in cases where the circumvention takes place for legitimate purposes. This provision only applies to the prohibition on circumvention, not the prohibition on trafficking. According to the Explanatory Memorandum, the circumvention shall be deemed to take place for legitimate purposes, if the use is covered by a copyright exception or if it relates to a work that (i) according to Article 15 of the Act is exempted from copyright protection; or (ii) with regards to which the term of protection has expired.⁴⁴⁵

Whereas the limitations on copyright prevail in law over the legal protection of TPMs, this does not mean that users necessarily possess the required skills to circumvent a TPM for legitimate purposes. In specific circumstances, users should be given the necessary means to proceed with the circumvention. To mediate between the rights owners' needs for protection and the users' right to exercise a limitation on copyright, Article 39b SARRA foresees the creation by the Federal Council of the Technical Measures Observatory (TMO). The Observatory is

444. Article 39a, cf. Arts 62 and 69a.

445. Message concernant l'arrêté fédéral relatif à l'approbation de deux traités de l'Organisation Mondiale de la Propriété Intellectuelle et concernant la modification de la loi sur le droit d'auteur, Bern, 06.031, 10 Mar. 2006, 3298.

entrusted with the monitoring of the general impact of the use of TPMs on copyright exceptions. The Observatory's findings must be reported to political authorities.⁴⁴⁶ In practice, the TMO serves as an intermediary between user and consumer groups on the one hand and the users of TPMs on the other. If needed, the Observatory acts as a mediator between these groups to promote voluntary solutions.⁴⁴⁷ The Federal Council may further entrust the TMO with additional powers to take appropriate measures when the public interest reflected in copyright limitations so require.⁴⁴⁸

4.3.2. THE ACQUIS COMMUNAUTAIRE

At the European level, one of the principal objectives behind the adoption of the Information Society Directive was to transpose into Community law the main international obligations arising from the WIPO Internet Treaties. Among the main international obligations arising from these Treaties was, of course, the implementation of Articles 11 WCT and 18 WPPT. The aim of the European Commission was also to create a solid legal framework for the development and growth of DRM systems, which would foster the development of 'pay-as-you-go' (on-demand) type business models, in which users would pay for each use of every (portion of a) work retrieved from the Internet.⁴⁴⁹ In this vein, recital 53 of the Directive states that 'the protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject matter from a place and at a time individually chosen by them'.

The discussions that took place in the context of the Information Society Directive on the issue of the legal protection of TPMs should not be considered in isolation, however. Under Article 7(1)(c) of the Computer Programs Directive, Member States were required to provide appropriate remedies against persons putting into circulation, or possessing for commercial purposes, 'any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program'. Moreover, while the process leading towards adoption the Information Society Directive was only beginning, the European Conditional Access Directive was about to be enacted. This Directive, adopted in 1998, aims to protect access to and remuneration for various kinds of services delivered electronically and through means of conditional access.⁴⁵⁰ The Directive is

446. Article 39b(1)(a).

447. Article 39b(1)(b).

448. Article 39b(2).

449. See: Koelman (2003). See e.g., the description of 'the "online" market' in the Explanatory Memorandum accompanying the Directive (original proposal), § 6–8.

450. Directive 98/84/EC of the European Parliament and of the Council of 20 Nov. 1998 on the legal protection of services based on, or consisting of, conditional access, *OJ* 1998 L 320/54 [Conditional Access Directive].

targeted at ensuring that the service provider is remunerated, rather than at protecting the content of the service itself.⁴⁵¹

The Conditional Access Directive applies to television and radio broadcasting, whether by wire or over the air (including by satellite), as well as 'information society services'. Conditional access is defined as 'any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorization'. The Directive prohibits the business of trafficking in 'illicit devices', where 'illicit devices' are defined as 'equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorization of the service provider'.⁴⁵² The Conditional Access Directive requires Member States to prohibit the manufacturing, sale, and rental of such devices and their possession for commercial purposes, as well as their installation, maintenance, or replacement and commercial promotion.⁴⁵³

The sanction and remedy provisions in Article 5 are somewhat similar to those set out in the Information Society Directive. Contrary to the Information Society Directive; however, neither the act of circumvention nor the possession of an illicit device for personal use is prohibited by the Directive. In the Explanatory Memorandum to the Information Society Directive, the European Commission explained the relationship between the two directives, as follows:

It should be stressed that such legal protection is complementary with the initiative already proposed by the Commission in the field of the protection of conditional access services. This latter proposal addresses in fact harmonized protection against unauthorized reception of a conditional access service, which may or may not contain or be based upon intellectual property, whilst this proposal deals with the unauthorized exploitation of a protected work or other subject-matter, such as unauthorized copying, making available or broadcasting.⁴⁵⁴

As a result, Community law now comprises two different legal regimes applicable to TPMs: on the one hand, a regime that prohibits the business of trafficking in illicit devices, pursuant to the Computer Programs Directive and the Conditional Access Directive; and, on the other hand, a regime that prohibits both the act of circumvention of TPMs, as well as the business of trafficking in illicit devices or circumventing services, pursuant to the Information Society Directive.⁴⁵⁵

451. N. Helberger, *Controlling Access to Content: Regulating Conditional Access in Digital Broadcasting* (The Hague: Kluwer Law International, 2005); Cunard et al. (2004), 79; T. Heide, 'Access Control and Innovation under the Emerging EU Electronic Commerce Framework', *BTLJ* 15 (2000): 993–1048.

452. Conditional Access Directive, Art. 2(e).

453. Conditional Access Directive, Art. 4.

454. Explanatory Memorandum to the Information Society Directive, 41–42.

455. See: Koelman (2003), 117 et seq.; P. Wand, *Technische Schutzmassnahmen und Urheberrecht* (München: Beck, 2001), 77 et seq.; and Koelman (2000), 277.

Article 6 of the Directive went through numerous amendments before the European legislature finally agreed on a text introducing a 'third' layer of protection for rights owners, according to which not only the dealing in circumventing devices for commercial purposes is prohibited, but also the act of circumventing TPMs.

However, because of the deep controversy that surrounded its adoption, the final text of Article 6 of the Directive ended up being very convoluted and complex, not to mention imprecise and ambiguous.⁴⁵⁶ Moreover, the regime established by the Information Society Directive leaves Member States ample discretion to decide how to implement the provisions contained in Article 6 of the Directive, which establishes a general framework for the protection of technological measures composed of broadly worded provisions, within the boundaries of which Member States may legislate.

In the following pages, we analyze the different elements of the protection granted on TPMs pursuant to Article 6 of the Directive, including the definition of 'effective technological measure' (Article 6(3)); the prohibition against acts of circumvention (Article 6(1)); the prohibition against preparatory acts (Article 6(2)); and the interplay between TPMs and the limitations on copyright (Article 6(4)).

4.3.2.1. *Definition of 'Effective Technological Protection Measure'*

In accordance with Articles 11 of the WCT and 18 of the WPPT, Article 6 of the Information Society Directive grants legal protection in regard of 'effective TPMs'. Hence, only those TPMs that meet the criterion of effectiveness benefit from the protection under the Information Society Directive. But what is to be understood as an 'effective' TPM? Although the text of the WCT and the WPPT contains no definition of the concept, Article 6(3) of the Directive does define 'effective TPMs'. This definition, which is applicable to both the anti-circumvention and the anti-facilitation provisions contained in Articles 6(1) and 6(2) of the Directive, reads as follows:

any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the right holder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

456. Koelman (2001), 82–89.

Three elements of this rather convoluted definition are likely to give rise to interpretation: (1) the meaning of the word ‘effective’; (2) the scope of the expression ‘designed to prevent or restrict acts, (...) which are not authorised by the rightholder’; and (3) the nature of the ‘acts, (...) which are not authorised by the rightholder’.

With respect to the criterion of ‘effectiveness’, this term has been construed so far as reflecting the legislature’s intention to avoid granting protection with regard to obsolete devices, or devices the circumvention of which is too easy, accidental, or simply possible.⁴⁵⁷ Completely useless TPMs are not protected, while TPMs that do achieve the protection objective and exercise at least some control over the use of the work are protected, even if they eventually get circumvented. The requirement of effectiveness also expresses the legislature’s intention that the TPM be proportionate to the objective that it pursues, that is, the protection of copyright and related rights on a work. Furthermore, a TPM is not effective if it negatively interacts with the normal operation of playing or reading equipment.⁴⁵⁸ An example of a TPM that is not ‘effective’ and therefore not protected would be a TPM barring digital uses that can be circumvented by making analogue copies.⁴⁵⁹

With respect to the second element, that is, the scope of the expression ‘designed to prevent or restrict acts, (...) which are not authorised by the rightholder’, there appear to be important deviations in the Member States’ implementation of this part of the provision. Some Member States, like Austria, Denmark, and Germany, have restricted the scope of TPMs as understood in Article 6(3) to those devices that are designed to objectively protect works against restricted acts under copyright. Other Member States have not clarified whether there must exist a certain relationship between the application of a TPM and the prevention of an act of copyright infringement. The lack of harmonization in this respect certainly does not contribute to the establishment of a coherent legal framework for the protection of TPMs within the European Union and gives rise to legal uncertainty.

With respect to the third ambiguous element of the provision, a TPM is deemed effective ‘if it controls the use of a work through an access or copy-control mechanism’.⁴⁶⁰ According to the second sentence of Article 6(3) of the Directive, a TPM is protected if it controls use through ‘application of an access control or protection process’. This part of the definition of Article 6(3) has generally been interpreted in the legal commentaries as granting protection on TPMs that are applied to protect against access to a work.⁴⁶¹

457. E.A. Caprioli, ‘Mesures techniques de protection et d’information des droits d’auteur’, *Communication Commerce électronique* 11 (2006): 25–31, 29, [Caprioli, 2006].

458. Dusollier (2005), 138.

459. LG Frankfurt, 31 May 2006, 2-06 O 288/06 (Napster DirectCut) <www.affiliateundrecht.de/lg-frankfurt-umgehungssoftware-kopierschutz-wettbewerbswidrig-2-06-O-288-06.html>.

460. Bechtold, in Dreier & Hugenholtz (2006), 388.

461. Caprioli (2006), 27; Gasser (2006), 47; A. Lucas & P. Sirinelli, ‘Chroniques – Droit d’auteur et droits voisins’, *Propriétés intellectuelles* 20 (2006): 297–316, 316, [Lucas & Sirinelli, 2006]; Dusollier (2005), 528.

Opinions are divided, however, on whether this is a correct reading of the Article 11 WCT and on whether the protection of TPMs should extend to access control technology. On the one hand, the argument has been put forward that, traditionally, 'access' to a work is not considered to fall within the scope of copyright protection. As such, TPMs that prevent access should, according to these commentators, not receive legal protection.⁴⁶² On the other hand, some commentators have argued that the act of accessing a work:

in digital form implicates the reproduction right under the Berne Convention given the fact that every apprehension of a digital work involves the making of a temporary copy in the user's random-access memory (RAM). In addition, it is argued that access controls underpin the communication and distribution right, and that therefore Member States are obliged to protect both copy and access controls against circumvention.⁴⁶³

Most EU Member States have taken the latter view on implementing Article 6(3) of the Information Society Directive. In practice, the grant of protection against the circumvention of TPMs that control the use of a work through access control mechanisms is akin to recognizing a de facto 'right of access' to the rights owner.

4.3.2.2. *Protection Against Acts of Circumvention*

According to Article 6(1) of the Information Society Directive, Member States must 'provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective'. In other words, this provision requires that Member States prohibit acts of circumvention of TPMs by any person who knows or should have reasonable grounds to know that she is committing an act of circumvention. This provision did not appear in Article 6 of the Proposal for a Directive presented in December 1997. The EC was at the time satisfied that a provision prohibiting any commercial activities, including the manufacture or distribution of devices or the performance of services, designed to enable or facilitate without authority the circumvention of a TPM, was sufficient to meet the requirements of Articles 11 of the WCT and 18 of the WPPT. In the Explanatory Memorandum to the Proposal for a Directive, the Commission explained:

It is not directed simply against the 'circumvention of technological measures' as in the WIPO Treaties, but covers any activity, including preparatory activities such as the manufacture and distribution, as well as services, that facilitate or enable the circumvention of these devices. This is a fundamental element, because the real danger for intellectual property rights will not be the single act of circumvention by individuals, but the preparatory acts carried

462. Heide (2000), 470; Koelman (2000), at 277.

463. Gasser (2006), 47.

out by commercial companies that could produce, sell, rent or advertise circumventing devices.⁴⁶⁴

It is fair to say that the entire provision of Article 6 went through several controversial rounds of negotiations between the EC, the Council, and the Parliament. Because the text of the initial provision was considered too vague and prone to interpretation, the European Parliament insisted that a separate provision for acts of circumvention and for the facilitation of acts of circumvention be incorporated into the Directive.⁴⁶⁵ The current text is therefore the result of a political compromise between the three institutions which, like most political compromises, is far from being a model of clarity.

Article 6(1) of the Directive requires that Member States provide adequate legal protection against acts of circumvention. Clearly, the provision imposes no obligation, either on the Member States or the rights owners, to apply a TPM. The related sanctions find application only once a person has actually circumvented a TPM. As Koelman point outs, in view of the formulation of this provision, an ‘innocent’ act of circumvention, for example, accomplished without the knowledge or grounds to know that the act would result in the circumvention of a TPM, would not fall under the prohibition of the Directive.⁴⁶⁶

For the rest, the vague wording of Article 6(1) leaves some questions unanswered. What is an ‘adequate legal protection’? Who may invoke it – the rights owner, the content provider, or both? Must the circumvention of the TPM give rise to a copyright infringement or is circumvention itself sufficient to trigger the application of the provision? What is the nature of this adjunct protection? What type of technological measure is covered by the legal protection?

The Directive contains no definition or any other indication of what constitutes ‘adequate legal protection’ for the purposes of this provision. Member States have therefore given varying interpretations to this expression. The reference to the words ‘adequate legal protection’ is directly inspired by the international obligations under the WCT and the WPPT. To amount to an adequate protection under the WCT and the WPPT, the implementing provision must meet the following three criteria: (1) the TPM must be ‘effective’ to deserve legal protection; (2) it must be applied by authors in the context of the exercise of their rights; and (3) it must restrict the effectuation, with respect to a work, of acts that are not authorized by law or by the rights owner.⁴⁶⁷

The first element of this equation is discussed above. Concerning the second element, neither Article 6(1) nor 6(3) of the Information Society Directive expressly mentions that the protection of TPMs is granted to authors ‘in the exercise of their rights’. What, then, constitutes the author’s ‘exercise of his

464. Explanatory Memorandum to the Information Society Directive, 41.

465. Amended Proposal for a Directive on the Harmonisation of Copyright and Related Rights in the Information Society, 21 May 1999, COM (1999) 250 final, *OJ* 1999 C 180/6; see: Wand (2001), 103.

466. Koelman (2003), 83.

467. Dusollier (2005), 87.

rights'? Opinions vary on this point. It has been argued that a broad interpretation of this expression, which would encompass the exercise of any right, moral or economic, would be protected under the WIPO Internet Treaties irrespective of the form in which the right is exercised.⁴⁶⁸ According to the EC, the link between the protection of TPMs and the exercise of the exclusive rights must be inferred from the wording 'acts not authorised by the rightholder' in Article 6(3). This implies, in the Commission's opinion, that Article 6(3) protects only technological measures that restrict acts that come within the scope of the exclusive rights.⁴⁶⁹

However, this interpretation disregards the fact that 'acts not authorised by the rightholder' may be broader in scope than the mere 'exercise of rights' or may not even be necessarily connected to any copyright-relevant act. This interpretation would therefore entail that any set of licensing conditions attached to a work – including clauses regulating the liability of the licensor, for example – would be sufficient to justify the application of TPMs on that work, for they would qualify as an 'exercise of rights'.

With respect to the third element, the WIPO Internet Treaties require that Contracting Parties adopt 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures (...) that restrict acts, in respect of their works, which are not (...) permitted by law'. Neither Article 6(1) nor 6(3) of the Information Society Directive expressly mentions that the protection of TPMs is granted if the technological measures serve to restrict the effectuation, with respect to a work, of acts that are not authorized by law. The definition of Article 6(3) of the Directive merely refers to acts 'which are not authorised by the rightholder', without any mention of those acts that are 'permitted by law'. Besides the argument put forward above, according to which the application of the legal protection would appear to be triggered solely by the authorization of the rights owner, this omission in the text of the Directive effectively eliminates the need to establish a connection between the circumvention of TPMs and copyright infringement. This means that the Directive does not make it clear that circumventing a TPM for legitimate purposes is not prohibited.

In the Basic Proposal to the WCT, one could read that 'Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject-matter that is in the public domain'.⁴⁷⁰ There is, under both international instruments, a clear connection between the legal protection of TPMs and copyright law, where the protection of the WCT and the WPPT is granted only in relation to acts of circumvention that result in a copyright infringement.⁴⁷¹ In fact, the initial text of Article 6(1) was much closer to

468. Gasser (2006), 47.

469. Report on Application Information Society Directive 2007, 7.

470. WIPO Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works To Be Considered by the Diplomatic Conference, CRNR/DC/4, 30 Aug. 1996, para. 13.05.

471. Koelman (2003), 66.

the intent of the international instruments. Article 6(1) of the Proposal for a Directive 1997 read as follows:

Member States shall provide adequate legal protection against any activities, including the manufacture or distribution of devices or the performance of services, which have only limited commercially significant purpose or use other than circumvention, and which the person concerned carries out in the knowledge, or with reasonable grounds to know, that they will enable or facilitate without authority the circumvention of any effective technological measures designed to protect any copyright or any rights related to copyright as provided by law or the *sui generis* right provided for in Chapter III of European Parliament and Council Directive 96/9/EC.

In the Explanatory Memorandum to the Proposal, the Commission had insisted that:

Finally, the provision prohibits activities aimed at an infringement of a copyright, a related right or a *sui generis* right in databases granted by Community and national law: this would imply that not any circumvention of technical means of protection should be covered, but only those which constitute an infringement of a right, i.e. which are not authorized by law or by the author.⁴⁷²

The provision was substantially modified in the course of the legislative process to the version that we now know. Article 6(1) of the Directive makes no connection between the protection of intellectual property rights and the legal protection of TPMs. At most, Article 6(3) of the Directive, which gives a definition of what constitutes an 'effective measure', states that 'such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the right holders of any copyright, rights related to copyright or the *sui generis* right in databases without, however, preventing the normal operation of electronic equipment and its technological development'.

Considering the major changes brought to this provision and the fact that the text that was finally enacted no longer expressly links the act of circumvention to an act of infringement, it is very doubtful whether this quote still reflects the intent of the European legislature. The final text of Article 6(1) therefore departs in two substantial respects from the provision of the WIPO Treaties: first, it does not specify that the technological measures must be used in connection with the exercise of a right; second, it fails to specify that the technological measure must restrict acts not permitted by law and not only acts not authorized by the rights holder. The logical consequence of these two omissions is that the act of circumvention is not clearly linked to an act of copyright infringement, as a result of which the legal protection of TPMs can, in principle,

472. Explanatory Memorandum to the Information Society Directive, 41.

be invoked against acts of circumvention accomplished for purposes that are lawful under the copyright act.⁴⁷³

Another question arises in connection with Article 6(1) of the Directive, concerning the person entitled to claim the application of this provision. The formulation of this provision does not specify who exactly is entitled to invoke the protection: the rights owner, an intermediary, or both. According to Wand, the rights owners are in any case entitled to invoke the protection, but Member States would be, in his opinion, allowed to designate the maker and distributor of TPMs as parties entitled to invoke the protection.

This position is contested, especially if one takes account of the words 'which are not authorised by the right holder of any copyright or any right related to copyright' included in the definition of an 'effective protection measure' in Article 6(3). This reference to the right holder would tend to exclude any other person who is not the right owner, from exercising this protection. In practice, TPMs are 'not used or applied by the authors themselves but rather by their agents or licensees acting with the author's consent'. Moreover, if right holders bundle their exploitation rights through licensing agreements in the hands, for example, of a record company, this licensee's authorization or non-authorization is the relevant consent for the purposes of Article 6(3).⁴⁷⁴ Although individual authors undeniably bundle their rights in the hands of one producer, it is far from obvious that the producer will always be the one applying the TPM. In many cases, the TPM is applied by the content provider of the work, such as an Internet service provider, not the rights holder or licensee himself.⁴⁷⁵ Who then has standing to sue over the circumvention of a TPM?

Because the Directive leaves this issue entirely to the Member States, national legislatures have taken a different approach in relation to categorizing acts of circumvention. In several Member States, Article 6(1) was implemented so as to clarify a direct relationship with copyright infringement, in that authorization is required only for acts that constitute a use of the work in a legal sense.

Scholarly literature tends to consider this type of protection as at most an ancillary (*flankierende*) form of protection.⁴⁷⁶ In the Basic Proposal for a Treaty on Copyright, the International Bureau of the WIPO wrote that 'the obligations established in the proposed Article 13 are more akin to public law obligations directed at Contracting Parties than to provisions granting intellectual property rights'.⁴⁷⁷ This view was confirmed by the District Court of Cologne, where the court declared that the protection against circumvention of TPMs provided for under Article 95a of the German Copyright Act does not constitute a new intellectual property right (*Leistungsschutzrecht*), but rather a right that is ancillary to the

473. Koelman (2003), 89.

474. Bechtold, in Dreier & Hugenholtz (2006), 387.

475. Ricketson & Ginsburg (2006), 973.

476. Wand (2001), 102.

477. Basic Proposal, para. 13.03.

exclusive rights of the author.⁴⁷⁸ Some Member States have adopted another view, however, granting to the legal protection of TPMs the status of 'right' of the rights owner.

4.3.2.2.1. Protection against Circumventing Devices and Facilitation

As a complement to the protection afforded under Article 6(1) of the Directive, Article 6(2) provides for a prohibition on the supply of any product or service that primarily enables or facilitates the circumvention of TPMs or a prohibition on acts preparatory to actual circumvention. According to Article 6(2) of the Information Society Directive, Member States must provide:

- adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:
- (a) are promoted, advertised or marketed for the purpose of circumvention of; or
 - (b) have only a limited commercially significant purpose or use other than to circumvent; or
 - (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of any effective technological measures.

For more certainty, recital 48 of the Directive declares that:

such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the right holders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection.

According to the Explanatory Memorandum to the 1997 Proposal, this solution would 'ensure that general-purpose electronic equipment and services are not outlawed merely because they may also be used in breaking copy protection or similar measures'.⁴⁷⁹

478. LG Köln: 'Abmahnkosten bei Online-Privatauktion einer urheberrechtswidrigen Kopier-Software' (Urteil v. 23.11.2005 – Az: 28 S 6/05), available at <www.jurpc.de/rechtspr/20060049.htm>.

479. Explanatory Memorandum to the Information Society Directive, 41.

Article 6(2) therefore prohibits certain commercial dealings in devices that enable the circumvention of TPMs. In addition, it prohibits certain services and advertisements for circumvention devices, including any online transmission of circumvention tools.⁴⁸⁰ For instance, Article 95a(3) of the German Copyright Act, which implements this provision of the Directive, was invoked successfully to prevent the dissemination of circumventing software, as well as its description and use inside magazine articles or online news services. Indeed, in the *heise.com* case, the Court of Appeal of Munich ordered the removal of a link from an editorial article of a news service to the website of a circumvention software provider.⁴⁸¹

However, as in the case of Article 6(1) of the Directive, the link between copyright protection and the legal protection against certain commercial dealings is not readily apparent. Apart from the requirement in paragraph 3 that the TPMs concern restricted acts ‘in respect of works or other subject matter’, the provision is silent on whether such devices must facilitate copyright infringement or whether any technology which facilitates the circumvention of TPMs is covered. Paragraphs a to c of the provision make no distinction between circumvention devices that protect against copyright infringement and those that do not. This derives in part from the broad definition of ‘effective TPM’ in Article 6(3) of the Directive, which is also applicable to the prohibition of Article 6(2).⁴⁸²

The requirement of paragraph b is certainly the most controversial part of the provision because it does not require intent on the part of the manufacturer or distributor of devices. As many commentators have noted, the provision casts a cloud on technology with ‘dual-purpose’ capabilities, which might inhibit technological innovation.⁴⁸³ Moreover, absent any interpretative guidelines it is exceedingly difficult to interpret. When does a device or software have only a ‘limited commercially significant purpose or use other than to circumvent’? Is it when it can be used sixty, fifty, twenty or ten per cent of the time to circumvent? How must the commercial significance be evaluated? According to the generated income? To the number of devices sold? In the absence of any indication in the Directive, it is up to the courts to decide the issue.

4.3.2.2.2. Interplay Between TPMs and Limitations on Copyright

The provision in the Information Society Directive on the legal protection of TPMs has turned out to be the most controversial of the entire Directive, especially

480. Bechtold, in Dreier & Hugenholtz (2006), 389.

481. LG München I, 7 Mar. 2005, 21 O 3220/05 – *Heise Online*. The decision was upheld by the Munich Superior Court (OLG) on 28 Jul. 2005, *ZUM* 12 (2005): 896–901.

482. Cunard et al. (2004), 72.

483. Götting, in Schricker (1999), 1844; Dusollier (2005), 60; Koelman (2003), 110; G. Spindler, ‘Europäisches Urheberrecht in der Informationsgesellschaft’, *GRUR* 2 (2002): 105–120, [Spindler, 2002], at 116; and Wand (2001), 111 et seq.

as it pertains to its interaction with the limitations on copyright. The European solution with regard to the interplay between the legal protection of TPMs and the exercise of limitations on copyright and related rights is rather unique in the world in that it prescribes affirmative action by the rights owners or in its absence, by the Member States, to ensure the exercise of limitations despite the use of TPMs.

Article 6(4) of the Information Society Directive purports to resolve the problem of the intersection between the legal protection of TPMs and the exercise of limitations on copyright and related rights. Despite its good intentions, Article 6(4) is far from being a model of clarity and its complex formulation has not led to the implementation of concrete legislative solutions in most Member States. Article 6(4) of the Directive reads as follows:

Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Different aspects of Article 6(4) are marked by ambiguity and uncertainty. Among the issues considered below are the scope of application of the obligation, the meaning of the terms 'voluntary measure by a rights holder' and 'appropriate measure by a Member State', the list of limitations covered by the provision, the special status of the private copying exception and the contractual overridability of the provision.

4.3.2.2.3. Scope of Application of the Obligation

Article 6(4) of the Directive opens with the words ‘notwithstanding the legal protection provided for in paragraph 1’. This formulation clearly indicates that the obligation to provide the means to exercise a limitation applies only to the circumventing act protected under Article 6(1) of the Directive, and not to the supply of circumventing devices or services prescribed under Article 6(2).

But the provision is more complex than it appears at first glance, for even if Article 6(4) creates an obligation to provide the means to exercise a limitation, this obligation is imposed on rights owners and does not give users any authority to perform acts of circumvention themselves. In other words, this provision ‘does not introduce exceptions to the liability of the circumvention of technological measures in a traditional sense, but rather introduces a unique legislative mechanism which foresees an ultimate responsibility on the rightholders to accommodate certain exceptions to copyright or related rights’.⁴⁸⁴

The implementation of Article 6(4) of the Directive at the national level has led to a vast array of different solutions with respect to the persons entitled to claim the exercise of the limitation on the basis of this provision. In some Member States, only individual beneficiaries may claim the application of the limitation, whereas in other countries, interest groups and other third parties also have the right to do so. In yet other Member States, administrative bodies may be entitled to force rights holders to make the necessary means available to beneficiaries of limitations.

Denmark and Norway do grant users, under strict conditions, a right of ‘self-help’ to circumvent TPMs to make a lawful use of a work. In Germany, a general self-help right for public authorities has expressly been introduced, according to which TPMs can be circumvented for purposes of public administration and the judiciary. The right holder applying TPMs is additionally obliged to make circumvention tools available for that purpose should such self-help not be possible.⁴⁸⁵

Moreover, it is important to stress that the Directive does not require rights owners to grant access to their work in order for a user to benefit from a limitation contained in the list of Article 6(4) first paragraph. This paragraph of Article 6(4) aims at facilitating the exercise of a limitation, once a person has lawful access to a work. As Dusollier explains, this implies that the provision does not imply an obligation to facilitate the circumvention of access control mechanisms, but only obligates rights holders to facilitate the circumvention of copy-control mechanisms. In other words, the rights owner must accommodate a user only in respect of TPMs used to restrict acts that fall under the rights owner’s prerogatives, for example, acts of reproduction or making available. TPMs used to restrict access remain unaffected. Strangely, this requirement does not appear in the second paragraph of Article 6(4) of the Directive, concerning the private copying

484. Braun (2003), 499.

485. Bechtold, in Dreier & Hugenholtz (2006), 393.

exception. According to Dusollier, nothing indicates whether this is a simple omission or a fundamental difference in treatment between the two types of limitations.⁴⁸⁶

4.3.2.2.4. Voluntary Measure by a Rights Owner

Article 6(4) of the Information Society Directive essentially puts the solution to the problem of the intersection between the legal protection of TPMs and the exercise of copyright limitations in the hands of the rights holders. Rights owners are obliged to take voluntary measures, including agreements between themselves and other parties concerned, to ensure that the beneficiary of certain limitations provided for in national law have the means of benefiting from that limitation, to the extent necessary to benefit from that limitation and where that beneficiary has legal access to the protected work or subject-matter concerned. Because the Directive nowhere describes what types of voluntary measures are required, it is primarily up to the rights owners to decide how they want to fulfil their legal obligation.⁴⁸⁷

Solutions vary widely, depending on the types of copyright-protected works being used, and the extent of TPM usage in the particular sector. Voluntary measures can take on many forms, including the supply of a non-protected version of the work, or the supply of an encryption key to allow the user to circumvent the TPM. The encryption key might also be deposited with a third party, so that on request the beneficiary of a limitation can obtain it to make a lawful use of a TPM protected work.⁴⁸⁸ Another possible solution is to design the TPM so that certain lawful uses are possible.

From the text of Article 6(4), however, the negotiation of agreements between rights owners and parties concerned would appear to be the European legislature's preferred method to achieve its objective. The way to contractual negotiations is only realistic, however, when users are easily identifiable, for example, libraries and archives, broadcasting organizations, social institutions, educational institutions, groups of disabled persons, and public entities. This is not necessarily the case for all users who may invoke the right to benefit from a limitation pursuant to Article 6(4). In other sectors of the copyright industry, where users do not belong to easily identifiable groups and where the negotiation of acceptable agreements is more difficult, rights holders appear to ignore the obligation.

In some cases, rights owners will point at the responsibilities of online distributors. Indeed, it is not uncommon to observe that in specific sectors, such as the music industry, TPMs are generally not applied by the rights holders themselves but rather by an intermediary, for example, the content or service provider. Whereas the legal obligation to provide beneficiaries of limitations with the means to exercise such limitation is addressed to the rights holder, it is not

486. Dusollier (2005), 175.

487. *Ibid.*, 168.

488. Koelman (2003), 92.

surprising to note that most content or service providers do not feel concerned by this provision and neglect to provide any means for beneficiaries to exercise their rights.

4.3.2.2.5. Appropriate Measures by Member States

Article 6(4) furthermore provides that ‘in the absence of voluntary measures taken by rightholders, (...) Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law’. From the text of the provision, it appears that voluntary arrangements concluded by rights holders must be given precedence over any measure to be adopted by a Member State. For the rest, the formulation of Article 6(4) leaves a lot of room for interpretation by the Member States.

Several areas of uncertainty have arisen following the implementation of this paragraph in the national legislation. The first uncertainty comes from the fact that the Directive nowhere defines what constitutes an ‘appropriate measure’ by a Member State; must such an ‘appropriate measure’ take the form of a statutory provision or can the State leave the parties to resolve the issue before the courts or through alternative dispute resolution mechanisms? In view of the lack of guidelines in the Directive, the Member States have implemented this obligation in different ways, ranging from no implementation at all to a right of self-help for the user. Quite a number of Member States have established a dispute resolution or mediation mechanism, or created an executive or administrative authority to prevent the abuse of such measures taken by rights owners.⁴⁸⁹

A second uncertainty relates to the nature of the obligations that Member States will impose on the rights owners. A third element of uncertainty is, of course, the delay during which a Member State must wait before taking action. According to recital 51, such delay must be ‘reasonable’. As a commentator points out, ‘it is also unclear under which conditions the mere authority to impose obligations changes to a duty to impose obligations. It is questionable, for example, whether this duty only emerges once an abusive behaviour by a rightholder has become apparent’.⁴⁹⁰

4.3.2.2.6. Limitations Covered by the Provision

The Information Society Directive provides that, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States must take appropriate measures to ensure that right holders make available the means of benefiting from a certain number of

489. See: Submission to WIPO on the Treaty for the Protection of Broadcasting Organizations by the European Community and Its Member States and the acceding States of Bulgaria and Romania, Geneva, WIPO, 11–13 Sep. 2006, SCCR 15/5, 4 available at <www.wipo.int/edocs/mdocs/ccr/en/sccr_15/sccr_15_5.doc>.

490. Bechtold, in Dreier & Hugenholtz (2006), 393.

limitations, to the extent necessary to benefit from these limitations and where that beneficiary has legal access to the protected work or subject-matter concerned. Not all limitations appearing in the list of Article 5 of the Directive are covered by this measure, but only a selection of the limitations included in Articles 5(2) and 5(3) are subjected to the obligation of the rights holder to provide users with the means to exercise them. These limitations are:

- acts of reproduction by means of reprographic equipment (Article 5(2)a);
- acts of reproduction by publicly accessible libraries, educational establishments or museums, or archives (Article 5(2)c);
- ephemeral recordings of works made by broadcasting organizations (Article 5(2)d);
- reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons (Article 5(2)e);
- use for the sole purpose of illustration for teaching or scientific research (Article 5(3)a);
- uses for the benefit of people with a disability (Article 5(3)b); and
- use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings (Article 5(3)e).

This list gives rise to several comments. First, compared with the total number of limitations mentioned in Articles 5(2) and 5(3) of the Directive, the list seems strikingly short and the selection of provision random.⁴⁹¹ Surprisingly, even the mandatory limitation of Article 5(1) of the Directive on transient and incidental acts of reproduction is not mentioned. With respect to the limitations not mentioned in Article 6(4), rights holders have complete discretion to override these limitations by using TPMs.⁴⁹²

By omitting some other key limitations in this provision, the European legislature failed to take account of the possible impact that the prohibition on the circumvention of technological measures applied to copyrighted works may have on activities such as criticism, comment, news reporting, parody, scholarship, or research.⁴⁹³ The absence of the right to quote from this list sparked the following comment from Ricketson:

... if a work is only available in a digital protected format, with no provision for the making of quotations other than on the terms specified by the right-holder, the effect of this will be to deny the exception under Article 10(1) [Berne Convention] altogether. This will obviously have far-reaching consequences into the future as more and more works become available in digital protected formats only. The result would be that the only exception specifically

491. Lucas & Sirinelli (2006), 322.

492. Götting, in Schricker (2006), 1852.

493. Note that the private copying exception is the object of a separate regulation which is examined in the following section.

mandated under the Berne Convention would be effectively neutralized in the digital environment.⁴⁹⁴

Moreover, rights holders and Member States alike are bound to provide the means to exercise these – otherwise optional – limitations on copyright and related rights only insofar as these have indeed been transposed in the national order. The list of limitations that are subject to the obligation therefore risks being even shorter in reality, because, to take but one example, the limitation on reproductions of broadcasts made by social institutions pursuing non-commercial purposes has not been implemented in some countries.

The reasons behind the legislature's choice of limitations for which the means of exercise must be provided to the user remain a mystery to this day. Because this provision was negotiated in the last hours before adoption of the final text of the Directive, there is no public record available to shed light on the legislature's intent. As a result, the list of limitations included in Article 6(4) appears highly arbitrary.⁴⁹⁵ For instance, it would be hard to explain how the limitations permitting acts of reproduction by means of reprographic equipment and reproductions of broadcasts made by social institutions pursuing non-commercial purposes have made it onto the list, given their presumably minor role in the digital environment, while many far more important limitations have not. Any modification to this provision should ensure that the limitations for which the rights holder or the Member States must provide the means of exercise are determined along objective criteria. Article 6(4) second paragraph provides that Member States:

may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

Member States are under no obligation to take action in respect to the private copying exception. Moreover, if the rights holder designs his TPM in such a way that private copies are possible, then Member States are not allowed to intervene on the basis of Article 6(4). And, as the text of recital 52 stipulates, right holders may in any case use TPMs to control the number of reproductions in accordance with Article 5(2)(b) and Article 5(5).⁴⁹⁶ TPMs that are used to control the number of reproductions receive equal protection according to Article 6(4) paragraph 3. Not all Member States have taken advantage of this provision. In the

494. S. Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, presented at the WIPO SCCR meeting Geneva, 23–27 Jun. 2003 (WIPO SCCR/9/7), 84 <www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf>, [Ricketson, 2003].

495. Dusollier (2005), 166.

496. Lucas & Sirinelli (2006), 323.

Member States that have implemented it, the number of copies that can be made for private use varies significantly. This decreases transparency for on-demand content providers and their customers alike. In those Member States where the private copying exception is not enforceable against TPMs, one can expect the debate to continue.⁴⁹⁷

A particularity of the German Copyright Act is worth mentioning here. Article 95a of the Act obliges content providers to disclose the scope and characteristics of the DRM protection they use for their content. The aim of this measure is to put the German consumer in a better position to make an informed decision about whether or not he wants to buy the protected content.⁴⁹⁸

The German provision fills a definite need among consumers, as a series of cases in France have shown.⁴⁹⁹ Indeed, the sale of tangible digital supports equipped with anti-copy devices, which prevent consumers from making any copy for time or place shifting purposes, may give rise to serious consumer protection issues.⁵⁰⁰ In several cases brought before the French courts, the French consumer protection association *UFC Que Choisir* argued successfully that the sale of a digital support equipped with anti-copy devices without indication that the support may not be suited to play on certain equipment was misleading to the consumer.⁵⁰¹

4.3.2.2.7. Contractual Overridability

According to the fourth paragraph of Article 6(4) of the Directive, ‘the provisions of the first and second subparagraphs shall not apply to works or other subject matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them’. The last sentence of recital 53 specifies that ‘non-interactive forms of online use should remain subject to those provisions’. What constitutes a non-interactive transmission is unclear. According to one commentator, ‘only

497. Note that the issue of the intersection between the private copying exception, the level of compensation and the application or non-application of TPMs, remains outside the scope of this study.

498. S. Bechtold, ‘Digital Rights Management in the United States and Europe’, *American Journal of Comparative Law* 52 (2004): 323–382, 380, [Bechtold, 2004].

499. See: Court d’Appel de Versailles, 30 Sep. 2004, Case RG No. 03/04771 9 (*EMI Music France v. CLCV*).

500. Guibault (2008), 409.

501. TGI Nanterre 15 Dec. 2006, Case No. RG 05/3574 (*Ufc Que Choisir v. Sony*), Juriscom.net; TGI Paris, 10 Jan. 2006, Case No. RG 03/8874 (*Christophe Ret UFC Que Choisir v. Warner Music France et FNAC*), Juriscom.net; Cour d’Appel de Paris, 22 Apr. 2005, Case No. RG 04/14933 (*Stéphane P. and Association UFC Que Choisir v. Universal Pictures Ind.*), Juriscom.net; TGI Nanterre, 24 Jun. 2003, *Association CLCV v. EMI Music France*, www.legalis.net/cgi-iddn/french/affichejnet.cgi?droite=internet_dtauteur.htm; Cour d’Appel de Versailles, 30 Sep. 2004, *EMI v. CLCV*, www.foruminternet.org/documents/jurisprudence/lire.phtml?id=809.

live webcasting, web radio and similar transmissions where the user cannot choose the time of the transmission qualify for non-interactive transmissions'.⁵⁰²

The exclusion actually extends to any work offered 'on-demand', covering any work transmitted over the Internet, as long as the user is able to choose and initialize that transmission. In view of the fact that most works offered on-demand through systems that rely on the conclusion of contracts and the application of TPMs, the scope of this provision is potentially very broad, reducing as much the statutory obligation put on rights owners and Member States under paragraphs 1 and 2 of Article 6(4) of the Directive to provide beneficiaries of limitations with the means to exercise them.

Another source of lack of clarity relates to the exact meaning to be given to the expression 'agreed contractual terms' in this provision. The word 'agreed' seems to suggest that the parties must have manifested their common consent to be bound by terms that they have jointly drawn up. Accordingly, the exception to the main rule of Article 6(4) of the Directive could be interpreted as applying only in respect to the supply of online services for which the contracting parties have negotiated the terms of use. In such a case, the exception laid down in Article 6(4), fourth paragraph, of the Information Society Directive would not apply in the case of services offered according to the terms of a non-negotiated standard form license, such as iTunes, where the licensee had no opportunity to influence the content of the terms.

Such an interpretation of the exception in Article 6(4), paragraph 4, of the Directive would be in line with the presumed intention of the European legislature because it would preserve the respective parties' freedom of contract while protecting the licensee from an unbridled use of standard form contracts. As we saw earlier, the way to contractual negotiations is realistic only when users are easily identifiable. In reality, however, standard form contracts, rather than negotiated contracts, actually govern the vast majority of transactions relating to information in the digital networked environment. In other words, not only do users lose the benefit of paragraphs 1 and 2 of Article 6(4), whereby the obligation to provide the means to exercise one of the specified limitations is removed, but users are also deprived of any say in the content of the vast majority of contractual arrangements dealing with the interactive online transmission of protected material.

4.3.2.2.8. Monitoring the Use of TPMs

Conscious of the potential negative impact of the application of TPMs on users' interests and competition, several countries throughout the world have established observatory bodies as part of their anti-circumvention regimes. These bodies have been entrusted with the mission to monitor or respond to the possible negative consequences of the anti-circumvention legislation or the use of TPMs. The rationale behind the formation of these observatories lies in the acknowledgement that

502. Bechtold, in Dreier & Hugenholtz (2006), 394.

the legal protection of TPMs is a relatively new phenomenon, created from the drawing board without any mentionable practical experience upon which to rely.⁵⁰³ Such an administrative body could also contribute to ironing out the numerous difficulties of interpretation associated with the wording of Article 6(4) of the Directive.

Several jurisdictions within the territory of the European Union have already put in place one form of observatory body or another to monitor the evolution of the technology and the market with respect to the use of TPMs. These monitoring authorities generally constitute the national solution to the implementation of the obligation imposed on the Member States under Article 6(4) of the Information Society Directive to take appropriate measures, in the absence of voluntary measures by the rights holders, to ensure that the beneficiaries of certain limitations are able to benefit from them. Among the different observatory or mediation authorities created in the Member States, are those of Denmark, France, Greece, Italia, Lithuania, Norway, and the United Kingdom.

Under the Danish Act, if voluntary measures fail, parties may address the Copyright License Tribunal. This administrative⁵⁰⁴ expert organ may, in response to a request from a user, order that the rights holder make available the means needed for a beneficiary to benefit from a protected copyright exemption.⁵⁰⁵ Such obligations are, in other words, imposed on rights holders by the Copyright License Tribunal on a case-by-case basis. According to the Explanatory Memorandum, the Tribunal may determine the conditions of use and instruct rights holders to hand over to the beneficiary either an analogue copy, a TPM-free digital copy, or the codes and keys etc. needed for decryption.⁵⁰⁶ If the rights holder does not comply with such an order within four weeks, the user may lawfully circumvent the over-protective measure. This right to circumvent is a statutorily-based sanction to the individual orders of the Tribunal. Both rights holders and users can bring a case before the Tribunal, and the upfront costs are shared equally by the parties. Decisions of the Tribunal are subject to judicial review. Whether a case can be brought directly before the courts without prior adjudication by the Tribunal is, however, uncertain.

The French Act of 1 August 2006 provides for the creation of a specialized body called *Autorité de régulation des mesures techniques* (ARMT).⁵⁰⁷ The powers

503. See e.g., Gasser (2006), 104.

504. U. Gasser & M. Girsberger, 'Transposing the Copyright Directive: Legal Protection of Technological Measures in the EU, A Genie Stuck in a Bottle', Series No. 10 (Cambridge, Mass: Berkman Publication, 2004), 20, [Gasser & Girsberger, 2004].

505. Consolidated Act No. 763 of Jun. 30, 2006, § 75d(1) cf. (2) available at <www.kum.dk/graphics/kum/downloads/Lovgivning/Lovgivning_Engelsk_site/Consolidated%20Act%20on%20Copyright%202006.pdf>.

506. T. Foged, 'Overview (Denmark)', <www.euro-copyrights.org/index/4/11>, ['Foged, Overview (Denmark)']; Braun (2003), 501.

507. Act No. 2006-961 of 1 Aug. 2006 on Copyright and Related Rights in the Information Society, Art. L. 331-6.

of the ARMT are determined by governmental decree.⁵⁰⁸ According to Article L. 331-13 of the French Code, any beneficiary of a limitation listed in Article L. 331-8 or any organization representing them are entitled to bring a case before the Authority requesting the application of the limitations recognized in the Intellectual Property Code, including the private copy exception. Accordingly, the ARMT has the power to arbitrate disputes and to define the minimal amount of authorized copies depending on the type of work or subject matter protected.

With respect to the issue of interoperability between different technologies, the ARMT has the power to enjoin the person or entity concerned to take appropriate measures to ensure the plaintiff's access to the information necessary for interoperability. According to Article L. 331-8 of the Code, the ARMT possesses both adjudication powers and rulemaking powers. The safeguard of the exercise of the limitations included in the list takes either one of two forms: either the Authority takes action on its own initiative or it reacts to a complaint by a beneficiary of a limitation who is prevented from exercising such limitation.⁵⁰⁹

The Greek Act places a statutory obligation on rights holders to enable the enjoyment of protected copyright exemptions by giving to the beneficiaries 'the measures to ensure the benefit of the exception[s] to the extent necessary and where that beneficiaries have legal access to the protected work or subject-matter concerned'.⁵¹⁰ If rights holders do not take voluntary measures, both rights holders and beneficiaries may request the assistance of one or more mediators selected from a list of mediators drawn up by the Copyright Organization (an official body established by the Ministry of Culture).⁵¹¹ The mediators make recommendations to the parties. If no party objects within one month from the notification of the recommendation, all parties are considered to have accepted the recommendation. Otherwise, the dispute is settled by the Court of Appeal of Athens trying at first and last instance.

The Italian Act provides that, in the absence of voluntary agreement between beneficiaries and right holders, each party can address the existing Standing Consultation Committee on Copyright – a pre-existing committee nominated directly by the Prime Minister every four years – with a request for a compulsory attempt to conciliation. This initiates a process by which the Committee attempts to mediate between the involved parties. If no agreement is reached, the dispute is passed on to

508. Décret No. 2007-510 du 4 avril 2007 relatif à l'Autorité de régulation des mesures techniques instituée par l'article L. 331-17 du code de la propriété intellectuelle (*JO* No. 81 du 5 avril 2007 page 6427 texte n. 45).

509. S. Dusollier, 'L'introuvable interface entre exceptions au droit d'auteur et mesures techniques de protection', *Communication Commerce électronique* 11 (2006): 21–24, [Dusollier, 2006].

510. Article 66A para. 5, Law 3057/2002 (*Official Gazette A/239/10* October 2002) Art. 81, Implementation of the Directive 2001/29 EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society and other provisions. <www.culture.gr/8/84/e8401.html> [Law 3057/2002].

511. Braun (2003), 501.

the regular courts for determination by a judge. The Committee has therefore no autonomous decision-making powers under the established scheme.

The Lithuanian Act⁵¹² imposes a statutory obligation on rights holders to provide beneficiaries of relevant copyright limitations with 'conditions or adequate means (i.e., decoding devices and other), enabling to use legitimately accessible objects [...] to the extent necessary for the users of the rights to benefit from the limitations'.⁵¹³ Rights holders that intend to offer voluntary measures to ensure that users can benefit from relevant copyright limitations, must furnish information to an institution authorized by the Government about (i) the measure(s) to be applied and (ii) other issues related to the implementation of such measure(s), including information about ongoing negotiations between rights holders, users and other interested persons. If negotiations are ongoing, the institution shall have the right to appoint a representative to take part.

If rights holders fail to take such measures as required by the Act, beneficiaries may apply to the Council for mediation. The mediator shall present proposals and help the parties reach an agreement. The mediator may also suggest solutions to the conflict. If so, the parties will have one month to object in writing; otherwise they shall be deemed as having accepted the solution. If the parties do not accept the proposal of the mediator, the dispute shall be settled by the Vilnius regional court.

The UK Act⁵¹⁴ provides that where the application of TPMs prevents a person from carrying out a permitted act⁵¹⁵ in relation to the protected work, that person may issue a notice of complaint to the Secretary of State, who has been given an administrative⁵¹⁶ power to act in this area, as and when required. On receipt of such a complaint, the Secretary of State shall initiate an investigation to establish 'whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists'.⁵¹⁷ If it is established that no voluntary measure or agreement subsists, the Secretary of State may order the rights holder to ensure that the complainant can benefit from the permitted act. Failure to comply with his direction will amount to a breach of statutory duty and is actionable by the complainant or a representative of a body of complainants.⁵¹⁸

With respect to the workings of the complaint procedure before the Secretary of State, the Gowers Review reports that the process is 'slow and cumbersome'. The Review suggests making it easier for users to file notice of complaints

512. Copyright Act of the Republic of Lithuania, as amended by Law amending the law on copyright and related rights, 5 Mar. 2003, No. IX-1355.

513. Lithuanian Copyright Act, Art. 75(1).

514. Copyrights, Designs and Patents Act 1988, as amended by the Copyrights and Related Rights Regulation 2003, <www.legislation.hmso.gov.uk/si/si2003/20032498.htm>.

515. Section 296ZE(1) para. 1 defines 'permitted act' as an act 'which may be done in relation to copyrighted works, notwithstanding the subsistence of copyright, by virtue of a provision of this Act listed in Part 1 of Schedule 5A'.

516. P. Akester, 'Overview (UK)' <www.euro-copyrights.org/index.php/8/13>, [Akester, 'Overview (UK)'].

517. Section 296ZE(3)(a).

518. Section 296ZE(6).

procedures relating to TPMs by providing an accessible web interface on the Patent Office website.⁵¹⁹

4.3.2.2.9. Towards a Pan-European Observatory Body?

Apart from the fact that not all Member States have created an observatory body, the multiplicity of different monitoring bodies across the EU clearly has a disharmonizing effect, which is bound to create legal uncertainty for rights owners and users, especially in respect to cross-border content services, because the outcome of a single case brought before a national authority can vary from one Member State to another. These bodies represent the national legislature's response to the obligation imposed by Article 6(4) of the Directive, so they have generally not been given a rulemaking or monitoring power.

Considering these drawbacks, and in view of the speed at which technological developments and market changes take place in the information society, there might be grounds to institute a monitoring body at the European level.⁵²⁰ Although there would, in theory, be clear advantages to centralizing the monitoring and regulatory functions now performed by a plethora of national authorities, and putting these into the hands of a European body, there are important legal and political obstacles in the achievement of this goal. As we shall briefly explain, the Community legal framework imposes certain constraints on the creation of European Agencies.

