



The Recasting of Copyright & Related Rights for the Knowledge Economy

final report

Institute for Information Law

University of Amsterdam

The Netherlands

November 2006

EUROPEAN COMMISSION DG INTERNAL MARKET STUDY CONTRACT No. ETD/2005/IM/D1/95

THIS STUDY WAS COMMISSIONED BY THE EUROPEAN COMMISSION'S INTERNAL MARKET DIRECTORATE-GENERAL, IN RESPONSE TO THE INVITATION TO TENDER MARKT/2005/08/D. THE STUDY DOES NOT, HOWEVER, EXPRESS THE COMMISSION'S OFFICIAL VIEWS. THE VIEWS EXPRESSED AND ALL RECOMMENDATIONS MADE ARE THOSE OF THE AUTHORS.



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Executive Summary

This study on the ‘Recasting of copyright and related rights for the knowledge economy’ was carried out by the Institute for Information Law* on commission by the European Commission. As does the call for tender that inspired it,[†] the study covers extensive ground. Chapters 1 and 2 describe and examine the existing ‘acquis communautaire’ in the field of copyright and related (neighbouring) rights, with special focus on inconsistencies and unclarities, while Chapters 3-6 deal with distinct issues that were identified a priori by the European Commission as meriting special attention: possible extension of the term of protection of phonograms (Chapter 3), possible alignment of the term of protection of co-written musical works (Chapter 4), the problems connected to multiple copyright ownership, including the issue of ‘orphan works’ (Chapter 5), and copyright awareness among consumers (Chapter 6). Finally, Chapter 7 provides an overall assessment of the benefits and drawbacks of the fifteen years of harmonisation of copyright and related rights in the EU and dwells on regulatory alternatives.

Chapter 1: Introduction

Chapter 1 commences with an overall description of the process of harmonisation that has brought, in the course of 15 years, seven directives in the field of copyright and related rights. It goes on to discuss various institutional and exogenous issues relevant to the process of harmonisation Europe. The main focus here is on the question of competence of the EC legislature in the field of copyright and related rights. This chapter also examines the legal instruments of harmonisation and unification, and concludes with a brief description of the process of convergence that is a main cause of many of the inconsistencies and unclarities that are identified in Chapter 2.

Chapter 2: Consistency & clarity: consolidating the acquis?

Chapter 2 examines the ‘acquis communautaire’ in the field of copyright and related rights, and identifies the main inconsistencies and unclarities. This chapter follows traditional categories: subject matter of protection; economic rights; exceptions and limitations; and collective rights management. Preceding this analysis, an introductory paragraph critically assesses the principle of territoriality that remains one of the cornerstones of copyright law in the EU.

Territoriality

The seven directives have smoothed out some of the main disparities between the laws of the Member States, but largely ignored one of the main obstacles to the creation of an internal market in products of creativity: the territorial nature of the economic rights. As a consequence, even in 2006 content providers aiming at European consumers need to clear rights covering some 25 Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States. While EC (case) law has tackled the

problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, policies in respect of Internet-based services, as reflected in the Information Society Directive, have left the territorial nature of rights of communication intact. While the Commission's recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such. As long as this territorial nature is left intact, harmonisation can achieve relatively little.

Subject matter

As regards the subject matter of copyright only a limited *acquis* can be reported. Here harmonised rules have been established only with respect to new or controversial subject matter, such as computer software, databases and photographs. The absence of a general *acquis* implies that fundamental differences between continental and common law systems will remain, although a certain 'rapprochement' is noticeable. The question arises whether an extension of the *acquis* to all copyright works would be beneficial to completing the Internal Market. The practical effect of any such harmonisation may be limited if the dynamic application of harmonised norms by national lawmakers and courts (the so-called 'homing tendency') persists. On the other hand, national variations may be so slight as not to cause any noticeable problem from an Internal Market perspective.

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

In sum, no clear advantage of aligning the *acquis* with regard to protected subject matter seems to exist.

Economic rights

As regards exclusive rights, only minor inconsistencies appear in the *acquis*. One concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction. Both inconsistencies might be clarified by the Commission in an interpretative communication, without the need of treading on new ground.

A more serious inconsistency relates once again to broadcasting. The advent of online dissemination models that share the characteristics of broadcasting and on-demand delivery, cause uncertainty whether they come under the broadcasting right or making available right. Although the *acquis* contains a harmonised definition of 'making available', the same is not true for the concept of broadcasting as an act restricted by copyright and related rights. However, precisely because particularly in the area of broadcasting the transition to new forms of transmission, distribution and business models is in full swing, it might be advisable to opt here for the most flexible solution, i.e. to leave the interpretation to the courts of Member States and ultimately to the European Court of Justice. Alternatively, an attempt at delineating broadcasting and making available could be included in an interpretative communication.

The most problematic inconsistency concerns the overlap in the digital environment of the reproduction right, which includes acts of temporary copying, and the right of communication to

the public, which includes a right of making available online, both of which are defined in a very broad manner in the Information Society Directive. Arguably, these rights cannot co-exist in the way they are presently –too broadly– defined. Given that the right of making available was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years. Consultations with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue claims for ‘double payment’ by different right holders for unitary acts of exploitation, resulting in market distortions.

Limitations

The issue of limitations is dealt with in greater detail in the forthcoming IViR Study on the Information Society Directive, which will be completed in early 2007.[‡] This study’s provisional recommendations are as follows: (1) the issue of transient and incidental acts of reproduction should be reassessed, and a consistent legal solution applied to all categories of works capable of being transmitted; (2) the limitations on related rights permitted by the directives should be aligned with the permitted limitations on copyright; (3) the EC legislature should strive to establish a more flexible and forward looking regime of limitations on copyright and related rights. A non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise in the dynamic information market. Such an open-ended regime would best reflect the principles of subsidiarity and proportionality. Recommendations (1) and (2) could largely be achieved in the form of an interpretative communication, while recommendation (3) would require some form of legislative redress.

Collective rights management

As regards collective rights management, in the absence of a general directive on this issue no true ‘acquis’ can be reported here. Nevertheless, the existing directives do contain a number of rules relating to the issue, the most important of which are found in the Satellite and Cable Directive. The Directive gives rise to a number of questions that are best answered by the Commission in the form of an interpretative communication. In the first place, there is a need for clarification of the term ‘transfer’ used in article 10 of the Directive. Second, a communication could shed more light on the mediation system that the Directive imposes upon the Member States, for instance by setting mandatory negotiation deadlines. Third, a communication might delineate the notion of ‘cable retransmission’, and clarify whether it covers simulcasting via the Internet.

