

EUROPEAN
FILE



The emergence of Community-wide protection for creativity

Copyright and
neighbouring rights
in the
European Community

Page 2 in the original is blank.

The prospect of completing the internal market in 1992 and the emergence of new technologies in the 1980s have brought to the forefront the Commission's concern regarding the complex matter of copyright and neighbouring rights.

Copyright and neighbouring rights account for an annual volume of business worth some ECU 150 to 250 billion,¹ 3 to 5% of the Community's gross domestic product. In view of the increasingly international repercussions of problems associated with these rights and their economic and cultural importance, the Commission had to go for a comprehensive approach.

After publishing a Green Paper² in 1988, which was followed by several months of consultation with interested circles, the Commission drew up a work programme³ covering the various areas of copyright and neighbouring rights and setting out measures to be taken and implemented by 1992. The programme mainly seeks to reinforce the protection of copyright and neighbouring rights so as to promote and protect creativity in Europe.

Copyright and neighbouring rights: What are they?

- Copyright, as defined by the Berne International Convention, means the set of rights *in rem* and *in personam* conferred on the creators of literary and artistic works.
 - Thus, depending on the type of work created, an author enjoys a number of exclusive rights *in rem* — property rights — such as the right to authorize translation, reproduction, representation, public communication, public performance, adaptation or arrangement of his work. Consequently, these acts may not take place without the author's consent. Consent is normally given in return for payment, which enables the author to derive some income from the exploitation of his work.
 - The author also enjoys a right *in personam* — a moral right — over his work, which implies certain prerogatives such as the right to claim authorship of his work or the right to oppose its deformation or mutilation.
- Neighbouring rights are the rights allied to copyright which guarantee that certain classes of persons or enterprises contributing to a cultural act can derive an income from their activities.
 - Thus the Rome International Convention specifies that performers have the right to oppose the broadcast, communication to the public, fixing or reproduction of their performances. Accordingly, quite apart from the

¹ 1 ecu = approximately UKL 0.70, IRL 0.76 and USD 1.17 based on rates in force on 31 August 1991. Manuscript completed in June 1991.

² Green Paper on copyright and the challenge of technology — Copyright issues requiring immediate action (COM(88) 172 final, 7 June 1988).

³ Follow-up to the Green Paper — Working programme of the Commission in the field of copyright and neighbouring rights (COM(90) 584 final, 17 January 1991).

remuneration they receive for their performances as such, such persons may control subsequent uses of their performances, such as the sale of fixings, and obtain remuneration for them too.

- Producers of phonograms enjoy the right to authorize or prohibit direct or indirect reproduction of them.
- Broadcasting organizations enjoy the right to authorize or ban retransmission, fixing on a material support and reproduction of their broadcasts.

In addition to these three categories of beneficiaries, some Member States in the Community recognize other persons' neighbouring rights. Some Member States ignore the formal distinction between copyright and neighbouring rights but ensure protection for both areas by the single concept of copyright.

Why Community action is needed

Protection of copyright and neighbouring rights is traditionally guaranteed by national provisions which vary from one country to another and have effect only on the territory of the State in which they are enacted. They can therefore result in protective barriers which form an obstacle to the free movement of goods and services and to the free play of competition, two of the basic principles of the European common market. Accordingly, this situation can hinder the development of European cultural creativities.

Naturally, the Court of Justice of the European Communities may sanction misuses which could mask illegal agreements, discrimination on the grounds of nationality or possibly a covert intent to restrain trade between the Member States, but the European treaties permit restrictions on imports when they are justified by the need to protect intellectual property rights. If a genuine European internal market is to be created, the grounds on which such restrictions are considered justified must be eliminated or at least curtailed while at the same time authors and holders of neighbouring rights must continue to enjoy a high level of protection.

The European Commission is therefore taking action on two fronts: first, it is seeking to harmonize the Member States' legislation so that the frontier-free internal market can be completed without losing that high level of protection; second, it wishes to provide more effective safeguards for intellectual property throughout the world.

Internal aspect of the Commission programme

With respect to the internal aspect, the Commission work programme calls for the accession of all the Member States to certain international conventions, the harmonization of national legislation for a wide range of vital questions and a detailed study of other questions to ascertain whether subsequent harmonization is necessary and, if so, how far it should go.

1. ACCESSION OF ALL MEMBER STATES TO CERTAIN INTERNATIONAL CONVENTIONS

Copyright has been the subject of international attention for over a hundred years:

- The Berne Convention for the protection of literary and artistic works dates from 1886. It has been amended and improved on several occasions. The most recent version dates from the Paris Act of 1971.
- The International Convention for the Protection of Performers and Producers of Phonograms and Broadcasting Organizations is more recent since it was signed in Rome in 1961. There has been no revision so far.

These conventions, which require the signatory States to introduce minimum protection, have not been ratified by all the Member States of the Community. Belgium and Ireland have not yet ratified the Paris Act amending the Berne Convention; Belgium, the Netherlands, Spain, Portugal and Greece have not yet ratified the Rome Convention.