Community law makes a distinction between executive and regulatory agencies. The former concept refers to agencies responsible for purely managerial tasks, that is, assisting the Commission in implementing the Community's financial support programmes. Issues related to the creation, legal status, location, tasks, structures, organs of governance, and budget of the executive agencies are dealt with by the Council Regulation laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes.⁵²¹

The concept of regulatory agencies has been defined by the Commission as referring to agencies required to be actively involved in the executive function by enacting instruments, which help to regulate a specific sector,⁵²² including through the preparation, adoption, and implementation of a regulatory framework or of the legislative acts for implementing a regulatory framework.⁵²³ In only limited cases, have European Agencies been given regulatory competence in the form of

519. Gowers Review (2006), s. 4.106.

520. See A. Kreher, 'Agencies in the European Community: A Step Towards Administrative Integration', *Journal of European Public Policy* 4 (1997): 225–246, [Kreher, 1997].

521. Council Regulation No. 58/2003 of 19 Dec. 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programs, *OJ* 2003 L11/1.

522. Communication from the Commission. The operating framework for the European Regulatory Agencies, COM (2002) 718 final (Brussels, 11 Feb. 2002), 3–4.

523. See Report by the Working Group 'Establishing a framework for decision-making regulatory agencies' (group 3a) in preparation of the White Paper on Governance, Work area 3, Improving the executive responsibilities (June 2001), at point 11.

quasi-judicial powers. This is the case, for example, for the Office for Harmonization of the Internal Market and the Community Plant Variety Office, which can take binding decisions on the registration of applications for Community trademark or plant-variety rights and keep public registers of the relevant titles.

By contrast, the vast majority of the existing European Agencies are information agencies and have been apportioned with tasks that do not constitute regulatory powers as such, but consist in assisting the exercise of regulatory powers by the Commission or the Member States. More research should be carried out to determine the possible contours of the powers that could be attributed to a pan-European observatory body in the area of TPMs and copyright law. Another question that would need to be examined is whether the European body should coexist with the existing national bodies or replace them.

4.4. ASSESSMENT AND CONCLUSIONS

The broad formulation of Articles 11 of the WCT and 18 of the WPPT according to which Contracting Parties must provide 'adequate legal protection and effective legal remedies against the circumvention of effective technological measures' has given national lawmakers a range of different options for implementation. Among the observable distinctions in the manner in which Contracting Parties have implemented their obligation to provide 'adequate legal protection against the circumvention of effective technological measures' is the type of circumvention activity that the law prohibits.

All implementing laws examined here prohibit the dealing in circumvention tools, which are deemed to constitute preparatory acts to the actual circumvention of a TPM. However, not all Contracting Parties have chosen to prohibit acts of circumvention as such, unlike the European Union. Another distinction appears with respect to the options followed by the national legislatures concerning the type of TPMs that are protected by the anti-circumvention provisions. More specifically, the Contracting Parties were free to decide whether to protect TPMs that control the use of a work either through access controls or copy controls, or both.

Three approaches can be distinguished among existing anti-circumvention regimes: First, there are laws that do not substantively differentiate between the two types of measures. Second, there are the laws that clearly differentiate, in the sense that both types of measures are protected, but to different extents. Third, some regimes extend legal protection to only one of the two types of measures. The European regime falls under the first category, where the law makes no substantial difference between access controls and copy controls.

Article 6 on the legal protection of TPMs turned out to be one of the most intricate and controversial provisions of the entire Information Society Directive. In view of the overall vagueness of Article 6 of the Information Society Directive, Member States were confronted with the difficult task of interpreting the intention of the European legislature and of putting in place an entirely new form of protection against the circumvention of TPMs. Without proper guidelines, it is not

surprising to observe major variations in the way the Member States have implemented Article 6 of the Directive.

As a result of this lack of harmonization, however, it is clear that the scope of protection afforded to TPMs varies considerably from one country to the next. The vague wording of Articles 6(1) and 6(2) of the Directive leaves a number of questions unanswered. What is an 'adequate legal protection' under both provisions? Who may invoke it – the rights owner, the content provider, or both? When does a device or software have only a limited commercially significant purpose or use other than to circumvent, according to Article 6(2)? How must the commercial significance be evaluated? In the absence of clear indications in the Directive and of satisfactory solutions in the implementing legislation, it is up to the courts to provide some level of legal certainty on these issues. Moreover, the sanctions and remedies attached to the act of circumvention and to the dealing in devices and services differ between the Member States ranging from purely civil remedies to criminal sanctions or to a mix of both.

To constitute an adequate protection under the WCT and the WPPT, the implementing provision must in any case meet the three following criteria: (1) the TPM must be effective to deserve legal protection; (2) it must be applied by authors in the context of the exercise of their rights; and (3) it must restrict, with respect to a work or other protected subject matter, acts that are not authorized by law or by the rights owner. Although the protection afforded under Article 6 of the Information Society Directive probably meets the first criterion, for example, by requiring that the TPM be effective to deserve legal protection, the protection granted under the Directive seems to depart from the criteria set by the WIPO Internet Treaties in two important respects.

First, contrary to the WIPO Treaties, the text of Articles 6(1) to 6(3) nowhere expressly specifies that the TPM must be applied by authors in the context of the exercise of the rights owner's exclusive rights. Moreover, the Directive grants protection against the circumvention of TPMs that control the use of a work through access control mechanisms. Because 'access' is not technically a copyright-relevant act, this protection is akin to recognizing a *de facto* 'right of access' to the benefit of the rights owner. Whether this element of Article 6(3) complies with the requirements the WCT and the WPPT and whether such broad protection is desirable are questions still open for debate. Apparently not all WIPO Contracting Parties share the view that access control technology deserves the same type of protection as copy-control mechanisms, as the examples of Australia (before the implementation of the AUSFTA) and Japan illustrate.

Second, both international instruments establish a clear connection between the legal protection of TPMs and copyright law. Indeed, according to the WCT and the WPPT, to deserve protection, a TPM must restrict the effectuation, with respect to a work, of acts that are not authorized by law or by the rights owner. By contrast, in the words of the Directive, the protection is granted only with regard to TPMs that are 'designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright (...)'.¹

Therefore, we must conclude that the Directive fails to correlate the legal protection of TPMs with acts of circumvention that result in copyright infringement. Conversely, in the absence of such a connection, the protection against the circumvention of TPMs conferred under the Information Society Directive would seem to also extend to acts that are authorized by law, which goes beyond the requirements of the WIPO Treaties. The solution adopted under the Information Society Directive differs, for example, from the solution put forward in Switzerland, where only TPMs preventing or restricting acts that have been statutorily reserved for the right holder enjoy protection against circumvention. Despite the omission of the Directive, significant variations in the implementation also can be observed on this point. Some Member States do require a certain proximity or nexus to copyright infringement for both the act of circumvention and the preparatory acts. Others require a connection only with respect to acts of circumvention and not with respect to preparatory acts, whereas another group of Member States have not established any correlation at all between the protection of TPMs and the prevention of copyright infringement.

To remedy the prevailing legal uncertainty and the lack of harmonization with respect to the legal protection of TPMs, and to align the European provisions with the international obligations under the WIPO Treaties, the European legislature could consider bringing the following four clarifications to the legal framework.

First, following the requirements of the WCT and the WPPT, the prohibition on acts of circumvention pursuant to Article 6(1) of the Directive should find application only in circumstances in which the act of circumvention results in copyright infringement. Such precision would have the added advantage of reducing the risk for abusing TPMs for purposes other than the protection of copyrighted works.

Second, the relationship between Articles 6(1) and 6(2) of the Information Society Directive should be clarified. The prohibition on commercial dealings in devices and services should apply only if the result of such commercial dealings directly leads to acts of circumvention prohibited under Article 6(1). In other words, the dealings targeted by the prohibition of Article 6(2) should be sanctioned only insofar as they constitute preparatory acts to acts of circumvention that give rise to copyright infringement. In such circumstances, the supply of circumventing devices or services that are used to commit an act of copyright infringement could be construed as a special case of contributory liability or as act of 'inducement'.

Third, and as a corollary to the preceding two recommendations, it should be made clear that the protection provided for under Articles 6(1) and 6(2) constitutes an ancillary (*flankierende*) form of protection rather than an exclusive right of the rights owner.

Finally, because the rights owner is not always the one who applies the TPM on the work, it is important that the legal or physical person who applies the TPM on a work with the consent of the rights owner, that is, usually the content provider or distributor, be legally entitled to invoke protection against circumvention.

The use of TPMs must take account of the users' interest in exercising certain limitations on copyright and related rights. Accordingly, Article 6(4) of the Information Society Directive prescribes affirmative action by the rights owners or in its absence, by the Member States, to ensure that users benefit from certain limitations with respect to works protected by TPMs. In the absence of any clear guideline in the Directive on how to accommodate the exercise of limitations on copyright, it is safe to say that no real harmonization has been achieved regarding the implementation of Article 6(4) in the EU.

In some Member States, only individual beneficiaries may claim the application of the limitation, whereas in other countries, interest groups and other third parties also have the right to do so. In yet other Member States, administrative bodies may be entitled to force rights holders to make the necessary means available to beneficiaries of limitations. With respect to the option given to Member States regarding the benefit of the private copying exception, not all Member States have taken advantage of the possibility offered under this provision. In the Member States that have implemented this provision, the number of copies that can be made for private use varies significantly. This decreases transparency for on-demand download content providers and their customers alike.

Article 6(4) of the Information Society Directive is unnecessarily long, convoluted, and obscure. The terms used in the provision are too vague and leave too much discretion to the Member States, as consequence of which a large degree of legal uncertainty prevails in this regard within the EU. A first uncertainty comes from the fact that the Directive nowhere defines what constitutes an 'appropriate measure' by a Member State. Must such an 'appropriate measure' take the form of a statutory provision or can the State leave the parties to resolve the issue before the courts or through alternative dispute resolution mechanisms? In view of the lack of guidelines in the Directive, the Member States have implemented this obligation in different ways, including by establishing a dispute resolution or mediation mechanism, or by creating an executive or administrative authority in order to prevent the abuse of such measures taken by rights owners. A second element of uncertainty is how long a Member State must wait before taking action. Third, what event should trigger the Member State's intervention? Is it the mere passage of time, or must there be an instance of abuse on the part of the rights holder?

In addition, the choice of limitations appearing in the first paragraph of Article 6(4) of the Directive gives rise to controversy. It is indeed remarkable that even the mandatory limitation of Article 5(1) of the Directive on transient and incidental acts of reproduction is not subjected to the obligation to provide beneficiaries of this exception the means to exercise it. Moreover, it is difficult to comprehend why essential limitations based on free speech and other human rights and freedoms, such as those permitting criticism, comment, news reporting, parody, scholarship, or research, are not mentioned in Article 6(4) of the Directive. As a consequence, rights holders have all discretion to override these limitations by using TPMs, which may have a serious impact on the interests of users.

The same holds true for the exclusion in Article 6(4)(4), which rules out the application of this provision to works or other subject matter made available to the

public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. The distinctions in treatment between the different limitations and between works that are made available interactively or not, distinctions for which no convincing justification has been put forward, will inevitably affect the provision's balanced character to the detriment of the users.

The principle underlying Article 6(4) of the Directive should be maintained. There is indeed not much point for a user to be allowed to circumvent a TPM for a lawful purpose, if he does not have the means to do so. However, the European legislature should consider simplifying and clarifying the provision. A revised provision should not distinguish between the types of TPMs for which accommodation must be provided, or between interactive or non-interactive modes of making a work available. A revised provision should identify limitations for the exercise of which accommodation must be provided on solid grounds and in an objective manner. Limitations that reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, those that have a noticeable impact on the Internal Market or concern the rights of European consumers deserve accommodation, whereas other 'minor reservations' do not.

Ideally, the determination of the conditions of application and its practical implementation might be entrusted to a European monitoring or observatory body. Further research should be conducted to define the possible contours of such a European body and to examine whether such a body should coexist with, or rather replace, existing national bodies. Finally, in line with Article 95d of the German Copyright Act, a revised Article 6 should oblige content providers to disclose the scope and characteristics of the TPM protection they use, so as to properly inform consumers.



Chapter 5

Term Extension for Sound Recordings

Arguments that the current term of protection of copyright or certain related rights is either too short or too long periodically make their way onto the political agenda. The controversies about the US Sonny Bono Copyright Term Extension Act (or ‘Mickey Mouse Protection Act’)⁵²⁴ of 1998 have yet to subside, but ten years on, across the Atlantic, the European Commission (EC) has proposed its term extension.⁵²⁵ The proposal of July 2008 envisages extending the term of protection of related rights in phonograms (sound recordings)⁵²⁶ from fifty to ninety-five years.

The Commission’s proposal to adapt the Term Directive comes after prolonged and intensive lobbying by the music industry, which advocated at the national and the European level for a longer term of protection. In the United Kingdom, where the

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524. W.M. Landes & R.A. Posner, *Indefinitely Renewable Copyright* (John M. Olin Law & Economics Working Paper no. 154, 2002), 11–15, [Landes & Posner 2002]. S.J. Liebowitz & S.E. Margolis, *Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects* (AEI-Brookings Joint Centre for Regulatory Studies, December 2003), <ssrn.com/abstract=488085> or DOI: 10.2139/ssrn.488085, [Liebowitz & Margolis 2003]; E. Rappaport, ‘Copyright Term Extension: Estimating the Economic Values’ (Congressional Research Service Report no. 98-144E, 1998), [Rappaport, 1998].
525. See also Commission Staff Working Document accompanying the proposal for a Council Directive amending Council Directive 2006/116/EC in regard to the term of protection of copyright and related rights, Impact Assessment on the legal and economic situation of performers and record producers in the European Union, SEC (2008) 2287 (Brussels, 16 Jul. 2008) [Impact Assessment on Term Extension].
526. An explanatory note on terminology is in order here. Whereas sound recordings are protected in the United Kingdom and other common law countries by ‘copyright’ (in a narrow sense), most countries at the European continent protect sound recordings by ‘neighbouring rights’. At the European level, however, the more neutral term ‘related rights’ (i.e., rights related to copyright) is used. This covers both dogmatic approaches. Therefore, the term ‘related rights’ shall be used in this chapter.

rights to the early recordings of Sir Cliff Richard and the Beatles are about to fall into the public domain, the lobby has probably been the most intense. In 2007, this resulted in the Committee for Culture, Media, and Sport urging the UK government to press the EC to extend the term of protection for the producers of sound recordings from presently fifty years to at least seventy years.⁵²⁷ The British government, however, turned down the proposal.⁵²⁸ In doing so it followed the advice of the Gowers Committee against a term extension.⁵²⁹

At the European level, the term of protection of related rights in phonograms featured prominently in the Staff Working Paper on Copyright Review.⁵³⁰ The issue was also raised by many interested parties that responded to the Staff Working Papers' consultation round (for the purpose of this chapter, hereinafter referred to as: the consultation).⁵³¹ During this consultation, phonogram producers have called for the term of protection of related rights in sound recordings to be extended to ninety-five years, 'in line with the highest international standards'.⁵³² Interest groups representing performers argued that the term of protection should be aligned to that of authors, who enjoy a term of protection under copyright law of life plus seventy years.⁵³³ Others have urged the Commission to consider extending the term of protection of performers' related rights to last for seventy years from the first communication to the public or publication of their recordings,⁵³⁴ or for at least the lifetime of the artists whose performances are embodied on the recordings.⁵³⁵

By contrast, several groups of stakeholders have asked the Commission not to proceed towards a term extension. These stakeholders state that the existing term of

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527. House of Commons, Culture, Media and Sport Committee, 'New Media and the Creative Industries', Fifth Report of Session 2006–2007 (London: The Stationery Office, 2007), </www.parliament.the-stationery-office.com/pa/cm200607/cmselect/cmcomeds/509/509i.pdf>, [UK Culture, Media and Sport Committee, 2007], para. 236.
528. Government Response to the Culture, Media and Sport Select Committee Report into New Media and the Creative Industries, presented to Parliament by the Secretary of State for Culture, Media and Sport, July 2007, <www.cep.culture.gov.uk/images/publications/375268_GovResponse.pdf>, [UK Government Response, 2007].
529. Gowers Review (2006), 48–57. The Gowers Review's advice on term extension was informed by a study commissioned by the HM Treasury and performed by the Centre for Intellectual Property and Information Law (CIPIL), University of Cambridge, 'Review of the Economic Evidence Relating to an Extension of the Term of Copyright in Sound Recordings' (Cambridge: Cambridge University CIPIL, 2006), <www.hm-treasury.gov.uk/d/gowers_cipilreport.pdf>, [CIPIL, 2006].
530. Staff Working Paper on Copyright Review, 10–11.
531. See, for the text of the Staff Working Paper on Copyright Review as well as the contributions to the consultation: <www.ec.europa.eu/internal_market/copyright/review/consultation_en.htm>.
532. Responses to the Staff Working Paper on Copyright Review by BPI (part 1) and various national departments of IFPI.
533. Responses to the Staff Working Paper on Copyright Review by ARTIS GEIE, BECTU and GIART.
534. Response to the Staff Working Paper on Copyright Review by AEPO.
535. Response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

protection of related rights in sound recordings is already more than long enough. Therefore, they would like to see the Commission to maintain the status quo.⁵³⁶

This chapter examines whether the various calls for an extension of the term of protection of related rights in sound recordings are justified or not. It does so by scrutinizing the various arguments for and against term extension, including those put forward by the Commission. Throughout, we consider whether there is sufficient evidence to justify the Commission's proposal. It is, however, not the purpose of this chapter to critically evaluate all aspects of the term extension proposal in detail, which includes accompanying measures such as a fund for session musicians and a 'use it or lose it' rule.

The question whether or not there is reason for extending the term of protection for sound recordings is analyzed both legal and economic perspectives. The arguments for and against can be grouped into three categories: arguments concerning the nature and objectives of related rights (Section 5.1), economic arguments (Section 5.2) and arguments with regard to the competitive position of European Union (EU) right holders in the global market (Section 5.3). This chapter shall be concluded by a final assessment of all of the arguments made (Section 5.4).

5.1. ARGUMENTS BASED ON THE NATURE AND OBJECTIVES OF RELATED RIGHTS

A first category of arguments in favour of term extension relates to the nature and objectives of protection of related rights. The supporters of a term extension assert that an unreasonable discrimination would exist between the duration of protection of related rights in performances and phonograms on the one hand, and that of copyrights in works of authorship on the other hand.

In regard to related rights in performances, it has been argued that performances involve a similar creative activity as the production of copyright works.⁵³⁷ In addition, the proponents of a term extension argue that it is unfair that some of the most famous artists of the twentieth century may have to witness how their first recordings fall into the public domain. It would not respond to the objectives of protection granted to performers to withhold protection from performers during their lifetimes. Not only would it result in a loss of income, performers also worry that once in the public domain, their sound recordings may be changed and exploited by anyone in whatever manner they choose without reference to them.⁵³⁸

536. See, for instance, the responses to the Staff Working Paper on Copyright Review by BAK, BEUC, CRID, EDRI, FIPR & VOSN, EFFI, Foundation for a Free Information Infrastructure, and NAXOS.

537. Response to the Staff Working Paper on Copyright Review by GIART.

538. See in particular the response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

Several stakeholders therefore favour a term that covers at least the performer's life span.⁵³⁹

The Commission, apparently persuaded by these arguments, made them central in its proposal for term extension. The assertion is that a longer term of protection is needed to improve the social situation of performers. The Commission says it aims to close the income gap at the end of the performers' lifetimes, to protect performers from potentially objectionable uses of their performances, and to reduce the discrepancy that currently exists between the protection of performers and authors.⁵⁴⁰

Phonogram producers have advanced a different line of reasoning in favour of a term extension. They argue that they need a longer period of time to gain a proper return on their creative work and investments made. The recording industry maintains that the costs of producing and marketing original material have increased. At the same time, the losses from piracy have considerably reduced the returns on investments in the short to medium term.⁵⁴¹ This argument also lies at the heart of the Commission's proposal, which assumes that record producers need a longer term of protection to generate additional income as a compensation for the decline in record sales and the losses in revenue resulting from peer-to-peer file sharing.⁵⁴² Record producers further claim that the existing terms of protection for related rights are intended to provide them with protection sufficiently long to allow them to recoup the investment made in a recording and also to profit from the commercial success it generates.⁵⁴³ Finally, record producers perceive that they are discriminated against, because film producers in some countries are considered to be authors and therefore benefiting from the longer term of protection of life plus seventy years. Phonogram producers maintain that there appears to be no logical basis for the distinction between themselves and film producers.⁵⁴⁴

Many of the above arguments turn on the supposed similarity between copyright and related rights. The following sections will describe the distinctive features of copyright versus related rights protection; this enables us to value especially the 'discrimination' arguments that phonogram producers and performers advance. More specifically, a closer look is taken at the subject matter and scope of protection (Section 5.1.1) and – in a little more detail – the objectives of protection (Section 5.1.2).

539. There is some support for this argument in legal writing. See e.g., S.M. Stewart, *International Copyright and Neighbouring Rights* (London: Butterworths, 1989), 249, [Stewart, 1989] and F. Brison, *Het naburig recht van de uitvoerende kunstenaar* (Brussels: De Boeck & Larcier, 2001), 94, [Brison, 2001].

540. Proposal Term Extension, 2–4; Impact Assessment on Term Extension, 13 et seq.

541. Responses to the Staff Working Paper on Copyright Review by various national departments of IFPI.

542. Proposal Term Extension, 4–5; Impact Assessment on Term Extension, 18 et seq.

543. Response to the Staff Working Paper on Copyright Review by IFPI.

544. Responses to the Staff Working Paper on Copyright Review by BPI (Part I) and various national departments of IFPI.

5.1.1. SUBJECT MATTER AND SCOPE OF PROTECTION

The concepts of copyright and related rights differ in subject matter and scope of protection. The subject matter of copyright is the ‘work’ of authorship, the author’s intellectual product of creativity and originality (see also Section 2.1.2). The protection is focused on the immaterial intellectual creation, not on the medium in which the work is fixed.⁵⁴⁵ To qualify for protection, it is essential that the author’s work is original.⁵⁴⁶

The subject matter of most related rights, on the other hand, is not the work of the mind, but the interpretation (‘performance’), the sound recording (‘phonogram’), the audiovisual recording (‘film’), and the transmission (‘broadcast’). Although it can generally be said that these objects also exist in immaterial form, it must be understood that it is not the immaterial intellectual creation that related rights protect. Protection is granted for the specific object with a particular economical value. To qualify for protection under related rights, it is not required that an original and creative achievement is made.⁵⁴⁷ The simple fact that a performance is made, that sounds or moving images are fixed on a phonogram or film, or that a broadcast is transmitted, makes these objects eligible for protection.⁵⁴⁸

Another important difference between copyright and related rights lies in the scope of protection. One of the characteristics of copyright is that it protects the author for the various ways in which his or her work can be exploited. The protection granted is not limited to the original form of the work, but typically also covers adaptations, even if the author did not foresee the possibility of such modifications at the time of creation.⁵⁴⁹ The scope of protection of related rights, on the other hand, is much narrower. The rights are unambiguously limited to the particular performances, phonograms, films, and broadcasts made.

545. P.B. Hugenholtz, *Auteursrecht op informatie* (Deventer: Kluwer, 1989), 20–25, [Hugenholtz, 1989]. Note that some states make the protection of the work dependent on whether or not it has been fixed in a tangible medium. In the United Kingdom, ‘copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise’ (Art. 3(2) UK Copyright Act).

546. Hugenholtz (1989), 26–27.

547. D. Vaver, ‘The National Treatment Requirements of the Berne and Universal Copyright Conventions (Part 1)’, *IIC* 17 (1986): 577, 594, [Vaver, 1986]: ‘Performers, sound recorders, broadcasters and the like are neither “authors” nor do they create “literary and artistic works”. Performers, however creative, only present a performance of a work; broadcasters do no better. Sound recorders at best record the performance of a work, or at worst record an event in nature. In either case, their work, however skilled, is essentially mechanical rather than creative’.

548. T.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten* (Zwolle: W.E.J. Tjeenk Willink, 1994), 126–127, at 129, 132 and 448–449, [van Engelen, 1994].

549. Van Engelen (1994), 72–73 and 448.

5.1.2. OBJECTIVES OF PROTECTION

Closely connected with the object and scope of protection are the objectives of protection, which are not identical for copyright and related rights. The objectives of copyright protection are usually explained on the basis of four types of arguments. A traditional argument is based on notions of natural justice. It dates back to the early modern copyright laws of the nineteenth century and finds the most support in civil law or '*droit d'auteur*' countries. The author is the creator of a work that expresses her or his personality. Therefore, the author should be able to decide if and how this work is to be exploited. The author should also be able to prevent any damage or mutilation to his or her intellectual creation; a reason behind moral rights.

The objective of copyright is also explained in terms of economics. The creation of works requires efforts in time and money; an exclusive right is necessary to enable the author (or his or her assignee) to recoup the investment made. This reasoning features predominantly in common law ('copyright') countries especially. A related reason to grant copyright protection is that by rewarding the author's creativity, copyright provides an incentive for the author to create new works. Copyright can therefore contribute substantially to the cultural and social development of society.⁵⁵⁰ A last group of arguments that can be advanced in favour of copyright protection are social arguments. Because copyright guarantees that the author receives a share in the exploitation of his or her works, it is a means of securing an adequate income for the author and, therefore, of securing social independence.

Related rights have their own specific objectives. It should be noted that because related rights do not serve a homogeneous interest, the position of performers differs considerably from that of the other beneficiaries of related rights. Whereas the skills needed to produce a phonogram or film or to transmit a broadcast are mainly of a mechanical and industrial nature, and perhaps belong more appropriately to the sphere of industrial property,⁵⁵¹ performers' skills do not seem to be qualitatively all that different from those of authors of derivative works, such as translators, screenwriters, and other creative 'adaptors'.

However, because performers began to seek protection only after the fruition of technologies that made it possible to record their performances and reproduce them on a larger scale – decades after the author's rights paradigm found international recognition in the Berne Convention – they were too late, and perhaps also too poorly organized, to gain protection as authors. Instead, performers found protection under the Rome Convention of 1961. Hence, their rights were grouped

550. Stewart (1989), 3–4. See also F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context* (Deventer: Kluwer, 1986), 125–145, [Grosheide, 1986].

551. At least, these are productions on the borderline between 'industrial property' and copyright. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986* (London: Kluwer, 1987), 309–310, [Ricketson, 1987]; Ricketson & Ginsburg, 2006, para. 8.112, 507–508.

with those of record producers and broadcasters, although it is generally acknowledged that performers deserve protection on quite different grounds.⁵⁵² This is why in the next subsections we distinguish between the objectives of protection of performers and phonogram producers.

5.1.2.1. Performers

The need for the protection of performers was first perceived when, following the invention of the phonograph, technology made it possible to record performances and reproduce them on a large scale. The new techniques for recording and reproduction were viewed as a serious threat to the livelihood of performers, who feared that the playing of recordings would substitute their live performances. They not only faced the risk for loss of employment because their physical presence was no longer needed; the uses of fixed performances would also yield profits in which performers had no share. Equity demanded that performers be compensated.⁵⁵³ As we have described in Section 3.1.1, at the international level, the Rome Convention of 1961 gave performers a measure of control by guaranteeing them the right to prevent certain uses. They were also granted a remuneration right in respect of the secondary uses of their fixed performances (Articles 7 and 12 RC).

From the outset, the protection of performers in the Rome Convention was based on social objectives.⁵⁵⁴ In addition, because of the similarities between the artistic and creative efforts of performers and authors, it was felt that 'natural justice' – based arguments equally applied to the protection of performers. There was and is little controversy that performers should be able to decide whether and how their (fixed) performances are to be exploited.⁵⁵⁵ The EC recognized these objectives when it first sought to harmonize related rights. It maintained that performers need an adequate legal protection in order to recompense them for their creative achievement. The Commission also raised the argument that performers need exclusive right in their performances to secure an adequate income, which in turn enables further artistic work.⁵⁵⁶

Considering the artistic efforts performers put in their performances, it has been argued that fairness demands that just like authors, performers enjoy moral rights (personality rights).⁵⁵⁷ Many national laws of Member States recognize

552. Ricketson (1987), 869–870; Ricketson & Ginsburg (2006), para. 19.04, 1208–1209.

553. A. Kerever, 'Should the Rome Convention Be Revised and, If So, Is This the Right Moment?', *Copyright Bulletin* 25 (1991): 5–16 at 5, [Kerever, 1991].

554. Report on the Implementation of the Rome Convention, 105.

555. E. Ulmer, *Urheber- und Verlagsrecht* (Berlin: Springer-Verlag, 1980), 515, [Ulmer, 1980].

556. Explanatory Memorandum to the Rental Right Directive, 5–6 and 29. See also recital 7 of the Rental Right Directive (1992); recital 5 of the Rental Right Directive (2006) and recital 10 of the Information Society Directive.

557. Kerever (1991), 6 and 10. The performers' moral rights include rights such as the right to claim paternity of the performance, the right to oppose alteration to the performance, and the right to oppose distortion, mutilation or other impairment of the performance that could be prejudicial to the name, reputation, or dignity of the performer.

certain moral rights of performers.⁵⁵⁸ But neither the Rome Convention, nor any of the EC directives, protects the performer's moral rights. Only the WPPT (Article 5) grants performers:

the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

5.1.2.1.1. The Social and Moral Claims of Performers

In light of the objectives of related rights for performers as described previously, one could argue that any term of protection should cover at least the lifetime of the performer. This is what right owners have argued in the consultation process. Because average life spans have increased, the term of fifty years as is currently provided for, is too short. The average life expectancy in the EU has increased by only 3.0 years (men) and 2.2 years (women) between 1995 and 2005;⁵⁵⁹ by itself this does not justify an extension of the term of protection. But because the life expectancy currently is 75.8 years for men and 81.9 years for women,⁵⁶⁰ one could indeed argue that the fifty-year term may not always cover the lifetime of a performer. This is certainly true for performers who start their career at an early age or who live longer than average.

Proponents of a term extension argue that a fifty-year term causes recordings to fall into the public domain during the performer's lifetime. As a result, the performer would not only miss out on income, but also lose control over how his or her recordings will be used. Performers are particularly concerned that their recordings may be altered and be used, for example, in advertisements for products and causes that they disapprove of or in films whose subject matter they find distasteful.⁵⁶¹

558. Today, the majority of Member States grant performers moral rights protection at least to some extent. See e.g., Art. 34 Belgian Copyright Act; Art. 70 Czech Copyright Act; Art. 5 Dutch Neighbouring Rights Act; Art. L. 212-2 French Copyright Act; Arts 74–76 German Copyright Act; Art. 75 Hungarian Copyright Act; Arts 81 and 83 Italian Copyright Act; Arts 309–319 Irish Copyright Act; Art. 86 Polish Copyright Act; Art. 113 Spanish Copyright Act. Even in the United Kingdom, where performers were declined statutory moral rights protection for a long time, they now enjoy moral rights protection since 1 Feb. 2006, when The Performances (Moral Rights, etc.) Regulations 2006 (Statutory Instrument 2006 no. 18) came into force. The aim of these regulations was to amend the UK Copyright Act with view to giving effect to Art. 5 WPPT.

559. Source: Eurostat demographic data – Life expectancy at birth. For men, the life expectancy increased from 72.8 years (1995) to 75.8 years (2005). For women, the life expectancy increased from 79.7 years (1995) to 81.9 years (2005). Note that the figures for 2005 are provisional.

560. *Ibid.*

561. See in particular the response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

Thus, what performers want to achieve with an extension of the existing terms of protection is both that their income is ensured throughout their retirement years and that their moral interests in their performances are safeguarded throughout their lives. This raises some fundamental questions. For one, it is questionable whether a term extension would in practice actually benefit the majority of performers or rather just the specific group of bestselling artists. In Section 5.2.2, the question of under which circumstances performers benefit from a term extension shall be dealt with more extensively. It far from certain that revenues from related rights would provide the average performer with a stable source of future income or indeed enable him or her to continue to earn an adequate income after retirement. If so, the question must be raised whether there would not be other, more sophisticated means to achieve this goal (e.g., social security plans), rather than extending the term of protection as what in effect would in all likelihood be a retirement policy for a small group of performers.⁵⁶²

Second, the more general question is whether making *economic* rights of performers last longer is the appropriate way to protect their *moral* interests. Longer economic rights would indeed enable performers to control the use of their recorded performances in films or advertisements that they disapprove throughout their lives. But it is highly debatable that an extension of economic rights to protect the performers' moral interests would actually outweigh all the costs associated with a term extension. These costs will be discussed in more detail in Section 5.2.1 below.

There are other, less far-reaching options to ensure that performers have reasonable means to protect their reputation and the integrity of their work. The obvious solution would be to grant to performers a lifetime of harmonized moral rights. If performers would have the right to oppose certain distortions, mutilation or other impairment of their performances that is prejudicial to their reputation or dignity, they would have the legal means to prevent their recordings to be used in dishonourable or distasteful productions, like pornographic movies, or in commercials they would not want to be associated with. Since moral rights in most Member States cannot be waived, or only partially, they provide performing artists with a larger measure of control than economic rights. Performers routinely assign the latter to phonogram producers when they enter into a recording deal.⁵⁶³

Interestingly, the European Commission dismissed the moral rights option in its Impact Assessment. It did conclude that moral rights would benefit performers, by allowing them to restrict objectionable uses, improve their social standing and

562. In the Impact Assessment on Term Extension this question is not addressed. In the Term Extension Proposal 2008 (at 10) the Commission acknowledged that social measures (like subsidies and social security schemes) could also alleviate subsistence problems of performers, but rejected such policy options.

563. P.B. Hugenholtz & L. Guibault, *Auteurscontractenrecht: naar een wettelijke regeling?* (Amsterdam: Instituut voor Informatierecht, 2004), <www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf>, [Hugenholtz & Guibault, 2004], 24–25; see also Guibault & Hugenholtz (2002).

signal the recognition of their artistic contributions on a par with authors.⁵⁶⁴ But it went on to argue that granting moral rights would not protect performers during their entire lifetime, thereby ignoring the possibility to grant moral rights for life rather than for fifty years.⁵⁶⁵ In the end the Commission dismissed the option because moral rights would not bring financial benefits to performers and record producers.⁵⁶⁶ The reference to the financial interests of record producers seems telling; it implies the real objective of the term extension is to further the financial interests of record companies, rather than protect performers.

5.1.2.2. *Phonogram Producers*

Like performing artists, phonogram producers also first felt the need for protection when the new techniques for recording and reproduction enable third parties to use and exploit recordings. The commercial production of records required considerable time, skill, effort and money. Because of high upfront investments, phonogram producers could be seriously prejudiced by a situation in which others could very easily, and without much additional cost, reproduce their phonograms.⁵⁶⁷ The record companies therefore demanded protection ‘against piracy, unfair or parasitical competition, and, in general, all acts whereby a third party derives undue commercial profit from their investments’.⁵⁶⁸ Phonogram producers have found this protection, together with performers and broadcasters, in the Rome Convention,⁵⁶⁹ and as we have seen in Chapters 2 and 3, at the European level, initially in the Rental Right Directive.

Phonogram producers reasoned that apart from organizational and technical skills, the making of a phonogram also involved artistic skills, at least where it concerned recordings of high quality.⁵⁷⁰ It is, however, not the phonogram producer – the corporation – that actually makes the artistic contribution to the sound recording, but rather the persons who direct the recording and operate the equipment. These include the persons who capture and electronically process the sounds (the sound engineer or sound producer) and the person who actually compiles and edits the sounds (the sound editor).⁵⁷¹ What phonogram producers

564. Impact Assessment on Term Extension, 41–42.

565. See e.g., Art. 76 German Copyright Act.

566. Term Extension Proposal 2008, 7.

567. W. Mak, *Rights Affecting the Manufacture and Use of Gramophone Records* (Den Haag: Nijhoff, 1952), 144, [Mak, 1952].

568. Kerever (1991), 8.

569. See Arts 10 and 12 RC, in particular.

570. E. Ulmer, *Der Rechtsschutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendegesellschaften in internationaler und rechtsvergleichender Sicht* (München: Beck, 1957), 11, [Ulmer, 1957].

571. H. Cohen Jehoram, ‘The Nature of Neighboring Rights of Performing Artists, Phonogram Producers and Broadcasting Organizations’, *Columbia – VLA Journal of Law and the Arts*, 15 (1990): 75–91, [Cohen Jehoram, 1990], 88; M.B. Nimmer & D. Nimmer, *Nimmer on Copyright* (New York: LexisNexis Matthew Bender, loose-leaf updated 2008), § 2.10[A][2][b], [Nimmer & Nimmer, 2008].

wanted was not primarily protection for their personnel, but for the investments made to deploy recording equipment and to employ their artistically and technically skilled personnel.⁵⁷²

The protection of phonogram producers by means of related rights is therefore based on purely economic objectives, aimed at safeguarding the investments in the production of their sound recordings ('*Leistungsschutz*'). Phonogram producers enjoy related rights in recognition of the technical and organizational skills and economic investments that the production of their phonograms requires.⁵⁷³

Given that the related rights of phonogram producers are based on an investment rationale, these rights have perhaps more in common with the sui generis database right or rights of industrial property, such as design rights, semiconductor topography rights and plant-variety rights. Interestingly, whereas all these rights share the same 'investment' rationale, they run for considerably shorter terms,⁵⁷⁴ the threshold required for protection is generally higher.⁵⁷⁵ For example, whereas the sui generis database right requires 'substantial investment' in a database, the phonographic right requires no more than the making of a sound recording, regardless of the costs involved.⁵⁷⁶ Compared with other intellectual property rights with similar objectives, therefore, one may argue that the current term of protection of related rights for phonogram producers is already very long.

5.1.2.2.1. The Nature of the Investment Protected

Phonogram producers argue term extension is necessary because they need more time to recoup or to gain a proper return on their investments in producing and marketing sound recordings.⁵⁷⁷ This raises the question of what kind of investment the regime of related rights for phonogram producers seeks to protect. The EC

572. Ulmer (1957), 11.

573. W. Nordemann et al., *International Copyright and Neighbouring Rights Law: Commentary with Special Emphasis on the European Community* (Weinheim: VCH, 1990), 340–341, [Nordemann et al., 1990].

574. The terms of protection vary from ten years for semiconductor topography rights (Art. 7(3) Semiconductor Directive) to fifteen years for the sui generis database right (Art. 10 Database Directive) to maximum five terms of five years for design rights (Art. 10 Designs Directive; Art. 12 Community Designs Regulation), to twenty-five to thirty years for plant-variety rights (Art. 19 Community Plant Variety Regulation).

575. For example, the semiconductor topography right requires that the topography is the result of its creator's own intellectual effort and that the topography is not commonplace in the semiconductor industry.

576. Obviously, the investments involved in industrial productions are generally much higher than the investments involved in the production of phonograms. See, for example, P.B. Hugenholtz, 'Juridische bescherming van chips', *BIE* 53 (1998): 127–134, at 128, [Hugenholtz, 1985]; L. Radomsky, 'Sixteen Years after the Passage of the U.S. Semiconductor Chip Protection Act: Is International Protection Working?', *BTLJ* 15 (2000): 1049–1094, at 1051, [Radomsky, 2000].

577. Responses to the Staff Working Paper on Copyright Review by IFPI and various national departments of IFPI.

directives provide little guidance, except that it concerns ‘investments required particularly for the *production* of phonograms’.⁵⁷⁸

Legal writers express different opinions on what exactly these investments are. Some argue that they concern in particular the investments in the recording equipment as well as in the salaries of the personnel making the sound recording.⁵⁷⁹ These are the investments directly related to the recording process; the ‘production costs’ in a narrow sense. Others argue that the relevant investment concerns the ‘production costs’ in a broad sense. These would include the human and material (including organizational and technical) investments connected to the first technical sound fixation (e.g., recording and production costs, including studio fees, studio musicians, sound engineers, etc.) as well as the time, effort, and money spent to conclude the necessary contracts and to make the selection of the tracks.⁵⁸⁰

Arguably, because all of these achievements are represented in the final product, that is, the manufactured phonogram that forms the subject matter of related rights protection (see Section 5.1.1 above),⁵⁸¹ the purpose of related rights is not to protect phonogram producers for other expenditures, such as marketing and promotion costs, the costs involved in scouting and developing new talent (artist and repertoire, hereinafter: A&R), the costs of production of music video clips, public relations, tour support, etc. In fact, because returns on investment do not automatically occur, it is obvious that producers of phonograms must also invest in developing their business (i.e., the scouting of new talent) and in marketing and promotion to sell their products. These costs would thus be part of the risk that every entrepreneur must take.⁵⁸²

Whatever may be the precise nature of the investment that related rights for phonogram producers seek to protect; these rights are clearly meant to serve as incentives to invest in the production of sound recordings. Presumably, absent

578. See recital 7 of the Rental Right Directive (1992); recital 5 of the Rental Right Directive (2006). Emphasis added.

579. Ulmer (1957), 11; Ulmer (1980), 515.

580. M. Vogel, in G. Schricker, *Urheberrecht: Kommentar* (München: Beck, 1999), 1237–1293 at 1280, [Vogel, 1999]. See also Nordemann et al. (1990), 362. Compare recital 7 of the Database Directive which states that the relevant investment in the making of databases includes ‘the investment of considerable human, technical and financial resources’. These resources are akin to the technical, organizational and economic achievements protected by related rights. See M. Leistner, ‘Verwandte Schutzrechte im europäischen Urheberrecht: Eine Untersuchung am Beispiel des Datenbankherstellerschutzes’, in Ganea, Heath & Schricker (2001), 506–510, [Leistner, 2001].

581. Vogel (1999), 1280.

582. An additional argument for this interpretation can be found in the ‘substantial investment’ required to obtain the sui generis database right. This covers the investment in the creation of a database as such. See ECJ British Horseracing Board, para. 30. Hence, the investment must be directly related to the making of the database and not, for example, to the marketing or promotion thereof. See E. Derclaye, ‘Database *sui generis* Right: What Is a Substantial Investment? A Tentative Definition’, 36 *IIC* (2005): 2–30, at 15–16, [Derclaye, 2005] and the Belgian court case *Spot (cinebel.be) v. Canal Numédia (allocine.be)*, District Court (*Tribunal de première instance*) (Brussels, 18 Jan. 2002), <www.droittechnologie.org/jurisprudences/civil_bruelles_180102.pdf>.

these exclusive rights, record producers would not undertake these activities. The rationale of related rights for phonogram producers is thus to *recoup* the investments made in the production of phonograms, not to gain a proper return on these investments.⁵⁸³ Although rights in sound recordings have obvious economic value, as is clear from the valuation of transferred or licensed catalogues as intangible assets on the balance sheets of record companies, their rationale is clearly not to create economic value for the companies as such.

5.1.2.2.2. The Alleged Comparative Advantage of Film Producers

In arguing for a longer term of protection, phonogram producers regularly compare their position to that of film producers. In addition to related rights protection (pursuant to the Rental Right Directive), film producers also benefit from copyright protection. This is because the national laws of the Member States contain various statutory mechanisms that give the film producer a measure of control over the rights of film authors (e.g., screen writers, directors, etc.).⁵⁸⁴ Consequently, film producers also benefit from the much longer terms of copyright protection. Phonogram producers have argued that this amounts to unfair discrimination. On a general note, one could ask why the producers of sound recordings compare themselves to film producers, rather than to other producers who invest in the creation of content, such as publishers or sports organizers.

How justified is the comparison of phonogram and film producers? If we consider why the law tends to concentrate copyright ownership in the hands of the film producer, we see that the sheer number of contributors – who have a potential claim in the intellectual property rights in the film – is the primary reason for doing so. Film producers are given rights to facilitate exploitation, avoid multiple claims of ownership in films, and circumvent the difficulties in tracing all the different authors of the film.⁵⁸⁵ To concentrate the exclusive exploitation rights in the hands of a single right holder serves legal certainty. The film producer

583. See also recital 5 of the Rental Right Directive (2006), which clearly speaks of the possibility for *recouping* the investments required for the production of phonograms.

584. In some countries, film producers have been granted film copyright, and are regarded, together with the principal directors, as co-owners of copyright in the film (Art. 9(2)(a-b) UK Copyright Act; Art. 21(b) Irish Copyright Act). Other countries have established a system of statutory assignment of economic rights in films in favour of the film producer (Arts 38–40 Austrian Copyright Act; Art. 45 Italian Copyright Act). Finally, there are countries in which film producers are deemed to have been assigned or licensed, by way of a statutory presumption, the economic rights that were originally vested in the authors of an audiovisual work (Art. 18 Belgian Copyright Act; Art. L. 132-24 French Copyright Act; Arts 88–89 German Copyright Act; Art. 24 Luxembourg Copyright Act; Art. 45d Dutch Copyright Act; Arts 88–89 Spanish Copyright Act). See also P. Kamina, *Film Copyright in the European Union* (Cambridge: Cambridge University Press, 2002), 164–166, [Kamina, 2002].

585. Kamina (2002), 32–33 and 138.

and intermediaries further down the chain (film distributors, etc.) can rely on the film producers' right to license or sell all required exploitation rights in the film.⁵⁸⁶

Similar problems of rights management do not usually occur with regard to the exploitation of phonograms. In films, producers have to deal with a large number of authors and performers, which may run into the hundreds for a single motion picture. By comparison, contracting with right holders in sound recordings is a relatively simple and straightforward task, because normally only a handful of performers contribute to a single phonogram. Furthermore, because it is common practice that performers, when entering into recording contracts with phonogram producers, assign part or most of their related rights to the phonogram producers, the economic rights often are already in the hands of the phonogram producer.⁵⁸⁷

In short, even if the roles of phonogram and film producers may be somewhat comparable in an economic sense, there appears to be no reason to provide for a similar treatment of both categories of producers under copyright law. Seen against this background, it is difficult to argue that there currently exists an unreasonable discrimination between the protection of phonogram producers and film producers.

5.2. ECONOMIC ARGUMENTS

European copyright and related rights law are to a considerable extent based on economic considerations. Intellectual property rights are perceived as an instrument to help develop and foster the European information economy. Works of authorship, phonograms, and performances are progressively regarded as products and services for which markets have to be created.⁵⁸⁸ This is particularly obvious in the case of related rights of phonogram producers, a field that is dominated by economic reasoning rather than natural rights considerations, which still are an important part of continental-European copyright theory.

A legal-economic analysis of the question of term extension for related rights in sound recordings involves balancing the different economic arguments in favour and against an extension and assessing to what extent they promote the objectives behind the protection of related rights.⁵⁸⁹ As established in Section 5.1.2, the objective of protection of related rights for phonogram producers is clearly to protect the investments needed for making a sound recording, thereby creating incentives to invest. It follows that, in the case of phonogram producers, an extension of the existing term can be justified only if it can be demonstrated that a term of fifty years is insufficient to recoup the investments made in the production of their sound recordings. In the case of performers, we have seen that additional

586. M. Salokannel, *Ownership of Rights in Audiovisual Productions: a Comparative Study* (Den Haag: Kluwer Law International, 1997), 102, [Salokannel, 1997].

587. Hugenholtz & Guibault (2004), 24–25.

588. See Information Society Directive, recital 2: 'Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content'.

589. Landes & Posner (2002), 5; Rappaport (1998), 1.

arguments apply, including social arguments and arguments based in natural rights considerations.

From an economic perspective, the term of protection ideally reflects a balance between the incentives to invest in performances, phonograms or films, and the costs of such protection.⁵⁹⁰ Landes and Posner, two leading writers on the economic aspects of the duration of intellectual property rights, summarize the question at hand as follows:

the optimal term of copyright protection is determined by balancing at the margin of the incentive effects of a longer term against both the administrative and access costs arising from the public goods aspect of intellectual property.⁵⁹¹

Stronger protection will not automatically lead to more creation, innovation, and thriving markets; it can also impede the same.

The economic analysis in this section will weigh the benefits of a term extension against the costs for society, including competitors, consumers, and public welfare in general.⁵⁹² After the following introduction of some basic economic concepts that are relevant when discussing term extension, the economic analysis in Section 5.2.2 examines the actual economic effects of a term extension for phonogram producers and performers, on the one hand, and for users and consumers of sound recordings, on the other hand.

5.2.1. TERM LIMITATION AND ECONOMIC RATIONALE

To fully appreciate the different economic arguments that are made in favour of and against an extension of the term of protection for sound recordings, one must keep in mind the basic economic theory behind exclusive rights in sound recordings. We will sketch this first.

5.2.1.1. A Temporary Monopoly

Related rights in sound recordings allow their producers to control temporarily the exploitation of a sound recording, such as the making of copies and the distribution or broadcasting thereof. Without prior authorization of the right holder, which often involves payment of a license fee, a protected phonogram cannot be used

590. N. Elkin-Koren & E. Salzberger, *Economic Analysis of Intellectual Property*, Draft November 2005 (unpublished), 122, [Elkin-Koren & Salzberger, 2005]; R. Bard & L. Kurlantzick, *Copyright Duration, Duration, Term Extension, The European Union and the Making of Copyright Policy* (San Francisco: Austin & Winfield, 1999), 23, [Bard & Kurlantzick, 1999]; Landes & Posner (2002), 5; R. Watt, *Copyright and Economic Theory: Friends or Foes?* (Cheltenham: Edward Elgar Publishing Limited, 2000), 13, [Watt, 2000].

591. Landes & Posner (2002), 5; Rappaport (1998), 1.

592. Elkin-Koren & Salzberger (2005), 64; Bard & Kurlantzick (1999), 22; Landes & Posner (2002), 5.

or copied by anyone. The effect is that related rights remove some of the public good characteristics⁵⁹³ that sound recordings are usually assumed to have. In so doing, related rights address the typical free-rider problem of public goods,⁵⁹⁴ and allow phonogram producers to sell their phonograms at prices that are higher than the marginal costs that they would be able to charge under perfectly competitive conditions. This again allows them to recoup their investments for producing a sound recording.

As in any monopoly situation, granting to phonogram producers exclusive rights with regard to the sound recordings they produce affects the position of other market parties, notably competitors and consumers (see the next section). The challenge in finding the optimal term of protection is to determine the optimum between giving one party the right to exclude others from the use of a principally non-rivalrous and non-exclusive good, and the costs of restricting its use for society.⁵⁹⁵ Or, in simpler words, to identify the point at which the costs of an extension would outweigh its benefits, that is the realization of the objectives for which related rights were granted in the first place (see Section 5.1.2).

5.2.1.2. *Costs Associated with a Term Extension*

Extending the existing term of protection for sound recordings will involve costs for consumers, competitors, and innovators, as well as costs for society as a whole.

5.2.1.2.1. *Costs for Consumers*

Related rights protection enables right holders to charge a price higher than would be possible in a fully competitive market. It results in higher costs for consumers and in potentially lower production volumes, compared to a competitive market situation without monopoly-like positions. Extending the term of protection means allowing excess pricing and inefficient allocation for a longer period of time.

593. A good qualifies as a public good if it is non-rivalrous and non-exclusive. Non-rivalrous means that the goods once created, can be used by everyone without depleting its quantity or quality. Non-exclusive means others cannot (easily) be excluded from 'consuming' the good (e.g., by copying it).