Chapter 3: Extending the term of protection for related (neighbouring) rights

Holders of neighbouring rights in performances and phonograms have expressed concern that the existing term of protection of 50 years puts them and the European creative industries, in particular the music industry, at a disadvantage, as compared to the longer protection provided for in the United States. Chapter 3 examines these concerns, first by describing and comparing the terms in the EU in the light of the existing international framework and existing terms in countries outside the EU, secondly by examining the rationales underlying related (neighbouring) rights protection and finally by applying economic analysis.

The authors of this study are not convinced by the arguments made in favour of a term extension. The term of protection currently laid down in the Term Directive (50 years from fixation or other triggering event) is already well above the minimum standard of the Rome

Convention (20 years), and substantially longer than the terms that previously existed in many Member States. Stakeholders have based their claim mainly on a comparison with the law of the United States, where sound recordings are protected under copyright law for exceptionally long terms (life plus 70 years or, in case of works for hire, 95 years from publication or 120 years from creation). Perceived from an international perspective the American terms are anomalous and cannot serve as a legal justification for extending the terms of related rights in the EU.

An examination of the underpinnings of existing neighbouring rights regimes does not lend support to claims for term extension. Whereas copyright (author's right) protects creative authorship, the rights of phonogram producers are meant to protect economic investment in producing sound recordings. The related rights of phonogram producers have thus more in common with rights of industrial property, such as design rights, semiconductor topography rights, plant variety rights and the *sui generis* database right. Whereas all these rights share the same 'investment' rationale, their terms are considerably shorter, while setting higher threshold requirements. For example, whereas the database right requires 'substantial investment' in a database, the phonographic right requires no more than the making of a sound recording, be it a complex studio production or simply a matter of 'pushing a button' on a recording device. Indeed, a good argument could be made for shortening the term of protection for phonogram producers.

Given that the legal protection of phonogram producers is based on an investment rationale, it is important to note that the costs of owning and operating professional recording equipment has substantially decreased in recent years due to digitalisation. On the other hand, the costs of marketing recordings has apparently gone up. These costs now make up the largest part of the total investment in producing a phonogram. However, it is doubtful whether these costs may be taken into account as investment justifying legal protection of phonogram producers. Insofar as marketing costs accrue in the goodwill of trademarks or trade names, phonogram producers or performing artists may already derive *perpetual* protection therefore under the law of trademarks.

For the large majority of sound recordings the producers are likely to either recoup their investment within the first years, if not months, following their release, or never. If a recording has not recouped its investment after 50 years, it is very questionable that it ever will. On the basis of this finding it can be assumed that a term of protection of 50 years offers phonogram producers more than enough time to recoup their investment.

As the rights expire, recordings falling into the public domain will become subject to competition and falling prices, which will lead to a loss of income for the former right holders. Stakeholders argue that this will negatively affect future investment in A&R. However, it appears that only limited shares of phonogram producers' overall revenues are currently invested in A&R, so the predicted negative effect on investment in new talent is likely to be limited.

Another argument that stakeholders have advanced in favour of term extension refers to the so-called 'long tail' (i.e. the reduced costs of digital distribution has created new markets for low-selling content). A term extension might indeed inspire phonogram producers to revitalise their back catalogues recordings, and make them available to a variety of digital distribution channels. On the other hand, the immense market potential of digital business models should already today have provided ample incentive to phonogram producers to exploit their back catalogues in new media. The recent history of the internet, however, indicates that these opportunities have not always been seized by those stakeholders now asking for a term extension.

Stakeholders have also posited that not granting a term extension would distort competition between right holders based in the EU and their competitors in non-EU countries, where right holders may enjoy longer terms. It has been argued that foreign countries would apply a 'comparison of terms' to the detriment of EU right holders. This argument is wholly unconvincing, for various reasons. In the first place, the Rome Convention probably requires full national treatment, which rules out a comparison of terms by those countries that are bound by

the convention. Moreover, many countries not party to the Rome Convention, such as the United States, do not apply a comparison of terms at all.

Another argument advanced by stakeholders is that a failure to bring the term of protection in the EU in line with the US will negatively affect the competitiveness of the European music industry. However, the competitiveness of phonogram producers is based on a wide variety of factors, intellectual property protection in general and the term of protection in particular being just one of them. Moreover, the worldwide music market is dominated by only four multinational companies (the so-called ‘majors’), that can not be characterised as either ‘European’ or ‘American’. Juxtaposing the interests of the European and the American music industries, therefore, would be wholly artificial. Even so, the market dominance of the ‘majors’ is an economic factor to be taken into consideration. A term extension would in all likelihood strengthen and prolong this market dominance to the detriment of free competition.

A final argument sometimes advanced in favour of term extension comes from the world of accountancy. It assumes that a longer term of protection would increase the value of ‘intangible assets’ in the balance sheets of European record companies. Granting a shorter term of protection to record companies in the EU than their competitors in the US already receive, would arguably result in a comparatively lower valuation of assets of European companies. This argument, however, is largely without merit. The value of a record company’s own recordings is not regularly recognised as intangible assets by the record labels, and not capitalised in the balance sheets. Acquired catalogues of recordings are usually capitalised, but routinely written off well before the existing terms of related rights protection expire. A term extension will perhaps play a minor role only in the valuation of the goodwill of a record company in the context of a merger or acquisition. Even then, its effect will be minimal.

The fact that some recordings still have economic value as rights therein expire, cannot in itself provide a justification for extending the term of protection. Related rights were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving ‘value’ in perpetuity. The term of related rights must reflect a balance between incentive and market freedom. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors. Without content that still triggers the public imagination a robust public domain cannot exist.

Admittedly, an argument could be made in favour of extending the term of protection of performing artists, since the reasons for protecting artists are comparable to those underlying author’s rights. However, in the light of existing contractual practices, it is unlikely that performers would actually fully benefit from a term extension, since record companies routinely require a broad assignment of the rights of the performing artists. Therefore, extending the term of protection of performing artists should be considered only in connection with the harmonisation of statutory measures that protect the artists against overbroad transfers of rights. Obviously, a term extension would benefit only those artists that are still popular after 50 years and continue to receive payments from collecting societies and phonogram producers. This however concerns only a small number of performing artists.