In December 1990 the European Commission presented a proposal for a Council decision requiring the Member States to ratify or accede to these conventions and comply with their most recent versions by 31 December 1992. Once this minimum protection is recognized throughout the Community, it will provide a foundation for harmonization on the basis of which additional provisions can be formulated to supplement and reinforce the protection of copyright and neighbouring rights in a manner reflecting the specific interests and nature of the Community.

2. HARMONIZATION OF COPYRIGHT AND NEIGHBOURING RIGHTS

■ Computer programs

The creation of computer programs calls for a considerable input of human, technical and financial resources, but programs can be copied at a fraction of the cost of the original. To assure the future of European software creation, it was vital to introduce effective and harmonized protection for the fruits of this effort and investment in all the Member States.

A directive concerning legal protection for computer programs was adopted in May 1991. It is the first instance of Community harmonization in the field of copyright.

The directive requires the Member States to give copyright protection to writers of computer programs, whatever form they may take and regardless of aesthetic or quality considerations. It further defines the author of the program, the scope of the protection, and any exceptions to the holders' exclusive rights. In particular, it provides that decompiling (reproduction of

the program code or translation of the form of the code) is authorized only in the case of interfaces and only when it is essential for the interoperability of a computer program created independently.

■ Piracy and rental rights

Piracy is chiefly taken to mean the unauthorized reproduction for commercial purposes of works protected by copyright or neighbouring rights, and subsequent transactions relating to their reproduction.

This is a serious problem as piracy deprives authors, performers, producers and broadcasting companies of the fruits of their creativity and investment. To combat this scourge, current legal provisions in the Community must be reinforced.

The Commission took the first step in December 1990 when it adopted a proposal for a Council directive on rental right, lending right and certain rights related to copyright to enable holders of such rights to share the fruits of all forms of economic exploitation of their creative efforts and protect them from serious financial loss.

The proposal provides for:

- the introduction of exclusive reproduction and distribution rights for performing artists, producers of phonograms and films and broadcasting organizations, and an exclusive fixing (or recording) right for performing artists and broadcasting organizations;
- the introduction of an exclusive commercial rental and lending right for authors, performing artists and producers. The Member States are authorized to derogate from exclusive lending rights, however, on cultural or other grounds. For instance, they may release their public libraries from the obligation to obtain authorization from an author to lend his works.

■ Duration of protection of copyright and neighbouring rights

The protection of copyright and neighbouring rights is limited in time. The international conventions provide only for minimum protection periods. Within the constraints of these conventions, the periods of protection provided for by the Member States differ, often quite substantially.

This impedes the freedom of movement of goods and cultural services and distorts competition, since at one and the same time a given work or object may be protected in one Member State and not in another. In its *Patricia* judgment,¹ the European Court of Justice pointed out that this problem could be solved only by Community harmonization.

The European Community is therefore preparing a directive that would fully harmonize periods of protection. The periods adopted will provide a high level of protection, which implies that they will generally exceed the minimum laid down in conventions.

■ **Home-copying of sound and audiovisual fixings**

Home recording of sound and audiovisual works by private individuals for personal and non-commercial use, whether from other recordings or from broadcasts, has become a widespread practice both in the European Community and elsewhere. It can be expected to grow even further, as a result particularly of technological progress.

To take account of the new situation, copyright legislation in a number of countries, both within and outside the Community, has been amended to ensure the protection of holders and to introduce a right to remuneration.

The Commission intends to tackle these problems at European level. One directive currently at the drafting stage will cover home copying and encourage the use of technical means to prevent unlimited digital copying of recordings.

■ **Databases**

The creation and compilation of databases is a booming business calling for substantial human and financial investment. The Member States all recognize that it can be given copyright protection. But, there are substantial differences in legal practice in the Community countries, especially with respect to definition of originality as a condition of eligibility for copyright protection.

The Community is drawing up a directive for the harmonization of legal protection here.

■ **Copyright and neighbouring rights applicable to satellite and cable broadcasting**

The Community Directive of 3 October 1989 on television without frontiers¹ contains no provisions concerning copyright. To establish a genuine European audiovisual area, the Community legal framework needs amplifying in this respect. Accordingly, in November 1990 the Commission put out a discussion paper entitled 'Broadcasting and copyright in the internal market' proposing Community harmonization in the field of satellite and cable broadcasting. There has been wide-ranging consultation in the industry and the need for a Community approach is generally confirmed.

¹ Directive 89/522/EEC, Official Journal of the European Communities L 298, 17.10.1989, p. 23.

The Community is preparing a directive which will seek to maintain a balance between the various parties interested (broadcasting companies, authors, performers, producers of phonograms, cable distributors and viewers) and facilitate the Community-wide administration of copyright and neighbouring rights.