594. An interesting question is what influence the introduction of Digital Rights Management technologies has on the public goods problem, and thereby, indirectly, on the economic justification of an extension of related rights protection. See e.g., Elkin-Koren & Salzberger (2005), 130 et seq. (about the question whether DRM protected content is still a public good). DRM allows producers to prevent others from unauthorized copying or redistribution and thereby enforce exclusivity. Arguably, in such a situation, the granting of additional legal rights just adds another layer of protection, and it is debatable whether additional or longer protection is actually needed.

595. Landes & Posner (2002); Rappaport (1998).

5.2.1.2.2. Costs for Competition and Innovation

The temporary monopoly not only allows the original right holder to control prices, but also transaction costs, distribution channels and certain secondary uses. As competition not only takes place on price, but also on the basis of quality and service, a term extension might put a break on innovation in regard to new distribution models (online stores, pay-per-listen, distribution via social network sites, and legal peer-to-peer networks, etc.), new technologies for releasing older recordings, novel ways of marketing of back catalogue repertoire, etc. This may affect competition not only in the market for sound recordings, but also in markets for secondary uses (such as the making of films, broadcasts, new recordings, etc.). Extending the term of protection would prolong this situation.

5.2.1.2.3. Costs for Society

Restricted access to sound recordings can be the result of inefficient allocation of existing sound recordings and a reduction of the public domain. Both would be perpetuated by a term extension.

The public domain can be described as a 'sphere in which contents are free from intellectual property rights'.⁵⁹⁶ Everyone is free to use material in the public domain without having to obtain prior authorization or to pay royalties.⁵⁹⁷ The public domain serves as a valuable (re)source for researchers, educational institutions, and creators, who are inspired by older material or use it in new creations (e.g., samples of recordings used in remixes).⁵⁹⁸ Public domain material is also used as input to innovative content distribution models, both commercial and not for profit. Examples of models that draw heavily on public domain material include the Penguin Classics series, Project Gutenberg,⁵⁹⁹ Google Earth,⁶⁰⁰ the Europeana project,⁶⁰¹ and various archives for classical music and performances, sheet music,

596. P. Samuelson, 'Digital Information, Digital Networks, and The Public Domain', draft paper 2001, <www.law.duke.edu/pd/papers/samuelson.pdf>, 80–107, [Samuelson, 2001], 82. See generally L. Guibault & P.B. Hugenholtz, *The Future of the Public Domain* (The Hague: Kluwer Law International, 2006), [Guibault & Hugenholtz, 2006].

597. Note that protected subject matter, such as a phonograms, can be subject to a number of cumulative exclusive rights with different expiry dates. As long as the last exclusive right has not expired, the material is only partly in the public domain.

598. See e.g., M.D. Birnhack, 'More or Better? Shaping the Public Domain', in *The Future of Public Domain*, eds L. Guibault & P.B. Hugenholtz (The Hague: Kluwer Law International, 2006), 59–86, at 85, [Birnhack, 2006]; Y. Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, paper given at the Conference on the Public Domain (Duke Law School 9–11 Nov. 2001), <www.law.duke.edu/pd/papers/benkler.pdf>, 203, [Benkler, 2001].

599. Project Gutenberg: <www.promo.net/pg/>.

600. Google earth: <www.earth.google.com/>.

601. Europeana: <www.europeana.eu/portal/>.

choral music, moving pictures, historical photographs, etc.⁶⁰² The public domain thus is a valuable reservoir of diverse contents from a variety sources and hence a driver of cultural, social, and political diversity.⁶⁰³ Extending the scope or duration of protection postpones the moment at which material will fall into the public domain. Additional social costs are the creations that have never materialized because of transaction costs or lack of access to material during the period of prolonged protection.⁶⁰⁴ This is why some scholars are of the opinion that the fact that a particular phonogram enjoys lasting popularity is actually one more reason to release it into the public domain sooner rather than later, so that the public can make full and effective use of it.⁶⁰⁵

A term extension could result in a situation in which less existing material will be made available than without an extension. This may be because of higher transaction costs or because the original right holder refuses to license the material to competitors. The public domain would thus be further diminished, and the extension would constitute an additional cost.

5.2.1.3. *The Incentive Paradigm*

The incentive paradigm is described as the ‘main contemporary law and economics framework for the analysis of intellectual property’.⁶⁰⁶ The paradigm says that related rights allows phonogram producers to recoup both the initial investment and the marginal production costs, and thereby creates incentives to invest and produce. Proponents of a term extension argue that consequently, any extension of the term of protection is good because it increases the incentives to invest in and produce new phonograms or performances.

It is important to be aware that, from an economic point of view, there is no solid evidence yet whether and to what extent intellectual property rights generally, and related rights specifically, actually constitute necessary incentives to promote,

602. See e.g., the Archive of Contemporary Music, New York City (<www.arcmusic.org/>); British Library National Sound Archive (<www.bl.uk/collections/sound-archive/nsa.html>); Harvard University, Archive of World Music (<www.hcl.harvard.edu/loebmusic/awm-about.html>); Oesterreichische Akademie der Wissenschaft: Phonoarchiv (<www.pha.oeaw.ac.at/home_e.htm>); Queens College, Louis Armstrong Archives (<www.satchmo.net/>); Rutgers University, Institute of Jazz Studies (<www.libraries.rutgers.edu/rul/libs/jazz/jazz.shtml>); Yale University Historical Sound Recordings Collection (<www.library.yale.edu/musiclib/collections.htm#hsr>); The Classical Archive (<www.classicalarchives.com/>); and Public Domain Music (<www.pdinfo.com/>).

603. See Birnhack (2006), 85; Benkler (2001), 203.

604. See Bard & Kurlantzick (1999), 60; D.S. Karjala, ‘Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study’, *EIPR* 16 (1994): 531–537, 533, [Karjala, 1994]. Critical Liebowitz & Margolis (2003), 10, pointing to the fact that e.g., fair use exceptions (limitations) would provide sufficient relief from the restrictions imposed by exclusive rights control.

605. Bard & Kurlantzick (1999), 60; Karjala (1994), 533.

606. Elkin-Koren & Salzberger (2005), 122; Bard & Kurlantzick (1999), 21; Landes & Posner (2002), 4.

innovate, create, and invest in information goods and services.⁶⁰⁷ It is not even clear whether the granting or extending related rights protection is the optimal and most proportionate means to stimulate investment.⁶⁰⁸ An illustrative example is the Database Directive. In its review of the Directive, the European Commission acknowledged there is no evidence that the introduction of the *sui generis* right for non-original databases has indeed led to an increase in the production and distribution of databases in the EU, or improved competitiveness. The Commission has expressed doubts as to whether the introduction of the *sui generis* rights has achieved its original objectives.⁶⁰⁹

Any assessment of the impact of an extension on incentives is further complicated by the fact that in a dynamic and unpredictable sector such as the music sector, it is extremely difficult to foretell which material will still sell after fifty, seventy, or ninety years.

In the context of the incentive paradigm, one must distinguish between incentives to create or produce new material from incentives to improve, maintain, and distribute already existing material. Although the importance of the first aspect – incentives to create or produce – is generally accepted, the second argument is often overlooked in law and economics discussions. This aspect plays, however, a particularly important role when discussing retroactive extension, that is, extending the term of protection for pre-existing subject matter.⁶¹⁰ Extending the duration of protection for existing phonograms cannot as such provide incentives to produce new phonograms.⁶¹¹ Still, the (controversial) argument is sometimes advanced that a term extension might create efficiencies by promoting better management, maintenance, or distribution of existing catalogues. It could, for example, incentivize the digitization of material; creation of metadata; investment in multimedia

607. Bard & Kurlantzick (1999), 60; S.E. Sterk, 'Rhetoric and Reality in Copyright Law', *Michigan Law Review* 95 (1996): 1197–1249, at 1213–1215, 1220–1222, 1225–1226, [Sterk, 1996]; Karjala (1994), 533; and extensively Elkin-Koren & Salzberger (2005), 89 et seq.

608. Elkin-Koren & Salzberger (2005), 112 et seq. Positive: F.M. Scherer, 'The Innovation Lottery', in *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, eds C.R. Dreyfuss, D. Zimmerman & H. First (Oxford: Oxford University Press, 2001), 3–21, at 15 et seq., [Scherer, 2001]. Critical: M.A. Lemley, 'Property, Intellectual Property, and Free Riding', *Texas Law Review* 83 (2005): 1031–1075, at 1060–1062, [Lemley, 2005]; C. Nguyen, 'Toward and Incentivized but Just Intellectual Property Practice: The Compensated IP Proposal', *Cornell Journal of Law and Public Policy* 14 (2004): 113–143, at 113 et seq., [Nguyen, 2004]. Apart from purely economical reasoning, another important aspect that in the end will have to weigh in the analysis is whether the rationale behind related rights is to promote profit maximization or reasonable recoupment of investment (we support the latter position, see the discussion in Section 5.1.2).

609. Report on the Database Directive, 24 et seq.

610. In this sense also Liebowitz & Margolis (2003), 4.

611. W.M. Landes & R.A. Posner, *The Political Economy of Intellectual Property Law* (Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies, 2004), 17: 'The possibility of retroactive legislation is a candle to rent-seeking moths.' Rent-seeking refers in this context to the process of using political processes (e.g., in the form of lobbying) to gain unilateral economic advantage [Landes & Posner, 2004].

products, digital archives, and other derivatives; and investment in distribution models and/or the provision of value added services.⁶¹²

5.2.2. ECONOMIC ANALYSIS

Bearing in mind what was said about (law and) economics theory earlier, the following section analyzes how a term extension could actually help to achieve the objectives of related rights protection and what the costs of a term extension are likely to be. First, the effects of a term extension on phonogram producers' ability to finance their activities and recoup their investment is analyzed, followed by an evaluation of the likely effects on their ability to invest in the development of new talent and repertoire. Second, the impacts of a term extension on access, cultural diversity, competition, and innovation are assessed, with specific respect to the effects of digitization. Third, an overview is given of the types of costs associated with a term extension. Finally, the potential effects of a term extension on performing artists, in particular on their ability to receive an adequate income, are analyzed.

The analysis was based on in-depth desk research, extensive dialogues with affected stakeholders, and – as far as it was available and accessible – data about the market for sound recordings. As for many aspects of the analysis, no reliable empirical data were available. Stakeholders arguing in favour of a term extension could not support their claims with such data. Where appropriate, therefore, estimates by stakeholders or experts were used to illustrate certain points.

5.2.2.1. *Phonogram Producers' Ability to Recoup Investment*

As observed in Section 5.1, the goal of related rights for phonogram producers is to enable them to recoup their investment and to protect them against piracy and unfair or parasitical competition. Against this backdrop, a term extension would make sense economically if the current term of fifty years is insufficient for phonogram producers to *recoup* their investment. This is not the same as gaining any return on investment. The objectives of protection are satisfied once the investment is recovered. So from the economic point of view, the term of protection should not be calculated to allow the producer additional returns beyond cost recovery, that is, to guarantee the maximum benefits of a recording's commercial success.⁶¹³ This section examines whether record producers would need a longer term of protection to recoup their investment only. To evaluate this need requires an

612. Liebowitz & Margolis (2003), 4 et seq.; critical Elkin-Koren & Salzberger (2005), 109 et seq., 113 et seq., with further references.

613. Nevertheless, the proponents of a term extension argue that '[p]roducers need a longer period of time to have a return on their creative work and investments'. See the responses to the Staff Working Paper on Copyright Review by AFYVE, UPFR, LaMPA and many others.

assessment of: (i) the average investment necessary to produce (and market) a sound recording; and (ii) the time needed to recoup this investment.

5.2.2.1.1. Average Investments in Sound Recordings

The amount necessary to produce a sound recording is difficult to estimate because production costs vary heavily, for example, between large and small productions or between different genres such as classical music (requiring an entire philharmonic orchestra) and electronic dance music (that can be produced on a computer). Average numbers are therefore not very meaningful in this setting. What can be said, though, is that in general production costs have decreased over the past thirty years due to technological advances. While, for example, master tapes used to be recorded in sophisticated sound studios that charged several thousand Euros per day, today, because of digital studio techniques, even large productions can be made for less than EUR 1,000 per day.⁶¹⁴ In addition, digital recording tools are available that enable semi-professional sound recordings in small ‘home studios’ and simple sound recordings can even be produced with the help of specialized software on a desktop computer. Table 5.1 gives a rough picture of the ‘average’ investment in a sound recording, for illustrative purposes. It contains estimates of the costs for a small production.

Table 5.1 Example of Investment in a Small Production of a Sound Recording

Fixed Costs	EUR	Total Cost (%)
Studio production	20,000	18
Marketing and overhead	40,000	37
Video production for marketing	15,000	14
Variable costs per Compact Disk (CD)		
Production and shipment	1.20	12
Royalties authors and composers	0.90	9
Royalties artists	1.00	10%
Total costs for 11,000 CDs	109,100	
Total revenue at price published to dealer (PPD) EUR 10 per CD	110,000	

As Table 5.1 shows, phonogram producers invest not only in the production, but also in the promotion and marketing of new phonograms. For most music labels (at least for the larger ones) this latter type of investment is typically very important. According to the Organization for Economic Cooperation and Development

614. A. Künne & A. Torkler, ‘Managing Recording and Production’, in *Ökonomie der Musikindustrie*, eds M. Clement & O.W. Schusser (Wiesbaden: DUV-Verlag, 2005), 113–130, [Künne & Torkler, 2005].

(OECD), 'marketing and promotion of a particular music piece make up for the greatest cost of music production'.⁶¹⁵ Major labels often also simply acquire the rights to an already produced master tape and invest only in the reproduction, distribution, and marketing of the recording. If related rights are to protect the overall investment necessary to bring a new sound recording to the market, marketing costs would have to be considered as well. As noticed earlier, however, the question of whether promotion and marketing investments are meant to count towards the investment that is protected by related rights is rather controversial.

In the case of marketing costs, average figures are even harder to estimate and have even less explanatory power than average production cost. On the one hand, major labels spend millions of Euros on the promotion of new releases of hit artists. On the other hand, an increasing number of artists use the Internet to promote their work, at relatively low cost. The example in Table 5.1 assumes marketing costs of EUR 40,000 and an additional EUR 15,000 for a music video production that serves marketing purposes as well. In this example, the phonogram producer would need to sell about 11,000 CDs to recoup its investment, assuming a (PPD) of EUR 10 per CD. This figure is broadly in line with assessments from stakeholders from the music industry, who stated that 20,000 sold CDs is the threshold to make the production of an 'average' CD profitable. If marketing costs and video production costs were excluded, sales of only 3,000 CDs would be sufficient to recoup investment.

5.2.2.1.2. Time Needed to Recoup Investment

To evaluate whether fifty years is sufficient to recoup the investment in a sound recording would require an assessment of the 'average' time needed to sell 20,000 copies of a newly released record. Such an assessment is, again, difficult to make, because numbers of sales vary widely, depending, for instance, on the hit status of an established popular band and an unknown artist. For example, in March 2006 the average top forty albums sold about 100,000 copies worldwide each week;⁶¹⁶ but many other records will never in years get close to such a figure. It is well-known that the life cycles of most sound recordings are short and that the music markets continue to move faster, resulting in shorter life cycles. Strack (2005) estimates the average diffusion rate of long-play sound recordings to be six to twelve months.⁶¹⁷ This means that six to twelve months after the sound recording is introduced on the market, it has its last sales. Again, significant differences exist, especially between different music genres. While some sound recordings have a short lifetime, tightly linked to fashions or news events, some others are regularly

615. OECD, Working Party on the Information Economy, Digital Broadband Content: Music (Paris, OECD, 2005), <www.oecd.org/dataoecd/13/2/34995041.pdf>, 43, [OECD, 2005].

616. Source: <www.mediatraffic.de>.

617. J. Strack, *Musikwirtschaft und Internet* (Osnabrück: epOs-music, 2005), [Strack, 2005].

selling over a very long period.⁶¹⁸ This is the case for certain classical music and jazz. Other recordings experience a revival in interest many years after their first release, for example, in a 'retro wave'.

Nevertheless, the large majority of sound recordings probably either recoup their investment within the first years – if not months – after their release or never.⁶¹⁹ Despite the lack of meaningful 'hard' data to prove this hypothesis, it seems safe to assume that fifty years is more than enough time for phonogram producers to recoup their investment in a sound recording, even if marketing costs are included. If a recording has not recouped its investment after fifty years, it is extremely unlikely that it ever will.

5.2.2.2. *Phonogram Producers' Ability to Invest in New Talent*

Although most sound recordings are no longer on the market after fifty years, a small number still generate considerable revenues to their right holders after fifty years. An important argument of the proponents of a term extension is that these revenues are crucial for the ability of record producers to invest in the development of new artists and creative works. 'Record companies use revenues generated by previous releases to invest in the development of new talent and new repertoire.'⁶²⁰ If related rights protection for these recordings expires, they argue, this will negatively affect phonogram producers' revenues and their ability to invest in developing new talent and in producing new sound recordings. Record industry representatives argue that 'Its [the music industry's] ability to make the huge investments necessary to generate and market recordings with worldwide appeal depends to a significant extent on continuing revenues from sales of recordings of the classic artists of the 1950s and 1960s.'⁶²¹

In its proposal for term extension, the Commission strongly emphasized the need to prolong the protection of related rights in phonograms so as to allow the European music industry to continue investing in new talent.⁶²² It underlines that this need is urgent, considering the declining sales and loss of revenue caused by online piracy. The Commission believes that this would severely undermine the record producers' ability to invest in A&R, thus increasing the risk that talented European artists remain undiscovered or will not be developed.⁶²³

To examine this need, the following section evaluates: (i) the significance of the repertoire affected by the expiration of related rights in sound recordings in the next five to ten years and (ii) the impact that an expiration of these rights would have on revenues and investment in new talent and repertoire.

618. See also the calculations by S.J. Liebowitz, 'What Are the Consequences of the European Union Extending Copyright Length for Sound Recordings?', Study prepared for the IFPI, February 2006 (not published), 12–17, [Liebowitz, 2006].

619. See also Gowers Review (2006), 52–53; CIPIL (2006), 35.

620. Response to the Staff Working Paper on Copyright Review by IFPI.

621. Response to the Staff Working Paper on Copyright Review by BPI (part 1).

622. Proposal Term Extension, 5.

623. Impact Assessment on Term Extension, 18–19.

5.2.2.2.1. Repertoire in the Public Domain in the Short to Medium Term

Statements on the significance of repertoire losing protection would require, first, figures on the share of repertoire that will lose protection and, second, figures on the commercial value or market share of this repertoire. Unfortunately, stakeholders did not provide for data on these figures.

One indication for the first figure, the share of repertoire that will lose protection, can be obtained from the recording database of Gramex, the collecting society for related rights in Denmark. It indicates that 0.43% of all registered tracks will be unprotected in 2010; this share will increase to 11.9% of the registered repertoire in 2020.⁶²⁴ Estimates of the share of repertoire that will lose protection are complicated by the fact that many phonogram producers do not have an exact overview of the size of their overall repertoire of protected recordings (their catalogue), because many of them are no longer published. Some market participants estimate that more than 95% of the music industry's back catalogue recordings are not or no longer released.⁶²⁵ This already indicates that a large majority of the protected repertoire currently does not have commercial value. If this repertoire loses protection, any impact on the revenues of phonogram producers will be limited at most.

As for the second figure, International Federation of the Phonographic Industry (IFPI) Germany estimates that sound recordings that will lose protection in the next five years have a market share of about 3% overall.⁶²⁶ Again, significant differences exist between different music genres. In pop music, where life cycles are usually shorter, the share is estimated to be less than 3%. In classical music, the market share of recordings from the 1950s might amount to 10%. In turn, the classical music market makes up approximately 8% of the overall music market.

Absent a term extension, in the next ten to twenty years the market share of commercially still valuable repertoire that is no longer protected will increase considerably, as rights in popular repertoire from the 1960s and 1970s expire.

5.2.2.2.2. Impact on Revenues and Investment in New Talent

The repertoire that stands to enter the public domain over the next five to ten years is a valuable source of revenue to European record producers. This income is mainly derived from three sources: revenues from recorded music sales, royalties collected for broadcasting and communication to the public, and revenues from private copying levies. Because of a lack of adequate figures on the latter revenues, they are not taken into account in the following analysis.

Revenues from recorded music sales in Europe amounted to USD 12,375.2 million in 2004.⁶²⁷ The estimated market share of 3% of commercially still valuable repertoire losing protection in the next five years, would thus translate

624. These shares do not take into account new registered tracks in the respective periods.

625. Response to the Staff Working Paper on Copyright Review by NAXOS.

626. Statements by IFPI Germany made to the authors.

627. IFPI, *The Recording Industry in Numbers 2005* (IFPI, August 2005), 27, [IFPI, 2005].

into USD 371 million of revenues. The recording industry would not automatically lose this amount, because they may continue to sell the phonograms affected. However, in a situation in which phonogram rights expire, revenues might come under pressure. Recordings can be re-released by any competing phonogram producer, potentially at lower prices. The availability of low-price recordings can also affect the revenues from new phonograms, particularly in genres such as classical music, where recent recordings often directly compete with older recordings of the same work.

Remuneration of record producers for broadcasting and communication to the public collected by collecting societies amounted to USD 358 million in Europe in 2004.⁶²⁸ A share of 3% would translate into USD 10.75 million that might not accrue to phonogram producers when related rights expire in the next five years. However, this would be the case only if collecting societies would adjust their collections and distributions to the actual share of repertoire that is still protected. They currently do not do so.

A term extension of related rights would postpone potential negative effects on the phonogram producers' revenues. In case of a term extension, these additional revenues could in theory be used to invest in the development of talent and repertoire. However, according to Jakob (2005) only about 2% of the net revenues of major music labels are spent on A&R (Figure 5.1). This estimate seems to be at the low end, and A&R spending surely varies considerably, for example, between major and independent labels. The British Phonographic Industry (BPI) estimates that the United Kingdom record industry reinvests about 17% of its turnover in A&R to discover new talent.⁶²⁹ Based on the figures of the BPI, Pricewaterhouse-Cooper estimates that additional revenues over the next ten years from a forty-five-year term extension would amount to GBP 11.1 million additional available for A&R investment.⁶³⁰ In any case, the overall effect of a term extension on investment in new talent and repertoire would only be limited, because the largest part of revenues primarily finances the running cost of phonogram producers (see Figure 5.1). Moreover, the Commission's proposal does not make the extension of the term of protection for sound recordings conditional on investing a certain or any share of the revenues from the extension into A&R.⁶³¹

Some opponents of term extension are even more sceptical about the positive effects of a term extension on future investments in A&R. They argue that:

extending copyright protection for sound recordings will tend to cause the record industry, in general, to produce and release even fewer new recordings

628. IFPI (2005), 20–21. These figures include collections from music videos. Excluded from these figures are the performing artists' share and private copying levy income.

629. BPI, 'Record industry reinvests 17% of turnover in new music', 19 Apr. 2006, <www.bpi.co.uk/index.asp?Page=news/stats/news_content_file_989.shtml>, [BPI, 2006].

630. Price Waterhouse Coopers, *The Impact of Copyright Extension for Sound Recordings in the UK. A report for the Gowers Review of Intellectual Property prepared by PwC on behalf of the BPI* (London, April 2006) (not published), [PWC, 2006].

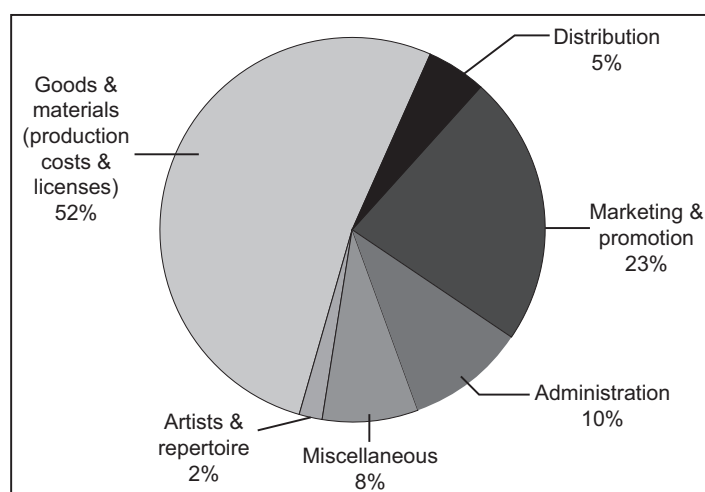
631. Remarkably, without further explanation or reference to lower estimates, the Commission bases its assessment of the impact of term extension on A&R expenditure on the high estimate of 17%, citing the unpublished study from PWC above. See Impact Assessment on Term Extension, 39.

than is currently the case, particularly in the fields of classical music and jazz. This is because the industry increasingly tends to rely on the exploitation of its back catalogues for profits, instead of investing in commissioning new recordings.⁶³²

Indeed, re-releases and compilations of old bestsellers are often more profitable and less risky than new recordings. They are frequently long-time 'self-sellers' without the need for large marketing investment. This is shown vividly in the 2005 annual report of Warner Music Group, which reads:

In a typical year, approximately 43 per cent of our total revenues come from new album releases, although most of that is more predictable revenue from proven artists and less than 10 per cent is generally derived from artists without an established track record. [...] Relative to our new releases, we spend comparatively small amounts on marketing for catalogue sales.⁶³³

Figure 5.1. Typical Cost Structure of a Major Record Company
(in % Net Revenue)



Source: Jakob (2005).

632. Response to the Staff Working Paper on Copyright Review by NAXOS.

633. Warner Music Group, *2005 Annual Report*, 6–8. <www.library.corporate-ir.net/library/18/182/182480/items/181572/2005_AR.pdf>, [Warner, 2005].

5.2.2.3. *Impact on Access and Cultural Diversity*

We established that only a small share of sound recordings still continue to generate a commercial value for record producers after fifty years. A term extension of related rights beyond fifty years would therefore have only a positive effect on the revenues from the small share of recordings that are still popular after this time.

From the remaining part of the back catalogue repertoire, phonogram producers typically no longer derive revenues. Repertoire that does not sell well or that generates insufficient royalty payments, and older niche productions, usually cease to be disseminated after a certain time. These recordings will likely disappear from the market, rendering them inaccessible to the general public.⁶³⁴ A term extension would keep these recordings from being free to use by the public for an additional period of time. From a public welfare perspective, this would have several negative implications. Many recordings that are not commercially valuable enough for the (former) right holder are still of economic or simply social or cultural interest to special interest groups, smaller user groups, fan communities, collectors, and/or the general public. Hence, usages that would be possible and would increase public welfare overall are not being realized. This, however, is nowhere acknowledged in the Commission's proposal.

The focus on long-time bestsellers limits the accessibility of cultural heritage to a few recordings that might primarily derive commercial value from large marketing efforts rather than superior quality. This also affects cultural diversity. Recordings are kept from the public domain, thus disfavoured artists interested in using existing material to create new works, for example, by means of sampling or remixing. Extending the term of protection with an additional twenty or forty-five years would further aggravate this situation.⁶³⁵

5.2.2.3.1. *The Effects of Digitization*

Earlier we pointed out that the mere fact that material is in the public domain does not guarantee that the material is actually widely accessible and available to users.⁶³⁶ It still takes parties that are willing to invest in public domain material

634. See the response to the Staff Working Paper on Copyright Review by BEUC: 'Many works do not stay in the commercial chain and a majority of sound recordings are locked in vaults'.

635. These negative effects caused by a term extension also have been emphasized in the discussion in the framework of the European Commission 'i2010: Digital Libraries' initiative. 'The digital environment has added a completely new dimension to the value of public domain material, because this material can be distributed through the Internet without any restrictions. Recently, the public domain has been under some pressure. The harmonization of the term of copyright protection until seventy years after the death of the author has, for example, brought material that was out of copyright back under copyright protection'. See Commission Staff Working Document, Annex to the Communication from the Commission 'i2010: Digital Libraries', SEC(2005) 1194 (Brussels, 30 Sep. 2005) [Staff Working Document on Digital Libraries], 11.

636. In this sense: Impact Assessment on Term Extension, 37–38.

and distribution models. The opportunities that arise from digitization and digital networked technologies are one important parameter in this context. Digitization can result in lower production, storage, and distribution costs. Digital networks also allow for interactive, simultaneous, and decentralized production and access. Thus, digital networked technologies enable content goods with low individual sales volumes to be marketed in sufficient quantities so that they can collectively make up a market share that rivals or exceeds the relatively few bestsellers. This is often referred to as the 'long-tail' effect of digital distribution.⁶³⁷

The long-tail effect could not only have a positive impact on cultural diversity, but it could also turn into a profitable business for the music industry – for the original producers of the phonograms, as well as for secondary parties. Proponents of a term extension therefore argue that a term extension will 'create an incentive for the creators of recordings, which own the original masters, to invest in re-mastering, digitizing, and remarketing older recordings in a new format and to new audiences'.⁶³⁸ From this perspective, a longer term of protection could serve as an incentive for phonogram producers to make use of long tail effects and digitize older back catalogue recordings that would otherwise lose protection in the near future.⁶³⁹

However, it is questionable whether protection of sound recordings beyond fifty years would actually induce phonogram producers to better make use of the new business potential of digital distribution and whether related rights protection is the adequate measure for creating incentives to exploit this potential in the first place.⁶⁴⁰ Moreover, the development of a vibrant online market that also involves old and niche market content not only requires that phonogram producers really invest in digitizing large parts of their back catalogues. It also requires that they indeed support new distribution models by licensing their sound recordings to a

637. C. Anderson, 'The Long Tail', *Wired Magazine* (October 2004), [Anderson, 2004]. The term 'long tail' refers to a common statistical distribution that is characterized by a small high-frequency population (in our case: bestselling hits), followed by a large low-frequency population which gradually 'tails off' (recordings with low sales volumes). Even if the individual titles each sell in low quantities (the long tail), they can add up to significant sales in the aggregate.

638. Response to the Staff Working Paper on Copyright Review by BPI (part 1). See also Liebowitz (2006), 21.

639. Liebowitz (2006), 19–20. Sceptical Lemley (2004), 132 et seq.; Liebowitz & Margolis (2003), 3; Elkin-Koren & Salzberger (2005), 110 et seq. and 113 et seq. with an interesting reference to the complexity of human motivations and the trend to decentralized production.

640. The Commission nevertheless claims – without further evidence – that 'a term extension provides record companies with an incentive to digitize and market their back catalogue of old recordings'. See Proposal Term Extension, 8; Impact Assessment on Term Extension, 38. Critical: CIPIL (2006), 30 with further references; Gowers Review (2006), 54; M. Kretschmer et al., '“Creativity stifled?” A Joint Academic Statement on the Proposed Copyright Term Extension for Sound Recordings', *EIPR* 30 (2008): 341, 342–343, [Kretschmer et al., 2008]. See also PWC (2006), 51, concluding that '[limited] evidence makes it difficult to form a firm conclusion on whether increasing copyright term would increase or decrease availability'.

diverse landscape of online services, even if these are still experimenting and not yet well established. This has not always been the case in the past.⁶⁴¹

Finally, as the next section details, exclusive rights allow record producers, at the expense of others, to control exploitation models for back catalogue repertoire, secondary uses (except the broadcasting right and the right of communication to the public, which both are remuneration rights), and new distribution models. A term extension would extend this control, thus bearing a direct impact on the availability of diverse content in new media and distribution platforms.

5.2.2.4. *Impact on Competition and Innovation*

We have seen that related rights provide record producers and performers with what in effect constitutes a temporary monopoly in their phonograms. The rights enable record producers, for a limited time (i) to prevent competition from competing record companies by controlling the reproductions that competitors are allowed to make; (ii) to control certain secondary uses of their phonograms, such as usage in films, commercials, remixes, and samples; and (iii) to control distribution of their phonograms.

If a phonogram loses protection after the current term of fifty years, competing record companies may release the same recording without having to clear the rights and paying licensing fees to the original phonogram producer, assuming of course that they have access to the material. One would expect that the resulting competition typically leads to lower prices for these recordings. An extended protection would postpone this effect by allowing phonogram producers to keep charging monopoly prices for sound recordings (an issue we will return to later).

Competition does not take place only on price, however, but also on quality and service. The value of re-releases of older or more eccentric sound recordings often lies in discovering and locating interesting back catalogue repertoire, technically 'brushing up' old recordings, putting them in a new context, providing information about the work and the performer, marketing it to special interest groups, etc. The original holders of related rights are not necessarily the (only) ones that can best provide this specific value added. But as long as they hold the exclusive rights of reproduction, they can deny competitive releases or raise the costs of third parties, thus preventing the re-release of old recordings to specific niche markets or obstructing other new innovative and competing usage forms.

Moreover, extending the term of protection could also put a break on innovation by keeping phonogram producers from more actively looking for new exploitation models for older recordings or niche content.

The phonogram producers would prefer to sit on the recordings hoping that some windfall such as a film use or some revival of interest in that particular

641. Kretschmer et al. (2008), 343.

genre of music comes along. There is no obligation or incentive for the record producer to actively exploit the recordings.⁶⁴²

This limit on competition and innovation would persist for a longer period of time in case of a term extension.

There is another reason why an assessment of the impact of a term extension on competition and innovation is important. Currently, the European music market is dominated by four major music labels that have an overall market share of 81%.⁶⁴³ Therefore, the competition in this market is already limited. Because of the exclusive rights granted to record producers or that have been assigned to them by performers, these record companies can exercise significant control over not only the primary exploitation, but also over certain secondary uses, and over the physical as well as the online distribution channels for their recordings. A prolongation of the term of protection would extend this control and simultaneously reduce the possibility for more competition (e.g., by public domain labels) in the current – largely oligopolistic – music market.⁶⁴⁴

5.2.2.5. *Impact on Licensing Costs and Consumer Prices*

The temporary monopoly caused by related rights has some other drawbacks. Monopolies typically result not only in lower volumes of products provided to the market (because of limited access) but also in higher prices for the products concerned. In economic theory, these negative effects are typically referred to as deadweight losses.⁶⁴⁵ Deadweight losses can be acceptable if they help to achieve the goals of related rights: ‘some deadweight losses serve a useful function if they are unavoidable consequences of an incentive system for which there is no better alternative’.⁶⁴⁶ However, as we saw earlier, the current term of fifty years is usually sufficient to achieve the main goal of related rights, which is to enable record

642. Response to the Staff Working Paper on Copyright Review by the UK Music Manager’s Forum.

643. IFPI (2005), 7.

644. The Commission, however, concludes that an expiration of related rights has limited impact on competition (e.g., by public domain labels), inter alia, because the musical works recorded often are still protected by copyright. See Impact Assessment on Term Extension, 31 and 35. This assertion is false, because the Commission totally ignores a vital characteristic of copyright in musical works, namely, collective rights management. Because the mechanical reproduction rights in musical works – unlike the reproduction rights of phonogram producers – often are administered by a collecting society from which anyone can obtain a license, competing labels are able to exploit recordings once the related rights therein have expired. See S.J. van Gompel, ‘Another 45 Miles to Go? *Kritisch commentaar op het richtlijnvoorstel duurverlenging naburige rechten*’, *AMI* (2008): 169, 179, [van Gompel, 2008].

645. The term ‘deadweight loss’ typically refers to a situation where on the demand side consumers will not purchase a good or service, because the price is deemed too high. The result is that consumers are denied the benefit of the product or service, whereas on the supply side, providers of the good or service misses profits. The resulting costs to society are called ‘deadweight losses’.

646. Liebowitz & Margolis (2003), 12.

producers to recoup their investment. The UK Gowers Review, highlighting the need for a fair balance, advanced a similar line of reasoning:

Copyright is a contract between creators and society; once the work has been created, altering the length of term of protection changes the terms of that contract. This is not fair for consumers, as they would be forced to pay monopoly prices for longer than they had implicitly accepted. The same logic applies to all forms of IP rights.⁶⁴⁷

A term extension beyond fifty years would involve deadweight losses that cannot be justified with reference to the goals of related rights. The losses would include higher costs for secondary uses of phonograms. Such costs for secondary uses include remuneration due for the broadcasting of phonograms and the communication to the public of recordings by bars, restaurants, discotheques, etc.;⁶⁴⁸ licensing fees for on-demand transmissions of recordings such as podcasts or webcasts; levies on blank media collected in some Member States for private copying;⁶⁴⁹ licensing costs for other secondary uses of phonograms, such as the use of recordings as sound tracks in films, as background music in computer games, commercials, advertisements; etc. Other potential deadweight losses include continued tracing costs, that is, the costs associated with identifying and clearing the rights with right holders, and higher consumer prices for music.⁶⁵⁰ In the end, the costs that an extension of the term of protection of phonograms would bring about would have to be paid by users and consumers of sound recordings.

647. Gowers Review (2006), 56.

648. The Commission maintains that a term extension will have no impact on the equitable remuneration for broadcasting and communication to the public of sound recordings, because this remuneration is usually paid in lump sums or as a percentage of the revenues of the user (these parameters thus being independent of how many sound recordings are still under protection). See Proposal Term Extension, 8; Impact Assessment on Term Extension, 35. However, in the current situation, it is assumed that the majority of recordings being used are under protection. If the protection of sound recordings of the 1960s and 1970s expires, and these recordings are still communicated to the public (thus lowering the percentage of protected phonograms being used), one would expect charges to be adjusted correspondingly. See van Gompel (2008), 178.

649. Responses to the Staff Working Paper on Copyright Review by Intellect and Nokia.

650. The Commission, however, assumes that an expiration of protection will have no significant impact on consumer prices for sound recordings. See Proposal Term Extension, 8; Impact Assessment on Term Extension, 36. The Commission refers to PWC (2006), 49, claiming that there appears to be no significant difference between the prices of recordings that are still protected and recordings the protection of which has expired. Critical of the PWC findings: CIPIL (2006), 40–44, estimating that the proposed extension implied consumer costs of between GBP 240 and 480 million; Kretschmer et al. (2008), 343–344; ‘Comment by the Max-Planck Institute on the Commission’s proposal for a Directive to amend Directive 2006/116 EC of the European Parliament and Council concerning the Term of Protection for Copyright and Related Rights’ (Munich: Max Planck Papers on Intellectual Property, Competition & Tax Law Research No. 08-01, September 2008), 17, [MPI, 2008].

5.2.2.6. *Performing Artists' Ability to Generate Adequate Income*

One major goal of related rights for performing artists is to enable them to receive an adequate income as a basis for, and economic incentive to, further creative and artistic work (see Section 5.1.2).⁶⁵¹ The improvement of the economic situation of performers – in particular that of the less affluent artists such as session musicians – is also a prominent objective of the Commission's term extension proposal.⁶⁵² For an economic analysis of the extent to which a term extension would further these objectives, it would be necessary to assess how much individual performers actually earn from their rights. This again would require extensive qualitative/quantitative research that exceeds the scope of this study.⁶⁵³ Instead, the following section will examine more generally how performers can generate an income from related rights protection (income from remuneration rights and/or income from exclusive rights), to what extent and under which conditions they would actually benefit from a term extension, and what the role of contractual arrangements is in this context.

5.2.2.6.1. *Income from Remuneration Rights*

The performers' income from remuneration rights consists of royalties collected by collecting societies for the broadcasting of phonograms and the communication to the public of recordings, for example, the playing in bars, restaurants, discotheques, etc. (Article 8(2) Rental Right Directive). In many countries, a remuneration right also exists for private copying, for example, levies on blank storage media and recording devices. The remuneration collected by collecting societies is usually shared evenly by agreement between performers and phonogram producers, in the case of private copying levies, according to a fixed distribution model.

According to Association of European Performers' Organisations (AEPO-ARTIS), this income from remuneration rights often forms the largest part of the overall revenues of performing artists from their recordings. Rights to remuneration usually represent the main or sole guarantee of remuneration for performers for the multiple uses of their performances.⁶⁵⁴

As concerns income from remuneration rights, performing artists might indeed directly profit from a term extension *if* their sound recordings are still broadcasted or communicated to the public after fifty years. Only then do they share in the fees that are (collectively) collected. As we have seen, however, only a limited share of the overall protected repertoire is still actively communicated after fifty years. In addition, as in the present situation, the income from remuneration rights resulting from a term extension would not accrue to performers alone; it is

651. See recital 7 of the Rental Right Directive (1992), recital 5 of the Rental Right Directive (2006) and recital 10 of the Information Society Directive.

652. Proposal Term Extension, 2 et seq.

653. See for estimates e.g., PWC (2006), 30–31; CIPIL (2006), 35–36.

654. AEPO-ARTIS in a statement on the effects of the term of protection on performers.

usually shared with record producers. Moreover, fees paid by broadcasters or public venues are generally not calculated on a 'per track' basis but on the basis of other factors (e.g., as a percentage of the total revenue, net broadcasting revenue, or advertising). The amount of payments is hence not influenced by the number of performances that are still protected or in the public domain.⁶⁵⁵ Insofar, it is difficult to predict if and how a term extension will affect performers' income from these secondary remuneration rights.⁶⁵⁶

5.2.2.6.2. Income from Exclusive Rights

Performers not only have remuneration claims, but as set out in Section 3.1, they also have certain exclusive rights, such as the right to authorize or prohibit the fixation, reproduction, and distribution of their recordings.⁶⁵⁷ These exclusive rights are typically transferred to a record producer by contract. For that reason, the degree to which the income of performing artists from exclusive rights would be affected by a term extension depends heavily on the terms of the contract between performing artists and phonogram producers.⁶⁵⁸

In general, three different contractual settings can be distinguished. First, there are a small but increasing number of so-called distribution deals. These involve contracts where the exclusive rights of reproduction of a readily produced master tape remain with the performing artists. Only the distribution rights in the sound recording are assigned or exclusively licensed to a record producer, for a limited time (often three to five years). A second category of contracts are buyouts. These are contracts in which all exclusive rights are transferred to a record producer against a single fee, which is by definition not proportionate to future sales and also independent of the duration of rights. Session musicians usually enter into such agreements. The third and most common type of contract is the royalty-based deal. Performers – mostly featured artists – sign an exclusive contract with a record company and get paid on a royalty basis as a percentage of the sales of the recording and/or for certain secondary uses (the latter depending on the contract). The royalties performing artists receive vary considerably. Depending on the popularity and the negotiating power of the artist they usually range between 5% and 15%.⁶⁵⁹ The exclusive rights are often assigned for the whole duration of protection of the performers' rights.

In the case of a distribution contract in which the rights remain with performers and in the case of royalty-based contracts, performers would benefit from a

655. Proposal Term Extension, 8; Impact Assessment on Term Extension, 28 and 33 et seq.

656. Critical also van Gompel (2008), 173.

657. See Arts 7–9 of the Rental Rights Directive and Arts 2 and 3 of the Information Society Directive.

658. E. Vanheusden, 'Performers' Rights in European Legislation: Situation and Elements for Improvement', Study prepared for AEPO-ARTIS (June 2007), 94–96, <www.aepo-artis.org/pages/148_1.html>, [Vanheusden, 2007].

659. CIPIL (2006), 36. AEPO-ARTIS departs from lower estimates: 4%, see Vanheusden (2007), 94.

term extension, provided of course that the fixation of their performance still sells after fifty years, which, as we have seen, is usually not the case. Performers that have signed buyout contracts do not stand to benefit from a term extension.

In the light of current contractual practices, it can be argued that any proposals to extend the term of protection of performers' rights should be accompanied by statutory measures that would at least ensure performers will benefit from the extension.⁶⁶⁰ The Gowers Review in the United Kingdom even argued that instead of a term extension, it would seem 'that a more sensible starting point would be to review the contractual arrangements for the percentages artists receive'.⁶⁶¹

The Commission proposes to have funds established for session musicians. Record producers would be obliged to set aside each year at least 20% of the revenues from the reproduction, distribution, and making available of all recordings that are past the original term of protection of fifty years and that were made before the term extension takes effect. These revenues would accrue to performers who assigned their rights to a producer against a buyout fee.⁶⁶² The Commission estimates that funds for session musicians would give performers an additional income of EUR 11 to 172 per month.⁶⁶³

In all other cases, the income that performers will receive is a matter of negotiation. As a result of imbalances in negotiation power and differing interests, the outcome of such negotiations is not always favourable to the interests of performers or their earnings. For example, Towse found in her study that despite high aggregate earnings in the music industry, the median individual payment for performers in the United Kingdom averaged a meagre GBP 75 per year.⁶⁶⁴ She interpreted this also as a result of contractual practices:

The large sums of royalty income that copyright law enables to be collected goes mainly to the publishers (music publishers and record companies) and to a small minority of high earning performers and writers. These are persons who can defend their own interests in the market place by virtue of their bargaining power and ability to hire advisers (managers, lawyers and accountants) to control their own affairs by contractual arrangements.⁶⁶⁵

If the Community legislature would want to extend the term to help performers, the more sensible and effective thing to do would be to extend the term of protection for performing artists only and to scrutinize the contractual terms between performers, music publishers, and phonogram producers.⁶⁶⁶

660. See Guibault & Hugenholtz (2002), 81, 157; Gowers Review (2006), 51; MPI (2008), 3.

661. Gowers Review (2006), 51.

662. Proposal Term Extension, Art. 10a(3)-(5), 19.

663. Impact Assessment on Term Extension, 57. Critical van Gompel (2008), 177, criticizing the lack of empirical evidence and actual figures to support these estimates.

664. R. Towse, *Creativity, Incentive and Reward: an Economic Analysis of Copyright and Culture in the Information Age* (Cheltenham: Edward Elgar Publishing Limited, 2001), 124, [Towse, 2001].

665. Towse (2001), 126, see also Kretschmer et al. (2008), 342.

666. In this sense also MPI (2008), 3.

5.2.2.6.3. Continued Availability of Older Recordings

If a record producer decides to no longer publish a recording after a certain number of years, the performing artists concerned will not receive any royalties from sales. But at the same time, the assignment of all exclusive rights to the record producer will keep artists from developing alternatives for exploiting their own recordings or simply making them available to the general public. Performers could in theory license or buy back their recordings from the record label and take exploitation in to their own hands. In practice it is difficult for them to get record companies to agree;⁶⁶⁷ sometimes the price asked is prohibitive. A term extension of performers' rights would, depending on the applied contractual agreement, keep performers from exploiting their otherwise unpublished recordings or making them available to the public for an extended period of time.

Some stakeholders therefore have proposed the introduction of a 'use it or lose it' rule. It would stipulate that related rights assigned to a record producer would revert to the performing artist if the producer fails to exploit them within a certain time span (say, for instance, three to five years).⁶⁶⁸ In copyright law, several Member States already have statutory rules that give authors, and in some instances performers, the right to reclaim assigned right after a period of 'non usus'.⁶⁶⁹ Other stakeholders call for a harmonized rule that limits the length of time for which performers may assign rights in their fixed performances.⁶⁷⁰ Such rules might be better suited to strengthen the overall position of performing artists than extending the term of protection of related rights.

In its proposal the Commission opts for the introduction of a 'use it or lose it' rule.⁶⁷¹ According to the proposal, performers can 'reclaim' rights by terminating the contract, if after the original term of protection of fifty years the producer fails to offer for sale copies of the recording 'in sufficient quantity' or to make the recording online available. This again applies only to recordings of which the protection period would have expired absent the term extension. If the rights revert to the performers, the phonogram producer's rights automatically expire. The performer can then publish and market the recording himself, provided that he or she is fast enough. If the recording is not made available online within one year after the lapse of the original term of protection of fifty years, either by the record producer or the performing artists, all rights in the recording expire.

It remains to be seen what the practical value of the 'use it or lose it' clause is. Even if the rule applies, only a few performers, who are by then age seventy or older, may still be willing to engage in entrepreneurial activities.⁶⁷² The 'use it or

667. Response to the Staff Working Paper on Copyright Review by International Music Manager's Forum (IMMF).

668. See e.g., the responses to the Staff Working Paper on Copyright Review by EDRI, IMMF, UK Music Manager's Forum, and VOSN.

669. Guibault & Hugenholtz (2002).

670. Response to the Staff Working Paper on Copyright Review by IMMF.

671. Proposal Term Extension, Art. 10a(6), 19.

672. Van Gompel (2008), 177.

lose it' rule will hence benefit, if at all, most likely only the heirs. Moreover, to exploit the recording, all performers that were involved in the making of the fixation must be found and convinced to agree in re-issuing the performance – a process that can take much longer than one year. Finally, it is also important to note that the suggested rule does not apply to new rights that come into existence after the prolongation of the term.⁶⁷³

5.3. ARGUMENTS CONCERNING COMPETITION WITH NON-EU MARKET PLAYERS

A final line of arguments advanced in support of a term extension relates to the competitive position of EU right holders in the global market. Proponents of a term extension argue that a shorter term of protection in the EU would negatively affect the competitiveness of the European music industry and would be detrimental to an adequate protection of all beneficiaries of related rights in EU phonograms.

One would expect the EU institutions to be sensitive to such arguments because the global competitiveness of European industries is a key policy concern.⁶⁷⁴ And indeed, one of the operational objectives of the Commission's Term Extension Proposal is to diminish the existing discrepancies in terms of protection between the EU and non-EU markets, in particular those between the EU and the United States. This should help to enhance the international competitiveness of the European music industry.⁶⁷⁵

It remains to be seen, however, whether a term extension would indeed improve the competitive position of the European music industry on the global market. It will therefore be examined first whether the current term of fifty years in the EU runs out of line with existing terms in non-EU countries. For that purpose, Section 5.3.1 provides a survey of the terms of protection stipulated by the national laws of those non-EU countries where EU right holders are expected to find important markets.

Subsequently, the main arguments relating to the impact of a term extension on international competitiveness and trade shall be examined. These arguments can be roughly distinguished into three categories. One type of argument is that in foreign markets EU phonogram producers (and performers) are at a disadvantage because of the application of a 'comparison of terms' rule.⁶⁷⁶ This argument will be scrutinized in Section 5.3.2.

673. MPI (2008), 18.

674. Increasing the global competitiveness of the EU is one of the key Lisbon targets, aimed at achieving the strategic goal for 2010 'to become the most competitive and dynamic knowledge based economy in the world'. See e.g., the Lisbon European Council, Presidency Conclusions 23 and 24 Mar. 2000, <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm>.

675. Impact Assessment on Term Extension, 22–23.

676. Responses to the Staff Working Paper on Copyright Review by BPI (part 1) and various national departments of IFPI.

Section 5.3.3 deals with the second and third type of arguments. The second type of argument asserts that because of the shorter term in the EU, the European music industry would find less favourable conditions to market their recordings as compared to, for example, their competitors in the United States, with the result that the EU industry would become less profitable. Related is a third argument that holds that because of the longer term of protection in the United States, European phonogram producers will focus on sound recordings that appeal to American audiences. This could have a negative impact on European culture and diversity.⁶⁷⁷

5.3.1. TERM OF PROTECTION OF EU TRADE PARTNERS

A general distinction can be made between countries with the same or shorter term of protection as the EU and countries with a longer term. The first group includes Canada (fifty years),⁶⁷⁸ China (fifty years),⁶⁷⁹ Japan (fifty years),⁶⁸⁰ and Australia (twenty to fifty years for performers).⁶⁸¹ In general, these terms of protection are in conformity with the international standards of the TRIPS Agreement (fifty years)⁶⁸² and the WPPT (fifty years),⁶⁸³ and well above the minimum standard of the Rome Convention, which is twenty years.⁶⁸⁴ The group of countries with longer protection include Mexico (seventy-five years for performers and phonogram producers),⁶⁸⁵ Brazil (seventy years for performers and phonogram producers),⁶⁸⁶ Australia (seventy years for sound recordings),⁶⁸⁷ and the United States.