Chapter 4: Calculation of the term of protection of co-written musical works

Stakeholders have also expressed concern about existing disparities at the national level regarding the calculation of the term of protection of musical works. Although the Term Directive has harmonised the terms of copyright and related rights protection, disparities have remained

because Member States treat musical works containing lyrics ('songs') in different ways. The Term Directive has not determined how to qualify such musical works, e.g. as a single joint work, as two works –music and lyrics– or as some form of collaborative works. Chapter 4 describes the way the laws of the Member States deal with co-written musical works, examines the resulting disparities, queries whether there is a need for amendment of the Term Directive and looks at alternative solutions.

Split copyright terms only affect co-written music that is at least seventy years old (but more likely 100-120 years) and still actively licensed. Clearly, the size of the problem is modest today considering that the large volume of popular songs of the post-war period will not begin to fall (partly) out of copyright for another few decades. Also, since most music is co-written by authors of the same generation, the actual gap between the respective terms of protection will normally not be substantial. Moreover, split copyright does not arise where the creators have both contributed to music and lyrics, or are registered as such (e.g. Lennon & McCartney). The problem is currently experienced mainly in the area of opera, an area of limited significance from the Internal Market perspective.

Admittedly, the existing disparities cause some administrative inconvenience to the music publishers that control most of the rights concerned, and possibly to the collecting societies as well, but in the light of the principles of proportionality and subsidiarity this would hardly justify initiating an amendment of the Term Directive. Moreover, in the light of recent advances in the field of digital rights management, right holders must be able to surmount these administrative inconveniences with relative ease and without incurring disproportional cost.

Another point to consider is that a harmonised term calculation rule would most likely extend the term of copyright protection of co-written musical works in those Member States that currently provide for 'split' terms (e.g. UK, Germany, Nordic countries). The hidden economic and social costs associated with such a de facto term extension in large parts of the European Union obviously need to be factored in.

Moreover, given that national copyright laws do not treat musical works differently from other works that involve contributions by more than one person, the question is why a special rule should be introduced solely for music. Similar term calculation problems may also occur with other types of productions, e.g. multimedia productions, illustrated books, industrial design and computer software. A more consistent solution would then be to harmonise the concept of joint work of authorship for all types of subject matter.

Chapter 5: Rights clearance issues relevant to the reutilisation of existing works: multiple ownership and orphan works

An issue that has been lingering among institutional users of copyrighted works for some time concerns the re-utilisation of works of multiple copyright ownership. The emergence of the information society has created new markets for old 'analogue' content, such as archived newspaper articles, scientific publications and broadcast television programs. Re-utilisation often requires licenses from a multitude of authors or rights owners. In some cases right holders are difficult or even impossible to track and identify. Chapter 5 examines the validity of these concerns, refers to existing models in Member States and elsewhere (in particular, to the current debate in the United States regarding 'orphan works'), and proposes solutions.

Where it concerns the general rights clearance problems associated with works of multiple ownership, no Community action is recommended. Seeking licenses from a multiplicity of right holders may be sometimes inconvenient and costly to prospective users, but this does not in and of itself justify legislative intervention, unless a structural market failure can be demonstrated.

Moreover, the laws and legal practices of the Member States already provides for a variety of legal solutions to alleviate these problems, varying from special rules on ownership of audiovisual works to the mechanism of collective licensing. Arguably, the European Commission might limit its role to promoting voluntary arrangements including the establishment of ‘one-stop shops’ by organisations of right holders and collecting societies.

As regards ‘orphan works’, this is indeed a case of structural market failure that would justify some form of legislative intervention, even though the size of the problem is as yet difficult to quantify. Rules addressing the issue should ideally reflect an equilibrium between safeguarding the interests of right holders and giving legal certainty to bona fide prospective users. This points to a system that allows for a competent public authority to issue a licence to use an orphan work, under strict conditions. Such a licence would not be all-inclusive, but granted to a designated user for a specific use only. If the right owner would re-appears, he might collect the royalties fixed in the licence, and deposited in an escrow account or with a collecting society.

Legislative measures of this kind would best be introduced at the national level. Alternatively, Member States might consider addressing the orphan works problem by way of extended collective licensing. Absent evidence indicating that the orphan works problem has a noticeable impact on the Internal Market, it would be premature for any legislative initiative at the Community level. However, it is suggested to complement national measures by appropriate measures at EU level that attend to the licensing difficulties that may occur in case of a cross-border exploitation of orphan works. This could be done in the form of a Commission recommendation, instructing the public authorities to cooperate and facilitate cross-border licensing.

Finally, it is advised to encourage right owners to make rights management information widely available to the public, in order to minimise the orphan works problem in the future. As a possible legal flanking measure, which would require intervention by the Community legislature, one could consider amending article 7 of the Information Society Directive in such a way that the legal protection of rights management information is only granted to right owners in case this information has been deposited in a publicly accessible database.

Chapter 6: Consumer awareness and acceptance of copyright

Chapter 6 critically examines the prevailing belief that copyright is losing its moral imperative with the general public. To this end a distinction is made between consumer *awareness* and consumer *acceptance* of copyright. The former refers to knowledge, while the latter implies acknowledgement of copyright principles and values.

Various developments have contributed to a growing knowledge about copyright and related rights among the general public. The growth of online stores offering copyright and DRM protected content has confronted consumers with copyright-based business practices as a matter of course. There is increased public debate about the position of the consumer in copyright law, as is illustrated by the implementation of the Information Society Directive in France. Also, publicity campaigns by stakeholders have familiarised the general public with copyright principles and end users’ rights and obligations. Clearly, large-scale copyright infringement by consumers can not be explained in terms of a lack of copyright awareness. Consequently, no need appears to exist for the Community institutions to promote or undertake further initiatives aimed at raising copyright awareness.