■ **Reproduction techniques**

The reproduction of printed material (in particular photocopying and similar processes) is expanding considerably. The question arises whether this constitutes an improper exploitation of works and an invasion of authors' legitimate interests. The Community could take an initiative in this field after consulting those concerned.

3. MEDIUM-TERM ACTION

In addition to the above proposals, the Commission is currently studying other subjects associated with copyright and neighbouring rights to determine whether Community action is necessary. These include authors' moral rights, 'droit de suite' (right to remuneration for the author for a plastic work of art in the event of a resale) and the collective administration of copyright and neighbouring rights. A study on photographic works is also under consideration.

External aspect of the Commission programme

The challenges of the new technologies cannot be dealt with solely in a Community framework; the protection offered in some non-member countries is so inadequate that the works of Community creators are in effect being pillaged, and this is damaging both economically and culturally.

Given the growing internationalization of the market for cultural goods, the Community attaches great importance to the international aspects of copyright and neighbouring rights.

■ **GATT negotiations**

Intellectual property is one of the topics of negotiation in the Uruguay Round of GATT, the General Agreement on Tariffs and Trade. The Community has made the greatest efforts to bring these talks to a successful conclusion. For instance, it presented a full draft agreement on intellectual property to the negotiating group. The proposal has been taken as the principal basis of discussion; it covers both the basic rules and their implementation (for example, internal and frontier measures and the means by which rights are acquired) and fundamental principles (for example, national treatment, non-discrimination, transparency, dispute settlement procedure).

The Community is taking the leading in these negotiations, for it wishes to achieve the highest possible level of protection of intellectual property, in particular copyright and neighbouring rights.

■ WIPO's role

The World Intellectual Property Organization (WIPO), either alone or jointly with other international organizations, administers the intellectual property conventions, in particular the Berne and Rome Conventions. It is the main international organization in this field. The Community has observer status in WIPO. Before the end of 1992, the Commission will review the need to change that status.

With respect to copyright and neighbouring rights, WIPO's main concern in 1990-91 is to prepare a protocol to supplement the Berne Convention and a Treaty on the settlement of disputes between States in the field of intellectual property in general. The Community plans to play an active part in this work and contribute to its success.

■ Relations with the other European States

Europe is one of the cradles of culture. It is therefore especially important that copyright and neighbouring rights should be given effective protection. The Community emphasizes this in its negotiations with the EFTA countries for a European economic area, in its relations with Central and Eastern Europe and in the context of the Council of Europe. The Community would like to see other European States adopt a level of protection at least equal to its own so that the whole of Europe achieves a high enough level of protection to allow the harmonious development of creative activity throughout the continent.

■ Intellectual property in bilateral relations

In addition to work undertaken in the field of multilateral international relations, the Community attaches great importance to intellectual property matters in its bilateral relations. Community industry faces severe problems in some of these countries, especially on account of the lack of adequate rules of protection, poor enforcement of these rules or failure to apply national treatment to Community citizens who hold rights.

The Commission is drawing up a list of situations encountered in non-member countries and the difficulties they generate for Community industry. This should raise the general level of information and make it easier for the Commission to defend the Community's interests in its external relations.

Conclusion

Copyright and neighbouring rights form the foundation of intellectual creativity and the propagation of culture. Protection of these rights guarantees the maintenance and development of creativity and cultural diversity to the benefit of authors, of performers, of cultural industries, of consumers and ultimately of society at large.

Harmonization of the laws of the Member States does not mean making them uniform or reducing them to the lowest common denominator. What it does

mean is making the various bodies of national legislation achieve the same result while respecting their diverse approaches and seeking a high level of protection. Accomplishment of the tasks described in this booklet is only the first step towards developing a genuine European area for creativity, but it is an essential one.



The contents of this publication do not necessarily reflect the official views of the institutions of the Community. Reproduction authorized.

■
Commission of the European Communities

■
Directorate-General X
Audiovisual, Information, Communication and Culture
Rue de la Loi 200 — B-1049 Brussels

■
Office in Ireland 39 Molesworth Street, Dublin 2 — Tel. 71 22 44

■
Office in England 8 Storey's Gate, London SW1P 3AT — Tel. 222 81 22

Office in Wales 4 Cathedral Road, Cardiff CF1 9SG — Tel. 37 16 31

Office in Scotland 7 Alva Street, Edinburgh EH2 4PH — Tel. 225 20 58

Office in Northern Ireland Windsor House, 9/15 Bedford Street,
Belfast BT2 7EG — Tel. 24 07 08

■
Information services 2100 M Street, NW, Suite 707,
in the USA Washington DC 20037 - USA — Tel. (202) 862-9500
305 East 47th Street, 1 Dag Hammarskjöld Plaza,
New York, NY 10017 - USA — Tel. (212) 371-3804

■
Countries fully or partly English speaking. Offices also exist in other countries including all Member States.



Office for Official Publications
of the European Communities
L-2985 Luxembourg

ISSN 0379-3133

Catalogue number: CC-AD-91-009-EN-C