The United States is a special case because the US Copyright Act protects sound recordings under copyright (Article 102(a) under 7). Only persons who make an original contribution to a sound recording are regarded as author.⁶⁸⁸ Authors may be the producer of the recording, the sound engineer, performers, etc. In general, sound recordings created before 1 January 1978 enjoy a ninety-five-year term of protection, calculated from the year in which the copyright was first

677. Liebowitz (2006), 18. See also Impact Assessment on Term Extension, 19–20: ‘The term gap could lead to record companies producing sound recordings to cater to American taste in music’.

678. Article 23(1) of the Canadian Copyright Act.

679. Articles 38 and 48 of the Copyright Law of the People’s Republic of China.

680. Article 101(2) of the Japanese Copyright Law.

681. Article 248(C)(A) of the Australian Copyright Law.

682. Article 14(5) TRIPS Agreement.

683. Article 17 WPPT.

684. Article 14 RC.

685. Articles 122 and 134 of the Federal Copyright Law of Mexico.

686. Article 96 of the Brazilian Law on Copyright and Neighbouring Rights 1998.

687. Articles 93 and 94 of the Australian Copyright Act 1968.

688. Nimmer & Nimmer (2008), § 2.10[A][2] and [3]. Note that apart from the possible general protection of performers under US copyright law – if and to the extent that they made a creative contribution and can therefore be regarded as authors of the sound recordings – performers do not benefit from protection in their own right, as is the case in Europe.

secured.⁶⁸⁹ As for sound recordings created on or after 1 January 1978, the main rule is that if an individual author owns the copyright in the sound recording, the term of protection equals the life of the author plus seventy years (Article 302(a)). If, as often is the case, a commercial sound recording is a work of joint authorship, the term consists of the life of the last surviving author and seventy years after that author's death (Article 302(b)). However, if the sound recording is a 'work made for hire', the copyright lasts for a term of 95 years from the year of its first publication, or 120 years from the year of its creation, whichever expires first (Article 302(c)).⁶⁹⁰

A sound recording is usually considered as a 'work made for hire' if it is made in the course of employment by a record company. The record company in its capacity as employer is considered to be the author, rather than the performer, sound engineer, or other employees. Unless agreed otherwise, therefore, the employer owns the copyright in the sound recording (Article 201(b)). Because it is common practice in the United States that recording contracts between record companies and performers contain clauses that specify that the works produced by performers are 'works made for hire',⁶⁹¹ the common term of protection for

689. Note that there are different measuring points for sound recordings created before 1 Jan. 1978. Sound recordings first fixed before 15 Feb. 1972 are not eligible for protection under US federal copyright law, but may be protected by various state laws or doctrines of common law. See e.g., *Capitol Records v. Naxos*, New York Court of Appeals 5 Apr. 2005, 2005 N.Y. Slip. Op. 02570 (J. Graffeo), ruling that pre-1972 published sound recordings are subject to common law copyright under New York state law. Pursuant to Art. 301(c) US Copyright Act, the protection of these sound recordings shall maximally endure for a period of ninety-five years. Sound recordings fixed between 15 Feb. 1972 and 1 Jan. 1978 benefit from federal copyright protection only if they were registered or published with a notice of copyright. The law in effect before 1978 provided that the copyright lasts twenty-eight years from the date of publication or registration. During the last year of its first twenty-eight-year term, the copyright was eligible for renewal. Pursuant to Art. 304 US Copyright Act, the renewal term is now extended from twenty-eight to sixty-seven years, hence also resulting in an effective term of protection of ninety-five years from the year in which the copyright was first secured.

690. A 'work made for hire' is either a work prepared by an employee in the course of employment, or a work prepared on commission that falls within one of the categories specified in the Act (see Art. 101 US Copyright Act). The statutory list of commissioned works does not, however, mention sound recordings. Although sound recordings were added to the list of commissioned works by the Satellite Home Viewer Improvement Act 1999 (Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544), the Work Made for Hire and Copyright Corrections Act 2000 (Pub. L. No. 106-379, 114 Stat. 1444) deleted sound recordings from this list. This was because this 'technical amendment' raised a lot of concerns among recording artists and other stakeholders in the music industry, who successfully demanded the amended to be repealed. See e.g., S.T. Okamoto, 'Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free' *University of San Francisco Law Review* 37 (2003): 783-812, at 792-794, [Okamoto, 2003].

691. M. Peters, *Sound Recordings as Works Made for Hire* (United States House of Representatives, 106th Congress, 2nd Session, 25 May 2000) <www.copyright.gov/docs/regstat52500.html>, [Peters, 2000].

sound recordings is 95 years from the first publication of a sound recording, or 120 years from its creation.

Perceived from an international perspective, the American terms are anomalous. In fact, the terms do not truly reflect a judgment by the US legislature on the need to protect sound recordings for extended periods of time. Rather, the very long terms in the United States are due to the fact that under US federal law, sound recordings are not subject to related rights, but protected under copyright law. For this reason, the US term of protection follows the much longer terms applied in copyright law.

5.3.2. COMPETITIVE DISADVANTAGE DUE TO COMPARISON OF TERMS

The first type of argument concerning the competition of EU right holders with non-EU market players says that a shorter term of protection in the EU will disadvantage EU right holders outside the EU because of a comparison of terms in those countries. This argument is examined extensively in the following sections.

5.3.2.1. *Comparison of Terms*

The principle of national treatment is central to international conventions on copyright and related rights. Contracting States undertake to protect foreign right holders on the same terms as their own nationals. Rules allowing comparison of terms are an exception to national treatment. States applying a comparison of terms rule do not grant foreign right holders longer protection than the domestic law of the home country does.⁶⁹² For example, if an EU phonogram producer claims protection in a non-EU country with a seventy-year term, he or she would be enjoy fifty years of protection only, rather than the seventy years based on national treatment. It is argued that EU right holders are at a disadvantage compared to right holders from countries with longer terms of protection, and that it affects the EU right holders' ability to compete in the global market.

The Berne Convention is best known for reciprocal calculation of the term of protection, something Article 7(8) BC expressly allows. In the area of related rights, the treaties do not specifically allow a comparison of terms. This does not mean that Contracting States may not apply a comparison of terms rule. It rather depends on the scope of the national treatment principles in said treaties, which we will assess in the next subsection.

692. Explanatory Memorandum to the Term Directive, 30.

5.3.2.2. *Effect of National Treatment Obligations under the Rome Convention and WPPT*

There is much debate in legal writing concerning the scope of the national treatment obligation under the Rome Convention. On the one hand, it has been argued that the national treatment rule under the Rome Convention has a limited scope and that it is confined to the rights and terms specifically guaranteed in this convention. This would follow from Article 2(2) RC, which says that the national treatment is subject to ‘the protection specifically guaranteed [. . .] in this Convention’. Some legal writers assume that this provision limits the obligation to grant national treatment to the minimum rights and term of protection (i.e., twenty years) enshrined in the Rome Convention.⁶⁹³

Other commentators, however, believe that Article 2(2) RC obliges Contracting States to *at least* grant the minimum rights and terms laid down by the convention, even if a state does not grant such rights to its own nationals.⁶⁹⁴ This implies that the national treatment obligation in the Rome Convention covers all rights, including any terms beyond twenty years that a Contracting State grants to its own nationals.

The Records of the Rome Convention seem to corroborate that ‘the protection specifically guaranteed’ in Article 2(2) RC refers to the ‘minimum protection [. . .] which the Contracting States undertake to grant [. . .] even if they do not grant it to domestic performances, phonograms, or broadcasts’.⁶⁹⁵ Most commentators are of the opinion that the Rome Convention indeed requires broad national treatment. This implies that a Contracting State must extend its longer terms of protection to foreign right holders, as long as they qualify for protection on the basis of the

693. See J. Reinbothe & S. von Lewinski, *The WIPO Treaties 1996* (London: Butterworths, 2002), 285, [Reinbothe & von Lewinski, 2002]. See also Green Paper on Copyright and Related Rights in the Information Society, 39, where the European Commission expressed the same opinion.

694. See X. Desjeux, *La Convention de Rome (10–26 octobre 1961): Etude de la protection des artistes, interprètes ou exécutants, des producteurs de phonogrammes et des organismes de radiodiffusion* (Paris: Pichon et Durand-Auzias, 1966), 84–86, [Desjeux, 1966]; C. Masouyé, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO Publication No. 617 (E) (Geneva: WIPO, 1981), 19, [Masouyé, 1981]; Stewart (1989), 227; M.M. Walter, ‘The Relationship of, and Comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the TRIPS Agreement; the Evolution and Possible Improvement of the Protection of the Neighbouring Rights Recognized by the Rome Convention’, *Copyright Bulletin* 34 (2000): 4–43, [Walter, 2000], 8; Brison (2001), 32–33; Ficsor (2001) paras PP4.08-PP4.12; and P. Katzenberger, ‘Inländer-behandlung nach dem Rom-Abkommen’, in Ganea et al. (2001), 481–491, [Katzenberger, 2001].

695. WIPO, Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome 10–26 Oct. 1961, WIPO publication No. 326 (E) (Geneva: WIPO/BIRPI, 1968 (reprint 1995)), [Records Diplomatic Conference Rome Convention, 1961], 39 (Report of the Rapporteur-General).

relevant criteria in the Rome Convention. No comparison of terms would be allowed under the Rome Convention.⁶⁹⁶

But the Geneva Convention (Article 2), the TRIPS Agreement (Article 3(1)) and the WPPT (Article 4) require only a very limited form of national treatment in respect of related rights. The national treatment obligation contained in these treaties does not go beyond the protection that they expressly define.⁶⁹⁷ Contracting states are under the obligation to grant the minimum rights and terms as provided for in these treaties to foreign right holders. They need not apply higher domestic standards of protection to foreigners. As a consequence, any contracting state to the Geneva Convention, the TRIPS Agreement and the WPPT is free to apply a comparison of terms to determine the duration of protection accorded to foreign right holders.⁶⁹⁸

5.3.2.3. Reciprocal Terms of Protection Outside the EU

To determine what terms of protection apply to EU right holders in non-EU countries, one needs to establish in which countries EU right holders are protected under the Rome Convention and in which countries they qualify for protection under TRIPs, WPPT or the Geneva Convention only.

5.3.2.3.1. Rome Convention States

With the exception of Cyprus and Malta, all EU Member States are party to the Rome Convention. EU right holders can therefore claim protection in all Rome Convention states. The eligibility criteria of the Rome Convention stipulate that phonogram producers must be nationals of a Contracting State or have their phonograms first fixed or first published in a Contracting State.⁶⁹⁹ Performers qualify for protection if their performances are embodied on a protected phonogram made by an eligible phonogram producer (again on the basis of nationality or place of first fixation or publication).⁷⁰⁰

696. See B. Knies, *Die Rechte der Tonträgerhersteller in internationaler und rechtsvergleichender Sicht* (München: Beck, 1999), 17, [Knies, 1999] and Walter (2001), 611. However, there is an exception to this rule. In regard to the right to remuneration for the secondary use of commercial phonograms, Art. 16(1)(a)(iv) RC provides that a contracting state can declare that it will grant the remuneration right with respect to sound recordings, the producer of which is a national of another contracting state, only to the same extent and for the same duration as that state grants protection to sound recordings first fixed by one of its nationals. Such a declaration under Art. 16(1)(a)(iv) RC is made e.g., by Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, the Netherlands, Poland, Romania, Slovakia, Spain, Sweden and the United Kingdom.

697. Walter (2000), 8; Ficsor (2001), para. PP4.13-PP4.15; Reinbothe & von Lewinski (2002), 285–286.

698. Walter (2001), 612–613.

699. Article 5 RC (phonogram producers).

700. Article 4 RC (performers).

If we accept the dominant interpretation that the Rome Convention's national treatment principle has a wide scope, and that Rome therefore does not allow contracting states to compare terms, EU right holders qualify for protection in most of the EU's principal trading partners (e.g., Argentina, Australia, Brazil, Canada, Chile, Japan, Mexico, Russia, and Turkey). If EU performers or phonogram producers would seek related rights protection in Brazil, for example, they should be granted protection for seventy years, because this is the term Brazil accords to its own nationals.⁷⁰¹

5.3.2.3.2. States Not Party to the Rome Convention

We have seen that if a right holder from the EU can claim protection only under the Geneva Convention, TRIPS Agreement, or the WPPT, a comparison of terms rule could apply. The primary EU trading partner that is not a party to the Rome Convention is the United States. It has adhered to the Geneva Convention, the TRIPS Agreement, and the WPPT.

Where it concerns the protection of foreign sound recordings in the United States, the US Copyright Act rather generously provides that a sound recording that was first fixed in a 'treaty party' (i.e., a country that is party to an international agreement to which the United States is party) is protected under US Copyright Law.⁷⁰² The United States is also a party to the Berne Convention, the Universal Copyright Convention (UCC) and the WCT. As a result, because all EU Member States are party to at least one of these treaties, EU record producers generally qualify for protection in the United States.

In addition, if and to the extent that performers can be regarded as authors of a sound recording (see Section 5.3.1), they will also qualify for protection in the United States. That is because works are subject to protection under the US Copyright Act if (a) on the date of first publication, one or more of the authors of the work is a national or domiciliary of the United States or of a 'treaty party', or (b) the work is first published in the United States or in a foreign country that, on the date of first publication, is a 'treaty party'.⁷⁰³

The US Copyright Act is also liberal in respect of the terms of protection granted to foreign right holders. It applies no comparison of terms. Under US copyright law, the domestic term of protection applicable to sound recordings

701. It must be emphasized, however, that some Contracting States to the Rome Convention have made a declaration under Art. 16.1(a)(iv) RC, allowing them to make a comparison of terms in regard to the right to remuneration for the secondary use of commercial phonograms. Of the states mentioned, Canada, Japan, and Russia have made such a declaration. However, because Canada and Japan apply an equal term of protection as is applied in the EU (i.e., fifty years), in these countries, this provision is of no practical relevance to the protection of EU right holders.

702. Articles 101 and 104(b)(3) US Copyright Act.

703. Articles 101, 104(b)(1) and (2) and, in respect of sound recordings, 104(b)(3) US Copyright Act.

governs both domestic and foreign recordings.⁷⁰⁴ As a consequence, once EU right holders qualify for protection in the United States under the criteria above, they are accorded the same term of protection as US right holders are: life plus seventy years, or in case of works made for hire, 90 years from publication or 120 years from creation. No disadvantage for EU right holders therefore exists.

5.3.3. IMPACT ON COMPETITIVENESS AND CULTURAL DIVERSITY

The proponents of a term extension claim that the shorter EU term affects the European content industry's competitiveness in relation to non-EU companies, which in turn has implications for cultural diversity. These proponents argue that without an extension:

creators of sound recordings in Europe will face a crucial disadvantage when competing against their counterparts in other territories, such as the USA, that will receive revenues from recordings that no longer enjoy copyright protection in the EU. This will have a very negative impact on the ability of European record companies to invest in developing and marketing European talent and to compete successfully in a global market.⁷⁰⁵

Whether such a 'very negative impact' exists is questionable for several reasons. Many factors influence the competitiveness of record producers. Intellectual property rights in general, and the duration of rights in particular, plays only a limited role. It can be safely assumed that the future competitiveness of the European music industry will have much more impact on its ability to innovate and make use of the considerable potential of new distribution channels and new usage forms of music (e.g., mobile music, ring tones, podcasts etc.), as well as to save costs.

It is also difficult to believe that the extra years of protection beyond the EU's fifty-year term (notably under US law) really cause the European music industry to focus on US markets.⁷⁰⁶ After all, as we have seen in Section 3.4.2, for the majority of sound recordings, overall profitability is only marginally affected by the term of protection. A shift in focus towards other markets is not likely for another reason. Music is a cultural good that is very perceptive to local influences, traditions, preferences, and language. In the United States the market share of domestic repertoire of US recorded music sales in 2004 was 93%, so the US market is

704. Nimmer & Nimmer (2008), § 9.12[A]. Note that since the United States protects sound recording under copyright law, Art. 7.8 BC, which allows contracting states to apply a comparison of terms, is also applicable. The United States, however, does not apply a comparison of terms.

705. Response to the Staff Working Paper on Copyright Review by BPI (part 1).

706. See Liebowitz (2006), 18. The Commission also seems to follow the argument that shorter terms in Europe 'could lead to fewer incentives to produce sound recordings that appeal to the European market'. However, in the end, it acknowledges that 'it is difficult to assess the precise extent of this problem as other parameters than the term of protection may affect the investments of the record industry'. See Impact Assessment on Term Extension, 19–20.

not receptive to European local music.⁷⁰⁷ European productions and local music have a large and growing market share in Europe. For example, the share of domestic repertoire in Germany in 2004 was 49%, in Italy 47%, in France 63% and in the United Kingdom 51%.⁷⁰⁸ These figures indicate that it is actually attractive for European businesses to produce domestic repertoire and thereby to contribute to Europe's cultural and creative production.

A term extension would not change the relative position of EU-based music producers, because right holders from non-EU countries would also benefit from the longer term. In general, EU Member States are free to determine the third countries' nationals they will grant protection.⁷⁰⁹ No EC directive requires them to do so, but Member States have of course taken on obligations under the Rome Convention or other related rights treaties. All that the Term Directive stipulates is that *if* sound recordings from outside are protected, the duration is calculated on the basis of the provisions of the Term Directive (Article 7(2)).⁷¹⁰ The Directive does allow for a comparison of terms.⁷¹¹

In view of the different national treatment rules in the international treaties discussed earlier, there are two situations in which the same harmonized term of protection must be granted to non-EU right holders. The first is where a non-EU right holder can claim protection under the Rome Convention. The second situation concerns the non-EU right holder whose domestic law recognizes a term longer than the EU harmonized term and who can invoke the Geneva Convention, the TRIPS Agreement, or the WPPT. In both situations Article 7(2) Term Directive causes the non-EU right holders to benefit from any term extension.

A US phonogram producer will typically qualify for protection in EU Member States directly under the Geneva Convention, the TRIPS Agreement, and/or the WPPT.⁷¹² Because of the comparison of terms rule of Article 7(2) Term Directive, the relevant Member State should grant the producer a term of protection expiring 'no later than the date of expiry of the protection granted in the country of which the right holder is a national'. If the EU were to extend its term by 20 or 45 years, the US right holder would benefit from such an extension, considering that under US copyright law rights have a longer or similar duration: in sound recordings they expire 70 years after the author's death, or in case of works made for hire, 95 years from publication or 120 years from creation.

707. IFPI (2005).

708. IFPI (2005); see also Impala, 'Profile of the European Music Sector', 2002, <www.impalasite.org/docum/04-press/press_0302_1.pdf>, [Impala, 2002].

709. Explanatory Memorandum to the Term Directive, 38.

710. See e.g., Reinbothe/Lewinski 1993, 199, in respect of the Rental Right Directive.

711. Walter (2001), 609.

712. US record producers will qualify for protection under these treaties without problem, because the United States is a Contracting State to these treaties, and phonogram producers will qualify for protection if they are nationals of a Contracting State. See Art. 2 Geneva Convention; Art. 1(3) TRIPS Agreement; and Art. 3(2) WPPT (these latter two conventions refer directly to Art. 5 RC).

The same US record producer will often qualify for protection in an EU Member State through the 'back door' of the Rome Convention. If the phonogram has been published 'simultaneously' (i.e., within thirty days) in the United States and in one or more of the Contracting States to the Rome Convention,⁷¹³ the right holder can rely on the extended EU term directly, again, assuming that the Rome Convention does not permit a comparison of terms. Figure 5.2 shows that Europe is a net importer of records and recorded media from North America. About 50% of the EU's world imports of records and other recorded media come from the United States and Canada.⁷¹⁴ Unlike the United States, Canada is party to the Rome Convention. Because US and Canadian phonogram producers stand to benefit from an EU term extension, such an extension will not improve the relative competitiveness of EU phonogram producers.

Moreover, if we take into account where the main international cash flow resulting from related rights protection eventually ends up, it is obvious that a term extension is more likely to have negative effects on the competitiveness of EU right holders. Through the back door of the Rome Convention, US phonogram producers and the performing artists on US phonograms already benefit from the higher level of related rights protection in many EU Member States.⁷¹⁵ Rome's back door makes it very lucrative for US record producers to simultaneously publish their sound recordings in the EU. By doing so they can, for example, benefit from equitable remuneration (royalties) collected in EU Member States for the broadcasting and other communication to the public of commercially published sound recordings (pursuant to Article 12 RC and/or Article 8(2) Rental Right Directive).⁷¹⁶

The United States does not provide for a similar remuneration right.⁷¹⁷ Instead, the US Copyright Act provides for a limited public performance right for certain digitally transmitted sound recordings.⁷¹⁸ EU phonogram producers

713. Article 5(1) under c in combination with Art. 5(2) RC. However, a contracting state may declare not to apply the criterion of publication (Art. 5(3) RC) or, under circumstances, to maintain fixation as the sole criterion (Art. 17 RC), thereby ruling out the possibility of simultaneous publication. Of the EU Member States that are a party to the Rome Convention, a declaration of the first kind is made by Belgium, Denmark, Estonia, France, Luxembourg, Poland, Slovenia and Spain, and a declaration of the second kind by Finland and Italy.

714. Source: OECD ITCS International Trade by Commodity database.

715. Some EU Member States, however, have made a reservation under Art. 16(1)(iii) RC, declaring that they do not apply the remuneration right of Art. 12 RC to phonograms of which the producer is not a national of another Contracting State. A declaration of this kind is made e.g., by Austria, Belgium, Bulgaria, Czech Republic, France, Italy, Latvia, Lithuania, the Netherlands, Poland, Romania, Slovakia, Spain and the United Kingdom.

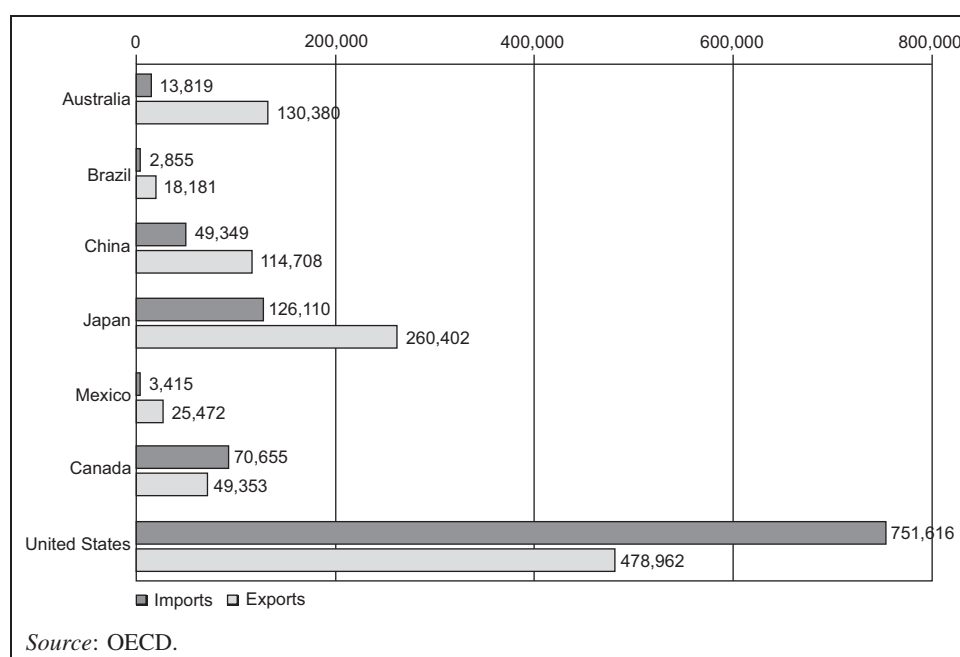
716. See e.g., Stewart (1989), 229.

717. Although the United States, in this respect, is bound by Art. 15 WPPT, which provides for a similar rule as Art. 12 RC, the US has made a declaration pursuant to Art. 15(3) WPPT, that it will apply the provisions of Art. 15(1) WPPT 'only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law'.

718. See Arts 106(6) and 114 US Copyright Act.

and performers whose performances are embodied on EU phonograms cannot claim remuneration in the United States for analogue broadcasting or public performance (playing of sound recordings in restaurants, bars, shops, offices). In sum, US right holders already have a comparatively better position than EU right holders, and any extension of the term of protection of related rights in Europe would only make their position better.⁷¹⁹

Figure 5.2. Trade flows from EU-15 in 2004 (USD 1,000) Records and Other Recorded Media (SITC Rev. 3,898.70)



A final observation to be made concerns the argument that EU Member States have to compete with countries with a longer period of protection.⁷²⁰ The argument implies that countries are in direct competition. The music industry is, however, a

719. Response to the Staff Working Paper on Copyright Review by NAXOS. But see Impact Assessment on Term Extension, 40–41, where the Commission looks at the trade implications of the proposed term extension and – provisionally – concludes that ‘most of the additional revenue collected over an extended term of protection would [...] stay in Europe and benefit European performers’.

720. Response to the Staff Working Paper on Copyright Review by BPI (part 1).

profoundly international industry, which is dominated by a small number of multinational corporations. Of the worldwide music market, 72% is controlled by just four multinational companies, the so-called Majors.⁷²¹ These companies have a large network of international affiliates and licensees in various countries. In these multinational companies, intra-company revenue flows often are not related to the shares of protected or unprotected recordings sold. This makes it nearly possible to determine which of any positive effects of a term extension would directly benefit the EU music industry, rather than the music industry in other countries.

5.4. ASSESSMENT AND CONCLUSIONS

In the previous sections we introduced and critically examined the arguments that are advanced in favour of a term extension of related rights in sound recordings. Most were put forward by stakeholders from the music industry in the consultation on the basis of the Staff Working Paper on Copyright Review. Many of these arguments reappear in some form in the Commission's Term Extension Proposal 2008. In the following section, we summarize the arguments for and against term extension and assess the proportionality of a term extension as an instrument to attain the objectives of related rights protection for performers and phonogram producers.

5.4.1. ARGUMENTS BASED ON THE NATURE AND OBJECTIVES OF RELATED RIGHTS

In Section 5.1 we examined the nature of related rights and queried whether it might support a claim for term extension. We first looked at performers' rights and saw that performers have never been recognized *de jure* as authors, even though stakeholders and scholars have argued that the art (or artistry) of performers is not fundamentally different from the creativity of authors of derivative works (such as translations and arrangements) that do merit copyright protection. The rationales underlying the legal protection of performers are basically the same as those underlying authors' rights: social justice, 'natural justice', cultural arguments, etc. Moreover, as stakeholders have rightly pointed out, in view of the average life expectancy in the EU, the existing fifty-year term of protection will not always cover the lifetime of a performer. Clearly, if performing artists could be equated

721. IFPI (2005).

722. See Impact Assessment on Term Extension, 21 ('from a legal perspective, the importance of their [the performers'] contribution to musical creation is not appropriately recognised. They are granted lesser moral and economic rights than authors') and 22–23, stating the intention to 'gradually align authors' and performers' protection' as one of the operational objectives of the proposal.

to 'true' authors, as the Commission assumes they should,⁷²² this is a powerful argument to extend the term for performers, perhaps even to the current copyright term of life plus seventy years.

There are, however, arguments against such an equation. First, important conceptual differences exist between copyright and related rights. Whereas works of authorship are protected by copyright on condition that the work is original, no similar creativity threshold applies to related rights protection. Moreover, if the main objective is to ensure performers a better 'social security', as the Commission's proposal clearly aims to achieve, we found that a term extension would be a very crude and imperfect measure. It would benefit only those performers whose recorded performances are still popular after fifty years (e.g., Sir Cliff Richard). Arguably, the rare artist that remains popular for more than half a century is the least likely to be in dire straits. A government policy promoting pension schemes for elderly artists would probably lead to more just and truly 'social' results.

Performers have also expressed concern that their older recorded performances could be abused or mutilated without their authorization, once the term of fifty years has expired. These are understandable concerns, but they need not be remedied by extending the term of the economic rights. One could instead imagine extending the term of moral rights protection for performing artists. In the law of copyright, it is not uncommon to have different terms for economic rights and moral rights.

Finally, in the light of existing contractual practices, it is unlikely that performers would actually (fully) profit from a term extension, as record companies routinely require a broad (or even full) assignment of the related rights of performers. In all likelihood, a term extension would primarily benefit record producers. Therefore, extending the term of protection of performing artists should be considered only in connection with statutory measures that protect them against over-broad transfers of rights. This question has further been examined in the economic part.

In regard to phonogram producers, we have observed that the existing regime of related rights is based on an entirely different rationale. They have been awarded exclusive rights not as a reward for creativity or artistry, but to protect, and serve as incentives to, investment ('*Leistungsschutz*'). Ideally, the protection granted to a phonogram producer for a recording is just long enough for the producer to recoup the investment in producing the recording. Comparing the shorter term of protection that is presently granted to record producers with the much longer term of copyright protection, misses the point that the rationales of both regimes are fundamentally different. Whereas copyright (authors' right) protects creative authorship, the rights of phonogram producers are meant to protect the economic investment in producing recordings. Also, the comparison with film producers, who in addition to related rights protection, often benefit from the much longer terms of copyright protection, falls short. The special rules for cinematographic works favouring film producers have not been developed to reward the work of film producers, but to facilitate the management of rights of the large number of

contributors to a film by concentrating these rights in the film producer. Similar problems of rights management do not normally occur when producing a sound recording.

Given that the protection of record producers is based on an investment rationale, the question rises as to the relevant 'investment' that justifies protection. We saw that the protection of record producers is founded on the premise that producing sound recordings is a costly undertaking, while a phonogram once recorded can be easily reproduced at very low (marginal) cost. Therefore, account is to be taken of the human and material – including organizational and technical – investment in making the sound recording (e.g., recording and production costs, including studio fees, studio musicians, sound engineers, etc.), because these are the achievements that are represented in the final product (the phonogram) that is the subject matter of protection. Surely, not all expenditures by phonogram producers may be taken into account. As in the case of the database right, a direct relation between investment and ensuing production of the sound recording must be demonstrated. This would exclude costs of marketing and after sales and possibly also investment in A&R.

Indeed, the related rights of record producers may have more in common with the sui generis database right and certain industrial property rights, such as design rights, semiconductor topography rights, and plant-variety rights. Whereas all of these rights share the same 'investment' rationale, their terms are considerably shorter while setting higher threshold requirements. Therefore, perceived through the lens of industrial property law, a good argument could in fact be made for shortening the existing term of protection of related rights for phonogram producers.

Whatever may be the precise nature of the investment that related rights granted to record producers seek to promote and protect, however, the rationale of these rights is not to create economic value for record companies as such. Ameliorating the balance sheets of record companies, or compensating these companies for losses incurred as a result of online piracy, as the Commission aspires to accomplish with its 2008 Term Extension Proposal, is clearly not the objective of granting related rights.

5.4.2. ECONOMIC ARGUMENTS

In Section 5.2 we examined various economic arguments and analyzed relevant data. It is noteworthy that stakeholders have presented very little quantitative (empirical) data to support their call for a term extension.

A central question that we addressed was whether record producers would need a longer term of protection to recoup their investment. To that end, we first examined the average costs of producing a sound recording. Whereas because of the advances in information technology the technical costs of owning and operating professional recording equipment has decreased, the costs of marketing recordings have gone up. These costs now make up the largest part of the total

investment in producing a phonogram. However, as concluded earlier, it is doubtful whether these costs may be taken into account as investment justifying related rights protection. Insofar as marketing costs accrue in the goodwill of trademarks or trade names (increasingly, successful performers are indeed branded as such), record producers or performers may derive perpetual protection from trademark law.

We subsequently demonstrated that for the large majority of phonograms the producers are likely to either recoup their investment within the first years, if not months, following their release, or never recoup the investment. If a sound recording has not recouped its investment after fifty years, it is very questionable that it ever will. On the basis of this finding it can be assumed that a term of protection of fifty years offers producers of sound recordings more than enough time to recoup their investment.

The temporary monopoly granted by related rights results in deadweight losses caused by lower volumes of sales resulting from higher licensing costs and consumer prices. Deadweight losses are acceptable if they help achieve the objectives at which related rights aim. However, assuming that the current term of fifty years is indeed sufficient to achieve the main goal of related rights, that is, to enable phonogram producers to recoup their investment and performing artists to receive an adequate income, a term extension beyond fifty years would involve deadweight costs in excess of the costs necessary to fulfil the objectives of related rights.

We have also seen that, as stakeholders have argued, phonograms that will lose protection over the next five to ten years indeed provide a valuable source of revenue to European record producers. As the rights expire, these phonograms will become subject to increasing competition and falling prices, leading to a loss of income from the licensing of sound recordings. Stakeholders argue that this will negatively affect future investment in A&R. This is also what the Commission assumes in its Term Extension Proposal 2008. However, it appears that only a limited share of the record producers' overall revenues are currently invested in A&R. The predicted negative effect on investment in new talent is therefore likely to be limited at worst.

Moreover, the expiration of related rights does not necessarily cause record producers to completely lose their competitive advantage. Property rights in the original master recordings that are indispensable to any high-fidelity re-use will remain safely with the phonogram producers. Expiration of the related rights does not bring these 'masters' into the public domain. Most likely, they will be treasured by the record companies for many more years to come. Without direct access to the master recordings, competitors will have to content themselves with releasing lower grade duplicates of phonograms previously published on vinyl or CD.

Another argument we examined concerns the 'long tail'. We found that a term extension might indeed inspire phonogram producers to revitalize their back catalogue recordings and make them available to a variety of (digital) distribution channels. This could, in turn, foster competition and innovation in new distribution models, also for niche content, and improve public access to sound recordings.

On the other hand, the recent history of the Internet shows that the stakeholders that now ask for a term extension have not been quick to seize on new exploitation possibilities. Moreover, a longer term of protection could also have the opposite effect of preventing the exploitation of the back catalogue by third parties. A term extension would prolong the exclusive rights of phonogram producers to control exploitation models for back catalogue repertoire, certain secondary uses, and new distribution models.

In regard to performers, a term extension would certainly benefit those artists that are still popular after fifty years and still receive payments from collecting societies and/or participate in the revenues from the sales of their recordings, provided that they have not signed away their rights against a single buyout fee. The share of recordings that are still commercially valuable after fifty years, however, makes up for only a small part of the overall repertoire. Benefits from a term extension would therefore accrue to only a limited share of performing artists.

For the majority of performers who do not derive substantial revenues from their recordings after fifty years a term extension would result only in their recordings not being commercially exploited and/or made available to the general public for a longer period of time. That is because most performers assign all or most of their economic rights to record companies when signing a recording contract.

If the EU legislature want to improve the financial situation for all performing artists, the more sensible and effective thing to do would be to scrutinize the contractual terms between performers and music publishers and record producers rather than to extend the term of protection of sound recordings for the benefit of only a few. This is what the Commission has attempted to achieve by including in its proposal for term extension a special fund for session musicians and a 'use it or lose it' rule. It has been shown, however, that although these measures may indeed improve the situation for performing artists to some degree, they are surrounded with quite some uncertainties. It remains to be seen, therefore, what the practical value of the special fund and the 'use it or lose it' clause would be.

5.4.3. INTERNATIONAL COMPETITION ARGUMENTS

Besides legal and economic arguments, stakeholders have also posited that not granting a term extension would distort competition between right holders based in the EU and their competitors based in non-EU countries where right holders may enjoy longer terms. In this context, we first examined whether the current term of fifty years in the EU is out of line with existing terms at the international level. We concluded that it is not. The fifty-year term of protection laid down in the Term Directive is in conformity with the TRIPS Agreement and the WPPT and well above the twenty-year minimum standard of the Rome Convention. Countries such as Canada, Japan, and China also provide for terms of fifty years, whereas longer terms (seventy to seventy-five years) exist in Australia, Brazil, and Mexico. Furthermore, in the United States, sound recordings are protected for exceptionally

long terms (life plus seventy years or, in case of works for hire, 95 years from publication or 120 years from creation).

Not surprisingly, therefore, stakeholders calling for a term extension have based their claim mainly on a comparison with US copyright law. The American terms, however, do not truly reflect a judgment by the US legislature on the need to protect sound recordings for extended periods of time. Rather, the very long terms in the United States are due to the fact that under US federal law, sound recordings are not subject to related rights, but protected under copyright law. The term of protection, therefore, follows the much longer terms applied in copyright law. From an international perspective, the American terms are anomalous. It cannot serve as a justification, from a legal perspective, for extending the terms of related rights in the EU.

Subsequently, we analyzed the argument that foreign countries would apply a 'comparison of terms' to the detriment of EU right holders. We found this argument unconvincing, for various reasons. For some countries, a comparison of terms is already ruled out by international law (including Argentina, Australia, Brazil, Canada, Chile, Japan, Mexico, Russia, and Turkey). Other countries do not apply a comparison of terms. Notably, the EU's main 'competitor, the United States, does not do so. Right holders from the EU that qualify for protection in the United States are accorded the same term of protection as is granted to US right holders.

Another argument advanced by stakeholders is that a failure to bring the term of protection in the EU in line with that in the United States will negatively affect the competitiveness of the European music industry. This is also one of the primary concerns of the Commission. However, the competitiveness of record producers is based on a wide variety of factors, such as intellectual property protection in general and the term of protection in particular. Moreover, the worldwide music market is dominated by only four multinational companies (the so-called 'majors') that cannot be characterized as either 'European' or 'American'. Revenues received by these companies are often subject to intra-company flows that are not related to the shares of protected or unprotected recordings sold. Juxtaposing the interests of the European and the American music industries would thus be wholly artificial.

Even so, the market dominance of the 'majors' is an economic factor to be taken into consideration when contemplating any extension of the term of protection of related rights. Currently, the European music market is dominated by four major music labels that have an estimated overall market share of 81%. Because of the exclusive rights they are granted and that have been assigned to them by performers, these companies have significant control over the exploitation, certain secondary uses, and distribution channels. A term extension would, in all likelihood, strengthen and prolong this market dominance to the detriment of free competition.

5.4.4. CONCLUSIONS

Based on the various findings of this study, we are not convinced by the arguments made in favour of a term extension. The fact that some sound recordings still have economic value as rights therein expire, cannot in itself provide a justification for extending the term of protection. Related rights for sound recordings were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving 'value' in perpetuity. The term of related rights must reflect a balance between incentive and market freedom. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the marketplace. It is also an essential source of inspiration to subsequent creators, innovators, and distributors. Without content that still triggers the public imagination, a robust public domain cannot exist.

Moreover, from the viewpoint of better lawmaking, the Commission's proposal for term extension is also very contentious. As was elaborated in Section 1.2.4, the principle of proportionality requires Community action to be suitable and necessary to achieve the objectives pursued. To establish the proportionality of its proposal, the Commission formulated six 'operational' objectives against which proposed measures are assessed. The objectives are to gradually align authors' and performers' protection; to incrementally increase the remuneration of performers; to diminish the discrepancy in protection between the EU and United States; to incrementally increase A&R resources; to ensure the availability of music at reasonable prices; and to encourage the digitization of back catalogues.⁷²³ On closer inspection, one can hardly escape the impression that these objectives are introduced to justify a commitment to extend the term of protection, rather than to objectively assess its impact.

In fact, this study and other independent studies have demonstrated that there are serious doubts as to whether a term extension is the right instrument to realize the objectives pursued by the Commission. Without hesitation however, the Commission concludes that '[the] above mentioned operational objectives [...] can best be achieved by changes to the performers' and producers' term of protection'.⁷²⁴ Of interest, the Commission arrived at its conclusion after referring almost exclusively to the studies that argue in favour of a term extension. Many of these studies, funded by the music industry, are not available publicly. In its Impact Assessment the Commission largely ignored more critical studies, including the Institute for Information Law (IViR) study it had itself commissioned. Furthermore, to the extent that the Commission used empirical data, its origins or quality were not always clear. Obviously, the inability (or reluctance) of term extension proponents to substantiate their claims with hard data made it difficult to assess the

723. Proposal Term Extension, 7; Impact Assessment on Term Extension, 22–23.

724. Proposal Term Extension, 10.

725. See e.g., para. 13 of Case C-331/88 (*Fedesa*).

need for a term extension. The way in which the Commission proceeded in the light of this apparent lack of empirical evidence is far from encouraging.

The principle of proportionality also requires that Community action reaches no further than necessary to achieve its objectives. The disadvantages associated with the measure must not be disproportionate to the aims it pursues.⁷²⁵ However, instead of carefully balancing the arguments in favour of and against term extension, the Commission focused on the alleged positive impact of its proposal on performers and record producers, while largely ignoring any negative impact on consumers, (re)users, and society at large. In fact, contrary to what the current and other independent studies demonstrate, the Commission arrives at the conclusion that '[a] term extension would have no negative impact on consumer prices and would have a positive impact on the quality of services offered to consumers as well as on consumer choice'.⁷²⁶

In sum, the sixty-one page Impact Assessment left us with the impression that the purpose of this document is not to substantiate a problem, explore various policy options and subsequently arrive at the best choice, considering the costs and benefits of various policy options. Rather, the Impact Assessment appears to be conceived to justify a policy decision already made.

It is doubtful that a term extension is the most appropriate measure to address the problems that the Commission says it wants to tackle. Admittedly, the two problems that feature most prominently in the proposal of the Commission, namely the precarious financial, legal, and social position of performers and the poor financial situation of the music industry that is confronted with significant losses as a result of peer-to-peer piracy, appear to be real and in need of attention. However, as this study has clearly demonstrated, there are other equally effective but less detrimental means to address the problems of performers and record producers. It seems that, in general, performers are better off with social security measures (pension schemes and the like) for later in life, a lifelong protection of their moral rights, and a stronger protection against overbroad contractual assignments than with an extension of the term of protection. To protect record producers against peer-to-peer piracy, on the other hand, Digital Rights Management (DRM) technologies or effective enforcement of anti-piracy legislation spring to mind as the more appropriate means.

On balance, the Commission's Term Extension Proposal is a fine example for those who have concerns about the quality, proportionality, and legitimacy of European intervention in the field of copyright law. The lack of a balanced consideration of the arguments for and against term extension affects not just this one proposal, but the legitimacy of European intellectual property policy in general. This cannot have been the intention. Better lawmaking must do better.

726. Impact Assessment on Term Extension, 36.

Chapter 6

Term Calculation for Co-written Musical Works

In Chapter 2 we elaborated how the Term Directive has not resulted in identical terms of protection for all authored creations throughout the European Union (EU). The primary cause is simple: the concept of a work of authorship is not harmonized. This means that where a certain production involves multiple authors, it depends on the domestic law of each Member State whether the contributions are viewed as works in their own right or as collective or joint works. And where those views differ, so does the term of protection, attaching as it typically does to the individual work. Musical works are an important although by no means the only category of works that suffers from this gap in the *acquis communautaire*. For this category, the EU legislature – heeding the call of music publishers – is considering a solution in the form of introducing a rule for co-written musical works along the same lines as was earlier legislated for film in the 1993 Term Directive.

Under the proposal, the term of protection for a co-written musical work would be calculated from the death of whomever survives last (lyricist or composer), regardless of whether domestic law grants these authors copyright exclusively in their own contribution or in the combined contributions. The result would be that music publishers and the estates of authors can benefit from a uniform and longer term of protection. They would no longer have to cope with lyrics or composition entering the public domain at different points in time, or so at least the argument goes.

In this chapter, we will examine more closely the nature of the problem of what we will call ‘term-split copyrights’⁷²⁷ in co-written musical works, and discuss the merits and drawbacks of potential solutions. We do so first by looking at

727. In the music industry, ‘split copyrights’ is the term commonly used to denote the situation in which there are various right owners with regard to the same musical production.

the various models of authorship expressed in the copyright laws of Member States. Second, we describe the problems associated with diverging terms of protection, both from the general interest perspective of the internal market and the perspective of practical problems that right holders claim arise for both individual and collective management of music rights. Last, we review the merits of the road the European Commission (EC) proposes to take to address the problem, as well as alternative avenues.

6.1. EU MEMBER STATES' MODELS FOR MULTIPLE AUTHORSHIP

Musical works are generally mentioned explicitly in Member States' copyright acts as eligible for protection. Quite a number of laws follow the distinction made in Article 2(1) of the Berne Convention between musical compositions (with or without words) on the one hand and dramatico-musical works (e.g., opera) on the other hand.⁷²⁸ This distinction as such has no bearing on the issue of (joint) authorship or ownership in music to which more than one author has contributed creatively. Article 7*bis* BC stipulates only in general terms that for works of joint authorship, the term of protection is to be calculated from the death of the last surviving author. As we saw in Chapter 2, the Term Directive specifies the same in Article 1(2). The question of *when* there is joint authorship is not addressed in either instrument, nor do they contain any further provisions relating to the term of protection for musical works specifically.

Recital 13 of the Term Directive poses that the question of authorship in the whole or part of a work is a question of fact to be decided by national courts. Consequently, the method of calculating the term of protection depends on how music is characterized under the law of individual Member States. Copyright laws do generally not address the status of co-written musical works in particular. Rather, musical works are treated the same as other creations involving multiple contributors. The basic relevant concepts are the musical composition as unitary work (i.e., one single work), as two separate works (lyrics and music, i.e., multiple works), or as a collaborative work. These three concepts feature in two combinations in the laws of Member States.

On the one hand, there are Member States that classify music as either a *single* (unitary) work or as *multiple* (separate) works. The principal criterion used to distinguish between the two is either:

- (a) whether the contributions are identifiable or have merged into an integrated whole (e.g., United Kingdom, the Netherlands); or
- (b) whether the contributions have separate economic value, that is, can be exploited separately (e.g., Germany, Hungary).

728. For example, Denmark, Finland, France, the Netherlands, Poland, Portugal, Spain, Sweden and the Czech Republic.

If there are no separable contributions (a), or no separately exploitable contributions (b), the work is classified as a joint work, in which joint authorship and ownership rests. A further relevant criterion is whether the co-contributors have worked creatively towards a common goal. Because lyrics and composition can typically be identified or exploited separately, as a rule the 'unitary vs. multiple' Member States regard co-written music as two separate works. The lyrics are considered an independent work, and so is the composition.

On the other hand, there are Member States that classify music as either *multiple* works or a *collaborative* work (e.g., France, Belgium, Portugal, and Spain). The principal criterion used in these legal systems is whether there has been creative collaboration towards a common goal or following a common plan. If there is such collaboration, the work is regarded as a joint work, in which joint authorship and ownership rests. Whether or not the individual contributions are separate entities is not a relevant criterion. On the contrary, if their contribution lends itself to separate exploitation, the authors as a rule retain the right to do so. The 'multiple vs. collaborative' Member States tend to regard music as a collaborative work, but in some cases, such as where pre-existing poems or other texts are set to music, the situation is less clear.

The terms 'joint work' and 'joint authors' and 'co-authored work' and 'co-authors' are often used interchangeably. For the sake of clarity, we reserve the term 'joint work' and 'joint authors' to indicate situations in which there is a unitary work (i.e., individual contributions cannot be distinguished or exploited). The terms 'co-authored works' and 'co-authors' indicate situations in which there has been a collaborative effort, but the individual contributions are still recognizable.

The three concepts – unitary, multiple, collaborative work – and the ramifications of their application to music will be analyzed in more depth later. Additional concepts can fit certain music productions. For instance, some musical works could be characterized as a 'collection', that is, a composite work that is original because of the selection and arrangement of its (copyrighted) contents (Article 2(5) BC, Article 3(1) Database directive). Remixes may come into this category. On the same token, arrangements of music or translations of lyrics can attract copyright notwithstanding the copyright in the original composition or lyrics (Article 2(3) BC). For such derivative works, the same questions arise as to who qualifies as author: is it for instance, in case of a cover of a song in a foreign language, the original composer as well as the translator of the lyrics? Other ownership concepts, such as work for hire and 'collective'⁷²⁹ works may also affect the issue of authorship or initial ownership – and therefore the term of protection – of music, but the use of these concepts is not at the heart of the problem that concerns us here.

729. A collective work or '*oeuvre collective*' is (with slight variations among the laws of Member States who recognize the concept) a work created at the initiative of a natural or legal person who edits it, publishes it, and discloses it under his direction and name. The personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created (e.g., Art. L-113(2) French Copyright Act, Art. 8 Spanish Copyright Act, Art. 16 Portuguese Copyright Act).

A point that should be clarified is that the differences in terms of protection because of split copyrights with regard to the same music, occur only on the assumption that the law governing the term of protection is that of the country for which copyright is claimed. In other words, from a conflict of laws perspective, the term of protection is governed by the *lex protectionis*, or law of the *Schutzland*.

The *lex protectionis* is quite widely accepted as the general conflict rule for copyright and indeed most intellectual property rights.⁷³⁰ On that basis, a person may be regarded as author, co-author, or joint author (or not qualify as author at all) with respect to the same creation in different Member States. The term of protection his or her successors in title enjoy is dependent on the local qualification of the kind of authorship/ownership. It is precisely in the area of authorship (initial ownership) that other conflict rules have been used in some Member States (and in the United States)⁷³¹ and have been propagated in legal doctrine.⁷³²

The most used alternative is application of some form of the *lex originis*, that is, the law of the country of origin of a work.⁷³³ The advantage of this rule lies in the fact that one single law governs the question of authorship with respect to a particular creation. For a given co-written musical work this could mean that it will not be treated as a collaborative work (co-authorship) or as multiple works (separate authorship for each contribution) from one Member State to the next. The *lex originis* would thus indirectly affect the term of protection, because this in turn depends on the qualification of a work. This possibility is discussed in more detail below (Section 6.4.3).

6.1.1. CO-WRITTEN MUSIC AS UNITARY WORK

Some Member States, including Denmark, Finland, Sweden, the United Kingdom, and the Netherlands, do not provide for collaborative works specifically.

730. For *infringement* of copyright, the Rome II Regulation provides for application of the *lex protectionis* (Art. 8).

731. For example, in French case law, in the Greek Copyright Act, in US case law. *ITAR Tass v. Russian Kurier* 153 F.3d 82 (2nd Cir. 27 Aug. 1998); Cass. 29 Apr. 1970 (*Lancio v. Editrice Fotoromanzi Internazionali*), *Rev. crit. dr. int. priv.* (1971); CA (Court of Appeal) Versailles 17 Dec. 1993 (*Sarl F2S v. Pravda*), *RIDA* No. 162 (1994): 448; CA Paris 6 Jul. 1989 (*Turner v. Huston*), *RIDA* No. 143 (1990): 329; CA Paris 1 Feb. 1989 (*Bragance v. Orban*), *RIDA* No. 142 (1990): 302; District Court and Court of Appeals in *Saab Scania v. Diesel Technic*, cited in Cass. 7 Apr. 1998, *Rev. crit. dr. int. priv.* 1 (1999): 76. For an overview see van Eechoud (2003).