An assessment of the acceptance of copyright by the general public is more difficult to make. For this purpose empirical data on p2p file sharing and software sharing were analysed as ‘indicators by proxy’. These surveys make clear that unauthorised use and distribution is the

norm for approximately 50 per cent of the populations concerned. However, a much larger share of the European public does recognise the equitability of and the need for copyright protection. However, in such circles as student communities as well as the ‘virtual communities’ that are p2p networks, the prevailing ethical norm is not so much one of complying with copyright, but rather one of sharing. It was furthermore found that consumer behaviour is also informed by a weighing of the advantages and disadvantages of file sharing versus legally purchasing copies. If a commercial content provider offers the consumer a ‘bad bargain’ in terms of limited availability, high prices or restrictive use conditions (e.g. portability), then the consumer is not likely to find it unethical to opt for p2p file sharing instead.

Given the fact that copyright (non)conforming behaviour seems largely influenced by social norms and rational/economic considerations, it would appear that European institutions have limited options to help compliance to copyright law. Consistently seeking input from stakeholders that represent consumers in the policy making process may contribute to a balanced end result, which in turn can lead to a better acceptance of and adherence to copyright norms. But the stakeholders themselves –industry and consumers alike– are clearly best positioned to influence acceptance, for instance through the development of more consumer-friendly business models and informative campaigns, including initiatives like standardised labelling of product features on playability. The European Commission could continue to play a facilitating role, especially by supporting the dialogue between industry and consumers.

Chapter 7: Conclusions & recommendations

Chapter 7 builds on Chapters 1 and 2, and critically examines the benefits and draw-backs of fifteen years of harmonisation of copyright and related rights in the EU.

A structural deficiency of the harmonisation process is the asymmetric normative effect of harmonisation by directive. As this study has illuminated, the harmonised norms of copyright and related rights in the seven directives in many cases well exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered. More often than not the norms also exceed average levels of protection that existed in the Member States prior to implementation. This process of ‘upwards’ harmonisation is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

Another structural draw-back are the administrative costs of the harmonisation process. The step-by-step approach towards harmonisation that the EC legislature has followed, has placed an enormous burden on the legislative apparatus of the Member States. For national legislatures, the harmonisation agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights.

On balance, the harmonisation process has produced mixed results at great expense, and its beneficial effects on the Internal Market remain largely unproven and are limited at best. This conclusion calls for caution and restraint when considering future initiatives of harmonisation by directive, even it were only a modest ‘recasting’ exercise. In the light of the renewed interest in the EC’s legislative competence and in view of the growing importance of the principles of subsidiarity and proportionality, the authors of this study advise the EC legislature not to undertake any new initiatives at harmonisation, except where a clear need for amendment of the existing *acquis* can be demonstrated.

Instead, various other legislative instruments appear to be more suitable and effective to further the goal of an internal market for content-related goods and services. In the short run, various instruments of ‘soft law’, such as recommendations, interpretative notices or

communications, would appear to be the legislative tools of choice. Soft law is particularly suitable for dealing with the dynamics of an information market that is in constant flux and regularly requires ad hoc legislative adjustment.

In the long run, if the Community is serious about creating an internal market for copyright-based goods and services, it must inevitably confront the problem of territoriality in a fundamental way. This would imply the adoption of a Community Copyright Regulation to replace the existing directives and partially pre-empt the national laws on copyright of the Member States. Besides its obvious deregulatory effect, a regulation of this kind might provide a certain ‘rebalancing’ of rights and limitations, in order to rectify the overprotection resulting from 15 years of ‘upwards’ harmonisation.

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† See the Call for tender MARKT/2005/08/D, Study on the recasting of the copyright for the knowledge economy, Notice of contract 2005/S131-129165 of 09.07.2005.

‡ IViR ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’ (Call for tender MARKT/2005/07/D), forthcoming (2007).



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THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY

Abbreviations

ALAI	Association littéraire et artistique internationale
art.	Article
arts.	Articles
BC	Berne Convention for the Protection of Literary and Artistic Works
cf.	confer
CFI	Court of First Instance (European Court of Justice)
CRi	Computer und Recht International
e.g.	for example
EC	European Communities
ECJ	European Court of Justice
ECR	European Court of Justice Reporter
et al.	et alii (and others)
et seq.	et sequens (and the following)
etc.	etcetera
EIPR	European Intellectual Property Review
EU	European Union
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht - Internationaler Teil (Germany)
i.e.	id est (that is)
ibid.	reference to source mentioned in previous note
IIC	International Review of Industrial Property and Copyright Law
IRDI	Intellectuele rechten/Droits intellectuels (journal)
LAB	Legal Advisory Board (of the European Commission, former DGXIII)
MMR	Multimedia und Recht
OECD	Organisation for Economic Co-operation and Development
p.m.a.	post mortem auctoris
para.	paragraph
RC	International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention)
RIDA	Revue Internationale du Droit d'Auteur
sec.	section
SCCR	Standing Committee on Copyright and Related Rights (WIPO)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC	Universal Copyright Convention
UFITA	Archiv für Urheber- und Medienrecht (journal)
UK	United Kingdom
UNESCO	United Nations Educational, Scientific and Cultural Organization
USA	United States of America
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organisation
ZEUP	Zeitschrift für Europäisches Privatrecht
ZUM	Zeitschrift für Urheber- und Medienrecht



THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY

1 Introduction

The renewed Lisbon agenda aims at fostering economic prosperity, jobs and growth, in particular by boosting the knowledge-based economy, and by enhancing the quality of Community regulation ('better regulation').¹ In doing so, the original Lisbon aim, to make the European Union 'the most dynamic and competitive knowledge-based economy in the world' by 2010, remains intact. It goes without saying that a consistent and transparent legislative framework for copyright and related rights in the information society that fosters the growth of the knowledge-based economy in the European Union is a crucial element in any strategy leading towards that goal.

At present seven EC directives in the field of copyright and related rights are in place.² The first, on computer programs, was adopted as early as 1991, while the most recent ones, dealing with copyright and related rights and artists' resale rights respectively, date from 2001. Whereas most of these directives have been reviewed by the European Commission, as required by specific review clauses in the directives themselves, an integral review of all directives taken together has never taken place.

The initiative to review the entire *acquis communautaire* was taken by the Commission at the conference 'European Copyright Revisited', which was organised by the European Commission in Santiago de Compostela in 2002. At the conference, at the invitation of the Commission Dr. Michael Walter presented a first inventory of areas where updating and consolidation of the *acquis* might be desirable.³ A next step was the publication, on 19 July 2004, of a Staff Working Paper on Copyright Review that identified in some more detail horizontal and vertical issues that might be ripe for updating and consolidation.⁴ The working paper contained a number of relatively minor proposals for adjustment, and did not call for sweeping reform or consolidation. The working paper invited stakeholders to submit their comments. Judging from the 131 contributions the Commission has received,⁵ a more ambitious evaluation of the *acquis* may be called for. There are indeed a number of reasons to do so.

