

## **Harmonizing European Copyright Law**

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## **Harmonizing European Copyright Law**

The Challenges of Better Lawmaking

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## Chapter 1

# The European Concern with Copyright and Related Rights

The European Union has come a long way since the five founding Member States signed the Treaty of Rome in 1956, 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.<sup>1</sup> Although it is not made explicit in the Treaties, European Community (EC) law has primacy over the law of Member States.<sup>2</sup>

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.<sup>3</sup>

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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.<sup>4</sup>

### 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup> The exact relevance of Article 295 for *intellectual* property however remains unclear;<sup>8</sup> 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.

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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*),<sup>9</sup> 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.<sup>10</sup> 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 allowed<sup>11</sup> only in as far as is necessary for preserving the 'specific subject matter' – the essence – of the intellectual property right at issue.<sup>12</sup> 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

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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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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’.<sup>18</sup>

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.

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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](http://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,<sup>19</sup> 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.<sup>20</sup>

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,<sup>21</sup> 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

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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.<sup>22</sup>

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.<sup>23</sup>

The Follow-up to the 1995 Green Paper<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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.<sup>27</sup> 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 Paper<sup>28</sup> 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'.

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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](http://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’.<sup>29</sup> 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’.<sup>30</sup> 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’.<sup>31</sup>

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

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29. *Ibid.*, 1.

30. *Ibid.*, 20.

31. *Ibid.*, 4.

whose owners cannot be identified or located'.<sup>32</sup> 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 rights<sup>33</sup> 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.

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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.<sup>34</sup> 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.<sup>35</sup>

#### 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.<sup>36</sup>

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.<sup>37</sup> 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,<sup>38</sup> and the measure must contribute to either the creation or a better functioning of the internal market.<sup>39</sup>

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.<sup>40</sup> 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’.<sup>41</sup> 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

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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 of<sup>42</sup> *artistic and literary creation* [emphasis added], including in the audiovisual sector.<sup>43</sup> Article 151(5) explicitly states that the Council has no competence to adopt harmonizing measures in the cultural sphere, although it can adopt recommendations.<sup>44</sup>

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.<sup>45</sup>

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.<sup>46</sup> 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.<sup>47</sup>

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,<sup>48</sup> Community plant-variety rights,<sup>49</sup> and Community designs.<sup>50</sup> 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.

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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.<sup>51</sup>

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’.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> 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')<sup>55</sup> and also where there is internal harmonizing competence (the so-called 'AETR' or 'ERTA' Doctrine).<sup>56</sup>

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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 opinion<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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)?<sup>60</sup> 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.<sup>61</sup>

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

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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](http://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.<sup>62</sup> 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.<sup>63</sup> 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,<sup>64</sup> but does require that the intensity of the action undertaken does ‘not go beyond what is necessary to achieve the objective pursued’.<sup>65</sup>

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.<sup>66</sup> 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.<sup>67</sup> 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,<sup>68</sup> 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 Trademark, the Community Design and the Community plant-variety right.<sup>69</sup> 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.<sup>70</sup> The duty under Article 5 TEC to take all appropriate measures to ensure the

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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.<sup>71</sup>

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’.<sup>72</sup> The ECJ is generally thought of as inclined to strengthen European policies and integration.<sup>73</sup> It is rare for the ECJ to rule that community legislation runs afoul of the proportionality principle.<sup>74</sup> 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.<sup>75</sup>

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,<sup>76</sup> the roots of which lie in the early 1990s,<sup>77</sup> 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'<sup>78</sup> 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.<sup>79</sup>

#### 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.<sup>80</sup> 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

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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](http://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.<sup>81</sup>

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.<sup>82</sup> 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.<sup>83</sup> 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 Directive<sup>84</sup> 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

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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.<sup>85</sup> 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,<sup>86</sup> 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,<sup>87</sup> an issue covered in Chapter 5.

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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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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.<sup>91</sup> 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.

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D'impact, Proposition de Directive du Parlement Européen et du Conseil Modifiant la Directive 2006/116/CE du Parlement Européen et du Conseil du 12 Décembre 2006 Relative à la Durée 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.<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup>

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

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92. B. Rosenblatt, 'EC Shelves Plans for Copyright Levy Reform', *DRM Watch* 14 Dec. 2006 <[www.drmwatch.com/legal/article.php/3649191](http://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](http://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](http://www.ec.europa.eu/internal_market/copyright/review/consultation_en.htm)> and <[www.circa.europa.eu/Public/irc/markt/markt\\_consultations/information](http://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:<sup>95</sup> ‘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.<sup>96</sup> 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.<sup>97</sup> 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.<sup>98</sup> 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](http://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](http://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.<sup>99</sup>

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.<sup>100</sup> 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.<sup>101</sup>

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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).