732. See, for instance, J.C. Ginsburg, 'The Private International Law of Copyright', *Receuil des Cours* 273 (1998): 356–357, [Ginsburg, 1998]; Goldstein (2001), 103 et seq.; H. Schack, 'Internationale Urheber-, Marken- und Wettbewerbsrechtverletzungen im Internet – Internationales Privatrecht', *MMR* (2000): 64, [Schack, 2000a]; P. Torremans, 'The Law Applicable to Copyright: Which Rights Are Created and Who Owns Them?', *RIDA* 188 (2001), [Torremans, 2001].

733. Another conflicts rule used for works made by employees is based on 'accessory allocation', whereby the law governing initial ownership in a work is the law that governs an employment contract.

Consequently, in these systems a musical work is either a unitary work or multiple works. The distinction between musical works as single or multiple works is based primarily on the *indivisibility* of the contributions of the creative contributors.⁷³⁴

For a co-written musical work to qualify as one work, a number of copyright acts require that the end result constitutes an inseparable whole, that is, in which the respective contributions of the authors are no longer recognizable as such. Their efforts should be directed at the production of an artistically integrated whole, in which their respective contributions have merged. If there is such a work, the authors are joint authors, owning the copyright jointly. Typically, each joint author can enforce the copyright individually. The term of protection is calculated from the time of death of the last surviving joint author. Under these systems, because the lyrics and the musical composition can clearly be distinguished from each other, the two combined are not seen as one work, but as two. As a result, if the creation of the music is a group effort, there will be two separate works (lyrics and composition), each of which is owned by the creators jointly.

Alternatively, the relevant criterion used to distinguish a unitary from multiple works is not factual indivisibility, but *economic* indivisibility, as is the case for instance under German, Czech and Hungarian copyright law. If parts are identifiable but are not suited for separate exploitation, the creative contributors who have worked towards a common goal, jointly own copyright in the work, and may not assign rights in their contribution.⁷³⁵ In such cases also, the term of protection is based on the death of the last surviving author.

There are some forms of music in which ‘lyrics’ and music do not appear to be separable, for example, in the vocal technique known as ‘scat’ in jazz music, where words or sounds are sung, often as part of a call-and-response interaction with other musicians. Normally speaking however, co-written musical works will not easily meet the required *economical* indivisibility of lyrics and music, let alone the *factual* indivisibility. The British Copyright Act is very specific where it considers lyrics and music as separate works. Article 3 of the Copyright, Designs and Patents Act 1988 provides ‘“musical work” means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music’. The Austrian Copyright Act also expresses – albeit indirectly – that music and words normally are separate, where it denies joint authorship in case works of diverse nature are joined (no joint authorship exist by mere ‘... Verbindung von Werken verschiedener Art – wie die eines Werkes der Tonkunst mit einem Sprachwerk’, Article 11 Austrian Copyright Act).

734. A similar criterion is used in e.g., Art. 10 Italian Copyright Act, Art. 11(1) Austrian Copyright Act (‘untrennbare Einheit’), Art. 2 Maltese Copyright Act, Art. 6 Danish Copyright Act, Art. 6 Finnish Copyright Act, Art. 6 Swedish Copyright Act, Art. 8 Slovenian Copyright Act.

735. Article 5(1) Hungarian Copyright Act, T. Dreier & G. Schulze, *Urheberrechtsgesetz: Urheberrechtswahrnehmungsgesetz, Kunsturhebergesetz: Kommentar* (München: Beck, 2004), [Dreier & Schulze, 2004].

6.1.2. CO-WRITTEN MUSIC AS MULTIPLE WORKS

In cases in which co-written music cannot be characterized as a unitary work or a collaborative work, lyricist and composer each are considered author and owner of their respective contributions.⁷³⁶ This is the predominant view in for instance the United Kingdom, the Netherlands, Germany, Austria, Italy, Denmark, Finland, and Sweden. Under these laws, both lyrics and music attract their own term of protection. Consequently, the lyrics and composition will typically enter the public domain at varying times.

The time gap may be substantial, as is the case in which one of the authors suffers an untimely death while the other lives a long life – the Gershwin brothers are an illustrative example, with their deaths occurring nearly fifty years apart. Lennon and McCartney could become another one. A large time gap may also exist where a pre-existing poem or other (literary) text is set to music. In many cases, however, lyricist and composer are likely to be contemporaries and the time gap will be limited.

6.1.3. CO-WRITTEN MUSIC AS COLLABORATIVE WORK

As has been said previously, a co-written musical work is usually made up of two distinct parts and is consequently not regarded as a unitary work. Member States have, however, developed various concepts of collaborative works to establish authorship and its modalities in which several authors are involved in a common project.

The French, Portuguese, and Spanish laws share a similar concept of works of collaboration that is of particular relevance to co-written musical works.⁷³⁷ A work of collaboration is a work in the creation of which more than one natural person has participated. The authors must have worked together creatively towards a common goal. As has been said, unlike for unitary works, it is not a relevant factor that the respective contributions can be identified separately or have independent economic meaning. On the contrary, the rules for collaborative works assume that parts are suitable for independent exploitation.⁷³⁸ For music to qualify as a collaborative work, Portuguese law in addition demands that the musical work is presented as such, that is, divulged or published under the name of (some of) the co-contributors.⁷³⁹

736. This does not mean that in the exercise of their copyright either author can ignore the legitimate interests of the other party, whether based on provisions within copyright acts, common torts, etc.

737. Article 7 of the Spanish Copyright Act and Art. 16 of the Portuguese Copyright Act.

738. Cf. Lucas (2001), 160 et seq.

739. Article 16(1) Portuguese Copyright Act. This criterion is primarily relevant to distinguish collaborative works from collective works.

All three legislations provide for the same consequences where works of collaboration are concerned. The work becomes the joint property of its authors and is to be exploited collectively, but may be enforced individually. Each author may, unless otherwise agreed, separately exploit his own personal contribution without, however, causing prejudice to the exploitation of the common work. The qualification as collaborative work implies that the lyrics or music are not themselves each the object of a copyright, that is, unlike is the case with composite works, there is not a copyright in the whole as well as in the separate parts.⁷⁴⁰ As is the case with joint works, the term of protection of collaborative works will be calculated from the calendar year of the death of the last surviving author.

French case law provides many examples of works of collaboration,⁷⁴¹ among which traditionally are co-written musical works.⁷⁴² Other collaborative works include, to name but a few, illustrations and dialogues for comic strips, photographs with comments, illustrations in scenarios, and cinematographic (or other audiovisual) works.⁷⁴³ Such works are characterized by what French courts have labelled: 'a common inspiration',⁷⁴⁴ that results in the creation of a work regardless of whether the different skills applied are of the same nature or are, on the contrary, of different genres. Similarly, if the collaboration is not simultaneous, it does not necessarily preclude the work from being qualified as a work of collaboration.

French case law has recently given its interpretation of the application of Article L. 113-3 of the Code of Intellectual Property, which allows each co-author of a work of collaboration to exploit his contribution separately, in a case involving a song of which the composer had agreed to lend his music to a commercial advertisement.⁷⁴⁵ It was ruled that the author of the lyrics could rightly invoke his moral rights to forbid such an exploitation as it robbed the song, a work of collaboration, of its 'oneness'. Indeed, adjoining different words, meant to increase sales of a product, amounted to causing prejudice to the song itself and thereby to the author of the original lyrics.

740. See, however, Art. 9 Polish Copyright Act, which states that in case of joint works, each creator may exercise the copyright in the part of the work created by him or her if the part has intrinsic value, without prejudice to the rights of the other joint creators. A similar provision is contained in Art. 30(3) Estonian Copyright Act.

741. French judges have been and still are entangled in the exact definition of works of collaboration and collective works. A plethora of court decisions points to the confusion the definitions, as formulated in the French Copyright Act, can lead to. The difficulty revolves around the notion of 'separate right' in the work.

742. See e.g., CA Paris, 19 Dec. 1878: DP 1880, 2, 62; CA Paris, 1ère ch., 11 May 1965: D. 1967, 555; CA Paris, 4ème ch. 29 Apr. 1998: Juris-Data n. 022149.

743. These form an exception, as they are the only category to have been expressly designated as works of collaboration by law. They also obey a set of special rules.

744. This criterion of 'common inspiration' was first suggested by French doctrine and duly applied by French judges. See e.g., CA Paris, 1re ch., 11 Dec. 1961: RTD com. 1962, 674; CA Paris, 7e ch., 8 Jun. 1971: D. 1972, 383; TGI Nanterre, 1re ch., 6 Mar. 1991, *Cah. dr. auteur*, April 1991, 19.

745. CA Paris, 12 Sep. 2001, reported at <www.nomosparis.com/fr/archives.php?idnews=2&mois=1&annee=2002>.

6.1.4. EXCEPTIONS TO SEPARATE CALCULATION OF TERMS

In a few Member States, although lyrics and music each attract their own copyright, the calculation of the term of protection is based on whoever – lyricist or composer – survives last. This is the case in Italy for certain musical works. The detailed Italian rules on copyright contract law singles out dramatico-musical works (and other musical compositions with words) as being of a nature where literary and musical parts can be distinguished and do not constitute a joint work. Dramatico-musical works (e.g., opera) are, however – like joint works – listed as works whose term of protection is to be calculated as expiring after the death of the last surviving author.⁷⁴⁶ The Italian legislator has expressly chosen to treat dramatico-musical works (opera) as a whole for the purposes of determining the term of protection.

Estonian copyright law also calculates the term of protection for copyrights in co-authored works the same as for copyright in joint works. Under Article 30(3) of the Estonian Copyright Act, authors who jointly create a work in which the various contributions are recognizable as separate and can be exploited as such, each own the copyright in their contribution.⁷⁴⁷ They may not exercise their individual copyright to the detriment of the other co-authors with whom the work as a whole was created. The term of protection for these co-authored works is – like that for joint works – based on the last surviving co-author. This is a generic rule that applies to all genres of creations, including music.

A model in between collaborative works and multiple or separate works is the German concept of ‘associated works’.⁷⁴⁸ This concept is also recognized in for example, Polish Copyright law.⁷⁴⁹ It applies where several authors have explicitly or implicitly agreed to ‘associate’ their individual works in view of joint exploitation. Under German law, the agreement to associate the works can either be for a determined period of time or extend to an open-ended venture (in doubt, the association of works will last until the death of the last surviving author). Typically, a libretto and the musical composition of an opera and the lyrics and music of a song are deemed to qualify as such works.

For the duration of the association agreement, all decisions pertaining to the exploitation of the ‘associated works’ must be taken jointly. In addition, independent exploitation of each contribution must not compete with or hinder the ‘association’. As a result, a poem that has been bound to a musical composition can be printed in an anthology. However, the author of the poem is prohibited from lending it to another musical composition as this would cause prejudice to the previously associated musical composition.

746. Article 26 of the Italian Copyright Act.

747. If the contributions are inseparable, there is joint ownership (and by definition, no separate exploitation possible).

748. Article 9 of the German Copyright Act.

749. Article 10 Polish Copyright Act.

The different works included in the 'association' will each individually fall into the public domain seventy years after their respective authors pass away. This means that the heirs of the author of a work (included in the 'association') passing away first will cease to receive royalties attached to the 'association' after the term of protection's expiration, whereas the heirs of the last surviving author will continue to enjoy the fruits of the exploitation of the 'association' until seventy years *post mortem auctoris*.

6.1.5. CONCLUSIONS

Typically, the copyright laws of Member States do not contain rules tailored specifically to musical works. Co-written musical works that are made up of music and lyrics are treated the same as other works of authorship. This means they are primarily categorized as multiple works or as collaborative works. The fact that lyrics or music constitute contributions eligible for separate exploitation, in many Member States means there is not one common copyright but only separate ones, each attracting its own term of protection of seventy years *post mortem auctoris*. This approach is consistent within the legal systems concerned, because they do not recognize collaborative works but only joint works – in which the individual contributions of authors have merged into one (economic) whole, which is protected for the life of the last surviving author plus seventy years.

The boundaries between various concepts are rather fluid, particularly where collaborative works are concerned. Some laws seem to grant the co-author a separate copyright in his or her contribution, while the term of protection is dependent on the last surviving of all the co-authors. Others regard collaborative works as one, that is, without separate copyrights for the individual co-contributors (although they generally are free to exploit their own contribution separately as long as it does not harm the work as a whole). In some Member States the concept of a joint work (inseparable whole) is incorporated in the concept of collaborative work, which may be a work with or without identifiable contributions. Other Member States explicitly distinguish joint works from co-authored works (collaborative works), while subjecting both to a term of protection based on the life of the last surviving author.

6.2. INTERESTS AFFECTED BY DIVERGING TERMS OF PROTECTION

In its Explanatory Memorandum to the Term Extension Proposal 2008, the European Commission identifies two types of difficulties that in their view justify legislative action for term-split copyrights in musical works. These are 'difficulties in administering copyright in co-written works across the Community', and 'difficulties in cross-border distribution of royalties for exploitation that occurs

in different Member States'.⁷⁵⁰ To argue the size of the problems, the Commission mentions a handful of musical productions, such as the opera 'Pelléas et Mélisande', for which the split-term issue will become acute in the near future. It also quotes figures provided by the International Confederation of Music Publishers (ICMP):

An analysis of the most popular French songs for the period 1919–2005 shows that 77 % of those songs are co-written. A similar analysis of the most popular songs in the UK for the period 1912–2003 shows that 61 % of those songs are co-written. Regarding newly created works, another survey sampling around 2000 newly registered works with SGAE the Spanish collective rights management society, in 2005–2006, reveals that over 60% of such works are co-written [footnotes omitted].

A first point to be made about these figures is that they do not give a proper idea of the size of the problem of diverging terms of protection in practice. Problems associated with the lyrics or music entering the public domain at different times are primarily relevant for musical works that are still exploited commercially by the right holders seventy years after the first author has died. As we have seen in the previous chapter on term extension for sound recordings, studies show that the average life cycle for sound recordings is short (at most a few years rather than decades). To the extent that the lifecycle of phonograms tells us something about the economic life of the musical works they embody, it seems likely that the vast majority of musical works cease to be exploited by while their creators are still alive.

Yet another thing is not clear from the music publishers' figures. How common is it for the lyrics and music to be created separately by individual artists, that is, one writes the lyrics and the other writes the composition? Probably, in a good many cases there is overlap in authorship, that is, multiple authors collaborate on both lyrics and music, or present themselves as co-authors, as for example Lennon and McCartney are reputed to have done in many instances. In those cases, the music publishers do not have the problem they report. After all, the lyrics then are considered a joint work, as is the music, so the rule of Article 1(2) Term Directive applies and calculation of the term is based on the life of the last surviving author.

Another point that matters when assessing the scope of the problem is to know just how prevalent it is for the authors to die many years apart. A well-known example of are the Gershwin brothers (George died in 1937, Ira in 1998).⁷⁵¹ But such examples may be only the exception to the rule. If indeed most co-creators are contemporaries with comparable life spans, the successors in title of the last

750. Explanatory Memorandum Term Extension Proposal 2008, 2.

751. Interestingly, the Gershwin brothers are not mentioned as an example by the EC, although it must be the single most important example (in terms of revenue to be extracted from an extension of copyright protection in the work of the composer George), and the Gershwin estate is widely known for lobbying to keep the work of George from falling in the public domain.

surviving author have relatively little to lose by separate term calculation. The figures presented by the European Commission shed no light on the issue.

What the figures do seem to indicate is that the level of co-creation has not changed significantly over the years. In other words: the problem is not at all new, or bigger, or something that could not have been envisaged in earlier term harmonization exercises. Yet as is evident from the short history of harmonization detailed in Chapter 1 of this book, term-split copyright is not identified as an issue requiring attention in either the Green paper of 1988 and its follow-up, or the Green paper of 1995 and its follow-up. Finally, although the proposed measure would have Article 95 TEC as its legal base, there is nothing in either the Impact Assessment or Explanatory Memorandum that explains in any depth how the term-split copyright phenomenon affects the functioning of the Internal Market.

It appears then that the Commission has merely adopted the concerns aired by a number of stakeholders⁷⁵² in the course of the consultations on the 2004 Staff Working Paper on Copyright Review. We will turn to these concerns now. Representatives of music publishers⁷⁵³ complained the term-split copyright problem affects a voluminous list of songs and generates 'substantial practical difficulties' that have the effect of creating distortions in the internal market.

6.2.1. ARGUMENTS OF RIGHT HOLDERS FOR LEGISLATIVE INTERVENTION

According to the music publishers, different terms of protection create barriers to the free flow of trade within the internal market: an instrumental version (or a version with new lyrics) could be marketed without the right holders' consent in EU countries where the music has fallen into the public domain, but not in Member States where the original version is protected in its entirety. This would diminish the value of the music (or of the original lyrics) where the work is still protected and the sale of the instrumental version (or of a new lyrical version) in that Member State is prohibited. Consequently, the different terms of protection, generate a situation in which the principle of free flow of goods in the marketplace may be contrary to the legitimate exercise of the copyrights in the musical works in the states applying uniform term protection when the goods incorporate co-written copyright musical content such as CDs, DVDs, videos, and other media products.

Another argument put forward by music publishers is that diverging terms of protection impede the estates of music composers and text writers from effectively licensing their works throughout the EU. When a work is protected in some

752. Stakeholders that have given more or less substantive replies on the issue are notably the International Confederation of Music Publishers, various UK organizations representing creators, music publishers, and/or collecting societies (Creators' Rights Alliance, British Music Rights), European Broadcasting Union, GESAC, PEARLE; see the list of contributions to this consultation: <http://forum.europa.eu.int/Public/irc/market/market_consultations>.

753. See the response to the Staff Working Paper on Copyright Review by the International Confederation of Music Publishers.

Member States, but certain of its elements are not in other Member States, exploitation problems arise because it is more complicated to control those elements that remain protected in some Member States but not in others.⁷⁵⁴

The music publishers further argue that term-split copyrights complicate multi-territorial licensing by collecting societies. The music collecting societies, representing the composers and authors and their music publishers, administer European works in their own territories through reciprocal representation agreements and must ascertain for which territories, which parts of a musical work has fallen out of copyright. Cross-border use of works makes the latter a point to contend with often. As a consequence, there are limitations to the development of multi-territorial licenses within the EU when different terms of protection apply to the elements of co-written works. This situation, it is stressed by music publishers, does not facilitate the ability to license transborder services within the Community (including broadcasting and other forms of communication to the public of sound and video images incorporating musical works, with the difficulties related to the broadcast via satellite, or to the simulcast or making available, of material that is unprotected in certain states into states where those rights are protected).

One of the recurring complaints pertains to administrative complications: the discrepancies in the definitions (i.e., the criteria to calculate the term of protection for musical works in the EU) make the administration of the rights in musical works (including technical difficulties in tracking the protected works) an arduous task. It also requires additional investment in information technology (IT) systems of both music publishers and collecting societies, who will have to deal with a growing stream of split copyrights.⁷⁵⁵

In addition, the differing applications of the term of protection are found to distort the flow of distributions to the creative community in music. Parts of a work can claim royalties in some countries but not in others, resulting in different amounts of income. This, in turn, again according to the ICMP, has a negative impact on investment potential, and decisions of that order will suffer because of the lack of legal clarity.

Not all stakeholders regard the differences in term calculation problematic, or favour an extension of the term of protection based on the life of the last surviving author.⁷⁵⁶ It has been argued that the arguments put forward by the music publishers and collecting societies point to a lack of evidence of any practical problems arising from diverging applicable legal concepts and definitions, and thus the necessity for intervention at the EU level.⁷⁵⁷ In practice there is no doubt as to

754. British Music Rights also pointed to the fact that split copyrights complicate licensing.

755. See response to the Staff Working Paper on Copyright Review by British Music Rights and the International Confederation of Music Publishers. GESAC has not raised these points in its response.

756. See responses to the Staff Working Paper on Copyright Review made by EBU, PEARLE; the latter suggesting that if a standard term for co-written music could be based not on the life of the author, but calculated from date of first publication.

757. See Response to the Staff Working Paper on Copyright Review by the EBU.

the duration of copyright in music in EU Member States, or as to the event that triggers the moment it will enter the public domain.

Summarized, it is primarily the music publishers who so far have voiced concerns, because the differences in terms of protection complicate the exploitation of works and results in less income. Those stakeholders who favour Community action advocated a solution in line with what the Term Directive has done for cinematographic works: it has designated the authors of the work as a whole for the purpose of calculating the term of protection of the economic rights, which is triggered by the death of the last surviving author and subsists for another seventy years.

6.2.2. PROBLEMS WITH TERM CALCULATION IN PRACTICE

In this section we will expand on the problems that term-split copyrights cause stakeholders in the music industry. As was said, these problems (or lack thereof) have primarily been put forward in the 2004 Consultation on the Staff Working Paper on Copyright Review. We have subsequently interviewed a number of these stakeholders.⁷⁵⁸

In the EU, term-split copyright only arises with regard to co-written works that are at the very least seventy years old, but given the average life expectancy of authors, the works in question are more likely to be a 100 to 120 years old (e.g., work of a young composer writing in his twenties, is may be over fifty years old by the time the composer dies and thus over 120 years by the time term calculation problems may set in). This is why split copyrights to date occur primarily in the classical ('serious') music repertoire, notably opera, and to a lesser extent in popular music from the 1920s to 1940s. The vast repertoire of popular songs created, especially since the second World War, will start falling partly out of copyright in about forty years. The economic effects will then in all likelihood be felt more strongly, by whoever owns the rights (estates, music publishers, investment groups, etc.).

It should be noted that the 'costs' properly attributed to the differential treatment of musical works do not include any changes in licensing revenues that result from compositions or lyrics falling in the public domain at varying times. In other words, if a composition falls out of copyright before the lyrics do, such 'costs' are in effect estimates on the extra income that music publishers and estates could generate if the term of protection for the composition were extended to match that of the lyrics.

It is difficult to ascertain the (future) size of the problem in terms of costs for right holders associated with the administration.⁷⁵⁹ These costs depend on various

758. The following stakeholders were consulted for further information on the practical impact of split copyrights: International Confederation of Music Publishers, European Broadcasting Union, GESAC, British Academy of Composers and Songwriters, and PEARLE. Correspondence is on file with the authors.

759. The ICMP has provided the authors an estimate of approximately EUR 15 million in additional costs per year for all EU music publishers combined, for the next ten years. The figure is

factors, such as the number of actively exploited works involved and the measure in which existing information systems can deal with the necessary metadata. In the following section the effects of diverging term calculation is analyzed in more detail for both collectively and individually managed rights.

6.2.3. COLLECTIVELY LICENSED MUSIC

The economic effects for music publishers, estates, and collecting societies are essentially twofold. First, there is the potential loss of income as an increasing number of titles in back catalogues become less valuable, because copyright no longer provides a basis for exploitation of either the lyrics or music, whichever is no longer protected.⁷⁶⁰ As we argued earlier, these are not actual costs. Second, the administration and monitoring of a growing number of co-written works affected by term-split copyright requires investments, notably in databases.⁷⁶¹ The general impression from information supplied by collecting societies⁷⁶² is that where fixed costs are concerned, these are estimated to be insignificant, because the systems of collecting societies are already equipped to deal with split copyrights.

Currently music publishers and the authors they represent derive the bulk of their revenue from fees for collective licensing (especially in regard to communication to the public). These right holders – always the authors, not always the music publishers because these are not represented in every collecting society – will ultimately also bear the costs of administration made by collecting societies, which is why they have an interest in seeing these controlled.

Where collective licensing is concerned, the variations in the term of protection of musical works has (or in theory at least should have) both an effect on the fee calculated for blanket licenses and on the redistribution of royalties to right holders.

extrapolated from estimates from two larger publishers and two smaller ones, and includes ‘a. One-time set-up costs (database, initial training of staff, etc.), Annual Staffing costs (primarily corresponding to headquarters’ costs), Annual Additional Administrative (“AAA”) costs (primarily corresponding to affiliates’ costs), and Annual Provision for Litigation costs.’ The latter reservation is counted as actual costs. No specific breakdown of costs was given, nor information which allows an evaluation of the estimates of the sampled music publishers, and of whether they are representative for the music publishing industry. Paper from ICMP of 28 Aug. 2006, on file with authors.

760. Of the two, music is more easily exploited separately from the lyrics, so the effect of lyrics falling out of copyright would appear to be less than that of the composition entering the public domain.

761. Of interest, this was not a point made by the collecting societies in the consultations on the Review of copyright (2004). GESAC did express concern over the loss of income resulting from split copyrights falling in the public domain.

762. Through GESAC, information was received from BUMA (Netherlands), PRS (United Kingdom), TEOSTO (Finland), SUISA (Switzerland), SPA (Portugal), STIM (Sweden), SGAE (Spain), SACEM (France), SOZA (The Slovak Republic), AKKA-LAA (Latvia), ARTISJUS (Hungary), and ZAIKS (Poland).

The effect of split copyrights on the fees for blanket licenses will in all likelihood be limited. Because each collecting society has its own method for calculating licensing fees, however, it is difficult to describe the exact effects of term-split copyright. Methods for calculating fees for various (commercial) uses are based on many different factors depending on the type of use and users. The ratio of music used in the public domain to music in copyright may be determined based on for instance complete cue lists or play lists or on samples. Where an increasing part of the repertoire publicly communicated by such users as broadcasters, websites, and restaurant or club owners, consists of titles that are partly in the public domain, this implies fees should decrease. But in relation to the size of the entire repertoire managed by collecting societies, with new music added and falling out of copyright daily, the proportion of the music in catalogue that is partly in copyright will remain small and is unlikely to have a substantial effect on fees. Especially considering that license fees are primarily calculated on the basis of capacity of a venue (e.g., for public performance in theatres, dancehalls, etc.), box office receipts or turnover, floor space (e.g., for use of music in background in stores), number of telephone lines (e.g., for use of music by call centres), size of audiences, etc.

On the distribution side of collective management, effects are potentially bigger. Once part of the musical work is in the public domain, the successors in title of the author of that part will no longer receive royalties. Typically, the monies calculated for distribution toward a given title will then accrue to all remaining right holders in the relevant revenue stream.⁷⁶³ For the individual right holders (primarily music publishers and estates) of compositions or lyrics that are still popular today, the loss in income may be substantial, depending on how sensitive their back catalogue is to term-split copyrights. Factors that determine this sensitivity include the average age of titles, the occurrence of co-writing, and the commercial viability of titles of approximately 100 years or more old.

Collecting societies that operate in countries that consider co-written music as multiple works of composer and lyricist can be expected to have an administrative model that accommodates for split copyrights. However, where the distribution of royalties through sister societies is concerned, problems arise. The transfer may concern royalties specified to the level of individual works or interested parties (authors, composers, music publishers), but may also be transferred based on aggregates. If the receiving society does not have an information system that allows it to recognize which of its members (estates, music publishers) are not eligible for a share in the royalties because the lyrics or music in question are not in copyright in the country of use,⁷⁶⁴ they may continue to receive royalties. This is of

763. This is the case in the United Kingdom (PRS) and the Netherlands (BUMA), both countries where composition and lyrics are typically considered as two separate works with their individual term of protection.

764. Most collecting societies report that they receive adequate information from their sister organizations to enable them to distribute the fees remitted. SPA Portugal reported that regardless of the status of the musical work in the (foreign) country of use, they redistribute monies

course disadvantageous to the right holders of music that is in copyright, because they share revenue with right holders for whom technically speaking no royalties were collected. The distribution of license fees for foreign repertoire seems less problematic where the local collecting society transfers the royalties to sub-publishers that have registered with it.

The allocation of royalties across borders demands even more refined management systems when collecting societies license repertoire for multi-territorial use, especially the Internet. On the other hand, advances in information technologies allow for the handling of complex metadata. Internationally standardized systems for the identification of works and composers, writers, arrangers, translators, etc., are also becoming more sophisticated (e.g., WID, IPI, CIS-net, and Fasttrack). Of particular importance is the interested parties information (IPI) system with its unique identifier (IPI number) for all individuals and legal entities that hold music copyrights.⁷⁶⁵

The question is whether the additional administrative burden for music publishers and collecting societies that differences in term calculation will cause them in the coming years makes a difference large enough to justify the introduction of a harmonized rule. A point to consider in this respect is that the operations of collecting societies may undergo serious changes in the near future. Such changes are caused by developments in information technologies and business models (e.g., increased use of DRM to individualize licenses and cross-border music services on the Internet), as well as by regulatory developments. As was set out in Chapter 3, the EC's Online Music Recommendation appears to mark a development towards collective management that is much less organized along territorial lines, giving right holders more leeway to choose different collecting societies to manage different rights for different territories. Such development could well require adjustments of the information systems of collecting societies that may dwarf those necessary to accommodate for the administration of term-split copyrights (e.g., multi-territorial licenses).

6.2.4. INDIVIDUALLY LICENSED MUSIC

As has been pointed out, a genre of music currently most affected by term-split copyrights is classical or serious music, notably opera as it by definition concerns a combination of composition and lyrics/text. In opera, the effect of separate copyrights for music and libretto is felt both where it concerns authorization for stage performances and collective licensing. Because individual licensing of stage performances and other 'grand rights' are relatively more important in opera than in

received on the basis of the status the musical work has under Portuguese law [e-mail correspondence on file with authors].

765. The IPI system is managed by SUIISA (the Swiss authors rights society), and was designed to replace the CAE system (unique identifier for Compositeur, Auteur, Editeur).

popular music, the practical implications of split copyrights for individual licensing warrant closer scrutiny.

The exploitation of copyrights for staged opera takes place along territorial lines, not in the least because theatre companies or opera groups predominantly stage performances in the Member States where they are based. The licenses for stage productions (including adaptations, e.g., translation of a libretto) are negotiated with local music publishers. For travelling productions, authorization is obtained directly from the foreign right owners or music publishers or indirectly through the local music publisher.

For music publishers and the authors whose work they commercialize, split copyrights may complicate license negotiations. The authors/music publisher have an interest in maintaining control over both music and lyrics/libretti, primarily for economic reasons but also because adaptations of the part that has fallen out of copyright may affect the integrity of the (author of the) work still in copyright.⁷⁶⁶ As was noted earlier, this is an economic concern voiced by music publishers.

The producers of stage performances, on the other hand, expect that the fact that the composition or libretto is in the public domain is reflected in the license agreement, notably in financial terms but also where it concerns freedom to stage adaptations or translations of the 'free' part of the work. To what extent the terms of use are actually revised as a result of the changed legal status of the opera in question, depends of course on the contracting parties' relative bargaining power.⁷⁶⁷

Obviously, where it concerns the duration of copyright, right holders would benefit from a uniform rule that takes the death of the last surviving author as starting point. The same cannot be said for stage performers and theatres (or other users, e.g., those seeking synchronization licenses). Most likely it only causes them to need permissions from music publishers/authors in Member States where they currently do not need them or where they can negotiate reduced fees because part of the opera is in the public domain. Because most opera's are staged for local audiences by local groups or theatres, the introduction of a uniform European calculation rule – which as has been noted would artificially extend the term of protection for part of the musical work – potentially has a large impact for users in Member States that currently use separate terms.

6.3. THE PROPOSED SPECIAL TERM CALCULATION RULE

We have seen that industry stakeholders (music publishers and collecting societies) have suggested that the calculation rule for audiovisual works as laid down in

766. An interesting question is – though not of practical importance for our purposes – to what extent moral rights of the composer can be invoked against adaptations of the lyrics of which he is not regarded author (and vice versa), whether or not the lyrics are in the public domain.

767. In some Member States model agreements are in use, such as those developed by the *Deutscher Bühnenverein* (German national organization of theatres and orchestras).

Article 2 Term Directive should apply to co-written musical works. The EC has adopted the idea.

In this section we will discuss the merits and drawbacks of said rule. As we shall see, on balance it is not at all clear that adopting the film rule for co-written music will solve the rights management problems associated with term-split copyrights. The rule raises as many questions as it answers, and it is highly debatable whether it meets the proportionality standard that we described in Section 1.2.4. That being said, alternative policy options that are put forward in the next sections are not without problems either.

Before we analyze the term calculation rule, a reminder of the source and objective of the film rule that inspired it is given. This will help to ascertain whether film and music share the characteristics that call for application of a similar term calculation rule.

6.3.1. TERM CALCULATION FOR AUDIOVISUAL WORKS

The question of authorship of cinematographic or audiovisual works in the Community was first raised in the 1988 Green Paper on Copyright and the Challenge of Technology. The disparities in national provisions establishing either the ownership of exclusive rights or a presumption of who was to exercise the economic rights on behalf of all the contributors were already then pointed out. It was the Rental Right Directive that marked the first Community harmonization of who was to be considered the author of a cinematographic work. This came about through a legislative procedure wrought with amendments first looking to introduce the principal director as the author of a cinematographic work and then looking to undo this introduction.

The final solution ended up establishing at EU level that ‘for the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors’. The solution, though determining, was to be construed as concerning only the Directive’s realm as the words: ‘for the purposes of this Directive’ clearly indicate. This, however, was further expanded when Article 1(5) of the Satellite and Cable Directive took over the very same definition. This had laid the foundations for the Term Directive to state for the first time that, in general, the principal director of a cinematographic or audiovisual work should be considered as its author or one of its authors without restricting the definition to ‘the purposes of this Directive’.

Article 2 of the Term Directive deals exclusively with cinematographic or audiovisual works; it does not establish their exact nature as unitary works, works of collaboration, or collections of works. After establishing that the principal director of a cinematographic work is to be considered as its author or one of its authors, it goes on to exhaustively enumerate the principal director, the author of the screenplay, the author of the dialogue, and the composer of music specifically created for use in the cinematographic or audiovisual work because the four

contributors whose life spans must be taken into account for the calculation of the term of protection's expiration. The death of the last of these four contributors triggers the seventy-year *post mortem auctoris*.

The European legislature have thus partly detached the calculation of the term of protection from the question of authorship. This was deemed necessary because of the sheer number of (creative) contributors to a film. Some Member States regard only certain contributors as authors, whereas others use open criteria, allowing everyone who creatively contributed to the work as author (e.g., persons designing sets, sound, costumes, lighting).⁷⁶⁸ A certain level of harmonization of who qualifies as author was necessary to arrive at a uniform term of protection. In its report on authorship of cinematographic or audiovisual works of 2002, the Commission concludes that further harmonization of the definition of authorship for film works is not necessary, because the existing differences do not seem to cause problems for the exploitation of the film or enforcement of copyright.⁷⁶⁹

6.3.2. SPLIT-TERM CALCULATION FOR CO-WRITTEN MUSIC

If indeed the practical impact of diverging terms of protection that we have discussed above *is* to be qualified as a hindrance to the internal market, which requires harmonization, the question is what the measure should entail, considering especially the principle of proportionality as elaborated in the Protocol on Subsidiarity and Proportionality (see Section 1.2.4). Let us recall that the principle of proportionality requires *inter alia* that the EU legislate only to the extent necessary, and that care should be taken to respect the integrity of Member States' legal systems. As shall be elaborated later, it will be difficult to satisfy both criteria simultaneously with the introduction of a harmonized rule for the calculation of the term of protection.

The first question to be answered when considering harmonization of the term of protection for co-written musical works is why a rule similar to that introduced for film would be suitable. As was set out above, from the legislative history of the term calculation rule for film, it can be inferred that the differences between the laws of Member States were more about who of the large number of people contributing (creatively) to the production of a film qualify as author, than about how audiovisual works are to be characterized. The introduction of the term calculation rule for film followed the development towards a minimum harmonized rule for

768. French legislation, for example, presumes five contributors to be the joint authors of an audiovisual work made in collaboration (Art. L. 113-7 French Copyright Act). These are the authors of the script, of the adaptation, of the dialogue, author(s) of the musical compositions, with or without words, specially composed for the work and the director. In addition, 'if an audiovisual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work'.

769. Report of the European Commission to the Council, Parliament and Economic and Social Committee on authorship of cinematographic or audiovisual works, COM (2002) 691 Def. (Brussels, 6 Dec. 2002) [Report on Authorship of Cinematographic or Audiovisual Works].

authorship in films. The difficulty with determining the term of protection for co-written music, however, depends not on who is (co)-author – essentially lyricists/translators and composers/arrangers – but on what type of work music with lyrics is. As was shown earlier, it can be a collaborative or unitary/single work (joint ownership), an associated work (separate ownership, common exploitation), or regarded as multiple works (separate ownership).

Given the fact that national copyright laws do not treat musical works differently from other works that involve the contribution of more than one person, the question is why a special rule should be introduced solely for music. The problems that arise with determining the term of protection for co-written musical works also occur with other types of productions, for example, multimedia, illustrated books, design, and software. These problems have always existed, indeed can never be avoided because it is a common characteristic of human cultural production that creators collaborate or build on each others' work.

Another important point to consider is the effect the proposed rule will have on various stakeholders and the public interest in general. Any harmonization will in effect extend the term of protection for significant markets (e.g., United Kingdom, Germany, Nordic countries). Past experience has shown that it is not a realistic option politically to devise a 'downward' harmonized rule that would result in a uniform but shorter term of protection, that is, based on the first author to die. It is more likely that any harmonization will result in a de facto extension of the term of protection. From the perspective of the internal market, intellectual property rights – and by implication the extension of the term of protection – are in essence seen as limits to the free flow of goods and services, as is evident from Article 36 EC Treaty (see Section 1.1).

Let us now turn to the exact provision that the European Commission has proposed. It gives rise to unclear areas, notably in regard moral rights and what precisely is meant by 'author' and 'composer'. Unfortunately, the Impact Assessment that preceded the Term Extension Proposal is silent on the term calculation issue. Nor can much guidance be inferred from what otherwise is an important source of interpretation of EC rules, namely the Explanatory memorandum to the proposed directive.

The Term Extension proposal 2008 is quite brief. It envisages an Article 1(7) is inserted:

The term of protection of a musical composition with words shall expire seventy years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the author of the lyrics and the composer of the music.

One would assume that the provision targets only musical works that are the result of intentional collaboration by lyricist(s) and composer(s). This means that if a pre-existing text is set to music, the author of that pre-existing text does not qualify as author within the meaning of Article 1(7). Likewise, where a lyricist writes a text to an old (possibly even public domain) melody, the composer of the melody would not profit from a term extension. If the term calculation rule were not limited to

intentionally co-written works, but apply to any ‘musical composition with words’, it could amount to musical works remaining in copyright for generations, even forever. Why is this so? Because any adaptation (derivative work) by a younger artist would trigger a recalculation. For example, a melody by an author who died in 1950 would not enter the public domain in 2020 if a lyricist used the melody in a new musical work, but instead be protected until seventy years past the death of the lyricist, or longer, if subsequent versions with adapted lyrics are created. A rule that is not restricted to intentionally co-written works could also result in the revival of protection in public domain compositions or texts. It is unfortunate that the Explanatory Memorandum and the Recitals are silent on the matter, for if the rule goes through unchanged, it will take years before the legal uncertainty caused by the said unclear areas is resolved by the ECJ.

Another problem with the Article 7(1) rule is that it does not clarify how moral rights should be dealt with. As we have seen in Chapter 2, the Term Directive explicitly excludes moral rights from its scope. Does this mean that Article 7(1) harmonizes only the method of calculating the term of protection for economic rights? Remember that in some Member States moral rights lapse when the economic rights do, in others the *droit moral* survives the economic rights indefinitely (e.g., Greece, France). Again, the Explanatory Memorandum and the Recitals do not shed light on whether the Commission proposes to have two separate regimes for calculating the term of protection: EU harmonized for economic rights and domestic for personality rights.

6.4. ALTERNATIVE APPROACHES

From what we stated earlier, it may be clear that in our view there are substantial drawbacks to the introduction of a term calculation rule as it currently is on the table, while there is scant evidence of the real need for such a rule. In fact, it has all the hallmarks of a legislature uncritically lending itself to rent-seeking by right holders, especially the music publishers. Before we consider possible approaches to the issue of diverging terms of protection for co-written musical works, it is worth recalling what we know – and do not know – of the scope of the problem.

Varying terms of protection do not occur only with respect to music and lyrics that have been intentionally co-written. They will also occur in the case of new arrangements by a later composer, translations of a later lyricist, or where pre-existing poems are set to music. Also, the duration of moral rights has not been harmonized. So from the point of view of rights administration, the basic facilities for dealing with term-split copyrights will still need to be in place. This raises the question of whether the music publishers and collective rights organizations can actually save as much on costs for information and communication technologies and organization as they claim.

Considering the size of the problem, let us recall that split copyright terms affect only co-written music that is at least seventy years old, but given the average life expectancy of authors, more likely over 100 to 120 years old. Especially in

popular music, very few songs are still of economic interest after that time (see the previous chapter on term extension of related rights above). In various studies it is estimated that by the time musical works fall into the public domain, only 3% to 5% are still commercially viable.⁷⁷⁰ This means that for the purpose of royalty redistribution, the status will have to be determined for a very limited number of works (i.e., those still exploited and having a separate composer and writer).

The size of the problem is modest today – it is notably present in opera – because the large volume of popular songs of the post-war period will not start to fall (partly) out of copyright for another few decades. Also, because much music is co-written by authors of the same generation, the actual gap between the respective terms of protection will normally not be very substantial. Even if this gap were to be closed, it is doubtful whether – given the average life cycles of new titles⁷⁷¹ – it will in and of itself cause music publishers to invest more in new authors or in re-exploiting the existing catalogue, as has been claimed it would.⁷⁷² It must also be reminded that a rise in the proportion of music that is co-written does not automatically imply a proportionate growth in the number of split copyrights and therefore administrative burden. Split copyright in terms of the problem addressed here does not arise where the creators have both contributed to music and lyrics (or are registered as such, e.g., Lennon/McCartney published songs under both their names, regardless of who composed them).

Another reason why the size of the problem – and consequently, any affect on intra-community trade – is limited has to do with the fact that currently it is predominantly in the area of opera that the effects of term-split copyrights are felt. In this genre of music the effects are also predominantly local because there are relatively few staged opera performances that travel among Member States. From that perspective the effects on the free flow of services and goods in the internal market seems very limited.

Speaking more generally of adverse effects on the internal market, it should be recalled that the fact that one Member State, by adhering to its own view of what constitutes a joint work of authorship, arrives at protecting musical works longer than the next Member State, does not engage in an unauthorized limitation of the free trade in goods within the meaning of the EC Treaty (see the case law discussed in Chapter 1). As the ECJ has elaborated in *Generalized Tariff Preferences*, a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms are not sufficient to justify community action. The creation of a ‘level playing field’ is not a legitimate basis for community action as such.

770. Compare Rappaport (1998) and the studies on commercial viability of recorded music in s. 5.2.2.

771. One would not expect investment decisions to be taken on the basis of expected returns in 70–100 years time. See Rappaport (1998).

772. Submission by ICMP in the consultations on the Review of copyright (2004), ascertaining the split copyrights have a negative effect on investment decisions.

Bearing in mind these points – which all indicate that the best policy option for the EU at least for the short and mid-term is not to do anything – we will discuss three alternative approaches to a term calculation rule. These are the use of contract law, harmonization of substantive law (e.g., a harmonized definition of musical works of joint authorship), and a private international law solution.

6.4.1. CONTRACTUAL ARRANGEMENTS

In the consultations, some parties have stressed the inequality that supposedly exists between the successors in title of the co-authors, when the contribution of one of them enters the public domain while the other contribution is still protected and may generate royalties. This may be considered as an issue between co-creators, which could be addressed by them at the contractual level. After all, why would the risk an author runs of dying before (or surviving) his co-creator have to be transferred to society at large.

Contractual provisions on the measure of control and share in royalties of co-authors based on the relative value of their contribution are common (such data can also be remitted to collecting societies, which then calculate monies due to the individual parties accordingly). This type of arrangement can be extended to curb the effects of term-split copyrights. If composer and lyricist desire to redistribute the risk of an untimely death and the chance of a long life, they can choose to let their successors in title share the royalty income between them (and the music publisher where necessary), even when either composition or lyrics is no longer copyrighted.

Another way for co-authors to rebalance their respective positions would be by agreeing not to have their successors in title exercise their copyright once the term of protection for the shortest living author has ended. The latter option in particular does not seem attractive for the authors, and would only benefit users of the musical work, as the contractual arrangement itself has no effect *erga omnes*.

6.4.2. HARMONIZATION OF SUBSTANTIVE LAW

We have argued above that there are reasons not to address the split-term copyright issue for musical works with a special calculation rule. So if the underlying cause of term-split copyright has to do with the definition of works of authorship, would not it make sense to harmonize Member States' laws at that substantive level, that is, provide for a common definition of a co-written musical work? One could argue such a partial harmonization is not desirable in the light of the development of a consistent and clear European *acquis* for copyright and related rights.

Alternatively, the EU could harmonize the concept of work of authorship across the board, that is, for all types of productions subject to copyright. What would be required is a common notion of what constitutes a collaborative or a joint work, which must then be done in such a way as to include all intentionally co-written musical works. This in turn raises another problem: variations in Member

States' laws also extend to other essential characteristics of the concept work of authorship, notably the originality criterion and the status of adaptations (Section 2.1 on the *acquis communautaire* for works of authorship and related rights subject matter). Thus, to only harmonize the concept of joint authorship would not aid consistency of the *acquis*.

Even if harmonization were limited to just authorship of joint works, that would appear to run counter to the maxim that the EU shall legislate only to the extent necessary. Obviously, from the point of view of the problem it seeks to address – diverging terms of protection for co-written music – harmonization across the board would be a draconian measure. It is informative that on the issue of authorship in audiovisual works, the Commission concluded that:

The different national solutions as regards ownership of rights in audiovisual works were in practice overcome by contractual solutions and do not seem to have created obstacles to trade which would impede the effective exploitation of rights across Member States.⁷⁷³

If across-the-board harmonization cannot be justified, what of harmonization limited to co-written musical works? This appears to run counter to the proportionality principle that requires that care be taken to respect the integrity of Member States' legal systems (see Section 1.2). A specific rule would have a negative effect on the internal consistency of copyright laws of those Member States that view music and lyrics as separate works, which therefore attract separate terms of protection. This is particularly so because copyright acts involved do not contain specific provisions for musical works, but these are treated the same as other protected subject matter, for which there is also no concept of collaborative work.

Even leaving aside considerations of proportionality, would the introduction of a harmonized definition of joint or collaborative musical works solve the problems associated with term-split copyright? Not quite, for several reasons.

Granted, like the film rule approach, a uniform rule (whether based on last or first of the composer or lyricist to die) would address the most important concern of music publishers and collecting societies, that is, it would free them of the cost of administering term-split copyrights. However, it is difficult to ascertain what part of administration costs right holders could thus save. It may be a very modest sum considering that collecting societies as well as music publishers already need detailed information systems for proper the multitude of right holders involved in musical works (composers, writers, translators, arrangers, publishers, sub-publishers, and any estates, other owners, or licensees).

On the more practical level, we have argued that a uniform term of protection for co-written music will in all likelihood only have a minor effect on revenues from collective licensing for public performances, which is the principal source of income for right holders in (popular) music. These revenues will under a uniform term based on the life of the last contributor plus seventy years, be shared by a

773. Report on Authorship of Cinematographic or Audiovisual Works, 11.

larger number of interested parties, resulting in a transfer of income from for example, contemporary composers and lyricists to the estates (or other successors in title) of long deceased authors.

A thorny issue – that also plagues the term calculation rule proposed by the EC – concerns the question of how originally co-written works would be distinguished from derivative works. Provision would have to be made to distinguish musical works in which pre-existing lyrics or music are used from ‘true’ co-written works. Otherwise, the use of, for instance, a poem in the public domain could lead to a revival of the copyright in it when it is set to music (possibly also making the successors in title of the poet co-owners of the copyright in the newly created work). As a result, even if for intentionally co-written works a harmonized term of protection were introduced, one would still have to determine per musical work what its status is (e.g., true co-written or derivative) and how long its term of protection runs. Split copyright would still occur – although much less frequently – which means music publishers and collecting societies would still have to deal with them as they do today.

6.4.3. PRIVATE INTERNATIONAL LAW RULE

The *lex protectionis* or law of the country for which protection is claimed is widely accepted as the conflict rule for copyright (see Article 8 Rome II Regulation). The law of the *Schutzland* is generally held to govern the various aspects of existence, scope, duration, ownership, transferability, etc. As has been pointed out above, for our purposes, the implications are that the qualification of co-written music as a work (joint, collaborative, multiple), as well as the issue of authorship (and initial ownership) and consequently the term of protection for each contributor varies throughout the EU.

An alternative rule to the *lex protectionis* could have the benefit of a single law governing the term of protection of each individual co-written musical work, meaning it would no longer fall partly in the public domain in one Member State while being protected in full in the next Member State. As has been indicated above, for the issue of initial ownership, the *lex originis* (the law of the country of origin) is used as an alternative to the *lex protectionis*. The matter of term calculation in individual cases is closely related to how a work is characterized, more precisely, who count as joint or co-authors. It is therefore worth exploring whether the introduction of a conflict rule that designates the law of the country of origin of a work/author would truly solve the term problem encountered with split copyrights.

An important aspect to be addressed is how to determine the country of origin. The criteria used in the Berne Convention⁷⁷⁴ are not really suitable. In the Berne

774. Article 4 BC, Paris Act. The concept of ‘country of origin’ within the framework of the BC is not conceived of as a conflict rule (designating the applicable law), but as a criterion used to determine whether a work or author is eligible for protection in (Berne) Union countries.

Convention the place of first publication is the primary criterion used, but this place is notoriously difficult to determine in the digital environment. Also, because not all music is published, an alternative connecting factor would be required, the most likely candidate being the habitual residence of the author. However, the problem with author-oriented criteria is that they are ill-suited connecting factors where more than one author is involved, because these can have different habitual residences. Of course by their very nature co-written musical works have more than one author.

An alternative connecting factor could be the place of creation of a musical work, but then again, this may have little added value compared to the habitual residence of the creator – as the latter is the place where one would normally expect the creator(s) to work. Also, if the music is composed not in the country of residence of the creator but elsewhere, the question is what the quality of the connection between author and place of creation is (i.e., song writer on the road). In private international law the choice of connecting factors typically expresses a close connection between subject matter (e.g., determination of term of protection for an author) and designated law.

Even if a suitable connecting factor is determined, it is unlikely that the introduction of the *lex originis* would serve the interests of stakeholders. For one, because the *lex originis* can refer to a copyright law that treats music as separate works, split copyrights will still have to be contended with, although no longer on a country-by-country basis. But a *lex originis* regime would mean that music publishers and collecting societies have to deal with varying terms across their catalogue (some titles maybe subject to German law, others to Spanish law, etc.).

A more general drawback of this policy option is that interjecting a choice of law rule in a framework that is built on substantive law could be detrimental to the clarity and consistency of the *acquis*. Also, the introduction of a choice of law rule specifically for co-written musical works attracts the same problems as regards proportionality as the introduction of a rule of substantive law would.

6.5. CONCLUSIONS

At first glance the variations in the term of protection for co-written musical works seem to stem from a simple dichotomy: music and lyrics are either considered to be one work, or two. Closer scrutiny of the position of co-written works in the copyright laws of individual Member States reveals a more nuanced legal framework. Certain Member States regard co-written musical works as one work, in which the authors jointly own the copyright. Other countries choose to differentiate each author's contribution granting individual copyright ownership: the author of the text accompanying the melody is the owner of the copyright in the lyrics and the author of the composition is the owner of the copyright in the music.