¹ This ambition was already laid down in previous documents, e.g. Communication of the Commission, 'Action Plan: simplifying and improving the regulatory environment', COM (2002) 278 final, Brussels, 5.06.2002.

² *Computer Programs Directive* (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, 17.05.1991), *Rental Right Directive* (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61, 27.11.1992), *Term Directive* (Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290/9, 24.11.1993), *Satellite and Cable Directive* (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248/15, 6.10.1993), *Database Directive* (Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77/20, 27.03.1996), *Information Society Directive* (Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167/10, 22.06.2001), *Resale Right Directive* (Directive 2001/84/EC of the European parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272/32, 13.10.2001).

³ Michel M. Walter, 'Updating and consolidation of the *acquis*. The future of European copyright', available at http://europa.eu.int/comm/internal_market/copyright/docs/conference/2002-06-santiago-speech-walter_en.pdf. [Walter 2002].

⁴ 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 July 2004. [Staff Working Paper on Copyright Review]

⁵ Available at <http://forum.europa.eu.int/Public/irc/markt/markt_consultations/library?l=/copyright_neighbouring/legislation_copyright&vm=detailed&sb=Title>.

In the first place, except for the Copyright (or Information Society) Directive, most directives have been designed to harmonise distinct aspects of copyright or related rights law (in terms of subject matter or scope of protection), without dealing with copyright or related rights across the board. Since each directive has experienced its own legislative history, and was adopted in a different era, this has inevitably led to fragmented, and sometimes inconsistent, solutions. In some cases, directives have been amended and updated by later ones, but in most cases the existing *acquis* was left untouched.

A second reason for a more thorough evaluation lies in the passing of time itself. The Computer Programs Directive was designed in the late 1980's, in a time when the internet was used primarily for sending email messages among engineers and academics, and software was published and distributed on floppy disks. The Rental and Lending Rights Directive, adopted in 1992, was similarly conceived with a world of 'hard copies' in mind; electronic rental and lending were, at best, futuristic scenarios. Perhaps the best example of technology-specific regulation is the Satellite and Cable Directive of 1993, dealing with satellite transmission and cable retransmission as two distinct media deserving completely different regulatory solutions. In 2005 satellite broadcasters have evolved into 'platforms' offering retransmission services in direct competition with cable operators, whereas the latter have reinvented themselves either as content providers (in direct competition with broadcasters) or as providers of digital broadband services (in competition with telecommunications companies). And, as its predecessors, the directive does not even contemplate the advent of the Internet as a means of broadcasting content. This ongoing process of *convergence* –the merging of formerly distinct, separately regulated media– is in itself an important reason for a thorough re-examination of the *acquis*.

The dynamic nature of the 'information society' (i.e. the Internet) itself presents yet another reason for review. Since the adoption of the Copyright Directive in 2001, a directive that was specifically meant to deal with the challenges of the 'information society' (i.e. the internet), the media landscape has dramatically changed again. Based on a Green Paper of 1995,⁶ and the WIPO Treaties of 1996, the Directive was designed to respond to the legal challenges posed by the information society as they were perceived in the mid-1990's – ten years ago today. In 'Internet time' this is light years ago. Since 1995, and even after the final adoption of the Directive in 2001, numerous important technological and economical developments have dramatically changed the landscape of the information society. The new millennium has seen the spectacular rise, both in popularity and in performance, of peer-to-peer communications software allowing consumers to 'share', largely illegally, vast amounts of copyrighted content (music, video, software, images and even books). Concurrently, the roll-out of 'legal' online content services, such as iTunes, and the rapid deployment of Digital Rights Management systems, that existed largely in theory when the Directive was adopted, has created a real, rapidly growing and vibrant market place for digital content services in Europe and elsewhere.

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

Moreover, by making national borderlines largely irrelevant the Internet has had an immediate effect on competition. By turning local or regional information markets into global ones almost

⁶ European Commission, 'Copyright and Related Rights in the Information Society', Green Paper 1995, Brussels, COM (95) 382 def. [Green Paper on Copyrights and Related Rights in the Information Society].

overnight, European content providers and media enterprises are now faced with direct competition from companies all over the world, including the United States and Japan. This may call for aligning the *acquis communautaire* with copyright norms of the EU's main 'competitors'.

Yet another valid reason for a critical examination of the process of harmonisation lies in the burden this process has imposed, over the years, on the legislative machinery, both at the EU and the national level. The step-by-step approach towards harmonisation that the EC legislature has applied has placed an enormous burden on the legislative apparatus. Directives are adopted only after a complicated and often protracted process of consultation between the Commission, the European Parliament and Member States (Council working groups). Implementation (transposition) requires yet another round of, sometimes complex, legislation at the national level. For national legislatures, the harmonisation agenda of the EC has resulted in an almost non-stop process of amending of the national laws on copyright and related rights.

In sum, the Lisbon agenda, the dynamics of the information society and several other factors combined call for a thorough, unbiased and critical evaluation of the *acquis communautaire*.

Outline of the study

As its somewhat grandiose title illustrates, this study on the 'recasting of copyright and related rights for the knowledge economy' seeks to cover a lot of ground, as does the call for tender by the European Commission that inspired it.⁷ The study is essentially composed of two parts: a description and examination of the '*acquis communautaire*', with special focus on inconsistencies and unclarities (Chapter 2) and a study of three issues of substantive law that have been identified, by the European Commission, as meriting special attention (Chapters 3, 4 and 5). Chapter 6 deals with the –largely unrelated– issue of copyright awareness amongst consumers, while Chapter 7 offers final conclusions and recommendations.

The present (first) chapter discusses institutional and exogenous issues relevant to the process of harmonisation of copyright and related rights in Europe. We will focus particularly on the question of competence of the EC legislature in the field of copyright and related rights, and examine the legal instruments of harmonisation and unification. This chapter will conclude with a brief description of the process of convergence that is a main cause of many of the inconsistencies and unclarities that will be identified in Chapter 2.

Chapter 2 will describe the '*acquis*' in a structured way, following traditional categories: (1) subject matter (works of authorship, such as computer programs, photographs and databases, related subject matter, such as performances, phonographs, broadcasts, films and again databases); (2) exclusive rights (of reproduction, communication to the public and various related rights); (3) exceptions and limitations (codified haphazardly in vertical directives, and more sweepingly and broadly in the Information Society Directive),⁸ and (4) collective rights management.⁹ Preceding this a special section will critically examine the principle of territoriality that still remains one of the cornerstones of copyright law in the EU.

⁷ See the Call for tender MARKT/2005/08/D, Study on the recasting of the copyright for the knowledge economy, Notice of contract 2005/S131-129165 of 09.07.2005.

⁸ Note that limitations and exceptions are treated much more extensively in the ongoing IViR 'Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society' (Call for tender MARKT/2005/07/D), which will be submitted to the Commission by the end of 2006. For this reason, some of the recommendations made in this report esp. regarding limitations on copyright and related rights are only tentative, subject to the findings of the second study.

⁹ Note that this study does not examine the Enforcement Directive, which applies more generally to rights of intellectual property. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004 [Enforcement Directive].

Replies received from stakeholders to the Staff Working Paper on Copyright Review have revealed a number of particular concerns regarding distinct substantive issues that will be dealt in Chapters 3, 4 and 5. Holders of neighbouring rights in performances, phonograms and broadcasts have expressed concern that the existing term of protection of 50 years puts them and the European creative industries, in particular the music industry, at a disadvantage, as compared to the longer protection provided for in the United States. Chapter 3 will examine these concerns, by (1) describing and comparing the terms in the EU in the light of (a) the existing international framework for the protection of neighbouring rights; (b) with similar regimes outside the EU, including the United States, Japan and other main competitors; and (2) by applying economic analysis, in particular by querying whether the desired term extension is likely to promote the creative industries and Europe.

Another concern that was mentioned in the Staff Working Paper on Copyright Review and flagged by stakeholders are existing disparities at the national level regarding the calculation of the term of protection of works of authorship, particular of musical works. Although the Term Directive has harmonised the terms of copyright and neighbouring rights protection, disparities have remained because Member States treat musical works containing lyrics (“songs”) differently. The Term Directive provides special term calculation rules for joint works, collective works and audiovisual works, and a designation of authorship for audiovisual works, but has not determined how to qualify, and deal with co-written musical works. Chapter 4 will examine the resulting disparities, and query whether there is a need for amendment of the Term Directive.

A third issue that has been lingering among certain institutional users of copyrighted works, particularly broadcasting organisations and media companies, concerns the re-utilisation of works of multiple authorship or ownership. The emergence of the information society has created new markets for old ‘analogue’ content, such as archived newspaper articles, scientific publications and broadcast television programs. Re-utilisation of such ‘analogue’ content often requires licenses from a multitude of authors or rights owners. In some cases right holders are difficult or even impossible to track and identify. Chapter 5 will examine the validity of these concerns, refer to existing models in Member States and elsewhere (in particular, to the current debate in the United States regarding ‘orphan works’), and propose solutions.

Chapter 6 then offers ‘something completely different’. It will examine the validity of the prevailing belief that copyright is losing its moral imperative among consumers, or rather the members of the general public at large. Acceptance by the public of legal norms is a function of many variables, and has been the object of extensive scholarly study. The large-scale availability at low cost of powerful reproduction equipment is undoubtedly one of those factors. By the same token, cheaply available IT is turning passive consumers into active authors and self-publishers, as the amazing success of web logs, and pod casting seems to indicate.

Finally, Chapter 7 will offer conclusions and recommendations, focussing on institutional and legislative solutions for the short term and future. Do the inconsistencies identified in the existing *acquis* require regulatory action? Should the process of harmonisation of copyright and related rights, which has resulted in seven directives, continue in the years to come? Or are other instruments, such as Recommendations, Interpretative Communications or other ‘soft law’ tools, more suitable to deal with the dynamics of the copyright market place? In conclusion, the study will dwell on the long-term future of European copyright. Will territoriality continue to rule, or should we start thinking of a ‘European Copyright Code’?

This study was written and produced by a team of researchers of the Institute for Information Law of the University of Amsterdam (IViR), under the supervision of Prof. P. Bernt Hugenholtz. Berlecon Research (Berlin) provided the economic analysis underlying Chapter 3, while Chapter 6 is based on research conducted by ITAS (Karlsruhe). Research for this study was finalized on October 31, 2006. No account could be taken of publications or case law appearing after that date.

1.1 The harmonisation of copyright and related rights in the EU – from 1991 until 2005

At present seven EC directives in the field of copyright and related rights are in place. The first, on computer programs, was adopted as early as 1991, while the most recent ones, dealing with copyright and related rights and artists' resale rights respectively, date from 2001. Except for the Enforcement Directive, which was adopted in 2004 and deals with intellectual property in general, no new directives in the field of copyright have been adopted or introduced in recent years, which might indicate a policy shift towards a less regulatory approach and more dynamic instruments aimed at the exercise of rights such as the Online Music Recommendation that was issued by the Commission in 2005.¹⁰

Harmonisation of the law of copyright and neighbouring (related) rights in Europe has occurred in two phases, marking different approaches and ambitions of the European legislature.¹¹

The 'first generation' directives have their roots in Green Paper on Copyright and the Challenge of Technology that was published by the Commission in 1988.¹² As stated in the Green Paper, EC intervention in the realm of copyright would be required based on four 'fundamental concerns' of the Community:

- The need 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.
- The need to improve the competitiveness of the economy in copyright goods and services in the Community. To this end a legal framework would need to be established that would guarantee protection of intellectual property at a par with the law in the countries of the Community's main competitors.
- The need to protect intellectual creation and investment produced in the Community against unfair exploitation by users in non-Member States.
- 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'.¹³

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 focussed on (then emerging, now defunct) DAT technology. The Internet, however, was still well below the Commission's radar screen.

In the Green Paper, the Commission identified six areas where 'immediate action' by the EC legislature was supposedly required: (1) piracy (enforcement), (2) audiovisual home copying, (3)

¹⁰ Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services [On line Music Recommendation].

¹¹ 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 presented at Fordham International IP Conference, April 2002, http://europa.eu.int/comm/internal_market/copyright/documents/2002-fordhamspeech-reinbothe_en.htm. [Reinbothe 2002].