The existence of diverging terms of protection for co-written musical works is viewed as a problem by music publishers (and the estates they represent) and to a

lesser extent by collecting societies. It not only complicates their administration, but also (theoretically at least) prevents them from draw income from the part the music (either lyrics or composition) that has entered the public domain. Term calculation is not perceived as a problem by professional users who are the right holders' clients.

Yet the EC heeded the call of particularly the music publishers, and proposed a special term calculation rule for music with words. Other than the administrative complications and inability to extract further income from public domain music, no justification or meaningful substantiation was given for the introduction of said rule. One could argue that advances in DRM systems should allow the management of term-split copyrights to be handled more easily, but this may require some investments. Of course it is not unreasonable to suppose that right holders already have in place systems that take account of term-split copyrights; and if they do, this undercuts the administrative costs argument they make. As for the 'loss' of income, it is precisely the idea behind a finite term of protection that at some point the public interest in unencumbered use trumps royalty claims by the music publishers and the estates of authors.

The primary argument against the term calculation rule is that the impact on the internal market of varying terms of copyright in music seems limited at best, at least in the short and mid-term. For as we have seen, term-split copyright occurs predominantly in the opera sector. In popular music – a much larger section of the industry – it will be decades before a substantial part of the catalogue owned by the heirs of authors and music publishers consists of co-written works that are partly in the public domain. Repertoire conceived from the 1950s onward will only start to be affected by split copyright on average from 2050 onward. And even when it is, the variations in terms of protection will then be felt only for the small share of musical works that are still commercially viable then.

This above argument against a term calculation rule is equally valid against the other approaches presented above. These are the introduction of a harmonized definition for musical works or for all works of authorship; the fostering of certain contractual arrangements; or the introduction a conflict of law rule. The latter two approaches seem the least attractive. On the whole, the introduction of a special conflict rule does not appear to have added value. The introduction of the *lex originis* (i.e., whereby one single national law would govern the term of protection for a work throughout the EU) would not end the occurrence of split copyrights, so the music publishers' concerns would not be addressed. Contractual arrangements between co-authors (and music publishers where necessary), that is, self-regulation, would not make the administration of split copyrights less complicated for music publishers or collecting societies.

The choice would thus appear to be between no (immediate) action and harmonization of substantive law. The most important question to be answered is whether, and in what form, harmonization would meet the requirements of subsidiarity and proportionality. It may prove to be a challenge to meet two important demands that turn out to be contradictory: harmonization limited strictly to co-written musical works appears to run counter to the proportionality principle where

it provides that care should be taken to respect the integrity of Member States' legal systems. Member States that currently regard lyrics and music as separate works do so because it follows from the general distinction made in their systems between joint works and separate works, based on the criterion of the (economic) divisibility of the contributions. A harmonized rule whereby the term of protection for co-written music is calculated on the basis of the last surviving contributor, would in effect introduce a term calculation rule devised to deal with collaborative works in national legal systems that do not recognize the concept of collaborative works.

On the other hand, harmonization of the concept of joint and co-authorship for all types of subject matter, while contributing to the consistency and clarity of the copyright acquis, would appear to run counter to the maxim that the EU shall legislate only to the extent necessary. Another point to consider are the accrued costs involved in a (isolated) regulatory initiative to harmonize rules on co-written (musical) works, that is, the administrative costs involved for the European institutions and national legislators, as well of course, any social and economic costs for society at large, which results from the de facto extension of the term of protection a last surviving author rule would bring.

Chapter 7

Orphan Works

The previous chapters focused on two issues that are high on the European agenda. Another such topic is the problem of orphan works, although here the Commission has not yet proposed legislative intervention. Orphan works are copyright-protected works (or subject matter protected by related rights),⁷⁷⁵ the right owners of which cannot be identified or located by reasonable inquiry. This may cause insurmountable obstacles for those who want to re-use these works and, for that purpose, need to obtain permission from the right owners involved. To a large extent, the problem of orphan works is also term related. Although every work may be affected, irrespective of its age, typical issues of orphan works arise in situations in which rights must be cleared in 'old' works, in works that are no longer published or otherwise made available to the public or in works of unknown origin. As a general rule, it is more likely that works become orphaned as they grow older. Consequently, valuable cultural materials may be left unexploited if the rights in them cannot be cleared. This is detrimental, not only to the interests of prospective users, but also to society at large.

The orphan works problem has drawn attention in various circles, among stakeholders with different interests in copyright-protected works. In particular, large-scale user groups, notably broadcasting organizations and cultural institutions (archives, museums, and libraries), try to address the problem for the various mass-digitization and re-utilization projects in which they are involved. It is therefore not surprising that the issue has been addressed by different departments within the Commission. In 2001, the problem was dealt with by the Audiovisual and Media Policies unit of the Directorate General (DG) Information Society

775. For reasons of ease of terminology, the term 'orphan works', as used in this book, will be deemed to include subject matter protected by related rights (performances, phonograms, broadcasts, and films).

and Media.⁷⁷⁶ Since 2005, the issue has formed an integral part of the ‘i2010: Digital Libraries’ initiative of DG Information Society.⁷⁷⁷ As we saw in Chapter 1, the 2008 Green Paper on Copyright in the Knowledge Economy by DG Internal Market also signals the problem.⁷⁷⁸

To date, the orphan works problem has received by far the most consideration in the ‘i2010: Digital Libraries’ initiative. Among other things, the Commission set up a High Level Expert Group (HLEG). Its Copyright Subgroup recommends in its final report of 2008 that Member States formulate policies to adequately address the issue and suggests different measures. To facilitate the search procedure and rights clearance process, the High Level Group proposes the creation of databases for information on orphan works and the establishment of rights clearance centres.⁷⁷⁹ These proposals build in large part on the 2006 Commission Recommendation on the digitization and online accessibility of cultural material and digital preservation. The Recommendation already called on the Member States to create mechanisms that would facilitate the use of orphan works and to promote the availability of lists of known orphan works and works in the public domain.⁷⁸⁰

So far, it has been largely left to Member States to identify solutions. Various studies have been conducted,⁷⁸¹ and national initiatives have been launched.⁷⁸² Yet, with few exceptions, little practical progress can be reported at the national level.⁷⁸³

776. Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, SEC (2001) 619 (Brussels, 11 Apr. 2001), 14–15 [Staff Working Paper on Cinematographic and Other Audiovisual Works].

777. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘i2010: Digital Libraries’, COM (2005) 465 final (Brussels, 30 Sep. 2005) [Communication on Digital Libraries], 6–7.

778. Green Paper on Copyright in the Knowledge Economy, 10–12.

779. Copyright Subgroup of the HLEG on Digital Libraries, ‘Final report on digital preservation, orphan works, and out-of-print works’, 4 Jun. 2008, <www.ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/copyright/copyright_subgroup_final_report_26508-clean171.pdf>, [Final Report of the Copyright Subgroup, 2008], 10–17 and 24–28.

780. Article 6(a) and 6(c) Commission Recommendation 2006/585/EC of 24 Aug. 2006 on the digitization and online accessibility of cultural material and digital preservation, *OJ L* 236/28 of 31 Aug. 2006, [Recommendation on digitization, online accessibility and digital preservation].

781. See, in the United Kingdom: Gowers review (2006), 69–72; in France: Commission pour la relance de la politique culturelles, ‘Livre blanc pour la relance de la politique culturelle’, 22 Feb. 2007, <www.crpc.free.fr/C.R.P.C/>, [CRPC, 2007], 70–74, and Conseil Supérieur de la Propriété Littéraire et Artistique, ‘Commission sur les oeuvres orphelines Rapport’, 19 Mar. 2008, <www.cspla.culture.gouv.fr/CONTENU/rapoeuvor08.pdf>, [CSPLA, 2008]; and in the Netherlands: M.H. Elferink & A. Ringnalda, ‘Digitale ontsluiting van historische archieven en verweesde werken: een inventarisatie’, *Onderzoek in opdracht van het WODC* (Ministerie van Justitie) (Utrecht, 14 Jul. 2008), [Elferink & Ringnalda, 2008].

782. For a comprehensive overview of the different initiatives at the national level, see A. Vetulani, ‘The Problem of Orphan Works in the EU: An Overview of Legislative Solutions and Main Actions in This Field’, report prepared for the European Commission, DG Information Society and Media, Unit E4: Digital Libraries and Public Sector Information, February 2008, 28–46, [Vetulani, 2008].

783. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Europe’s cultural heritage

Although some Member States have indicated that they would welcome a solution or guidance from the European legislature the Commission generally maintains that 'more efforts by Member States on the orphan works issue are needed'.⁷⁸⁴ At the same time it also recognizes that some EU solution could be necessary to ensure the effectiveness of the different national solutions for orphan works in a cross-border context. This was also stressed by the Council,⁷⁸⁵ and a key recommendation of the HLEG Copyright Subgroup.⁷⁸⁶ In the Green Paper on Copyright in the Knowledge Economy, the Commission takes this matter even further by stating: 'The potential cross-border nature of this issue seems to require a harmonized approach.'⁷⁸⁷

In this chapter, the issue of orphan works will be examined in detail and possible solutions to the problem shall be analyzed and evaluated. More in particular, this chapter scrutinizes whether and what legal action is needed at the European level, also with a view to ensure that different national solutions are suited to tackle cross-border aspects.

7.1. THE PROBLEM OF ORPHAN WORKS

An 'orphan work' can be defined as a copyright-protected work, the right owner of which cannot be identified or located by someone who wants to re-utilize the work in a manner that requires the right owner's consent. If after a reasonably conducted search the right owner cannot be found, the user has no choice but to either re-use the work and bear the risk of an infringement claim or to completely abandon his or her intention to use the work. In the latter case, productive use of the work is hindered. Clearly this is not in the public interest where the right owner, if located, would not have objected to the use in question.⁷⁸⁸

The problem of orphan works does not occur where the right owner's consent is not required. This is the case, for instance, if the term of protection has expired or if the act of reproduction or communication to the public is covered by an exception or limitation. A perfect example concerns Article 5(2)(c) of the Information Society Directive, which stipulates an exception in favour of archives or publicly accessible libraries, educational institutions or museums, to make specific acts of reproduction for non-commercial purposes. This allows Member States to introduce a statutory exception to permit these institutions to make analogue or digital reproductions for

at the click of a mouse: Progress on the digitization and online accessibility of cultural material and digital preservation across the EU, COM (2008) 513 final (Brussels, 11 Aug. 2008), 6 [Communication on Europe's Cultural Heritage]. Green Paper on Copyright in the Knowledge Economy, 11.

784. Communication on Europe's Cultural Heritage, 6 and 8 ('Key areas for attention').

785. Council conclusions on the digitization and online accessibility of cultural material, and digital preservation, *OJ C* 297/1 of 7 Dec. 2006.

786. Final report of the Copyright Subgroup 2008, 14.

787. Green Paper on Copyright in the Knowledge Economy, 11.

788. A similar definition is given by the US Copyright Office, Report on Orphan Works, January 2006, <www.copyright.gov/orphan/orphan-report-full.pdf>, [US Copyright Office, 2006], 15.

purposes of preservation or restoration of works available in their collections. Several EU countries have indeed adopted a provision of this kind. To the extent that the digitization of materials stored in national libraries, museums, or archives is covered by this exception, therefore, the issue of orphan works will not arise.

Yet, not all Member States have implemented this optional limitation, and those who did have sometimes implemented it in a rather narrow sense.⁷⁸⁹ In the United Kingdom, for example, it is not permitted to copy sound recordings, broadcasts, or films for preservation purposes.⁷⁹⁰ This makes it impossible to legally reproduce these materials without the consent of the right owners. Hence, in these cases the problem of orphan works may occur. The appropriate remedy would be for the affected Member States to implement the limitation of Article 5(2)(c) Information Society Directive to the broadest extent possible.⁷⁹¹ Therefore, issues relating specifically to preservation will remain outside the scope of this chapter.

7.1.1. BACKGROUND

The orphan works problem has surfaced particularly in mass-digitization and large-scale re-utilization projects. Modern digital networked technologies offer the capacity to digitize and re-use copyrighted works on a large scale and at relatively low cost. Content that could not be commercially re-exploited through the analogue distribution channels, can now be disseminated cheaply using digital distribution channels.⁷⁹² The digital environment grants providers of newly evolving services and business models ample opportunity for tapping into the enormous potential of pre-existing content. Archives, museums, and libraries play a key role in exploiting this opportunity. As keepers of the past and present, they contain a wealth of cultural and scientific materials, including books, newspapers, maps, films, photos, and music. Examples of new dissemination projects include the British Broadcasting Corporation (BBC) Creative Archive, which gives the UK public full online access to old BBC radio and television programmes;⁷⁹³ the INA-Média-Pro database, which offers professional users online access to the digitized materials of the French National Audiovisual Institute (INA);⁷⁹⁴ and the digital

789. IViR Study on Implementation of Information Society Directive 2007, 46–49.

790. This follows from Art. 42 UK Copyright, Designs & Patents Act, which applies to literary, dramatic or musical works, illustrations accompanying such works and typographical arrangements only.

791. See British Library, *Intellectual Property: A Balance – The British Library Manifesto* (September 2006), <www.bl.uk/news/pdf/ipmanifesto.pdf>, [British Library, 2006].

792. This is caused by the ‘long-tail effect’ of digital distribution. Marketed through online distribution channels, content goods with low individual sales volumes can collectively make up a market share that rivals or exceeds the relatively few bestsellers. See Anderson (2004).

793. BBC Creative Archive, <www.bbc.co.uk/creativearchive>. The pilot project recently came to an end, and the service has been temporarily withdrawn, awaiting a ‘public value test’ by the government.

794. INA-Média-Pro, <www.inamediapro.com>.

library portal *Europeana*, which provides a single access point to the collections of libraries, archives, and museums from all around Europe.⁷⁹⁵

Rights clearance is essential for such mass-digitization and re-utilization projects, because they involve different acts that are restricted by copyright or related rights. Digitization implies the making of a copy, which normally requires the right owner's consent. Consent is also required if digitized material is to be distributed, communicated, or otherwise made available to the public. The problem of orphan works may obstruct the entire process of clearing rights. Not being able to acquire the necessary permission from the right owner(s) concerned makes it impossible to legally re-use a work. Cultural institutions and other large-scale re-users are therefore calling for legislative or practical solutions to facilitate the rights clearance for orphan works. However, orphan works are only part of the problem that they are facing. Their biggest and most pressing problem concerns the mass-licensing for large-scale digitization and re-utilization projects (see Section 7.2.2).

The problem of orphan works is not limited to mass-digitization and re-utilization projects alone, however. The advent of new media and digital technologies has also fostered a rapidly growing market for the re-utilization of pre-existing works on a smaller scale. Authors, producers, publishers, broadcasters, and Internet service providers are discovering, as they did in analogue times, that pre-existing works can be put to new and sometimes profitable, secondary uses.⁷⁹⁶ Hits from long-forgotten artists may be re-released on compilation CDs; classic films may be reissued on DVD; books may be republished on Internet websites; etc. The widespread digital dissemination of existing works also inspires the making of new derivative works.⁷⁹⁷ Once pre-existing content has been digitized, citizens, researchers, and creative industries can benefit from it and make it usable for their studies, work, or leisure or use it as raw material for new creative efforts (e.g., in 'user-created content'). Archived television news items may serve as input to documentary films or multimedia encyclopaedias; old photos may be used for digital collages; songs and film clips may become part of computer games or educational software; etc. Rights clearance is typically necessary for all of these uses, and in all cases the orphan works problem may arise.

7.1.2. DRIVERS OF THE PROBLEM

The problem of orphan works certainly is not a 'new' problem. Technological developments have always sparked new secondary uses. For example, television broadcasting in the 1950s and 1960s created huge secondary markets for existing

795. Europeana, <www.europeana.eu/>.

796. P.B. Hugenholtz & A.M.E. de Kroon, 'The Electronic Rights War: Who Owns the Rights to New Digital Uses of Existing Works of Authorship?', *IRIS* No. 4 (2000): 16, [Hugenholtz & De Kroon, 2000].

797. O. Huang, 'U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans', *Berkeley Tech. L.J.* 21 (2006): 265, at 274, [Huang, 2006].

cinematographic works. In the 1980s, video-recorders gave new life to popular television programmes and further increased the commercial life span of movies, new and old.⁷⁹⁸ In these cases too, the rights needed to be cleared and users were already facing the problem that right owners could not easily be traced.

However, there is unmistakably a renewed urgency to the problem that is caused by the advent of digital networked technologies. Together with the political desire to derive full benefit from the opportunities the information society presents, this has placed the issue high on the agenda of many policymakers. The European Union (EU), in particular, set itself the strategic goal for 2010 'to become the most competitive and dynamic knowledge-based economy in the world'.⁷⁹⁹ In view of that, the digitization and widespread distribution of pre-existing content has been recognized as instrumental, because it is likely to have a positive impact on the European economy.⁸⁰⁰ In addition, enhanced access to works is expected to contribute to the promotion of cultural diversity and the use of multilingual content in the online environment. Both are EU policy objectives.⁸⁰¹ The renewed interest in the orphan works problem is also caused by the fact that the number of occasions in which clearance of rights has become a problem has grown exponentially. This is due, first of all, to the fact that the Internet has removed local access barriers. Copyrighted material from all over the world can easily be accessed across Europe. If users want to re-use these materials, the right owner might have to be traced abroad. Furthermore, where rights need to be secured for different territories (e.g., if the right owners of a work are nationals of different countries, or if a derivative work incorporates works that come from different countries), it may prove very difficult to clear the rights. This is especially so considering that the rules governing protected subject matter or copyright ownership may differ between the various Member States.⁸⁰² In principle, therefore, rights clearance issues are directly connected with the issue of territoriality, which is discussed elsewhere in this book (Chapter 9).

Another reason why rights clearance becomes increasingly difficult lies in certain factors that are ingrained in the system of copyright and related rights itself. In the first place, obtaining permission to use content has become more difficult because of the expansion copyright and related rights law over the past decades. This has resulted in new layers of protection and new categories of right holders with a claim in content.⁸⁰³ Today a single production may be protected by various

798. Hugenholtz & De Kroon (2000), 16.

799. Strategic goal for 2010 set at the Lisbon European Council, Presidency Conclusions 23 and 24 Mar. 2000, <www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm>.

800. Commission Staff Working Document, Annex to the Communication from the Commission 'i2010: Digital Libraries', SEC (2005) 1194 (Brussels, 30 Sep. 2005) [Staff Working Document on Digital Libraries], 4–5.

801. See, e.g., Art. 151 EC Treaty and Art. 22 Charter of Fundamental Rights of the EU.

802. On the unharmonized terrains of protected subject matter and copyright ownership, see ss 2.1 and 2.2.

803. These newcomers include software producers, performers, phonogram producers, broadcasters, film producers, and database producers. See, in general, the overview in Ch. 2.

layers of overlapping copyrights and related rights, which may be owned by different corporations.

Second, licensing difficulties increase as a result of the divisibility and transferability of copyright and related rights. Each right in a component part of a work can be separately assigned or exclusively licensed to a third party, either in whole or in part.⁸⁰⁴ Transfers can be limited to a specific use or a specified period of time. Ownership in intellectual property also fragments through inheritance. For each work that someone wants to use, the chain of title to existing rights must be traced to determine who currently owns the rights in that particular work.⁸⁰⁵ This can be complicated, especially as over the years rights may have been repeatedly transferred, assigned, or inherited.

As time passes, the tracing of right owners generally becomes more difficult.⁸⁰⁶ An important cause of the problem of orphan works, therefore, is the long duration of copyright.⁸⁰⁷ The 1993 Term Directive set the copyright term for all EU Member States at seventy years post mortem auctoris, which is twenty years above the minimum standard of the Berne Convention. This term extension has not only increased the number of works covered by copyright and, thus, the quantity of works liable to be orphaned. It has also expanded the practical hurdles to trace the current right holders of those works.⁸⁰⁸ A similar danger lurks if the EU legislature extends the duration of related rights in performances and phonograms as the Commission has proposed (see Chapter 5).

Both the accumulation and fragmentation of rights have exacerbated the problems of rights clearance for users of pre-existing content.⁸⁰⁹ National laws

804. For further details, see Guibault & Hugenholtz (2002).

805. I.F. Koeningsberg, 'An Overview of the General Business and Legal Principles Involved in the Licensing of Copyrights and Related Rights', in *WIPO Guide on the Licensing of Copyright and Related Rights*, WIPO Publication No. 897 (E) (Geneva: WIPO, 2004), 4–16, [Koeningsberg, 2004], 5.

806. Yet, as Ginsburg rightly indicates, the problem of orphan works is not limited to old works. See J.C. Ginsburg, 'Recent Developments in US Copyright Law: Part I – "Orphan" Works', *RIDA* 217 (2008): 98–197, at 104–105, [Ginsburg, 2008].

807. R. Bard & L. Kurlantzick, *Copyright Duration, Duration, Term Extension: The European Union and the Making of Copyright Policy* (San Francisco: Austin & Winfield, 1999), 59, [Bard & Kurlantzick, 1999].

808. Over the years, ownership information may become outdated or even lost, e.g., because the copyright was assigned to an unknown party, or because a corporate body owning the copyright has gone out of business. A longer term of protection may also lead to an exponential growth of the number of right holders in the later years of the term of protection, thereby resulting in an increased fragmentation of rights. This is particularly true in case of hereditary succession of rights upon the death of the author.

809. Except for the (partial) transfer or inheritance of copyright, multiple ownership may arise from the creation of a work by a plurality of authors (if the law has conferred a copyright in the work that is owned by the authors jointly), and from the creation of a new work based upon an existing work. Adaptations, translations or transformations of a work in a modified form, for instance, are protected as separate works without prejudice to the copyright in the original work. See e.g., Art. 10(2) Dutch Copyright Act; Art. 23 German Copyright Act; and Art. L. 112-3 French Intellectual Property Code.

normally require that all co-owners and other right holders consent to grant a license to use the work.⁸¹⁰ Each right holder thus has the power to prevent the actual use of the work. This is sometimes referred to as the ‘tragedy of the anti-commons’.⁸¹¹ The tragedy is that where multiple owners hold effective rights to authorize or prohibit the exploitation of a work and each user must secure permission of all rights owners, the work may not be used at all, despite its potential value.⁸¹² Because of the difficulty of locating all relevant co-owners in a work,⁸¹³ a work of multiple ownership is more likely to end as orphan than a work that is owned by a single right holder.

The fact that the issue of orphan works may be more pronounced when it comes to works of multiple ownership,⁸¹⁴ however, does not merit a different treatment of the problem. As long as it is ensured that the solution chosen applies to any untraceable copyright owner involved in a work of multiple ownership, there need not be additional rules to address this issue.

7.1.3. PRACTICAL IMPORTANCE OF THE PROBLEM

The practical importance of the problem of orphan works, in economic and social terms, has yet to be assessed. At the EU level, two consultations were organized in which this question was addressed.⁸¹⁵ Neither of the two has resulted in any quantitative data. Rough estimates are that over 40% of all creative works in existence are potentially orphaned,⁸¹⁶ but these estimates have not been corroborated by adequate data so far.⁸¹⁷ The consultations revealed only that the issue is

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810. See, e.g., Art. 3(3) Irish Copyright Act and Art. 173(2) UK Copyright, Designs & Patents Act. See also F.J. Cabrera Blazquez, ‘In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works’, *IRIS Plus* No. 8 (2002): 2, [Cabrera Blazquez, 2002].
811. M.A. Heller, ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’, *Harv. L. Rev.* 111 (1998): 621, [Heller, 1998], 668; J.M. Buchanan & Y.J. Yoon, ‘Symmetric Tragedies: Commons and Anticommons’, *J.L. & Econ.* 43 (2000): 1, [Buchanan & Yoon, 2000].
812. Buchanan & Yoon (2000), 4; A. Katz, ‘The Potential Demise of Another Natural Monopoly: Rethinking the Collective Administration of Performing Rights’, *J. Competition L. & Econ.* 1 (2005): 541, 559–560, [Katz, 2005].
813. Staff Working Document on Digital Libraries, 12.
814. For an account of, and models addressing, the multiple ownership problem, see IViR Recasting Study 2006, 159–195.
815. These consultations were launched, in 2001, by the Staff Working Paper on Cinematographic and Other Audiovisual Works; and, in 2005, by the Commission Staff Working Document, Annex to the Communication from the Commission ‘i2010: Digital Libraries’, Questions for online consultation, SEC (2005) 1195 (Brussels, 30 Sep. 2005) [Questions for online consultation on Digital Libraries].
816. Estimate given by the British Library. See British Library (2006), point 5. This estimate seems to be quite on the high side. There is no indication what it is precisely based on.
817. Even in the United States, where a large-scale inquiry was conducted into the problem of orphan works, no detailed figures exist to quantify the problem. See US Copyright Office (2006), 92.

perceived by stakeholders particularly in the audiovisual and cultural sectors (mostly public broadcasters, libraries, and archives), to be a real and legitimate problem.⁸¹⁸

No hard evidence was provided, however, on the degree to which orphan works present a problem for the actual use of these works or on the frequency with which orphan works impede creative efforts. In practice, users may not always consider it a problem if the right owner(s) of a work cannot be found. They may, for instance, revert to alternative uses, for example, by using another work that is already in the public domain, or a substitute work, the consent for which can be obtained.⁸¹⁹

Yet, although alternative uses may be advantageous for the incidental re-utilization of pre-existing works, they certainly do not help libraries and archives who wish to digitize and make available the materials in their collections. For these institutions, the problem of orphan works is said to be 'a real problem'.⁸²⁰ If they are unable to trace the relevant rightowners, they cannot use these works as planned. This could be to the detriment of society, because many of the works they hold in their catalogues are of unique historical, cultural, or scholarly merit. But if libraries or archives decide to digitize and make available these works without proper authorization, they expose themselves to claims for infringement. Because many small claims can add up to a considerable total for the large-scale projects, the risks become prohibitive, even though in Europe,⁸²¹ unlike in the United States, the damages recoverable are compensatory and not punitive in nature.⁸²²

818. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, COM (2001) 534 final (Brussels, 26 Sep. 2001) [Communication on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works], 14; and Results online consultation 'i2010: Digital Libraries', <www.ec.europa.eu/information_society/activities/digital_libraries/doc/results_online_consultation/en.pdf>, 5.

819. See US Copyright Office 2006, 52–59 for more alternatives.

820. Commission Staff Working Document, Impact Assessment supporting the Commission Recommendation on the digitization and online accessibility of cultural material and digital preservation, SEC (2006) 1075 (Brussels, 24 Aug. 2006) [Impact Assessment on digitization, online accessibility and digital preservation], 35.

821. Not only is this the basic rule under the civil law of most continental European countries, it is also the general rule under common law as applied in the United Kingdom. See Bently & Sherman (2004), 1101. Although in the United Kingdom, 'additional damages' are available (see Art. 97(2) UK Copyright, Designs & Patents Act), their award is the exception rather than the rule. If they nevertheless are awarded, the damages typically have been modest. See C. Michalos, 'Copyright and Punishment: The Nature of Additional Damages', *EIPR* 22 (2000): 470–481, 473, [Michalos, 2000].

822. Thus, in theory, users could reserve a certain amount of money to compensate right owners of orphan works should they eventually reappear. For large-scale re-utilization projects, however, it is difficult to make accurate estimations of expected future claims. In practice, therefore, it may be unclear how much money needs to be reserved. The legal uncertainty may be too high to risk using these works.

If right owners that have surfaced seek injunctive relief, that is, the prohibition of further use of their works, projects of libraries and archives usually do not run high risks, because the works can simply be removed from their online databases. There is much more at stake in the case of an orphan work that is integrated or transformed into a derivative work. If an orphan work is used in a documentary film, for example, and the further use of this work would be forbidden by a reappeared right owner seeking injunctive relief, the documentary filmmaker may run the risk that the orphan work needs to be removed (which may render the entire film worthless) or, in the worst case scenario, that the entire film needs to be taken from the market.

7.1.4. NEED FOR REGULATORY INTERVENTION?

From the outset, it must be borne in mind that clearing rights is inherent to the use or re-use of pre-existing content. It is completely normal and inevitable that transaction costs are involved in the rights clearance process and that these costs will increase in proportion to the number of works that one intends to re-use.⁸²³ Although it may indeed be a laborious and costly task to find all of the right owners of a work, it is fair to expect users to spend sufficient time and resources in seeking a license. The fact that large numbers of right owners may need to be traced does not by itself appear to be a valid reason for regulatory intervention. Only to the extent that there is a structural market failure could such intervention be justified.

The orphan works issue obviously presents a case of a structural market failure. If the right owners of a work remain unknown or cannot be located after a reasonable search, a prospective user cannot obtain a license. For many users, it is not an option to use orphan works without the required consent, especially if they depend on (public) funding that can be withdrawn if the rights are not cleared properly.

At the same time, the interest in using orphan materials is high, not least because they often hold immense cultural, academic, and social value. The legal uncertainty with which users might be confronted when the right owners of a work cannot be found may have a chilling effect on mass-digitization and re-utilization projects. Legal uncertainty may also cause users to refrain from using orphan works as building blocks for new derivative works.⁸²⁴ Although the size of the problem is as yet difficult to assess, there appears to be valid justification for a regulatory or legislative intervention to address the problem of orphan works.

823. See Koeningsberg (2004), 5, describing the due diligence for rights clearance.

824. B.T. Hickman, 'Can You Find a Home for This "Orphan" Copyright Work? A Statutory Solution for Copyright-Protected Works Whose Owners Cannot Be Located', *Syracuse L. Rev.* 57 (2006): 123, 135, [Hickman, 2006].

7.2. SOLUTIONS TO THE PROBLEM OF ORPHAN WORKS

In the following sections, different regulatory and practical solutions to the problem of orphan works are considered. First, we look at measures aimed at preventing a further expansion of the numbers of orphan works (Section 7.2.1). Subsequently, we turn to solutions inspired by collective agreements between users and collective rights management organizations (CRMOs) or other copyright collectives (Section 7.2.2). Lastly, legislative instruments shall be examined which specifically provide generic solutions for orphan works (Section 7.2.3).

The starting point of our examination is the principle that any rule that addresses the issue of orphan works should ideally reflect the equilibrium between the interests of right holders and those of bona fide users. Thus, while providing legal certainty to prospective users of orphan works, a solution should at the same time guarantee that the legitimate interests of copyright holders are not unnecessarily prejudiced.

Furthermore, it should be noted that when considering solutions to the problem of orphan works, we shall not confine ourselves to the mass-re-utilization projects of libraries, archives and museums. As witnessed, the issue equally presents obstacles for small re-utilization projects where individual works are integrated or transformed into derivative works. For this reason, the focus of our examination lies in finding appropriate solutions to the problem for any type of re-use of pre-existing content.

7.2.1. PREVENTING FURTHER EXPANSION OF THE PROBLEM OF ORPHAN WORKS

To a large degree, the inability to locate right owners is caused by certain intrinsic factors. First, not all works carry a statement indicating the authorship or ownership of rights, and, even if they do, the information on a work may be outdated because of a change of ownership.⁸²⁵ Second, there is a lack of adequate copyright registers and other publicly accessible records of rights management information (RMI).⁸²⁶ As a consequence, mechanisms that encourage the supply of RMI to the

825. See Huang (2006), 267–268. Huang analyses variations in the extent of the problem of orphan works for different types of copyright-protected works (music, books and graphical works). See, for similar analyses, CSPLA (2008), 11–14; Vetulani (2008), 7; and Ginsburg (2008), 102–103.

826. This is different with other intellectual property rights, which generally require RMI to be supplied to the public. In trademark law and design law, for instance, public registers fulfil an important function of making RMI publicly accessible. Holders of trademarks and designs are also required to register any assignment of their rights. The RMI available in these registers thus remains accurate and up-to-date. See S. van Gompel, ‘Unlocking the Potential of Pre-existing Content: How to Address the Issue of Orphan Works in Europe?’, *JIC* 38 (2007): 669, 673–674, [van Gompel, 2007].

public can prevent orphan works problems from arising.⁸²⁷ However, the supply of adequate RMI can be only a partial solution, because for many 'old' works the required information is simply unavailable. Although measures that are aimed at stimulating the provision of RMI may prevent the further expansion of the phenomenon of orphan works, the problem could not be solved by the supply of RMI alone.

Furthermore, obliging authors or copyright owners to provide RMI would be at odds with Article 5(2) BC, if this would make the existence or exercise of copyright reliant on formalities. Except for purely national situations, the Berne Convention does not permit Contracting States to establish mandatory registration systems or to require the affixation of a copyright notice, including information on the identity of a right owner and the place and date of publication, on each copy of the work.

Yet, it is allowed to establish measures stimulating right owners to voluntarily provide information on copyright ownership and licensing conditions. Examples are enhanced metadata tagging of digital content; the increased use of Creative Commons-like licenses; or a voluntary registration of RMI. Another option, which the Commission appears to be particularly keen on, would be the creation of specific databases containing information about orphan materials.

7.2.1.1. *Metadata Tagging of Digital Content*

A first possible measure would be to encourage authors and right owners to provide adequate copyright information and, for digital works, to incorporate inclusive RMI (metadata). The latter covers not only information identifying the work, the author and the right owner, but also information indicating the terms and conditions of use of the work and any numbers or codes that represent such information.⁸²⁸

Supplementary legislative measures could strengthen the advantages of metadata tagging. It is possible, for instance, to alter the provision of Article 7 Information Society Directive in such a way that the protection of RMI is subject to the requirement to provide, as a minimum, information regarding the current copyright owner.⁸²⁹ In addition, the law could also provide that the protection of RMI under Article 7 Information Society Directive is granted only in case this information has been deposited in a publicly accessible database. A provision of this kind may provide the necessary stimulus for copyright owners to supply RMI, thus enhancing efficiency in the right clearance of works.

827. A broader supply of RMI to the public would enhance transparency and alleviate the rights clearance of copyrighted works, especially those works that would otherwise be liable to become orphaned.

828. Article 7(2) Information Society Directive; Art. 12(2) WIPO Copyright Treaty.

829. At present, right owners are free to choose whatever combination of information listed in Art. 7(2) Information Society Directive (or Art. 12(2) WCT) is included. Ricketson & Ginsburg (2006), II, 991 (s. 15.39).

Because Article 7 Information Society Directive is based directly on Article 12 WCT, the question arises whether an alteration of this kind would be reconcilable with the international obligations of the Community and of the Member States under the WCT. According to the second part of the Agreed Statement concerning Article 12 WCT:

Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

This Agreed Statement reminds contracting parties not to rely on Article 12 as a basis or justification to institute formalities as prohibited under Article 5(2) BC, which is incorporated by reference into the WCT.⁸³⁰ In other words, Contracting Parties may not go as far as requiring right owners to provide RMI as a condition to enjoy copyright protection.⁸³¹

However, the protection provided for in Article 7 Information Society Directive does not concern the protection of *copyright*, but only the protection of RMI against removal or tampering. For that reason, a mandatory deposit of RMI would not seem to interfere with the prohibition on formalities.⁸³² Furthermore, with regard to the other elements of the Agreed Statement, it is quite unclear how a rights management system (as opposed to a technological protection measure) would prohibit the free movement of goods or impede the enjoyment of rights under the WCT.⁸³³

In any event, the protection of RMI under Article 12 WCT does not establish a new exclusive right of authors in their works. Rather, it resembles a traditional enforcement provision.⁸³⁴ Accordingly, because non-compliance with a mandatory deposit scheme of the kind suggested here would result in a loss of protection of RMI only and, thus, leaves the protection of any of the exclusive rights and

830. Article 1(4) WCT. Pursuant to Art. 3 WCT, the prohibition on formalities of Art. 5(2) BC must be applied *mutatis mutandis* to 'the protection provided for' in the WCT.

831. Ricketson & Ginsburg (2006), II, 991 (s. 15.39).

832. But see Reinbothe & von Lewinski (2002), 61, who maintain that on the basis of Art. 3 WCT, Art. 5(2) BC should apply *mutatis mutandis* to all elements of protection in the WCT, including the protection of RMI under Art. 12 WCT. However, the Agreed Statement concerning Art. 3 WCT seems to suggest that Art. 5(2) BC must be applied literally in the context of the WCT. Because Art. 5(2) BC refers to 'these rights' (i.e., the rights specially granted by the relevant treaties and the rights that are granted under the rule of national treatment) and Art. 12 WCT does not establish a new right of authors in their works (but rather aims at providing authors with ample legal safeguards in relation to the enforcement or management of their rights); therefore, it appears safe to conclude that the prohibition on formalities must not be applied *mutatis mutandis* to the protection of RMI.

833. Ricketson & Ginsburg (2006), II, 992 (s. 15.40).

834. Reinbothe & von Lewinski (2002), 152–153; Ricketson & Ginsburg (2006), II, 965 (s. 15.01).

rights of remuneration as protected under the WCT (and the Berne Convention) unharmed,⁸³⁵ this seems not to be at odds with the Agreed Statement concerning Article 12 WCT. In sum, there appears to be no violation of the Community's and the Member States' international obligations under the WCT if the EU legislature would decide to alter Article 7 Information Society Directive in the way as described above.

7.2.1.2. *Use of Creative Commons-Like Licenses*

Authors or right owners could also be stimulated to use Creative Commons (CC) licenses⁸³⁶ or similar licenses⁸³⁷ that provide a direct link between a work and its license. If authors or right owners decide a priori under what conditions they allow the re-utilization of their works and which rights they reserve, and attach the matching licensing conditions to copies of the work, this creates transparency and facilitates the licensing process considerably.⁸³⁸ After all, if the terms and conditions of use of a work are already indicated on copies of the work itself, a prospective user would be provided legal certainty to use the work without the need to locate its right owner to ask for permission.⁸³⁹

A disadvantage for right owners that seek income for the use of their works is that CC licenses do not allow for direct payment.⁸⁴⁰ To address this drawback, one could consider the introduction of standard licenses that permit re-utilization upon payment of a fee,⁸⁴¹ or to create a pass-through mechanism that would connect prospective users to a website of the right owner, or to a CRMO, to arrange the payment for the use made under the license.⁸⁴²

835. See the first part of the Agreed Statement: '[...] the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.'

836. Creative Commons, <www.creativecommons.org/>.

837. Alternative licenses include the three types of 'Click-Use Licences', for the re-utilization in the United Kingdom of Crown copyright information, Public Sector Information and Parliamentary copyright information, <www.opsi.gov.uk/click-use/index.htm>; as well as the former 'Creative Archive Licence' of the BBC, <www.bbc.co.uk/creativearchive/licence/index.shtml>.

838. This advantage of CC licenses has also been acknowledged by the EC in the Staff Working Document on Digital Libraries, 13.

839. Note that the extent to which legal certainty is provided for fully depends on the validity of the CC license. It may occur that a licensor was not entitled to issue a CC license because he did not hold all the relevant rights. A discussion of this matter, however, exceeds the scope of our current debate.

840. ALAI, 'Memorandum on Creative Commons Licenses', January 2006, [ALAI, 2006], 2.

841. In the United Kingdom, e.g., the 'Value Added Licence' (one of the three 'Click-Use licenses', above n. 837) may include a charge depending on the material the applicant wants to re-use and on the nature of that re-use, <www.opsi.gov.uk/click-use/value-added-licence-information/index.htm>.

842. ALAI (2006), 5.

7.2.1.3. *Voluntary Registration of RMI*

A third option is to provide right holders with certain facilities to record ownership of copyright in databases established and maintained for the purpose of providing information about the copyright status of works. Such an initiative could consist of facilitating either the creation of RMI databases by public or private entities,⁸⁴³ or the establishment of voluntary registration systems under national (or international) copyright law.⁸⁴⁴ An important role could also be reserved for CRMOs to open up their records, because they already hold huge records of RMI relating to their repertoire.

The key advantage is that, by encouraging the recording of RMI in databases or registers, users can easily access information on a work, its author, and its present copyright owner.⁸⁴⁵ Information brokers may play a part in assisting users to search the databases or registers to clarify copyright ownership and perhaps even to clear the rights in copyright-protected works. Provided that the information is kept up-to-date, this will facilitate the re-use of copyrighted works to a great extent.

7.2.1.4. *Specific Databases for Orphan Works*

Another way to ameliorate the orphan works problem is to create databases holding information on orphan works. The Commission, as well as the Copyright Subgroup of the HLEG, seem to support an approach of this kind.⁸⁴⁶ Databases of information on orphan materials are considered to profit users and right holders alike. The database can tell users whether works have been identified as orphan works and still remain in that category. For right holders, they may provide notification about their lack of traceability if users are seeking permission to use their works. In addition, they may assist right holders in keeping track of any unauthorized use of their works as a result of wrongful labelling of the latter as orphan works. The creation of databases for information on orphan works appears to be particularly practicable with the help of new technologies.⁸⁴⁷ At the EU level, there are already

843. See, e.g., 'Cannes market', an online database on rights in films, <www.cannesmarket.com>.

844. For an overview of voluntary registration systems at the national level, see WIPO, 'Survey of national legislation on voluntary registration systems for copyright and related rights', SCCR/13/2, 9 Nov. 2005. Illustrative, at the international level, is the International Film Register, provided for by the WIPO Treaty on the International Registration of Audiovisual Works, adopted on 18 Apr. 1989. At the European level, the Commission looked into the issue of the creation of a registration scheme, or of a database of right holders, for films and other audiovisual works in 2001. See Communication on Certain Legal Aspects Relating to Cinematographic and Other Audiovisual Works, 11–14.

845. For this reason, a voluntary register of copyrights has also been proposed in the UK Gowers Review (2006), 72 and Recommendation 14b.

846. Article 6(c) of the Recommendation on digitization, online accessibility, and digital preservation; Final report of the Copyright Subgroup 2008, 16 and 24–28.

847. See Hickman (2006), 141–142; van Gompel (2007), 685–686.

projects in which right holders and users work together to address the creation of databases of orphan works.⁸⁴⁸

However, where specific databases on orphan works are created, the risk exists that users may start relying ('piggybacking') on the search results of others, without conducting a proper search for the right owner themselves. Although in many cases, it would be inefficient to require subsequent users to re-conduct unsuccessful searches performed by others, this may be unacceptable. If the adequacy and reliability of previous search results cannot be guaranteed, for example, because information has been overlooked or has changed following a previously conducted search, a work may unjustly be regarded as being orphaned. Ideally, therefore, databases for known orphan works should be established only in combination with, and in support of, a legal solution permitting the re-use of orphan works on the condition that a reasonable search has been conducted (see Section 7.2.3). This allows for the reasonableness of a 'piggybacking search' of a subsequent user to be monitored and to be evaluated in light of the particular circumstances of that search.⁸⁴⁹

7.2.2. CONTRACTUAL ARRANGEMENTS WITH COPYRIGHT COLLECTIVES

A second set of measures concerns solutions based on collective agreements between users and right holders. This appears to be the most desirable solution for mass-re-use projects in particular. As mass-re-use by definition requires rights clearance for thousands or even millions of works, collective agreements are an efficient tool. A collective license enables users to obtain a license to use a multitude of works with a single transaction. Therefore, right holders need not be traced and asked for permission on an individual basis.

The collective administration of rights also alleviates the orphan works problem. If a CRMO has been established and it represents a significant part of right holders in a given field, there is a reasonable likelihood that the particular right owner the user is looking for will also be represented. In that case, users face fewer difficulties in finding the right owners whose works they intend to use. Yet, if a right owner is not represented by that CRMO, a user may still face considerable uncertainties.

Illustrative is the general agreement concluded in France between the INA and five French CRMOs, authorizing the INA to use the entire CRMOs' audiovisual and sound catalogue, to the extent that it is available in its archive, for any mode of exploitation, including Internet and mobile telephony.⁸⁵⁰ Although this agreement

848. See e.g., the *eContentplus* project ARROW – Accessible Registries of Rights Information on Orphan Works towards the EDL. For more details, see <www.arrow-net.en>.

849. US Copyright Office (2006), 78–79.

850. Communiqué de Presse, 'L'Ina et la SACEM, la SACD, la SCAM, la SDRM et SESAM s'accordent sur les conditions d'utilisation des œuvres audiovisuelles et sonores sur de

greatly facilitates and simplifies the exploitation of materials in the INA's archives, it does not cover the repertoire of right holders who are not members of any of the five collective management organizations involved. Consequently, INA still needs to identify and locate these, perhaps unknown, right holders to clear the rights of the works not covered by the agreement.⁸⁵¹

There are different legal techniques, however, to ensure that CRMOs can issue fully covering licenses to users of copyrighted works. These techniques include: (a) extended collective licensing; (b) legal presumptions of representation; (c) contracts with indemnity clauses; and (d) mandatory collective licensing.

Before these contract-based models are explored in more detail, a remark on their practical implementation is in order. In theory many of these models can provide valuable solutions to the problem of orphan works. But the success of these models depends on the conclusion of contracts between users and CRMOs. It is therefore vital that CRMOs operate in those fields where the orphan works problem is most pressing. This is currently not the case in all EU countries. Especially in the photographic and audiovisual fields, collective exercise of rights is still rather underdeveloped. Right owners in those areas generally prefer to manage their rights individually. The cautiousness of right holders to participate in collective licensing schemes may thus prevent any of the contract-based models to become a successful solution to the issue of orphan works.

7.2.2.1. *Extended Collective Licensing*

The system of extended collective licensing (ECL) is applied in Nordic countries in various sectors.⁸⁵² It is characterized by the combination of a voluntary transfer of rights from right holders to a CRMO with a legal extension of the repertoire of the CRMO to cover rights of non-members.⁸⁵³ Statutory provisions give extended effect to the clauses in the collective licensing contracts that are concluded between a representative organization of right owners and a certain group of users (or individual users). A precondition is that a 'substantial' number of right holders in a given category must be represented by the contracting organization.⁸⁵⁴

nouveaux modes d'exploitation d'image et de son', 3 Oct. 2005, <www.scam.fr/Telecharger/DocumentsInfos/Communiqués/cp03-10-05-accordINA-SPRD.pdf>.

851. J.-F. Debarnot, 'Les droits des auteurs des programmes du fonds de l'INA exploités sur son site Internet', *Légipresse* 232 (2006): 93, 93–94, [Debarnot, 2006].

852. T. Koskinen-Olsson, 'Collective Management in the Nordic Countries', in *Collective Management of Copyright and Related Rights*, ed. D. Gervais (The Hague: Kluwer Law International, 2006), 257–282, [Koskinen-Olsson, 2006].

853. D. Gervais, 'The Changing Role of Copyright Collectives', in *Collective Management of Copyright and Related Rights*, ed. D. Gervais (The Hague: Kluwer Law International, 2006), 3–36, 28, [Gervais, 2006].

854. See H. Olsson, 'The Extended Collective License as Applied in the Nordic Countries', Paper given at Kopinor twenty-fifth anniversary international symposium (Oslo, 20 May 2005), [Olsson, 2005], s. 6.2.

The ECL automatically applies to all right holders in the given field, irrespective of whether they are domestic or foreign. It also applies to deceased right holders, in particular where estates have yet to be arranged,⁸⁵⁵ and to unknown or untraceable right holders. This greatly facilitates the clearance of rights, because a user may obtain a license to use all works covered by the license without the risk for infringing the rights of right owners who otherwise would not be represented. In fact, the rationale of the system of ECL has always been to facilitate the licensing in the case of massive uses for which it would be impossible for users to clear all the necessary rights.⁸⁵⁶

To protect the interests of right owners who are not members of the CRMO and who do not wish to participate in the ECL scheme, the law should give right owners the option to either claim individual remuneration or to 'opt out' from the system altogether.⁸⁵⁷ Arguably, to prevent the ECL from being deemed a de facto formality prohibited by Article 5(2) BC, the process of opting out should be fairly simple and straightforward.⁸⁵⁸

The system of ECL may provide a valuable solution to the problem of orphan works. Because an ECL applies to all right holders in the given field (except to those who have explicitly opted out from the system), it provides re-users of existing works with a considerable extent of legal certainty that they require.⁸⁵⁹ From the perspective of right holders, an ECL would, however, be quite a radical solution. Therefore, if a system like this would be established, it should only be applied in cases in which the public interest is clearly at stake. Examples may include the exploitation of past archive productions of public broadcasting organizations for on-demand services or the (online) exploitation of copyright-protected works included in the collection of archives, museums, libraries, or educational institutions for specific purposes such as public exhibition, private studying, teaching, or scientific research.

7.2.2.2. *Legal Presumption of Representation*

An alternative legal technique is provided for in the legal presumption system. In this system, it is presumed by law that a CRMO has a general authorization to

855. Gervais (2006), 28.

856. Olsson (2005), s. 3.

857. For these 'opt out' mechanisms in the Nordic countries, see Olsson (2005), s. 6.4.

858. M. Ficsor, 'Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?', in *Collective Management of Copyright and Related Rights*, ed. D. Gervais (The Hague: Kluwer Law International, 2006), 37–83, [Ficsor, 2006a], 48. According to Gervais, the system of ECL does not constitute a prohibited formality under the Berne Convention. See Gervais (2006), 29 et seq.

859. It is likely that CRMOs establish a database in which they list the names and whereabouts of those right holders who opt out of the system. This would also provide legal certainty to users who wish to use works of their repertoire and thus need to find these right holders to ask for a license.

represent the right owners in a given field. This allows the CRMO to grant to users blanket licenses, which cover all right owners, even those who are not members of the CRMO. In the blanket license, a user is guaranteed that individual claims from unrepresented right owners will be settled by the CRMO and that he or she will be indemnified for any prejudice and expense resulting from a justified claim.⁸⁶⁰

Hence, for users, the legal presumption system provides comparable safeguards as the ECL system.⁸⁶¹ For right holders, on the other hand, the presumed 'automatic representation' by a CRMO is more far-reaching than an ECL. Right holders who deliberately choose not to take part in a collective licensing scheme are nonetheless assumed to participate therein. Aside from instituting legal action against CRMOs, right holders have no other possibility of 'opting out'. If no other more straightforward 'opt out' mechanism is provided, the compatibility of this system with the international copyright conventions remains doubtful.⁸⁶²

7.2.2.3. *Contracts with Indemnity Clauses*

Another alternative is for a CRMO to incorporate an indemnity clause into licensing agreements with users.⁸⁶³ In the indemnity clause, the CRMO assumes the financial liability for any claim made by a copyright owner who is not represented by the CRMO.⁸⁶⁴ Therefore, users need not fear unexpected claims for remuneration from right owners who are not covered by the collective agreement. Although CRMOs may voluntarily proceed to granting indemnities, the copyright law of some countries includes implied indemnities in certain collective licensing schemes.⁸⁶⁵

Although indemnity provides legal certainty to the user by protecting him or her against financial liability, it does not prevent a right owner from invoking his or her exclusive rights should he or she eventually come forward. That means that, despite the indemnity granted to the user, a right holder could still seek injunctive relief that would prohibit any further use of the work. Moreover, because indemnity only eliminates financial liability under civil law, the user may still be held responsible for infringement under criminal law.⁸⁶⁶ It is obvious, therefore, that this alternative does not completely safeguard the user's position, at least where the indemnity, as in many cases, is not supported by supplementary provisions in law.

860. Ficsor (2006a), 47.

861. Koskinen-Olsson (2006), 267.

862. Ficsor (2006a), 47.

863. Indemnity clauses are also applied outside the field of collective rights management. An example is *Foto Anoniem*, a Dutch organization for professional photographers, which grants indemnities in case the right owner of a photograph cannot be found. See van Gompel (2007), 690.