¹² European Commission, 'Copyright and the Challenge of Technology', Green Paper, COM (88) 172 final, Brussels, 7 June 1988. [Green Paper on Copyright and the Challenge of Technology].

¹³ Green Paper on Copyright and the Challenge of Technology, par. 1.3.1.–1.3.6.

distribution right, exhaustion and rental right, (4) computer programs, (5) databases, and (6) multilateral and bilateral external relations.

In the Follow-up to the Green Paper that was published by the Commission in 1990, after holding extensive hearings with stakeholders, several additional areas of possible Community action were identified: duration of protection, moral rights, reprography, 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) as well as 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 materialised 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 harmonised framework for the protection of computer programs as 'literary works', including economic rights and limitations, of which the infamous 'decompilation' exception was the subject of intense lobbying and political debate.

In 1992 the Rental Right Directive, that harmonised –and for some Member States introduced– rights of commercial rental and lending. Perhaps more importantly, the Directive established a horizontal harmonised framework for the protection by neighbouring ('related') rights of performers, phonogram producers, broadcasting organisations and film producers – at levels well exceeding the minimum norms of the Rome Convention.

In 1993 two more directives were adopted. 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 could be seen as a response to the deployment of new technologies of transmission of broadcast programs, 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 1989.¹⁴

The year 1993 also saw the adoption of the Term Directive, that harmonised the term of protection of copyright at the relatively high level of 70 years post mortem auctoris, and set the duration of neighbouring rights at 50 years.

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 prioritised in the Follow-up to the Green Paper, was never proposed. Private copying was eventually harmonised, to a limited degree, by the Information Society Directive, but the thorny issue of levies that was

¹⁴ European Commission, 'Television without Frontiers', Green Paper, COM (84) def, Brussels, 14.06.1984 [Green Paper on Television Without Frontiers]. Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, Official Journal L 298/23, 17.10.1989 [Television Without Frontiers Directive].

already mentioned in the Green Paper of 1988, has remained on the Commission's agenda until this day.

Of the other issues mentioned, but not prioritised 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 program was completed by the adoption in 2004 of the Enforcement Directive, that provided for harmonised remedies against piracy and other acts of infringement, in response to the need first identified in the 1988 Green Paper.

Mid-way through the 1990s, however, the Commission's harmonisation agenda had already become much more ambitious. The emergence of the Internet (or 'Information Society'), that promised seamless trans-border services involving a broad spectrum of subject matter protected by copyright and related rights, brought a new urgency to the harmonisation process, that had considerably slowed down after its productive start in the beginning of the decade. Early in 1994, work commenced on a new round of harmonisation 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 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.

Simultaneously, ongoing discussions at WIPO on a 'Protocol' to the Berne Convention initiative accelerated and led to the conclusion of the WIPO 'Internet Treaties' in 1996, the WCT and the WPPT. Both treaties were signed by the Commission representing the European Union, thereby taking on a commitment to implement the new international norms in a harmonised 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. While the Directive harmonises the basic economic rights (rights of reproduction, communication to the public and distribution) in a broad and '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 that was never on the agenda of any Green Paper.¹⁵ The inclusion of limitations in the Information Society Directive is illustrative of the add-on effect, i.e. in the course of the legislative process issues are taken on board or expanded upon – at the insistence of (individual) Member States or European Parliament – in order to attain political agreement on the initially envisaged subject of regulation.

Interestingly, the harmonised norms of copyright and related rights in the seven directives in many cases well exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered. More often than not the norms also exceed average levels of protection in the Member States prior to implementation, as exemplified by the Term Directive that has harmonised the duration of copyright at a level well above the 'normal' term of 50 years p.m.a. This trend of 'upwards' harmonisation is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause individual Member States. Moreover, the interests of certain stakeholders (especially right holders) are usually more successfully voiced at the EC level than those of the public interest at large.

But this process of 'upwards' harmonisation is also a source of major concern. The effectiveness, in economic terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary 'delicate balance' between the

¹⁵ See note 8.

interests of right holders in maximising protection and the interests of users, i.e. the public at large, in having access to products of creativity and knowledge. Moreover, a constant expansion of rights of intellectual property due to ‘upwards’ harmonisation is likely to create new obstacles to the establishment of an Internal Market, as long as exclusive rights remain largely territorial and can be exercised along national borders. This, it is submitted, is not what the EC legislature had in mind when embarking, more than 20 years ago, on its ambitious legislative journey.

1.2 Objectives of harmonisation and legislative competence

As the previous sketch of the *acquis* shows, the harmonisation of copyright and related rights has traditionally been inspired by three principal policy objectives: the proper functioning of the internal market, improvement of the competitiveness of the European economy (in terms of economic development and in relation to its trading partners), and protection against piracy and other misappropriations in third countries. A further ancillary objective which is referred to in policy documents of the Commission and in various directives, is the promotion of culture and cultural activity.

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 as laid down in the EC treaty and demarcated by the principles of attribution, subsidiarity and proportionality.¹⁶

1.2.1 Objectives of harmonisation

Before the onset of harmonisation in the 1990s, the intellectual property laws of the Member States were affected by EC law to a fairly limited extent only, through the EC treaties’ rules on competition and on the free movement of goods and services, rules which are central to the realisation of the common market.¹⁷ The EC treaty makes an exception to the free flow of goods and services where necessary for the protection of ‘industrial and commercial property’, including copyright and related rights.¹⁸ Article 30 EC Treaty says so explicitly for goods, while in *Coditel I*¹⁹ the ECJ affirmed the exception for services. The ECJ elaborated that the Treaty does not affect the mere existence of intellectual property rights under national laws, also considering that article 295 provides that the EC Treaty does not prejudice Member States rules on property ownership. As it is, the exact relevance of article 295 for intellectual property remains unclear, especially considering its historical roots, which is to guarantee the Member States their freedom to opt for public or private ownership of enterprises.²⁰

¹⁶ The authors wish to express their gratitude to dr. Ronald van Ooik (Amsterdam Centre for International Law, University of Amsterdam) for his comments on earlier drafts of this section.

¹⁷ Arts. 28-29 (free movement of goods) and art. 30 (exception to freedom of goods in the interest of protecting intellectual property), arts. 49-55 (free movement of services), and arts. 81-89 EC Treaty (rules on competition).