864. Koskinen-Olsson (2006), 267.

865. See, e.g., Art. 136 UK Copyright, Designs & Patents Act, which provides for an implied indemnity in certain schemes and licenses for reprographic copying.

866. Koskinen-Olsson (2006), 267.

7.2.2.4. *Mandatory Collective Rights Management*

Another model that may attend to the uncertainty surrounding orphan works involves mandatory collective rights management. Under this system, it is stipulated by law that right owners can exercise their rights only through a CRMO, with no possibility for individual claims or prohibitions. As we saw in Section 3.3, such a system exists in the EU for cable retransmission rights, pursuant to the Satellite and Cable Directive.⁸⁶⁷ Where mandatory collective licensing applies, the repertoire of all right holders in a given field is represented by one or more CRMOs.⁸⁶⁸ For prospective users, the system could therefore provide considerable legal safeguards.

Mandatory collective rights management by its very nature excludes the possibility of individual licensing, even for those right holders who would have the means to do so.⁸⁶⁹ It should, therefore, be exercised with great reserve.⁸⁷⁰ For the purpose of providing more legal certainty to users who intend to use orphan works, therefore, this system appears to be undesirable.

7.2.3. ORPHAN WORKS: TAILORED LEGISLATIVE SOLUTIONS

The last category of solutions comprises four solutions specific to orphan works, which can be grouped in two categories. The first category includes models that are essentially based on mandatory or compulsory licensing. These are the grant of non-exclusive licenses by a competent public authority and mandatory collective licensing specifically for orphan works. The second category consists of models based on a limitation on remedies available against good faith users of orphan works, and a statutory exception or limitation for orphan works respectively.

What these solutions have in common is that they allow the use of orphan works under the condition that the right holders of those works cannot be found after a reasonable search by a prospective user. This raises the elementary question of when a search qualifies as 'reasonable'. In the first category of solutions, a third party usually establishes whether the user's search was sufficiently diligent. In the second category of solutions, users need to determine whether they have made sufficient effort to find the right holder. Hence, if the aim is to establish adequate legal certainty for users, these models must be based on reliable search criteria. For right holders the diligence of a search should also be sufficiently clear, because this

867. Article 9(1) of the Satellite and Cable Directive.

868. In the situation in which multiple CRMOs compete, uncertainty may exist as to which of these CRMOs would represent a specific 'untraceable' right owner. However, this uncertainty may be removed if a statutory provision would be provided for, indicating that the untraceable right owner is presumed to be represented by a particular CRMO, or perhaps, by any of the CRMOs involved.

869. Note that under Art. 10 of the Satellite and Cable Directive, broadcasting organizations have been exempted from the rule of mandatory collective rights management.

870. Ficsor (2006a), 43 and 46.

standard determines the orphan status of their works. For this reason, stakeholders' organizations worked together in the context of the 'i2010 Digital Libraries' project to establish generic and sector-specific guidelines on diligent search criteria for orphan works. This finally resulted in a Memorandum of Understanding on orphan works, which was signed on 4 June 2008.⁸⁷¹

7.2.3.1. *Licensing by Public Authorities to Enable the Use of Orphan Works*

In Canada,⁸⁷² as well as in a few other countries,⁸⁷³ the law allows users to apply to an administrative body to obtain a license to use a particular work in those cases in which the identity or whereabouts of the right owner cannot be ascertained by reasonable inquiry. Under the Canadian license scheme the Copyright Board must be satisfied that the applicant has made 'reasonable efforts' to find the copyright owner before a license may be issued. In general, users may request by a single application a license for multiple orphan works.⁸⁷⁴ The purpose for which the license is requested (e.g., commercial, educational, or religious) is irrelevant.⁸⁷⁵

It is not required that 'every effort' has been made to trace the right holder, but an applicant must prove to have conducted a 'thorough search'. To that end, the applicant is advised to contact different CRMOs and publishing houses; to consult indexes of libraries, universities, and museums; to check the registers of copyright offices; to investigate inheritance records; and to simply search the Internet.⁸⁷⁶

In determining the reasonableness of a search, the Canadian Copyright Board often works closely with copyright licensing agencies and CRMOs.⁸⁷⁷ These entities assist in examining applications for the intended use of orphan works and advise the Copyright Board on the issuing of licenses, as well as on license fees and other terms and conditions. This provides more safeguards in regard to the

871. See Memorandum of Understanding on Diligent Search Guidelines for Orphan Works, 4 Jun. 2008, <www.ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf>.

872. Article 77 Canadian Copyright Act.

873. Comparable systems exist in Japan (Art. 67 Japanese Copyright Act), South Korea (Art. 47 South Korean Copyright Act), and India (Art. 31a Indian Copyright Act). In the United Kingdom, where the Copyright Tribunal may give consent to the making of a copy of an 'orphaned' recorded performance, a limited compulsory licensing scheme is also provided for (Art. 190 UK Copyright, Designs & Patents Act).

874. See, e.g., Copyright Board of Canada, *Canadian Institute for Historical Microreproductions (Re)*, 18 Sep. 1996, 1993-UO/TI-5, where a license was issued for the reproduction of 1,048 works.

875. L. Carrière, 'Unlocatable Copyright Owners: Some Comments on the Licensing Scheme of Section 77 of the Canadian Copyright Act', publication 103 (1998), 9, <www.robic.com/publications/Pdf/103-LC.pdf>, [Carrière, 1998].

876. Canadian Copyright Board, 'Unlocatable Copyright Owners Brochure' (July 2001), <www.cb-cda.gc.ca/unlocatable/brochure-e.html>, [Canadian Copyright Board, 2001].

877. See Treasury Board of Canada, 'Copyright Board Canada: Performance Report', for the period 1998–1999, <www.tbs-sct.gc.ca/rma/dpr/98-99/CB98dpre.pdf>, and, *ibid.*, for the period 2002–2003, <www.tbs-sct.gc.ca/rma/dpr/02-03/CB-CDA/CB-CDA03D01_e.asp>.

diligence of the search.⁸⁷⁸ Nevertheless, it is the Copyright Board that eventually decides to issue a license. It has full discretion to establish the appropriate terms and license fees in the circumstances of each particular case.⁸⁷⁹

Once the Copyright Board is convinced that the applicant cannot locate the copyright owner despite reasonable efforts, it may grant a license irrespective of whether the work is of domestic or foreign origin.⁸⁸⁰ A license cannot be granted, however, for works that are unpublished or works the publication status of which cannot be confirmed. This may be seen as a shortcoming of the system, because it is not always easy to resolve whether an old work (e.g., a photograph) has ever been published.⁸⁸¹ It must be emphasized that this provision ensures that the moral right of the author to decide whether or not to make his or her work available to the public (i.e., the *droit de divulgation*) is respected. In practice, however, the Copyright Board has sometimes presumed prior publication if conclusive evidence was hard to come by, but the circumstances nevertheless indicated the likeliness of publication.⁸⁸²

The license specifies the terms and conditions under which the applicant may use the copyrighted material. These include the type of use that is authorized,⁸⁸³ the restrictions of this use, the date of expiry of the license, etc. As a rule, the license is non-exclusive and limited solely to the Canadian dominion. The Copyright Board is not entitled to issue licenses beyond its own territory.⁸⁸⁴ The license usually also stipulates a royalty fee.⁸⁸⁵ Yet, there are cases involving charity-type uses or situations in which it is most likely that a work has entered the public domain, in which the Copyright Board requires the payment of royalties only if they are being claimed by a resurfaced copyright owner.⁸⁸⁶ Otherwise, the fees generally

878. Hickman (2006), 153–154. The Chairman of the Copyright Board indicates that in 21% of the applications filed, the Copyright Board manages to find the copyright owner before a license is being issued. See W.J. Vancise, Speech given at the Seminar jointly sponsored by the Intellectual Property Institute of Canada and McGill University (Montreal: Quebec, 15 Aug. 2007), 5, <www.cb-cda.gc.ca/aboutus/speeches/20070815.pdf>, [Vancise, 2007].

879. See e.g., Copyright Board of Canada, *Breakthrough Films & Television Inc. (Re)*, 10 May 2005, 2004-UO/TI-33. See also Vancise (2007), 6.

880. See e.g., Copyright Board of Canada, *National Film Board of Canada (Re)*, 13 Sep. 2005, 2005-UO/TI-34 (application denied).

881. P.B. Hirtle, 'Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Uses', *J. Copyright Soc'y U.S.A.*, 49 (2001): 259, [Hirtle, 2001]; and J. Brito & B. Dooling, 'An Orphan Works Affirmative Defense to Copyright Infringement Actions', *Mich. Telecomm. & Tech. L. Rev.* 12 (2005): 75, 106, [Brito & Dooling, 2005].

882. See, e.g., Copyright Board of Canada, *Canadian Centre for Architecture (Re)*, 17 Jan. 2005, 2004-UO/TI-32 (application denied); and Copyright Board of Canada, *The Office of the Lieutenant Governor of Québec (Re)*, 3 Mar. 2005, 2004-UO/TI-37 (application denied).

883. The Copyright Board can issue licenses for uses specified in Arts 3, 15, 18 and 21 of the Canadian Copyright Act only. This covers most, but not all, cases. See Carrière (1998), 7.

884. The rationale behind this rule lies in the territorial nature of copyright and related rights. On the predominance of the principle of territoriality in copyright law, see Ch. 9.

885. On the reasons for the Copyright Board to require a royalty to be paid, even if the copyright owner is unknown and may perhaps never come forward, see Vancise (2007), 7.

886. Vancise (2007), 7. An example of such case is Copyright Board of Canada, *Canadian Institute for Historical Microreproductions (Re)*, 18 Sep. 1996, 1993-UO/TI-5.

correspond to an ordinary royalty rate, as would have been made in consideration of consent being given.⁸⁸⁷

The royalties are usually ordered to be made directly to a CRMO that would normally represent the untraceable copyright owner. If the right owner comes forward, he or she may collect the royalties fixed in the license or, in default of their payment, start an action to recover them in a court of competent jurisdiction. However, if no copyright owner has come forward within five years after the expiry of the license,⁸⁸⁸ the royalty fee may be used for other purposes than those relating to the use in question. The Copyright Board may instruct a CRMO, for example, to use the undistributed fees for the general benefit of its members.⁸⁸⁹

The main advantage of the Canadian system is that it grants users adequate legal certainty to be able to use an orphan work. Where a user is granted a license, he or she is authorized to use the work, without the risk of an infringement claim should the right owner ever resurface. At the same time, the legitimate interests of right owners are not unnecessarily prejudiced. First, the verification of the good faith of a user is performed by an independent public body, which can take due account of keeping the interests of right owners and users in equilibrium. Second, it is decided on a case-to-case basis whether a license is issued and thus an exception to the exclusive rights of the right owner is made. Third, the license issued is not all-inclusive, but granted to a particular user for a specific kind of use only. Finally, the system does not result in a loss of income for right holders. If a right holder comes forward, he or she is reimbursed for the use made under the license. The Canadian system thus provides a well-balanced solution to the problem of orphan works.⁸⁹⁰

An often claimed disadvantage, however, is that a pre-clearance of orphan works by a public authority may be an expensive and lengthy process.⁸⁹¹ Although this may hold true to a certain degree, it should not be exaggerated. First, the procedure to obtain a license at the Copyright Board is free of charge.⁸⁹² Second, the Canadian Copyright Board indicates that once it has received all the required information, a decision can usually be issued within thirty to forty-five days.⁸⁹³ The opponents of the Canadian system also maintain that the inefficiency of the system is exposed by the small number of applications filed before the Board.⁸⁹⁴

887. Carrière (1998), 9–10.

888. This statutory cutoff date to recover royalties is provided for in Art. 77(3) Canadian Copyright Act.

889. Canadian Copyright Board 2001.

890. The system also appears compatible with the substantive minima of the Berne Convention (e.g., with the prohibition on formalities of Art. 5(2) BC). Ricketson & Ginsburg (2006), I, 329 (s. 6.108).

891. Brito & Dooling (2005), 106–107; D.W.K. Khong, 'Orphan Works, Abandonware and the Missing Market for Copyrighted Goods', *Int'l J.L. & Info. Tech.*, 15 (2006): 54, 75, [Khong, 2006].

892. M.H. Elferink, 'Digitale ontsluiting van cultureel erfgoed en de problematiek van "verweesde werken": Verkenning van een Canadees model', *BIE* 76 (2008) 4/5: 144, 146, [Elferink, 2008].

893. Canadian Copyright Board (2001).

894. From 1989 until December 2008, the Canadian Copyright Board has issued 228 licenses out of 235 applications that were filed, see <www.cb-cda.gc.ca/unlocatable/index-e.html>.

The relatively small number of applications, however, might also be caused by other factors, for instance, by the inability of the Copyright Board to grant licenses other than for uses within Canada.

A more practical obstacle is that currently not all Member States have in place the legal infrastructure that would be required for a system as existent in Canada to be established. In many countries, there is no Copyright Board or Tribunal that can be entrusted with the task of clearing rights for orphan works.⁸⁹⁵ It is feasible, however, that in such case, to appoint a specialized court for this task.

7.2.3.2. *Mandatory Collective Licensing of Orphan Works*

Another possible solution to the orphan works problem is a mandatory collective licensing scheme specifically designed for orphan works. In Switzerland the recent revision of the Copyright Act introduced a new provision on mandatory collective licensing for the re-use of orphan works embodied on sound or film carriers, to the extent that they are stored in publicly accessible archives or broadcasters' archives. A precondition is that the sound or film carriers involved were produced or reproduced in Switzerland at least ten years before the request.⁸⁹⁶ In 2008, the *Conseil Supérieur de la Propriété Littéraire et Artistique* (CSPLA), which is the Copyright Advisory Board of the French Ministry of Culture, has also suggested putting in place a system of mandatory collective rights management for written works and graphics the right owners of which cannot be found.⁸⁹⁷

The idea to tackle the problem of orphan works through a mandatory collective licensing scheme, which is focused exclusively on works the right owners of which are unknown or untraceable, is certainly worthy of consideration. However, the Swiss provision is not a very useful example, for it has not yet been worked out in great detail and is clouded in uncertainties. The most critical issue concerns the absence of clear indications on who determines the orphan status of a work on the basis of which criteria.⁸⁹⁸

Whereas the Swiss law obliges users to inform the relevant CRMOs about the sound or film carriers containing orphan works,⁸⁹⁹ it says nothing about a positive

895. In some countries (e.g., the Netherlands), the feasibility and desirability of creating a copyright tribunal has been examined. See P.B. Hugenholtz, D.J.G. Visser & A.W. Hins, 'Geschillenbeslechting en collectief rechtenbeheer: Over tarieven, transparantie en tribunalen in het auteursrecht', *Onderzoek in opdracht van het WODC* (Ministerie van Justitie) (October 2007), <www.ivir.nl/publicaties/hugenholtz/WODC_geschillenbeslechting_2007.pdf>, [Hugenholtz et al., 2007].

896. Article 22b of the revised Swiss Copyright Act. The revised Copyright Act was approved by the Federal Parliament on 5 Oct. 2007 and has become effective on 1 Jul. 2008.

897. CSPLA 2008, 15–20. For similar recommendations, see CRPC (2007), 70–74.

898. Because the provision was not part of the initial proposal for a revision of the Swiss Copyright Act, but brought in during the parliamentary debates in the *Ständerat* (one of the chambers of the Swiss parliament), there is no clear guidance by the government about its precise objective and reach.

899. Article 22b(2) of the revised Swiss Copyright Act.

obligation for CRMOs to also perform an independent search or to verify the reasonableness of searches conducted by users.⁹⁰⁰ Moreover, no criteria for establishing the diligence of the search are prescribed. Hence, there appear to be no safeguards for right holders to prevent their works being unjustly labelled as orphan works.⁹⁰¹ A further uncertainty exists in the fact that the law does not specifically address the issue of unpublished works. If the mandatory licensing scheme also covers unpublished orphan materials, this may very well interfere with the author's moral right of public disclosure (the *droit de divulgation*).⁹⁰²

The advantage of the Swiss system of mandatory collective licensing for orphan works is that users can easily obtain a license and that right holders keep a claim to remuneration. Even if it is not prescribed who fixes the royalty fee and licensing conditions, it most likely is the task for the appropriate CRMO administering the rights.⁹⁰³ For how long CRMOs must reserve the collected remuneration is unknown. The French CSPLA proposes that a term of ten years, on average, would suffice.⁹⁰⁴

Finally, it is unclear whether a mandatory collective licensing system for orphan works gives sufficient legal certainty to users of orphan works. This depends largely on the nature and scope of the collective licenses granted. It cannot be assumed, for example, that licenses granted pursuant to the Swiss mandatory collective licensing scheme for orphan works continue to exercise legal effects after the right holder has reappeared.⁹⁰⁵ Because the Swiss provision applies to

900. The French CSPLA assumes that the relevant CRMOs representing the unlocatable right holders will indeed verify whether prospective users have conducted a reasonable (*'avérées et sérieuses'*) search. See CSPLA (2008), 17. A further safeguard exists in the fact that, to be entitled to manage the rights in orphan works, CRMOs should receive a mandate from the French Ministry of Culture. *Ibid.*, 16.

901. Although the report of the French CSPLA does not contain any criteria to qualify a search as being reasonable (*'avérées et sérieuses'*), it recognizes the need for such criteria. The CSPLA recommends these criteria to be established by a joint committee of stakeholders. See CSPLA (2008), 17.

902. For this reason, the proposal of the French CSPLA does not cover unpublished works. See CSPLA (2008), 13. This also follows from the definition which the CSPLA has adopted: *'l'œuvre orpheline est une œuvre protégée et divulguée [. . .]'*. See CSPLA (2008), 8 and 16.

903. Pursuant to the proposal of the French CSPLA, CRMOs are allowed to grant non-exclusive licenses, which may be limited in time. CRMOs may refuse to grant a license if they suspect that the intended use of an orphan work may interfere with the moral rights of the author. See CSPLA (2008), 18–19.

904. CSPLA (2008), 20. This is consistent with the term of ten years which Art. L. 321-1(3) of the French Intellectual Property Code prescribes for right holders to claim the royalties collected on behalf of them by CRMOs. A bill currently pending in the Senate aims at bringing this term back to five years.

905. The extent to which licenses granted may continue to exercise legal effects after the right holder has reappeared largely depends on the legal mandate that is given to the relevant CRMO. The licenses granted during the time that right holders are unlocatable remain valid, e.g., if under the mandatory collective licensing scheme, the rights in orphan works are legally assigned to the CRMO, or if the system were devised as a compulsory licensing scheme, whereby unlocatable right holders are forced by law to license their rights to third parties. The Swiss mandatory collective licensing scheme for orphan works, however, appears

orphan works only, it appears that once right holders resurface, they are automatically excluded from the licensing scheme. If this is the case, users must re-enter into negotiations with right holders to establish the terms of use. If they cannot reach an agreement, this may well prove detrimental, especially if a previously orphaned work has been incorporated into a derivative work. Accordingly, as long as the law remains silent on how to deal with cases in which right holders reappear, users may face great legal uncertainty.⁹⁰⁶

7.2.3.3. *Limitation-on-Remedy Rule*

Another legislative solution would be to introduce a statutory provision that limits the liability of those users who use an orphan work after an unsuccessful but reasonable search for the right owner has been conducted. This solution was proposed by the US Copyright Office in its 2006 report on orphan works.⁹⁰⁷ Shortly afterward, the ‘Orphan Works Act of 2006’ and the ‘Copyright Modernization Act of 2006’ were introduced in the US House of Representatives.⁹⁰⁸ These bills, which proposed legislation along the lines of the limitation-on-remedy rule put forward by the US Copyright Office, were taken off the agenda, however, in September 2006. Their lack of clarity on the criterion of a ‘reasonably diligent search’ drew opposition from both users seeking greater legal certainty and right owners seeking more legal safeguards.⁹⁰⁹ In 2008, the House of Representatives and the Senate introduced new bills, which are largely based on those of 2006, yet with some changes.⁹¹⁰

Under the proposed limitation-on-remedy rule, bona fide users of orphan works remain liable for copyright infringement, but subject to a limitation on remedies that the right owner could obtain against the user if he or she would subsequently reappear and file a claim. To qualify for this limitation on remedies, the user must prove to have performed a ‘qualifying search, in good faith’ (in the 2006 bills called a ‘reasonably diligent search’) and, if possible, to provide attribution to the author or right holder of the work.⁹¹¹ In addition, the House and Senate bills of 2008 require users to include with the use a prescribed symbol of use

to include no true legal mandate for CRMOs. Rather, it assumes that as long as right holders are unlocatable, their interests are safeguarded by the relevant CRMOs. The French CSPLA proposes a similar legal representation without mandate. See CSPLA (2008), 18.

906. This is also acknowledged by the French CSPLA. Yet, it has not find a clear answer for how to deal with the issue of previously orphaned works. See CSPLA (2008), 19.

907. US Copyright Office (2006).

908. HR 5439, 109th Cong., 2d sess. (‘Orphan Works Act of 2006’); and HR 6052, 109th Cong., 2d sess. (‘Copyright Modernization Act of 2006’). The latter is a copyright bill with a broader scope, which includes in Title II a revised version of the ‘Orphan Works Act of 2006’.

909. Ginsburg (2008), 110–111.

910. HR 5889, 110th Cong., 2d sess. (‘Orphan Works Act of 2008’); S. 2913, 110th Cong., 2d sess. (‘The Shawn Bentley Orphan Works Act of 2008’), introduced both on 24 Apr. 2008.

911. The idea is that it should be unambiguously clear to the public that the work belongs to the author or right owner, and not to the user in question. See US Copyright Office (2006), 110–112.

of the orphan work. Unlike the Senate bill, the House bill also obliges users, before using an orphan work, to file a notice of use with the Register of Copyrights.⁹¹²

The proposal of the Copyright Office does not define the steps a user must take in order to meet the standard of ‘reasonable diligence’. This is a major deficiency in the proposal. Without any clear guidance as to what constitutes a reasonably diligent search, users may be faced with great uncertainty if they would ever wish to rely on the limitation-on-remedy rule in case it would come to a lawsuit.⁹¹³ Furthermore, an accurate description of the reasonableness of a search is necessary to ensure that the legitimate interests of the right holders of orphan works are not unreasonably prejudiced. This appears essential to guarantee the consistency of the provision with international norms.⁹¹⁴ For these reasons, the House and Senate bills of 2008 define more precisely the criteria required for conducting a ‘qualifying search’.⁹¹⁵

The bills generally proclaim that a qualifying search requires a diligent effort to locate the right owner of the orphan work before, and reasonably proximate to, the use. According to the Senate bill as amended,⁹¹⁶ this ordinarily includes, at a minimum, a review of the relevant information in the records of the Copyright Office and in other reasonably available sources and databases holding information on copyright holders. In addition, diligent search efforts normally require the use of reasonably available expert assistance and technology tools. The Copyright Office is instructed to maintain and make available current statements of recommended practices, on which any qualifying search must ordinarily be based. Users cannot be successful in their claims by referring solely to the lack of identifying information in the copy of the work. In any case, it is for the courts to determine whether, in the given circumstances, a user has satisfied the standards for a ‘qualifying search’.

If a user meets the threshold of conducting a ‘qualifying search’ and satisfies all other conditions on eligibility prescribed in the bills, a closed set of remedies would be available if the right owner comes forward and initiates litigation over the

912. In addition to these conditions that users must satisfy before using an orphan work, the 2008 bills also prescribe several conditions, mostly of a procedural nature, which users must comply with if a right holder subsequently comes forward and files an infringement suit.

913. See Hickman (2006), 149 et seq.

914. Without any further clarification of the criteria necessary to meet the reasonably diligent search, it is asserted, for instance, that the proposed limitation-on-remedy rule would not be in compliance with the three-step test of Art. 13 of the TRIPS Agreement. See C. Thompson, ‘Note – Orphan Works, U.S. Copyright Law, and International Treaties: Reconciling Differences to Create a Brighter Future for Orphans Everywhere’, *Ariz. J. Int’l & Comp. L.* 23 (2006): 787, 832–839, [Thompson, 2006]. See also Ginsburg (2008), 138–141, arguing that the level of diligence should be set consistently high.

915. Yet, for obvious reasons, the bills do not define the standards for a ‘qualifying search’ in minuscule detail. See Ginsburg (2008), 136–137, articulating that these search standards may well evolve with technology and will vary according to the creative sector and the nature of the use.

916. Shawn Bentley Orphan Works Act of 2008, amended, as passed in the Senate by unanimous consent on 26 Sep. 2008, and referred to the House Committee on the Judiciary, one day later.

use of the work. First, monetary relief is limited to ‘reasonable compensation’ for the use made. This should relate to a reasonable license fee as would have been established in negotiations between the user and right owner before the infringing use began.⁹¹⁷ A ‘safe harbour’ provision is available for certain non-profit institutions making non-commercial infringing uses for educational, religious, or charitable purposes. If they promptly cease the infringing use on a notice of the claim for infringement, they are exempted from the obligation to pay reasonable compensation.⁹¹⁸

Second, the orphan works bills offer a limitation on injunctive relief. Where an orphan work has been incorporated, or is starting to be integrated, into a derivative work (e.g., a motion picture or documentary film) that is sufficiently original, the right owner cannot obtain full injunctive relief to prevent the continued preparation or use of the derivative work, provided that the user pays the right owner reasonable compensation and grants sufficient attribution to the right owner, if so requested.⁹¹⁹ In any other case, for example, if an orphan work has simply been republished or posted on the Internet without any transformation of its content, full injunctive relief remains available. Nonetheless, the Senate bill of 2008, as subsequently amended, stipulates that as long as the user has satisfied the conditions of eligibility prescribed in the bill, courts shall, to the extent practicable and subject to applicable law, account for any reliance interest of the user that may be harmed by the injunction.

The main advantage of a limitation-on-remedy rule as proposed in the United States is that it would provide for an inclusive provision to address the problem of orphan works. First, it does not categorically exclude any type of work (e.g., unpublished works) from its scope.⁹²⁰ Yet, it is doubtful whether this is in agreement with international norms.⁹²¹ Second, it would not affect any existing rights, limitations, or defences to copyright infringement.⁹²² Finally, because users must not compensate right owners in advance, but only in case they reappear and file a claim, the proposed limitation-on-remedy rule is claimed to be much more cost-efficient than, for instance, the *ex-ante* clearance of orphan works as practiced in the Canadian copyright system.⁹²³

917. On what could be included in this ‘reasonable compensation’, see Ginsburg (2008), 114–121. Note that the 2008 House bill allows courts to award extra compensation in case of a registered work.

918. The House bill names non-profit educational institutions, libraries, archives, and public broadcasting entities as the beneficiaries of this ‘safe harbour’ provision. The Senate bill adds museums to this list.

919. For a critical viewpoint on the unavailability of injunctive relief with respect to derivative works, see Ginsburg (2008), 122–129.

920. US Copyright Office (2006), 100 and 121. The 2008 bills only exclude useful articles (below, text).

921. See V. Bronder, ‘Saving the Right Orphans: The Special Case of Unpublished Orphan Works’, *Colum. J.L. & Arts* 31 (2008): 409, [Bronder, 2008]. See also Ginsburg (2008), 106–109, 154–155 and 170–173, recommending the 2008 bills to exclude unpublished works the authors of which are still alive.

922. US Copyright Office (2006), 121.

923. *Ibid.*, 114.

This last argument, however, is not very convincing. By taking into account the costs that a limitation-on-remedy rule would initially impose on users (i.e., the costs of keeping search records and of assessing the likeliness of future claims), as well as the costs that arise in case a right holder reappears (i.e., the costs of litigation and of paying reasonable compensation after a successful litigation), the question remains whether the limitation-on-remedy rule would truly be more cost-efficient than the Canadian system. Moreover, the limitation-on-remedy rule may not make the most effective use of the judicial apparatus, because right holders are still required to file lawsuits against infringing users. The 2008 bills, however, state that before users can invoke the limitation-on-remedy rule in courts, they must first try to negotiate reasonable compensation in good faith with the copyright holder and, if agreement is reached, render payment of the compensation in a reasonably timely manner. Negotiations of this kind appear to be aimed at keeping infringement claims out of the courts.⁹²⁴

Another question is whether a limitation-on-remedy rule would actually provide the legal certainty users require. As observed, this first of all depends on the clarity that would be given on the minimum standards of a 'qualifying search'. Even if that were sufficiently clear, however, a user may still face considerable difficulties if he or she would have to convince a court *ex post* of the reasonableness of a search, especially where the search was conducted a long-time ago. To be able to provide sufficient evidence in court, users would need to exactly document each and every search they have made and keep records thereof, often for an indefinite period of time. This may impose unreasonable burdens, especially on smaller users.

In addition, particular groups of right holders have expressed the fear that users would not always undertake adequate diligent search efforts to find a right owner. As a result, works may be inaccurately labelled as orphans. Photographers, illustrators, and graphic artists, in particular, are strongly opposed to the limitation-on-remedy rule.⁹²⁵ They are concerned that users may unjustly regard their works as orphan works. Especially because right holders bear the burden of seeking judicial relief in the event of a dispute, and the cost of litigation to enforce their rights often is prohibitively high, they fear that many of their works will eventually be used without consent or reimbursement for the use made.⁹²⁶

To address these concerns, however, the bills of 2008 inserted additional provisions, including an exclusion from the limitation-on-remedy rule for fixations

924. Ginsburg (2008), 130–131.

925. Hearing before the Subcommittee on Intellectual Property of the Committee on the Judiciary of the US Senate, 109th Cong., on 'Orphan Works: Proposals for a Legislative Solution', 6 Apr. 2006 (statements of Victor Perlman and Brad Holland).

926. The Copyright Office responded to these concerns by stating that they go beyond the orphan works issue, because right owners bear the burden of seeking judicial relief in ordinary settings as well. See US Copyright Office (2006), 114. However, the point is that although the limitation-on-remedy rule grants legal certainty to the user, it does not provide for any legal safeguards for individual right owners.

in or on useful articles;⁹²⁷ an obligation for the Copyright Office to create databases of pictorial, graphic, and sculptural works; and a delayed effective date of the act in respect of these works.

Finally, it is highly debatable whether a limitation-on-remedy rule such as the one proposed in the United States would really improve the situation in Europe in regard to the use of orphan works. When it comes to the financial damages that a user may incur, the law in most EU countries is much more benevolent to the user than in the United States. As observed, in Europe, damages are compensatory and not punitive by nature. Hence, a limitation-on-remedy rule would not alleviate the situation for users as such, but would, at the most, encourage more users to use orphan works. Only to the degree that it also limits injunctive relief, as in the US proposal, would it improve the legal certainty for users who incorporate an orphan work into a derivative work.

7.2.3.4. *Statutory Exception or Limitation*

A last alternative that merits attention is a statutory exception or limitation that allows the re-use of orphan works under certain conditions. So far, this model has not been applied in practice. It does feature in some proposals, mostly initiated by groups of stakeholders. In Germany the *Aktionsbündnis Urheberrecht für Bildung und Wissenschaft* (a coalition of large research institutes, scientific organizations, and universities in Germany) proposed the introduction of a statutory exception for orphan works in 2007.⁹²⁸ In the United Kingdom, the British Screen Advisory Council (BSAC) advocated a similar though not identical solution,⁹²⁹ which afterwards was taken aboard by the Gowers Committee.⁹³⁰

The extent to which a statutory exception or limitation could offer an adequate solution to the orphan works problem depends, of course, on how it is devised. An exception or limitation would generally permit the use of an orphan work if, despite ‘best endeavours’ (cf. the BSCA proposal) or ‘*einer angemessenen professionellen und dokumentierten Suche und einer öffentlichen Bekanntmachung*’ (cf. the German proposal) the right owner of the work could not be found. Additional conditions can exist in the obligation to mark the work as used under the exception (cf. the BSCA proposal).

927. Fixations in or on useful articles (e.g., coffee mugs, t-shirts or other merchandise that may incorporate visual works) are important means of income for authors of pictorial, graphic, and sculptural works. See Ginsburg (2008), 144–145. The exception for useful articles is contained in both the House bill and the amended Senate bill (it was not included in the original Senate bill).

928. Aktionsbündnis Urheberrecht für Bildung und Wissenschaft, *Bedarf nach einer Urheberrechtsslösung für verwaiste Werke*, 29 Mar. 2007, <[www.urheberrechtsbuendnis.de/docs/verwaiste Werke.pdf](http://www.urheberrechtsbuendnis.de/docs/verwaiste_Werke.pdf)>, [Aktionsbündnis Urheberrecht, 2007].

929. British Screen Advisory Council, *Copyright and orphan works*, A paper prepared for the Gowers review, 31 Aug. 2006, <www.bsac.uk.com/reports/orphanworkspaper.pdf>, [BSAC, 2006].

930. See Gowers Review (2006), 69–72 and, in particular, Recommendation 13.

Once they resurface, the right owners of works used under the proposed exception are entitled by law to claim a 'reasonable royalty' or '*eine angemessene Vergütung*' for the use made. The amount of compensation should either be agreed by negotiation, failure of which it shall be fixed by an independent third party (cf. the BSCA proposal), or set unilaterally by a CRMO (cf. the German proposal).

Provision should also be made for subsequent usage of the work in case the right holder has reappeared. According to the BSAC proposal, users who want to continue using the work have to negotiate the terms in the usual way. Right holders may also refuse permission for a further usage of their previously orphaned works. If the work has been integrated or transformed into a derivative work, however, it is proposed that users would be allowed to prolong the use of the work, as long as they pay a reasonable royalty and grant sufficient attribution to the right owner. The German proposal of the *Aktionsbündnis Urheberrecht für Bildung und Wissenschaft*, in contrast, includes no provision for reappearing right holders. It generally states that right holders stepping forward cannot prevent the making available of their works by users who have satisfied the conditions set by law. The reason for this may perhaps be that the proposed exception is limited to the making available right, thus excluding other uses such as the making of derivative works.

As a general rule, the advantages and disadvantages of an exception or limitation will be similar to those of the US limitation-on-remedy rule, because both rules are essentially based on an ex post settlement of an (otherwise) infringing use of orphan works by a good faith user. Hence, a statutory exception or limitation may provide for an inclusive provision. However, it would offer adequate legal certainty to users of orphan works only if the standards for a reasonable search are sufficiently clear. Another disadvantage is that all searches need to be well documented and adequate search records must be kept in case a right holder contests the reasonableness of the user's search and files a lawsuit. The biggest difference is that, under an exception or limitation, reappearing right holders can directly claim reasonable compensation for the use made, rather than sue for infringement as under the US limitation-on-remedy rule.⁹³¹ As a result, proceedings before the courts would arise only if users would not fulfil their obligation to pay reasonable compensation or if right owners would challenge the reasonableness of the search conducted by a user.

Providing legal certainty to users by way of a statutory exception to the exclusive right of copyright owners, however, may be too rigorous a measure for the purpose of addressing the problem of orphan works. In any case, such exception should be compatible with the three-step test of Article 5(5) Information Society Directive (see Section 3.2.3). Let us recall that this test prescribes that an exception is only permitted: (a) in certain special cases; (b) that do not conflict with a normal exploitation of the work; and (c) do not unreasonably prejudice the

931. In other words, in case of a statutory exception or limitation, users do not legally infringe any rights, provided that their use remains within the boundaries of the law. Under the US limitation-on-remedy rule, users are deemed infringers, yet their liability is limited if they meet the statutory criteria.

legitimate interests of the right holder. It is questionable whether an orphan works exception, as the ones proposed here, would pass this test. This is especially true if the exception is not strictly limited to certain specific cases and for certain specific purposes. Also, the question is whether an exception provides enough guarantees not to unreasonably prejudice the legitimate interests of right holders, as the third step of the test requires.⁹³² For example, there is no built-in mechanism to verify the good faith of a user, as exists in the Canadian system. In sum, the question remains whether there are no other equally effective means to achieve the same objective, whilst providing more legal safeguards to protect the legitimate interests of right owners.⁹³³

Moreover, if national lawmakers would desire to adopt a statutory exception for orphan works, active involvement of the EU legislature would be required. As Article 5 Information Society Directive provides for a limited set of exceptions only, none of which currently allow for an orphan works exception to be introduced, the Directive should first be amended to allow such exception to be adopted at the national level.

7.3. ASSESSMENT AND CONCLUSIONS

The preceding overview detailed the various solutions to the problem of orphan works. Presumably, the problem would be most adequately suppressed if it were tackled at different fronts. On the preventive side, it is recommended that measures be taken to encourage making available to the public of more and better information on the identity and whereabouts of right owners. This would truly facilitate the search for right owners, thus alleviating the problem of orphan works. At the EU level, it appears that right holders and users are currently working together to address the creation of databases of orphan works. However, although this may perhaps improve the situation to some extent, preventing the orphan works problem from expanding in the future would provide for a more structural solution. To this end, adequate RMI should be made available for all works, rather than solely for works that are already orphaned. Section 7.2.1 gives several suggestions on how this may be achieved.

As for possible legislative measures, two solutions stand out. These are the Nordic model of extended collective licensing (which seems particularly useful for large-scale digitization and re-utilization projects) and the Canadian system that allows users to apply to a certain public authority to obtain non-exclusive licenses, authorizing the use of one or more orphan works. Whereas the Nordic model has the advantage of steering close to the tradition of collective rights management that

932. For an application of the three-step test to orphan works exceptions, see G. Spindler & J. Heckmann, 'Retrodigitalisierung verwaister Printpublikationen: Die Nutzungsmöglichkeiten von "orphan works" de lege lata und ferenda', *GRUR Int.* (2008): 271, 281–283, [Spindler & Heckmann, 2008].

933. See Senftleben (2004), 236.

has a proven track record, particularly in Europe, the Canadian system provides the user with maximum legal certainty to use an orphan work. At the same time, both of these models seem to take into account the legitimate interests of right owners.⁹³⁴

At present, several Member States are in the process of choosing and adopting a system that they think most adequately addresses the problem. This is consistent with the 2006 Recommendation, which urges Member States to adopt mechanisms to deal with orphan works. It appears that a small group of Member States (Finland, Sweden, and Hungary) have in place mechanisms of extended collective licensing for specific areas. Denmark recently changed its copyright law, adopting a general rule on extended collective licensing that allows any type of licensing agreement to be given extended effect, subject to approval by the Ministry of Culture. Hungary, on the other hand, seems to be looking at a solution to the problem along the lines of the Canadian model. Other countries are investigating whether some legislative solution can be found within the context of a broader adaptation of copyright law (Germany) or are considering an alternative legal resolution (France).⁹³⁵

Despite the various efforts at the national level, most Member States currently do not have in place legislative or practical mechanisms facilitating the use of orphan works. The Commission has therefore raised the question of whether it should take further legal action. Although the problem of orphan works seems real and legitimate, it appears premature for any legislative initiative to be developed at the EU level. So far, it has not been demonstrated that the problem of orphan works has had a noticeable impact on the internal market. In fact, the exact scale of the orphan works problem remains largely unknown, as relevant quantitative data are not yet available. Accordingly, because the orphan works problem does not seem to cause any real impediments to the internal market, it is questionable whether the Community should and may interfere.

Nevertheless, in the longer run, obstacles to the intra-Community trade in orphan works may arise, if each individual Member State were to adopt its own set of rules to deal with the problem. The territorial nature of copyright and related rights is the primary cause, because it limits the scope of national regulations (including those for orphan works) to domestic territories. Users who want to

934. Admittedly, both the Nordic model and Canadian system may result in an accumulation of royalties that cannot be distributed to the rightful copyright owners as long as they remain untraceable. Nevertheless, such disadvantage is the unintended result of a solution to a general market failure and, therefore, may need to be taken for granted. Although this may imply that users end up paying royalties for means other than those relating to the use in question, it may be regarded as the price that users must pay to use works for which they would otherwise not be able to obtain the required permission.

935. Commission Staff Working Document accompanying the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Europe's cultural heritage at the click of a mouse: Progress on the digitization and online accessibility of cultural material and digital preservation across the EU*, SEC (2008) 2372 (Brussels, 11 Aug. 2008), 14 [Staff Working Paper on Europe's Cultural Heritage].

use orphan works in several EU Member States would need to comply with a variety of national procedures to acquire the necessary permissions. This may not only impose considerable burdens on users, it could also create legal complications if one and the same application were ruled differently by national authorities. Because problems of this kind cause actual hindrances for the functioning of the internal market (cf. the attribution principle), and trans-national aspects by definition cannot be satisfactorily regulated by action of the Member States alone (cf. the subsidiarity principle), Community action may well be justified, given of course that it is proportionate to its aim (see Section 1.2).

For the issue of orphan works to be effectively addressed for the whole European territory, therefore, complementary measures at the EU level that attend to the licensing difficulties in the case of cross-border exploitation of orphan works seem indispensable. A recommendation of the Commission of a limited scope, calling on Member States to mutually recognize any mechanism adopted in another Member State, or allowing multi-territorial licensing, authorizing the use of orphan works in different Member States (or perhaps even the entire EU), may be in order here. In the end, if the aim is to give strong impetus to the development of mass-digitization and re-utilization projects and to allow orphan works to be used as building blocks for new works, it appears elementary that satisfactory solutions for facilitating the cross-border exploitation of orphan works be provided for at least.

Chapter 8

The Blessings and Curses of Harmonization

As the previous chapters have demonstrated, two decades of harmonization of copyright and related rights have brought the European Union a wide array of harmonized norms that have mostly found their way into the laws of the Member States. In this chapter we will critically examine this harmonization process. To what extent has Europe's harmonization process fulfilled its promise? What are its blessings and its curses? In Section 8.1 we will concentrate our analysis on the process of harmonization and analyze its strengths and weaknesses. Thereafter, in Section 8.2 we will examine the end product, the harmonized norms of European copyright, and summarize its main inconsistencies, based on our analysis in Chapters 2, 3, and 4.

8.1. TWO DECADES OF HARMONIZATION: A CRITICAL EVALUATION

At first impression, Europe's harmonization agenda in the field of copyright and related rights has been remarkably productive. Despite initial scepticism about the European Union's legislative competence in the realm of copyright among Member States, stakeholders, and scholars, the EU legislature has carried out an ambitious and broad-ranging programme of harmonization that has touched on many of the most important issues in the field of copyright and related rights. From the early directives dealing primarily with specific subject matter or rights to the more 'horizontal' Information Society Directive, the harmonization process has produced a sizeable body of European law on the subject matter, scope, limitations, term, and enforcement of copyright and related rights.

Although many inconsistencies – the most relevant of which will be summarized later – remain, the harmonization machinery has undeniably produced a certain *acquis communautaire*. Although far from complete, this *acquis* has had normative effect not only in the Member States that are obliged to transpose the directives, but also at the regional and international levels through bilateral trade agreements concluded by the EU that may contain minimum standards of copyright protection.⁹³⁶

Where the directives have provided precise instructions, leaving the Member States little discretion for deviation, such as in the case of the Computer Programs Directive, the harmonization process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency, and predictability of norms in these distinct sectors.

But these results have come at considerable expense, in terms of time, public finance and other social costs, to the organs of the European Union and its Member States. Because of the complexity of the European lawmaking procedure, even a relatively non-controversial directive takes several years to complete, from its first proposal to its final adoption, including translation into the twenty-three official languages of the Community. On adoption of a directive, another round of lawmaking will commence at the level of the Member States. Twenty-seven governments will consult local stakeholders, draft twenty-seven different implementation bills, and discuss with twenty-seven different parliaments, often ignorant of the fact that the directives leave only limited discretion to national legislatures. The step-by-step approach towards harmonization that the EC legislature has followed has placed an enormous burden on the legislative apparatus of the Member States. For national legislatures, the harmonization agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights.

In all, the time span between the first proposal of a directive and its final implementation can easily exceed ten years. Despite the Community's 'Better Regulation' agenda, which includes proposals to speed up, simplify and make more transparent the Community legislative process and its various end products, it is not to be expected that the duration and costs of this entire process will be significantly reduced. Even if 'Better Regulation' would lead to a speeding-up of lawmaking at the Community level, this will not affect the transposition process at the national level, which may take over five years from adoption of a directive. Clearly, the instrument of a directive is not well suited to quickly respond to the challenges of a constantly evolving, dynamic information market. But even a light-weight consolidation exercise (a so-called 'recasting' of the *acquis*)⁹³⁷ would take

936. See for example (for Turkey) Decision No. 1/95 of the EC-TURKEY Association Council on implementing the final phase of the Customs Union (96/142/EC), Annex 8. The schedule enumerates a series of directives in the field of copyright and related rights that Turkey is required to implement.

937. See European Commission, 'Updating and Simplifying the Community Acquis', COM (2003) 71 Final (Brussels, 11 Feb. 2003).

several years to complete and then transpose, assuming that Member States and stakeholders would exercise enough self-restraint to refrain from adding new policy options to the agenda.

Another structural deficiency of the harmonization process is the asymmetric normative effect of harmonization by directive. As this study has illuminated, the harmonized norms of copyright and related rights in the seven directives in many cases well exceed the minimum standards of the Berne and Rome Conventions, to which the Member States have adhered. More often than not the norms also exceed average levels of protection that existed in the Member States before implementation, as exemplified by the Term Directive that has harmonized the duration of copyright at a level well above the normal Berne term of fifty years *post mortem auctoris*. Surely, this trend of 'upward' harmonization is driven, in part, by the desire of the EC legislature to seek 'a high level of protection of intellectual property', which would lead to 'growth and competitiveness of European industry',⁹³⁸ – a proposition that has yet to be proven.⁹³⁹ But some up-scaling of protection is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

A related problem is the 'ratcheting-up' effect a harmonization directive inevitably has on national levels of protection, even in the unlikely case that a directive would later be repealed. Repealing a directive does not automatically lead to the undoing of implementation legislation at the national level, unless a national legislature has provided for a sunset clause. This makes harmonization by directive essentially a one-way street, from which there is no turning back.

This phenomenon of 'upward' approximation is inherent to the process of harmonization by directive, and a reason for serious concern. The effectiveness, in economic and social terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary 'delicate balance' between the interests of right holders in maximizing protection and the interests of users (i.e., the public at large), in having access to products of creativity and knowledge. Moreover, a constant expansion of rights of intellectual property resulting from 'upward' harmonization is likely to create new obstacles to the establishment of an Internal Market, rather than remove them, as long as exclusive rights remain largely territorial and can be exercised along national borders. Another weakness of the harmonization process lies in its short-term negative effect on legal certainty in the Member States, especially where a directive introduces new rights or novel terminology. Harmonization by directive creates additional layers of legal rules that require interpretation first at the national

938. Information Society Directive, recitals 4 and 9. See discussion in Ch. 9, text accompanying n. 985 and 5.1.3.1.

939. See Report on the Database Directive (arguing that a positive effect of the introduction of the *sui generis* right on the EU information economy cannot be proven).

level of the local courts and eventually by the ECJ. This extra legislative layer remains a cause of great legal uncertainty for as long as the ECJ does not pronounce its final judgment on the issue(s) at stake.

Yet another structural drawback of the instrument of harmonization is its limited potential to produce true unification. Harmonization directives usually leave a measure of discretion to the Member States, particularly when its provisions are expressly worded in vague terms to mask political compromise. Moreover, it is quite common for directives to provide only minimum standards of protection or optional provisions. In some cases the norms of a directive leave national legislatures so much leeway that their actual harmonizing effect is minimal. An example here is the Information Society Directive that allows Member States to 'pick and mix' limitations from a smorgasbord of some twenty-one broadly worded categories of exemptions. This kind of 'faux' harmonization merely creates havoc among Member States and interested parties and does not bring the internal market much closer.

Another critique concerns the quality of the legislative product, which is directly related to the harmonization process. The complex legislative procedure leading to a harmonization directive, which requires input from three European institutions and twenty-seven Member States, simply cannot produce norms of the quality that the EU – the largest economy in the world – requires. To make matters worse, pressure from powerful lobby groups and from the EU's main trading partners (especially the United States) does not allow enough time for reflection needed to produce good-quality regulation. At the national level, to avoid the risk for rushing into immature or unnecessary legislative initiatives, legislatures often seek advice from (committees of) academic advisors. For the same reason, academic experts could and should play an important role as 'quality controllers' at the European level as well.

Yet another criticism concerns the lack of transparency of the legislative process. The complex interplay between the legislative powers of the Community reduces the transparency of the legislative process and invites lobbying, rent-seeking, and overregulation. More often than not, harmonization initiatives are driven by hidden political agenda's. Indeed, the stated primary aim of a directive (i.e., to remove disparities in the laws of the Member States) rarely tells the full story and in some cases appears to be rather far-fetched. As we have suggested in Chapter 1, steering closer to the principles of proportionality and subsidiarity might substantially reduce this kind of unnecessary harmonization.

But even 'perfect' harmonization will never lead to truly uniform norms at the national level, as long as national legal systems with diverging histories and traditions are left intact. National legislatures and courts will inevitably interpret the norms of a directive, however well-crafted they may be, in the light of their own laws and legal terminology and (wishfully interpreting) read into the European norms the legal concepts with which they are most familiar. The flexibility of implementation that comes with legislating by directive rather than by regulation enables Member States to mould the European standard in their existing framework, which will often result in differing national standards. An example would be

the Database Directive that has sought to establish a uniform standard of originality for copyright protection – somewhere in between continental ‘creativity’ and common law ‘not copied’. One would have expected the Member States on both sides of the Channel to adjust their notions of originality, but this has not happened. Instead, most national legislatures, courts, and commentators have contented themselves with interpreting the harmonized standard (the ‘author’s own intellectual creation’) as compliant with pre-existing notions of originality for databases. This is the ‘homing tendency’ of harmonization by directive, a structural weakness that no directive can really overcome.

Indeed, when one compares the current copyright laws of the twenty-seven Member States – an exercise well outside the terms of reference of this book – one immediately perceives enormous differences in wording, terminology, and legislative style (not to mention language), even for areas squarely within the *acquis*. Despite seven harmonization directives, the look and feel of the copyright statutes of the Member States remains predominantly ‘national’. The enhanced transparency that harmonization initiatives often promise is in practice only rarely achieved. An uninformed outside observer would probably never guess that the copyright laws of the twenty-seven Member States reflect almost twenty years of sweeping harmonization. Although the EC legislature is to be lauded for its current agenda aimed at increasing transparency of EC law, the sad truth is that twenty years after the first Green paper on copyright, producers, providers, and users of copyright-protected content still cannot sail on the compass of a truly European copyright law.

8.2. INCONSISTENCIES IN THE ACQUIS

As Chapter 2 has revealed, the current *acquis* in the field of copyright and related rights, while generally coherent, suffers from inconsistencies and unclear areas that might merit some form of legislative redress. As we have seen, an important cause of these inconsistencies lies in the sequential and cumulative build-up of the *acquis*. Later directives are usually declared ‘without prejudice’ to earlier directives, a legislative technique that, by leaving the existing *acquis* intact, inevitably leads to inconsistencies. An example among many would be the limitation on transient copying that was introduced by the Information Society Directive, but does not apply to computer programs and databases, both of which are governed by earlier directives.

This problem is exacerbated by the ongoing process of convergence of content formats, transmission media, and platforms that is another major cause of inconsistencies in the *acquis*. This convergence has made the ‘vertical’ – content or media specific – approach towards harmonization that typifies, in particular, the earlier directives difficult to maintain. As a result, similar providers or users of content-related services are now subject to diverging rules. This obviously distorts competition and undermines legal certainty. A prime example here is the rules on compulsory collective management of retransmission rights that apply to cable

operators but not to functionally equivalent content aggregators such as providers of satellite or Internet-based simulcasting services.

Yet another structural cause for incoherency is the inconsistent application in the directives of full ('maximum') harmonization, which pre-empts the competence of Member States to legislate in the harmonized field, and 'minimum' harmonization, which leaves Member States discretion to preserve or even introduce local norms provided these do not conflict with the *acquis*. An example of full harmonization would be the rule on originality found in Article 3(1) of the Database Directive, which expressly forbids Member States from applying other tests. An example of 'minimum' harmonization is Article 13 of the same Directive, which allows a variety of concurring legal regimes, including unfair competition remedies, to survive at the national level. Needless to say, the positive effects on the internal market of such minimum harmonization are comparatively limited.

Having described and critically assessed in Chapters 2 through 4 the main harmonized norms of copyright and related rights, we will now summarize in the remainder of this chapter the main highlights and inconsistencies of the *acquis* and recommend repair wherever necessary.

8.2.1. WORK OF AUTHORSHIP AND OTHER SUBJECT MATTER

Surprisingly, the most central concept in the law of copyright, the work of authorship, has so far largely escaped harmonization. The directives appear to have taken the 'quasi-*acquis*' of Article 2 of the BC for granted, and have established harmonized rules only with respect to new or relatively controversial categories of works, such as computer software, databases, and photographs. Whereas software and databases are subjected to an identical test ('the author's own intellectual creation'), the criterion for photographs is somewhat stricter and stays closer to the *droit d'auteur* conception of the work of authorship.

The absence of a general *acquis* implies that fundamental differences between continental and common law systems will remain, although a 'rapprochement' is noticeable, particularly at the level of infringement analysis. The question arises of whether an extension of the *acquis* to all categories of works of authorship would be beneficial to completing the internal market. Note that the practical effect of any such harmonization may be limited if the dynamic application of a harmonized criterion by national lawmakers and courts (i.e., the 'homing tendency' mentioned above) persists. On the other hand, national variations may be so slight as not to cause any noticeable problem from an internal market perspective.

In the area of related rights, it is primarily the notion of broadcast that is in need of clarification. This is due to the convergence of dissemination methods, which is not reflected in the technology-specific definitions of the Rome Convention or the draft WIPO Broadcasting Treaty. On the other hand, the introduction of a European 'technology-neutral' definition may cause an unwarranted extension of rights (e.g., to webcasters), considering the original rationale of protecting

broadcasting organizations. To be sure, the economics of current and future broadcasting-type activities would have to be scrutinized before embarking on any attempts of clarification or harmonization effort.

8.2.2. AUTHORSHIP AND OWNERSHIP

As to the notion of authorship, the *acquis* has even less to offer. Although no general rules of authorship (including rules on co-authorship and collective works) have been established, various directives identify the director of a cinematographic work as its author or one of its authors.

Even more surprisingly, the harmonization process has hardly touched on the issue of ownership. Apart from a few specific rules on ownership found in the Computer Programs and Database Directives, allocation of copyright ownership is largely left to the Member States, while in the realm of related rights the European legislature seems to rely, rather optimistically, on the harmonizing effect of the Rome Convention and the WPPT.

Consequently, rights in a single object (e.g., a work made under an employment contract) may be in different hands in various states across the European Union, depending on the local rules of ownership allocation. The absence of harmonization thus raises the territorial barriers to complete market integration, as will be further discussed in Chapter 9.

8.2.3. ECONOMIC RIGHTS

On this quicksand of unharmonized ownership rules is erected an elaborate structure of harmonized economic rights. In regard to these rights, the most problematic inconsistency concerns the overlap in the digital environment of the reproduction right, which includes acts of temporary and transient copying and the right of communication to the public, which includes a right of making available online, both of which are defined in a very broad manner in the Information Society Directive. In practice, this overlap may result in unjustifiable claims for 'double payment' by different right holders for single acts of exploitation, resulting in market distortions. Arguably, these rights cannot coexist in the way they are presently – too broadly – defined. Given that the right of making available is especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of this right, which has been advocated by scholars for several years.

A minor inconsistency concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction, which, although it is described more broadly in the Information Society Directive, does not seem to have a meaning different from corresponding

terms used in the Computer Programs and Database Directives. Both inconsistencies might be clarified by the Commission in an interpretative communication, without the need of treading on any new ground.

8.2.4. DURATION OF RIGHTS

Although the harmonized terms of protection of copyright and related rights illustrate the seemingly unstoppable process of harmonization 'upward', no complete harmonization has been achieved or can even be achieved as long as essential underlying notions of (co-)authorship, collective work, and ownership remain unharmonized.

The recently proposed Term Extension Directive would create additional inconsistencies by extending the terms of protection for performers of musical works and phonogram producers, but leaving the terms for other performing artists, such as actors and film producers at fifty years.

8.2.5. LIMITATIONS AND EXCEPTIONS

As to limitations and exceptions, the *acquis* promises much more than it delivers. Notwithstanding the extensive enumeration of limitations and exceptions in Article 5 of the Information Society Directive, little actual harmonization has been achieved because all but one of the norms of Article 5 are optional. As a consequence, limitations and exceptions – traditionally a field in which national norms tend to differ sharply – have remained largely unharmonized. This is particularly problematic in respect to information services offered online under local limitations (e.g., a news reporting or library privilege) and might ultimately constitute a serious impediment to the growth of the information society.

This lack of harmonization could be corrected, we submit, by way of a two-tiered solution that would take into account the principles of subsidiarity and proportionality. First, the EU legislature could declare strictly worded limitations mandatory for transposition in all Member States. These limitations, no longer optional, as under the current Information Society Directive, should reflect the fundamental rights and freedoms enshrined in the European Convention on Human Rights, principles that are part of Community law. In addition, the list of mandatory limitations should include rules that have a noticeable impact on the internal market or directly concern the rights of European consumers. The second tier of our proposal would be the adoption of an open norm, leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms would not have a noticeable impact on the internal market.

A major inconsistency concerns the issue of transient and incidental acts of reproduction, which are exempted in the Information Society Directive for all categories of works and other subject matter, except for computer programs and

databases, to which the earlier directives apply. Clearly, this exemption should be extended to all categories of subject matter across the board.

8.2.6. RIGHTS MANAGEMENT INFORMATION AND TECHNOLOGICAL PROTECTION MEASURES

The relatively recent rules on the protection of technological protection measures (TPMs) suffer from various inconsistencies and a general lack of quality. In the first place, the TPM regime of the Information Society Directive has left the corresponding rules of the Computer Programs Directive, which are substantially different, intact. At the international level, the Information Society Directive deviates considerably from the WIPO Treaties. The nexus with copyright infringement that is essential to the WIPO regime and that avoids an overreaching of the legal protection of TPMs, has been mostly lost in the course of the adoption of Article 6. Thus the Directive fails to recognize that certain acts of circumvention may be done for entirely legitimate purposes.

The Directive's rules on TPMs have had a modest harmonizing effect at best. Article 6(1) instructs Member States to offer 'adequate legal protection', without indicating the nature of such protection, thereby leaving States a broad spectrum of legislative solutions. Worse, the opaque rules of Article 6(4), which offer virtually no legislative guidance, have inspired the Member States to establish at the national level an array of widely different solutions, procedures, and special agencies. Article 6(4) also lacks sustainability in that it is not formulated in technology-neutral terms. The rule immediately collapses as soon as content is delivered online and on-demand on agreed contractual terms. Finally, the choice of limitations protected under Article 6(4) defies rational explanation. All of this, it is submitted, would justify immediate legislative repair, assuming that the legal protection of TPMs remains as important today as it was considered in the end of the twentieth Century.

8.3. CONCLUSION

The process of harmonization in the field of copyright and related rights has produced mixed results at great expense, while its beneficial effects on the internal market are limited at best and remain largely unproven. Twenty years of harmonization of the law of copyright and related rights have not produced a balanced, transparent, and consistent legal framework in which the knowledge economy in the European Union can truly prosper. Worse, the harmonization agenda has largely failed to live up to its promise of creating uniform norms of copyright across the European Union. This, it is submitted, is not what the EC legislature had in mind when embarking in the 1980s on its ambitious legislative journey.

This sobering conclusion calls for caution and restraint when considering future initiatives of harmonization by directive, even it were only a modest

'recasting' exercise. In the light of the renewed interest in the EC's legislative competence, which is not given by the mere existence of disparities at the national level, and in view of the growing importance of the principles of subsidiarity and proportionality, which were discussed in Chapter 1, the authors of this study respectfully advise the European legislature not to undertake any new initiatives at harmonization, except where a clear need for amendment of the existing *acquis* can be demonstrated. Instead, various other legislative instruments appear to be more suitable and effective to further the goal of an internal market for content-related goods and services. In the short run, instruments of 'soft law', such as recommendations, interpretative notices, or communications, would appear to be the legislative tools of choice. Soft law is particularly suitable for dealing with the dynamics of an information market that is in constant flux and regularly requires *ad hoc* legislative adjustment. Moreover, solutions laid down in soft law might serve as test-beds for more permanent legislative solutions. In the long term, other more ambitious approaches towards unification deserve consideration. In the final chapter of this book (Chapter 9) we will entertain the option of a truly unified European copyright law.

Chapter 9

The Last Frontier: Territoriality

Having critically examined, in the previous chapters, the results of the process of harmonization of copyright and related rights in the European Union (EU), it is now time to look ahead. What will the future bring for European copyright? As we concluded in Chapter 8, harmonization has been a very mixed blessing at best. Although the laws of the Member States have been unified in specific areas, major fields have been left untouched or only 'quasi-harmonized', while the quality of the Union's legislative product is suspect and the administrative costs of the harmonization process enormous. Arguably, the law of copyright and related rights in the Member States of the EU would benefit from a renewed dedication on the part of the EU to the principles of subsidiarity and proportionality.

However, even perfect harmonization could not have solved, and cannot solve, the problem of territoriality. Regardless of how wide or narrow the net of harmonization would be cast over the laws of the Member States, and how rigorous the European legislature would comply with its self-imposed principles of 'better lawmaking', this could never remove the ultimate barrier to market integration: the territorial nature of nationally defined copyright and related rights.

Territoriality is the Achilles' heel of the *acquis*. As we saw in Chapter 1, the primary objective of harmonization is removing barriers to the free flow of information goods and services. Although the seven harmonization directives have indeed smoothed out some of the disparities among the laws of the Member States, the ground rule that the geographic scope of the economic rights granted under the laws of the Member States coincides with their national borders has remained intact. As a consequence, even today content providers aiming their services (e.g., an online music store) at consumers across the EU are compelled to clear rights covering some twenty-seven Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as

the United States. As the European Commission (EC) notes in its Communication on Creative Content Online:

as a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred, may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets.⁹⁴⁰

Moreover, the rule of territoriality combined with the traditional deference by EC law to systems of national property seems to have been an important driver of the upward trend in copyright protection that has, almost inevitably, accompanied the harmonization process. It is high time, then, to conquer this last frontier.

Whereas the ECJ and the EU legislature have tackled the problem of territoriality for the distribution of physical goods by establishing a rule of Community exhaustion for goods incorporating rights of intellectual property, EU policies in respect to Internet-based services have left the territorial nature of rights of communication to the public intact. Even the Commission's Online Music Recommendation, which purports to promote a pan-European market for online music delivery services, does not question the territorial nature of copyright and related rights as such.

Nevertheless, in the long run the EU must confront the problem of territoriality in a more fundamental way. In this final chapter we will first examine how the European institutions have grappled with the problem of territorially defined intellectual property rights in the single market. Strategies have so far included the introduction of the exhaustion doctrine, the use of competition law, and a largely failed experiment to overcome territoriality by way of introducing a home country control rule for satellite broadcasting. We will conclude by tentatively exploring a far more ambitious strategy: the unification of the law of copyright and related rights through the introduction of a Community title, a truly European copyright.

9.1. EC LAW'S STRUGGLES WITH TERRITORIALITY

The process of harmonization of copyright and related rights that has occurred over the last twenty-odd years has been largely blind to the structural impediment that territoriality presents to the free movement of copyright-protected goods and particularly services. Basing its harmonization agenda primarily on disparities between national laws, the EU legislature has been aiming, as it would seem, at the wrong target. Disparities between national laws by themselves hardly amount to impediments of the free movement of goods or services, given that the copyrights and related rights that underlie these disparities are drawn along national borders. Indeed, for as long as the territorial nature of copyright and related rights is

940. Communication on Creative Content Online, 5.

left intact, harmonization by itself can achieve relatively little.⁹⁴¹ By approximating the laws of the Member States, harmonization can perhaps make these laws more consistent and transparent to (foreign) providers of cross-border goods or services, and thereby – by enhancing legal certainty – promote the internal market indirectly, but removing disparities does not do away with the territorial effect that constitutes a much more serious obstacle to the establishment of a single market.

Even if perfect harmonization were achieved, the exclusivity that a copyright or related right confers on its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This has always been a core principle of copyright and related rights that has been enshrined in the Berne Convention and other treaties.⁹⁴² Given the obligation under the European Economic Agreement for Member States to adhere to the Berne Convention, the territoriality principle might even be described as ‘quasi-acquis’.⁹⁴³ In its *Lagardère* ruling⁹⁴⁴ the ECJ has recently confirmed the territorial nature of copyright and related rights.

The primacy of territoriality is also visible in Article 8 of the Rome II Regulation on the law applicable to torts. The Regulation provides that infringements of intellectual property rights are governed by the law of the place for which protection is claimed (*lex protectionis*). In regard to making works available over the Internet, which transcends borders almost by definition, this rule seems to imply that the legality of such acts has to be judged under as many laws as there are countries where the communication can be received.⁹⁴⁵

In sum, harmonization of substantive law does not solve the problems caused by territoriality. Instead, harmonization is more likely to preserve existing barriers to free trade and even raise new ones. As we have noted in Chapter 8, harmonization in practice invariably leads to an extension of existing rights or the introduction of new rights that previously were not known in the legal system of all Member States. Such ‘upward’ harmonization is almost inevitable given the political and legal problems that a scaling back of intellectual property rights would cause individual Member States.

To be sure, the territorial nature of copyright and related rights is not merely to be seen as an impediment to the internal market, but may have certain advantages as well, particularly in fields in which the Member States have remained largely

941. See ‘The Need for a European Trade Mark System. Competence of the European Community to Create One’, Commission Working Paper, III/D/1294/79-EN (Brussels, October 1979), 4 <http://aei.pitt.edu/5618/01/002702_1.pdf>.

942. Green Paper on Television without Frontiers, 301.

943. J. Gaster, ‘Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts’, *ZUM* 1 (2006): 8–14, at 9, [Gaster, 2006].

944. *Lagardère*, para. 46: ‘At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonization regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.’

945. See literature mentioned in Ch. 1, n. 26.

autonomous, such as culture and education. In the first place, preserving autonomy in the area of copyright law makes it far easier to tailor the rules of copyright to local conditions. This is particularly relevant for limitations and exceptions. Although, as we saw in Chapter 3, many limitations and exceptions deserve universal application across the EU, there will always remain a need for state-specific rules where local conditions deviate the most, such as in the fields of culture and education. Clearly, tailoring copyright rules precisely to the specific needs of national states is easiest if territoriality is left intact.

In the second place, marketing cultural goods in foreign countries will sometimes necessitate territorial licensing, for instance, when the good needs to be customized to cater for local audiences. This may be the case, for example, for the publication of foreign books or the cinema release and broadcasting of foreign films. More importantly, most collective rights management societies currently derive their existence from rights granted or entrusted to them on a national, territorial basis. Proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. By protecting and promoting local authors and performers, collecting societies thus play an important role in fostering 'cultural diversity' in the EU. Removing the territorial aspect of performance and communication rights would not only affect these cultural subsidies, but also undermine the societies' very existence, except for a handful of societies that are large enough to compete at the European level. Indeed, under the influence of the EC's Online Music Recommendation a 'struggle for survival' among collecting societies is already visible.

In the third place, and somewhat related, the territorial nature of copyright and related rights facilitates price discrimination, which may promote economic efficiency. Territoriality makes it easier for right holders to define, and split up, markets along national borders and set different prices and conditions for identical products or services in different Member States. However, notwithstanding the efficiency gained by such price discrimination, it goes without saying that such uses of intellectual property are fundamentally at odds with the goal of achieving an internal market. As the ECJ has repeatedly held, it is not within the 'specific subject matter' of rights of intellectual property to artificially partition markets.⁹⁴⁶

Yet another caveat is in order here. Although the transborder transmission of copyright-protected content may affect rights in multiple Member States, in practice these rights are often held in one hand. Absent transfers or licenses, authors will usually own the rights in their works in all territories of the EU. The problems of territoriality become acute only in cases in which rights in a single work are distributed over a variety of right holders in different Member States. This will typically be the result of rights transfers to publishers, producers,

946. See e.g., *Deutsche Grammophon* (distribution right of phonogram producers in Germany held to be exhausted in respect of records put on the market in France with the right holder's permission).

distributors, collecting societies, or other intermediaries with territorially limited mandates. Distributed rights may sometimes also result from disparities in national laws on authorship, ownership, or copyright contract law. Arguably, promoting rules that favour an allocation of rights to the original creators, either at the national level or by way of harmonization, might resolve some of the rights clearance problems associated with territoriality.⁹⁴⁷

In the following paragraphs we will describe how the European institutions – Court of Justice, Commission, and Legislature – have in the past struggled with the concept of territoriality in the law of copyright and related rights. We will first look at the rule of Community exhaustion, a doctrine developed by the Court and later codified in legislation. We will then turn to the Satellite and Cable Directive, a brave and forward-looking, but largely failed attempt at ‘de-territorializing’ the right of communication by satellite. Finally, we will mention European competition law, yet another field of law in which the battle between territorial rights of intellectual rights and EC law has been fought, without producing a clear winner. As we will conclude, despite several promising attempts, a fundamental solution to the problem of territoriality remains to be achieved.

9.1.1. EXHAUSTION

Finding a balance between national laws of intellectual property and the four economic freedoms recognized under the EC Treaty has been one of the main preoccupations of the Court of Justice during the years preceding harmonization.⁹⁴⁸ Because of the rule of national treatment found inter alia in Article 5(2) BC, copyright owners of works protected under the laws of the Member States enjoy a bundle of twenty-seven parallel (sets of) exclusive rights, the existence and scope of which are determined by the laws of the Member States. As a consequence, rights in multiple Member States will be concurrently affected by the cross-border trade in content-related goods and services. Whereas for the intra-Community distribution of goods the resulting impediment to the internal market has been mitigated by the rule of intra-Community exhaustion of rights, which was first developed by the ECJ⁹⁴⁹ and later codified inter alia in Article 4(2) of the Information Society Directive, the provision of content-related services remains vulnerable to the concurrent exercise of rights of public performance, broadcasting, cable transmission, or making available online in all the Member States where the services are offered to the public. For example, in its *Coditel I* (or *Le Boucher*)

947. But see Guibault & Hugenholtz (2002) (arguing that harmonization of copyright contract law is premature).

948. In its elaborate case law on the conflict between rights of intellectual property and the free movement of goods and services, the ECJ has often hinted at the need to approximate the laws of the Member States. Several harmonization directives thus have their roots in ECJ decisions, see e.g., *EMI-Electrola GmbH*.

949. See cases mentioned in Ch. 1, n. 12.

decision, the Court of Justice refused to recognize a rule of Community exhaustion of the right of broadcasting in respect of acts of secondary cable transmission. The Court opined:

15 Whilst article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

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

17 The exclusive assignee of the performing right in a film for the whole of a member state may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another member state, without thereby infringing community law.

In other words, the exercise in a Member State by a film producer of the right of cable retransmission was not exhausted by the authorized primary broadcast in another Member State. The right holder in the neighbouring Member State could therefore legitimately oppose the unauthorized retransmission of the film over cable networks without unduly restricting trade between Member States.

Note, however, that in arriving at this conclusion the Court expressly considered that the partitioning of markets along national borderlines was legitimate in this specific case because television broadcasting in the Member States was (then) traditionally organized on the basis of national monopolies.⁹⁵⁰ To infer from the *Coditel I* decision a general rule of non-exhaustion of communication rights would therefore be unwarranted.

Nevertheless, the EU legislature has eventually codified such a general rule in Article 3(3) of the Information Society Directive. Consequently, content-related services that are offered across the EU require licenses from all right holders covering all the territories concerned. If a service is offered to all consumers residing in the Union, as will be the case for many services offered over the

950. *Coditel I*, para. 15 et seq. Clearly, no such justification can be found for a territorial division of 'online' rights.

Internet, rights for all Member States will have to be cleared. This will be particularly problematic if the rights concerned are in different hands, as will often be the case, for instance, for rights in musical works that are exercised by national collecting societies or for rights in cinematographic works owned by locally operating distributors.

9.1.2. HOME COUNTRY RULE

For providers of content-related services across the EU the persistent fragmentation of rights along the national borders of Member States obviously presents a competitive disadvantage, particularly when compared to the United States, where copyright is regulated at the federal level and the constitutional rule of pre-emption⁹⁵¹ does not allow copyrights or 'equivalent' rights to exist at the level of the individual states.⁹⁵² Maintaining the territorial nature of copyright and related right in the EU thus implies high transaction costs for right holders and users alike.⁹⁵³

The harmonization of copyright and related rights in the EU has done relatively little to alleviate this problem.⁹⁵⁴ Apart from the codification of the rule of Community exhaustion, which permits the further circulation of copyrighted goods within the Community on their introduction on the market in the EU with the local right holder's consent, the only structural legislative solution can be found in the Satellite and Cable Directive of 1993. According to Article 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, that is, where the *injection* ('start of the uninterrupted chain') of the programme-carrying signal can be localized. Thus, the Directive has departed from the so-called 'Bogsch theory', which held that a satellite broadcast requires licenses from all right holders in the countries of reception (i.e., within the footprint of the satellite). Since the Directive was transposed, only a license in the home country of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is created, and market fragmentation along national borders is prevented, by avoiding the concurrent application of multiple national laws to a single act of satellite broadcasting.⁹⁵⁵

951. Section 301 of the US Copyright Act (17 U.S.C. § 301).

952. One would find it hard to imagine that for a service that is offered over the Internet in the United States, the relevant rights in some fifty states would have to be cleared. Note that the formation of federal states has in the past led to a transfer of legislative competence for intellectual property from the local to the state level (e.g., in the United States, Belgium, Germany, Switzerland).

953. K. Peifer, 'Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen', *ZUM* 1 (2006): 4, [Peifer, 2006].

954. See Communication on the Management of Copyright and Related Rights in the Internal Market, 7 et seq.

955. Satellite and Cable Directive, recital 14.

But the ideal of a pan-European television market has not materialized. As the European Commission readily admits in its review of the Directive,⁹⁵⁶ the market fragmentation that existed prior to the Directive's adoption has continued until this day, mainly through a combination of encryption technology and territorial licensing. Note that the Directive does not actually prohibit territorial licensing. Right holders and broadcasters have therefore remained free to persist in these age-old practices, and will undoubtedly continue to do so as long as broadcasting markets remain largely local and a pan-European audiovisual space a distant utopia.⁹⁵⁷ In retrospect, it must be concluded that the Directive's home country rule was not much more than an innovative solution in search of a problem.

Since the days of the Satellite and Cable Directive, the territoriality debate in copyright has shifted from broadcasting to online content services. Paradoxically, in these emerging markets where the problem of territoriality has now become acute, no similar legislative solution has been achieved or is even being contemplated. Unlike satellite broadcasters, providers offering transborder services online across the EU will have to clear rights from all right holders concerned for all countries of reception.

Providers of services comprising musical works may find some comfort in the Online Music Recommendation that was issued by the European Commission in 2005. This non-binding instrument seeks to facilitate the granting of Community-wide licenses for online use of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and entrust them to a single collective rights manager operating at Community level. The Recommendation, however, does not address the more fundamental problem of territorially divided rights. Moreover, its scope is limited to musical works, phonograms, and performances – subject matter that is traditionally licensed through collecting societies. The Recommendation does not concern existing contractual arrangements between, for instance, film producers and distributors or broadcasters, or writers and publishers.

9.1.3. COMPETITION LAW

Even less structural, but sometimes effective nonetheless, are the remedies found in EC competition law (Articles 81 and 82 EC Treaty) against the exercise of

956. Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM (2002) 430 final (Brussels, 26 Jul. 2002) [Report on the Satellite and Cable Directive].

957. P.B. Hugenholtz, 'Copyright without Frontiers: Is There a Future for the Satellite and Cable Directive?', in *Die Zukunft Der Fernsehrichtlinie/the Future of the 'Television without Frontiers' Directive*, Proceedings of the conference organized by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29 (Baden-Baden: Nomos Verlag, 2005), 65–73, [Hugenholtz, 2005].

intellectual property rights along national borders that might result in the unjustified partitioning of the internal market. The European Courts and the EC have produced a host of precedents on this issue, applying both Articles 81 (anti-trust) and 82 (abuse of a dominant position). With regard to the former article, the Court has held in *Coditel II* that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market.⁹⁵⁸ In *Tiercé Ladbroke* the Court of First Instance (CFI) ruled that an agreement by which two or more undertakings commit themselves to refusing to third parties a license to exploit televised pictures and sound commentaries of horse races within one Member State:

may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.⁹⁵⁹

The string of decisions issued by the EC in its role of competition watchdog, in which it underlined that certain exclusive, territorially defined licenses in the audiovisual sector can violate Article 81 EC Treaty, also deserve mention in this context. Such agreements will be generally exempted only where appropriate access rights are afforded to third parties.⁹⁶⁰

The *GVL* case illustrates how Article 82 of the EC Treaty may also restrict the territorial exercise of copyright. According to the ECJ:

a refusal by a collecting society having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of Article [82] of the Treaty.⁹⁶¹

958. *Coditel II*, para. 17 et seq.

959. *Tiercé Ladbroke SA v. Commission*, CFI 12 Jun. 1997, Case T-504/93, *ECR* [1997] II-923, para. 157 et seq. [*Tiercé Ladbroke*].

960. Commission Decision 89/467/EEC of 12 Jul. 1989 (*UIP*), *OJ* 1989 L 226/25; Commission Decision 89/536/EEC of 15 Sep. 1989 (*Film purchases by German television stations*), *OJ* 1989 L 284/36; Commission Decision 91/130/EEC of 19 Feb. 1991 (*Screensport/Members of the EBU*), *OJ* 1991 L 63/32; Commission Decision 93/403/EEC of 11 Jun. 1993 (*EBU/Eurovision System*), *OJ* 1993 L 179/23; Commission Decision 2003/778/EC of 23 Jul. 2003 (*UEFA Champions League*), *OJ* 2003 L 291/25. In the field of technology transfer the EC has provided for normative guidance by issuing so-called 'block exemptions', which prohibit in technology licenses between competitors (*inter alia*) the exclusive territorial allocation of markets, subject to certain well-defined exceptions. See Commission Regulation (EC) No. 772/2004 on the application of Art. 81(3) of the Treaty to categories of technology transfer agreements of 27 Apr. 2004, *OJ* 2004 L 123/11 [Technology transfer agreements Regulation].

961. *GVL*, para. 56.

Issues of territorial exclusivity are also at the heart of several more recent competition cases concerning licensing practices of collecting societies.⁹⁶²

9.2. TOWARDS A COMMUNITY COPYRIGHT?

In sum, it appears that territoriality, as an essential characteristic of copyright and related rights, is both a natural basis for the partitioning of the internal market into national markets – a practice ‘repugnant to the essential purpose of the treaty, which is to unite national markets into a single market’, according to the ECJ in *Deutsche Grammophon v. Metro* – and a hindrance for EC law to have its full effect. As a consequence, as long as national copyrights and related rights persist, no complete internal market will be attained, not even if total harmonization of national laws is achieved.

If the EU is serious about creating an internal market for copyright-related goods *and* services, it must inevitably confront the problem of territoriality in a more fundamental way. A truly structural solution to this problem, which would immediately remove the current disparity in treatment of goods and services in the realm of copyright, would be the introduction of a Community copyright title, inspired by the Community rights that already exist *inter alia* in the realm of trademark law and design protection.⁹⁶³ Long considered taboo in copyright circles, the idea of a Community copyright is gradually receiving the attention it deserves, both in political circles⁹⁶⁴ and in scholarly debate.⁹⁶⁵

The potential advantages of a Community copyright are undeniable. A Community Copyright Regulation (or ‘European Copyright Law’) would immediately establish a truly unified legal framework. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A Community copyright would enhance

962. Commission Decision 2003/300/EC of 8 Oct. 2002 relating to a proceeding under Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement (Case COMP/C2/38.014) [*IFPI Simulcasting Decision*]; Commission Decision C (2008) 3435 final of 16 Jul. 2008 relating to a proceeding under Art. 81 EC and Art. 53 of the EEA Agreement (Case COMP/C2/38.698), *OJ* 2008 C 323/07 [*CISAC Decision*].

963. Regulation on the Community Trade Mark, Regulation on Community Plant Variety Rights, Community Designs Regulation.

964. According to EC Commissioner V. Reding, ‘we have to start calling into question the territoriality of copyright protection in Europe’, speech given at IDATE conference (Montpellier, 21 Nov. 2005).

965. Schack (2000), 800; J. Bornkamm, ‘Time for a European Copyright Code’, conference speech at Management and Legitimate Use of Intellectual Property Conference of 10 Jul. 2000, 20, available online at <www.europa.eu.int/comm/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf>, [Bornkamm, 2000]; Hilty (2004), 760; see also various contributions in *ZUM* 1 (2006). In 2002–2003 a group of European copyright scholars formed the ‘Wittem Group’, which regularly convenes with the aim of drafting a ‘European Copyright Code’.

legal security and transparency, for right owners and users alike and greatly reduce transaction costs.⁹⁶⁶ Unification by regulation could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely *permits* limitations. A regulation might give rights and limitations equal status and could restore the necessary 'delicate balance', provided it were the product of a transparent legislative process wherein all interests concerned are fairly represented.

In the remainder of this chapter the advantages and drawbacks, as well as the very rough contours of a *European Copyright Code* will be described. But before turning to the normative challenges of a truly unified European copyright law, we will first revisit the issue of competence.⁹⁶⁷ Assuming that a Community copyright would indeed be beneficial to the creative economy of the EU, would the European Legislature have the power to enact it?

9.2.1. COMPETENCE ISSUES

As was noted in Chapter 1,⁹⁶⁸ the EC Treaty does not presently provide for a specific legal basis for the establishment of Community intellectual property rights. Legislative measures that provide for such rights, such as the Community Trademark and Design and Plant Variety Regulations, are based solely on the residual legislative competence derived from Article 308 EC Treaty. In its WTO's Opinion 1/94, the ECJ considered that the EC 'may use Article [308] as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark . . .'.⁹⁶⁹

The Court's characterization of Community intellectual property titles as rights that are 'superimposed on national rights', begs the question of whether a Community title that effectively replaces national rights would also be possible. Merely superimposing a Community copyright on a structure of territorially defined national copyrights and related rights would of course severely reduce the benefits of a Community title. Whereas Community trademark and design rights can to a certain extent coexist with national titles, because the granting of such rights requires an affirmative act of deposit and subsequent registration, a similar coexistence would be hard to imagine for the domain of copyright. In regard to trademarks and designs, companies are offered a choice between relative cheap protection in distinct national markets or more expensive, but extensive, Community-wide coverage. Owners of Community titles will have little or no

966. Peifer (2006), 3–4.

967. See discussion in Ch. 1.

968. Section 1.2.2.

969. WTO Opinion 1/94, para. 59. See also Case C-350/92, ECR [1995] I-1985 (*Spain v. Council; Supplementary Protection Certificate*), para. 23; ECJ 9 Oct. 2001, Case C-377/98, ECR [2001] I-7079 (*Netherlands v. Parliament and Council; Biotechnology Directive*), para. 24.

incentive to register the same trademarks or designs at the national level.⁹⁷⁰ Copyrights and related rights, by contrast, are granted *ex lege*. Absent pre-emption, each creation of a work would automatically trigger the vesting of a national right and a Community right in the same subject matter. If national rights would continue to survive side by side with Community rights, the existing obstacles to the free flow of goods and services would therefore remain.⁹⁷¹ Effectively, providers of copyright-related services would be even worse off, because the introduction of a Community copyright would create yet another layer of rights to be cleared.

In sum, a Community Copyright would make sense only if it replaces national copyrights. In legal literature a number of potential competence issues can be discerned, which we will examine in the remainder of this subsection. They concern the status of copyright and related rights as part of the fundamental right to respect for property rights, the proper legal basis for a Community title (Article 308 TEC) and the relation between EC law and national property systems (Article 295 TEC).

As to the first issue, both the ECJ and the European Court of Human Rights have held that intellectual property falls within the scope of the fundamental right to property.⁹⁷² The right to property is laid down in Article 1 of the First Protocol to the 1952 European Convention on Human Rights and also features in the Charter on Fundamental Rights in the European Union. Article 17(2) of the Charter explicitly refers to intellectual property as part of the fundamental right to property. The 2000 Charter will acquire legally binding status once the Lisbon Reform Treaty enters into force (Article 6 TEU new). The Court has consistently held that the right to property as recognized by Community law is not an absolute right and must be viewed in relation to its social function.

Would the introduction of a Community copyright be at odds with fundamental rights in intellectual property? This is not likely because right holders would benefit from EU-wide exclusive rights that are equivalent to the bundle of territorially limited national copyrights they now enjoy.⁹⁷³

970. This development is already visible in trademark law. For instance, the French *Institut National de la Propriété Industrielle* reports in its annual reports of 2003 through 2005 that the number of foreign applications for French trademarks has dropped significantly since the introduction of the Community trademark; similar developments are reported in the Benelux Trademark Bureau annual reports and those of the Deutsches Patent-und Markenamt. For economic actors whose activity is purely local (no internal market dimension) national titles obviously will continue to serve their purpose.

971. Compare Peifer (2006), who assumes that a European copyright title could exist next to national rights and will gradually make national rights obsolete.

972. *Laserdisken II*, para. 65, again in ECJ 29 Jan. 2008, Case C-275/06, *ECR* [2008] I-271, (*Promusicae*); ECHR 11 Jan. 2007, Application no. 73049/01 (*Anheuser-Busch Inc. v. Portugal*), paras 62–72: adding that the protection of Art. 1 applies only to a person's existing possessions and not to future intellectual property rights.

973. The introduction of a Community copyright would of course pose challenges in terms of enacting adequate transitional law.

As to the proper legal basis, the Lisbon reform will introduce a specific competence for Community intellectual property rights. Article 118 TFEU provides:

In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorization, coordination and supervision arrangements.

Article 118 TFEU will replace Article 308 TEC as the appropriate legal basis for European intellectual property titles. The ‘ordinary procedure’ that Article 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote. By contrast, the granting of Community rights based on Article 308 TEC requires a unanimous vote, and does not entail co-decision powers for Parliament.⁹⁷⁴

At first blush Article 295 appears to be more problematic because it provides that EC law ‘shall in no way prejudice the rules in Member States governing the system of property ownership’. Whether this implies that national intellectual property titles may not be replaced by European titles is, however, not at all clear.⁹⁷⁵ The Court has never been called to answer this type of question,⁹⁷⁶ and on the basis of case law one could argue that Article 295 poses no problem.

It is commonly assumed in legal literature⁹⁷⁷ that intellectual property comes within the scope of Article 295 TEC. The ECJ has only implicitly recognized this, in the case of *Consten v. Grundig*, which was decided as early as 1966.⁹⁷⁸ Historically, Article 295 TEC purports to guarantee the freedom of Member States to opt

974. For registered intellectual property rights such as patents, Art. 118 TFEU requires that any Council decisions on language regimes (e.g., filing of applications, official languages) are taken by a unanimous vote.

975. On the significance of Art. 295 for intellectual property, see H. Schack, ‘Europäisches Urheberrecht im Werden’, *ZEuP* (2000): 799–819, [Schack, 2000a]; compared with Chr.E. Würfel, *Europarechtliche Möglichkeiten einer Gesamtharmonisierung des Urheberrechts* (Karlsruhe: Universitätsverlag Karlsruhe, 2005), 3–6, 28–29.

976. In the *Tobacco Advertising II* case the question was different: the referring court asked whether EC restrictions on tobacco advertising constituted an infringement of Art. 295 TEC, considering that the relevant Directive has an impact on (the use of) trademarks for tobacco products. The ECJ concluded it did not and reaffirmed that Art. 295 ‘merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights’ (para. 147).

977. A. Hatje, in A. von Bogandy, *Europäisches Verfassungsrecht, Theoretische und Dogmatische Grundzüge* (Heidelberg: Springer Verlag, 2003), 697, [Hatje, 2003]; D. I. Bainbridge, *Intellectual Property* (Glasgow: Bell & Bain Ltd, 2007), 16, 779, [Bainbridge, 2007]; Wyatt & Dashwood, *European Union Law* (London: Sweet & Maxwell, 2006), 637, [Wyatt & Dashwood, 2006]; M. Walter (2001), 53.

978. ECJ 13 Jul. 1966, Cases 56 and 58/64, *ECR* [1966] 429 (*Consten v. Grundig*). A more recent explicit reference is by the President of the CFI. In *IMS Health* he did offer the opinion that ‘the public interest in respect for property rights in general and for intellectual property rights in particular is expressly reflected in Art. 30 and 295 EC’ (Pres. CFI, Order of 26 Oct. 2001, Case T-184/01R, *ECR* [2001] II-3193, para. 143) (in the subsequent ruling on appeal of 11

for public or private ownership of the means of production, especially enterprises.⁹⁷⁹ Not surprisingly then, ECJ cases on Article 295 (formerly 222) tend to deal with the compatibility of national rules with EC law in areas such as ownership of real estate, public sector companies, or public sector-owned golden shares.⁹⁸⁰ There is much less case law on the opposite issue: the compatibility of secondary EC legislation with national systems of property. Article 295 is sometimes invoked – typically as a minor point – by litigants against Commission decisions in competition matters. In a few cases, Member States have relied on it to argue against EU competence, in disputes over the validity of harmonization or unification measures. Now and again national courts in their preliminary questions also inquire on the effect of Article 295 on intellectual property.

In the few intellectual property cases in which Article 295 was raised as an issue, the Court has so far focused on determining what the ‘no prejudice to national property systems’ clause does not do. Article 295 does not affect the EC’s basic jurisdiction to harmonize national copyright laws or introduce community titles. Neither Article 295, nor Article 30 TEC for that matter, reserves a power to regulate substantive intellectual property law to the national legislature to the exclusion of any Community action.⁹⁸¹ Nor does Article 295 give Member States the power to adopt measures that would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty.⁹⁸²

Although this does tell us something about the limited role the ECJ accords to Article 295 TEC to keep national intellectual property systems from disrupting a functioning internal market, it still does not answer the question whether a Community copyright could actually replace national copyrights. We believe it could. A reading of Article 295, based on its history and place in the EC framework,

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- Apr. 2002, the President of the ECJ did not think it necessary to rule on the relevance of Art. 295 for interim measures imposed on intellectual property owners based on competition law).
979. P. Léger (ed.), *Commentaire article par article des traités UE et CE* (Brussels: Bruylant, 2000), [Léger, 2000]; J. Steiner, L. Woods & C. Twigg-Flesner, *EU Law* (Oxford: Oxford University Press, 2006), 665, [Steiner et al., 2006].
980. See e.g., ECJ 6 Nov. 1984, Case 182/83, *ECR* [1984] 3677 (*Robert Fearon & Company v. Irish Land Commission*); ECJ 1 Jun. 1999, Case C-302/97, *ECR* [1999] I-3099 (*Klaus Konle v. Republik Österreich*); ECJ 4 Jun. 2002, Case C-503/99, *ECR* [2002] I-4809 (*Commission v. Belgium*); ECJ 4 Jun. 2002, Case C-367/98, *ECR* [2002] I-04731 (*Commission v. Portugal*); ECJ 29 Mar. 2001, Case C-163/99, *ECR* [2001] I-2613 (*Portugal v. Commission*); ECJ 28 Sep. 2006, Cases C-282/04 and C-283/04, *ECR* [2006] I-09141 (*Commission v. the Netherlands*).
981. See for example ECJ 13 Jul. 1995, Case C-350/92, *ECR* [1995] I-1985 (*Spain v. Council; Supplementary Protection Certificate*), para. 22. In this case Spain brought an action for annulment of Council Regulation (EEC) N° 1768/92 of 18 Jun. 1992 concerning the creation of a supplementary protection certificate for medicinal products. The regulation in effect extended the life of patents in medicines.
982. For example, ECJ 15 May 2003, Case C-300/01, *ECR* [2003] I-04899 (*Salzmann*). Specifically for intellectual property: ECJ 18 Feb. 1992, Case C-30/90, *ECR* [1992] I-829 (*Commission v. UK; Compulsory license patents*), and ECJ 18 Feb. 1992, Case C-235/89, *ECR* [1992] I-777 (*Commission v. Italy*): national rules forcing local production by patent holders on penalty of compulsory license are in contravention of EC law.

implies that it merely lays down the prerogative of a Member State to regulate the allocation of ownership (public, private, or combinations thereof). If that interpretation holds, Article 295 would not present a stumbling block for a Community title that replaces national rights.⁹⁸³

In *Spain v. Council*, on the supplementary protection certificate for medicinal products, the Court revisited its earlier judgment in *Commission v. U.K.*, stating that in that judgment (paragraph 19):

far from endorsing the argument that rules concerning the *very existence* [italics added] of industrial property rights fall within the sole jurisdiction of the national legislature, the Court was anticipating the *unification* [italics added] of patent provisions or harmonization of the relevant national legislation.

This could be read as an indication that Article 295 does not stand in the way of a Community copyright. If one accepts that the Community is in principle competent not only to harmonize national copyright law, but also to introduce a uniform European title, one would have to accept the pre-emptive operation of the latter. After all, (harmonized) national copyrights and a uniform Community copyright cannot meaningfully coexist.

A final objection that could be raised against a unified Community copyright is that copyright regulation does not merely concern economic policy, but also cultural policies, and the latter is an area in which the EC's competence is limited. We saw in Chapter 1 that this is true today and will remain so in the future if the Lisbon reform takes effect. But here too, the ECJ allows the European legislature a wide margin of appreciation. More often than not a directive or regulation will have a harmonization 'side effect' in an area in which the EC has no harmonization powers (as in health, or culture), and the ECJ tends to accept this. All that is required is that the measure has a proper legal basis (e.g., Article 95 TEC) and that Article 95 is not used to circumvent a prohibition to harmonize.⁹⁸⁴ Arguably, the principles of subsidiarity and proportionality do demand that a Community Copyright Regulation leaves Member States some leeway to organize the more culture-oriented aspects of copyright as they see fit. One could imagine in this context local provisions on the exercise of moral rights by the State as under French copyright law, or local rules concerning the reallocation of income streams of collective rights management organizations to cultural funds or even local limitations and exceptions.

9.2.2. NORMATIVE ISSUES

Assuming the legal obstacles raised in the previous section are not insurmountable to the establishment of a Community copyright, important normative issues

983. Possibly only for the way in which collective rights management is organized.

984. See *Tobacco I*, esp. para. 77.

remain. What kind of rules would a Community Copyright Regulation contain? What underlying goals and purposes would it espouse, and what would inform its normative content? How could the Community Copyright Regulation prevent these norms suffering from the same qualitative defects as the existing directives, as observed in Chapter 8? This final section will offer some tentative answers.

As Chapter 1 and the previous section have made painfully clear, EU primary law offers little guidance as to the normative content of secondary law in the field of copyright and related rights. Although the existing harmonization directives are largely based on the EC's mandate to establish a single market for goods and services, this mandate by itself gives no normative guidance and certainly does not prescribe the 'maximalist' conception of copyright law that is apparent from the preambles to various directives.⁹⁸⁵ Regrettably, Article 17 (2) of the Charter of Fundamental Rights of the European Union, while recognizing intellectual property as a fundamental right of the EU, offers no further normative guidance because it fails to offer any insight into the underlying rationales of a structure of intellectual property in the EU.⁹⁸⁶ In this respect, the Charter has, unfortunately, much less to offer than the US Constitution, which provides for a constitutional mandate in the field of copyright with the aim 'to promote the progress of science and useful arts'.⁹⁸⁷

What then should be the rationales of a future unified European copyright law? Certainly, it would be informed by the author's rights tradition rooted in notions of natural and social justice, which has dominated the law of copyright on the European continent for over a century. But European copyright law should reflect other, competing values and policies as well. If protecting the rights of authors is a fundamental right, preserving user freedoms and a robust public domain can be based on freedom of expression and information, as protected in Article 10 of the European Convention on Human Rights and Article 11 of the Charter. Moreover, fostering competition and protecting consumer interests have always been prime motivators of secondary EU law, while promoting culture, science, and education are becoming equally important drivers. All of this does not necessarily point to the 'high level of protection of intellectual property' that is envisaged in, for example, the Preamble of the Information Society Directive. Instead, future European copyright law ought to reflect a balancing of competing policies.

The constant expansion of the EU towards the East adds an additional reason for restraint. These countries generally have less mature market economies and may require a differently balanced intellectual property system. The integration of Eastern European societies into the Union could well in itself justify a more moderate, less protectionist approach than the past directives have espoused.

985. Preamble to the Information Society Directive, consideration 12, Preamble to the Rental Right Directive, consideration 5, Preamble to the Term Directive, consideration 10.

986. C. Geiger, 'Intellectual Property Shall Be Protected!?' Art. 17 (2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope', *EIPR* 31 (2009): 113–117, [Geiger, 2009].

987. U.S. CONST. Art. I, § 8, cl. 8.

In other words, it is high time for the EU to start developing a consistent and coherent vision of the law of copyright and related rights at the EU level. Such a vision is hard to interpolate from the seven directives of the *acquis*. The recent debate on the Term Extension Proposal is a shameful illustration of the normative vacancy of European legislation in the field of copyright and related rights. In the absence of guiding principles and policies, lawmaking in Brussels seems to be driven solely by the agendas of major stakeholders.

Because few normative principles can be inferred from the mere aim of establishing a single market, it would be a mistake to leave to the Directorate General in charge of the Internal Market the primary responsibility for developing the Commission's copyright policies. Although several other Directorate Generals seem to be better qualified to take on this role, it would be essential at any rate to better coordinate the norm-setting process in the field of copyright and related right within the Commission. This could be achieved, for example, by creating a Coordinating Committee charged with developing coherent and socially responsible EU copyright policies and coordinating policies between the Directorate General's.

All this is not to suggest that a future Community Copyright Regulation should completely replace the laws of copyright and related rights of the Member States. In the light of the principles of subsidiarity and proportionality, a Regulation should not deal with issues that have little or no impact on the internal market and are intrinsically linked to the cultural, educational, and social policies of the Member States. Such issues might, for instance, include moral rights, copyright contract law, and the governance of collective rights management societies. In this context, distinguishing genuine national cultural interests from considerations of national economic self-interest will of course pose a challenge.

What a Community Copyright Regulation should certainly deal with are the basic economic rights and limitations that shape the law of copyright and related intellectual property. Its catalogue of economic rights could be easily reproduced from the *acquis*, adding a right of adaptation and translation. In regard to its limitations, one might consider a two-tiered approach, which would take into account the need for regulatory flexibility, according to the principles of subsidiarity and proportionality. The first tier might comprise a list of basic limitations and exceptions. These provisions, no longer optional as under the Information Society Directive, should ideally reflect the fundamental rights and freedoms that are enshrined in the European Convention on Human Rights and the Charter and thus are already part of European law. Limitations of this kind would include at the very least rights of quotation and criticism, a right of news reporting, a right of parody, basic scientific and educational freedoms, some library and archive limitations, and privileges for the impaired. In addition, a Regulation might include limitations that directly concern the rights of European consumers, such as a right of private copying. The second tier could be an open-ended norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on the condition that these freedoms not have a noticeable impact on the Internal Market.

As to the quality of the legislative product, perceived through the lens of 'better regulation', replacing the rules of seven directives and twenty-seven national laws on copyright and related rights by a single regulatory instrument comprising provisions that require no transposition and are directly binding upon the citizens of the EU, has obvious advantages in terms of enhanced transparency, consistency, and legal certainty. Although questions of interpretation will undoubtedly remain, they need not be channelled through the national courts to the ECJ, but could be answered directly by specialized Community Courts that have exclusive jurisdiction.⁹⁸⁸ In other words, replacing the seven directives by a single regulation would effectively amount to *deregulation*.

But several serious caveats are in order here. Many of the drawbacks of harmonization by directive mentioned in Chapter 8 may equally apply to unification by regulation. Although regulations do not require transposition by the Member States, the legislative process leading up to a regulation may still take a considerable length of time, particularly if it were based on Article 308, requiring a unanimous decision by the Council. Although technically less complicated than legislation by directive, the legislative process may still lack transparency and remain prone to rent-seeking. Like harmonization by directive, unification by regulation will favour standards of protection at the high end of the European average, especially if unanimity among Member States were required. Like directives, a regulation will be difficult to amend, and thus cannot provide rapid solutions to the most pressing problems of a dynamically evolving market. This would be an extra reason to build in a measure of flexibility, allowing the Member States to provide ad hoc regulatory first aid.

The quality of the legislative product also could be enhanced by engaging academic experts in its initial drafting. Although academics are traditionally involved in the legislative process in many of the Member States,⁹⁸⁹ such involvement is noticeably absent from the EU level. In addition, a Copyright Regulation should be subjected to a process of constant regulatory review that would allow for regular feedback from interested circles and possible adjustment of legal norms on an ongoing basis.

In view of all the political hurdles that undoubtedly would lie in the way of a future Copyright Regulation, this would surely become a project of the very long term, allowing sufficient reflection and continuous input from academic experts.⁹⁹⁰ In this respect, the slow but certain development of a body of European contract law in an institutionalized cooperation between the Commission and a

988. One might even consider attributing certain administrative or regulatory tasks (e.g., setting uniform levy rates) to existing Community bodies, such as the Office for the Harmonization of the Internal Market (OHIM).

989. For example, the Copyright Committee (Commissie Auteursrecht) that advises the Dutch Minister of Justice has a statutory basis; its members are appointed by the Minister. See Decree of 8 Jul. 2000, *Staatsblad* 309.

990. See for example, the ongoing efforts of the Wittem Group to draft a *European Copyright Code*, above n. 965.

group of qualified academic experts might serve as an example.⁹⁹¹ Ideally, such an ‘unhurried’ drafting process could produce the technologically neutral norms that make up a transparent, consistent, and stable legal framework for many years to come.

More importantly, before embarking on any such ambitious journey, we first need a clear perspective on the future of the EU. Obviously, the Union’s failure to agree on a Constitution that would, for the first time, create an express mandate for the EU to legislate in the field of intellectual property has not fostered a political climate that is favourable to such an undertaking. Surely, musing on a future Community Copyright in the current climate will remain ‘music of the future’ for some time to come.

991. Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward, COM (2004) 651 final (Brussels, 11 Oct. 2004).



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