¹⁸ That copyright and related rights fall under the exception of art. 36 (old) EC Treaty, which speaks of ‘industrial and commercial property’ has been affirmed in *Deutsche Grammophon v Metro SB*, ECJ 8 June 1971, case 78/70, ECR [1971] 487 [*Deutsche Grammophon*] and *Musik-Vertrieb Membran GmbH et al v GEMA*, ECJ 20 January 1981, joined cases 55 and 57/80, ECR [1981] 147 [*Musik Vertrieb Membran*].

¹⁹ *Coditel v Ciné Vog Films*, ECJ 19 March 1980, case 62/79, ECR [1980] 881 [*Coditel I*].

²⁰ See G. Tritton, ‘Articles 30 and 36 and Intellectual Property: Is the Jurisprudence of the ECJ now of an Ideal Standard?’, EIPR 1994, p. 422-428 [Tritton 1994], H. Schack, ‘Europäisches Urheberrecht im Werden’, ZEuP 2000, p. 799-819 [Schack 2000b]. ECJ cases on art. 295 (and its predecessor 222) have so far focused on national rules on (the acquisition of) property interests in land. The competence of Member States to regulate such ownership does not preclude application of the fundamental rules of the Treaty, see i.e. *Salzmann*, ECJ 15 May 2003, case C-300/01, ECR [2003] I-4899 [*Salzmann*]. In intellectual property cases, the ECJ seldom refers to art. 295 (ex 222) directly (e.g.

A string of cases has clarified that the provisions on free movement and competition law can interfere with a Member States intellectual property law to the extent that the national legislation empowers the right holder to exercise his intellectual property rights in a manner that adversely affects the functioning of the internal market. Such national measures which hamper the free movement of goods or services are only allowed²¹ in as far as they are necessary for preserving the ‘specific subject matter’ –the essence– of the intellectual property right at issue.²² By the late 1980s, the Community had initiated legislation to repair various types of impediments to the free movement of goods or services in the internal market that resulted from the fact that the EC Treaty allows for the existence of diverging national rules on copyright and related rights and their territorial application.²³ So far, the focus of the European legislative has been on the harmonisation of substantive law, i.e. the territorial character of copyright and related rights is maintained,²⁴ even though territoriality provides an ex ante demarcation of intellectual property markets along national boundaries. In other areas of intellectual property –trademarks and designs– community wide rights have been introduced (see below). A European property title of course does not preclude the use of exploitation models based on geographic markets, but it is likely that since territoriality is no longer an essential characteristic, such exploitation models must meet a stricter test to comply with (European) competition rules.

To date all directives have been based primarily on article 95 (ex 100A) EC Treaty, which is a legal basis for harmonisation necessary for the improvement of the conditions for the establishment and functioning of the internal market. All directives refer specifically to diverging national rules as detrimental to the functioning of the internal market, stating that ‘differences exist in the legal protection provided by the laws and practices of the Member States’, ‘such differences are sources of barriers to trade and distortions of competition which impede the proper functioning of the internal market’, and ‘existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising’.²⁵ Undisputedly, the removal of barriers to trade and provision of services and/or competition in the internal market constitutes the pre-eminent objective of copyright harmonisation within the EU.

As for the second objective put forward in policy documents, namely stimulating the European economy and increasing its competitiveness, in the actual Directives this translates into

in *Terrapin v Terranova*, ECJ 22 June 2006, case 119/75, ECR [1976] 1039 [*Terrapin*], it only did so in dismissing the argument made by parties that art. 222 prevented application of community law to industrial property).

²¹ 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 J.H. Jans, ‘Proportionality revisited’, *Legal Issues of Economic Integration* 2000 (vol. 27) 3, p. 239–265 [Jans 2000].

²² Art. 30/36 (old) EC Treaty cases on copyright and related rights: *Deutsche Grammophon; Musik-Vertrieb Membran; Coditel I*; *Coditel v Ciné Vog Films*, ECJ 6 October 1982, case 262/81, ECR [1982] 3381 [*Coditel II*]; *Dansk Supermarked v Imerco*, ECJ 22 January 1981, case 58/80, ECR [1981] 181 [*Dansk Supermarked*]; *Warner Brothers*, ECJ 17 May 1988, case 158/86, ECR [1988] 2605 [*Warner Brothers*]; *EMI-Electrola v Patricia*, ECJ 24 January 1989, case 341/87, ECR [1989], 79 [*Patricia*]; *Ministère Public v Tournier*, ECJ 13 July 1989, case 395/87, ECR [1989] 2521 [*Tournier*]; *Foreningen af danske Videogramdistributører v Laserdisken*, ECJ 22 September 1998, case C-61/97, ECR [1998] I-5171 [*Laserdisken*]. The territorial nature of (national) copyright and related rights was recently affirmed in *Lagardère Active Broadcast*, ECJ 14 July 2005, case C-192/04, ECR [2005] I-7199 [*Lagardère*].

²³ Chr.E. Würfel, *Europarechtliche Möglichkeiten einer Gesamtharmonisierung des Urheberrechts*, Karlsruhe: Universitätsverlag Karlsruhe 2005 [Würfel 2005], p. 129 links the Satellite and Cable Directive to *Coditel I*, the Term Directive to *Patricia*, the Rental Right Directive to *Warner Brothers*, and the Resale Right Directive to *Phil Collins v Intrat*, ECJ 20 October 1993, joined cases C-92/92 and C-326/92, ECR [1993] I-5145 [*Phil Collins*].

²⁴ Only the Satellite and Cable Directive contains a deviation, by defining the place of satellite broadcasting as the place of initiation (excluding places of receipt); see below, para. 2.1 on territoriality).

²⁵ Cf. Computer Programs Directive, recitals 4 and 5; Rental Right Directive, recitals 1-3, 6 and 9; Satellite and Cable Directive, recitals 5-14; Term Directive, recital 2; Database Directive, recitals 2-3; Information Society Directive, recitals 3-4 and 6-7; Resale Right Directive, recitals 9-15.

recitals justifying a strengthening or expansion of intellectual property rights. Growth and competitiveness are said to be served not only by a harmonised body of law (by decreasing legal uncertainty), but also by a high level of protection. According to the 1995 Green Paper on Copyright and Related Rights in the Information Society ‘proper’ copyright protection is vital to produce investment in the development of ‘creative and innovative activity’, one of the ‘keys to added value and competitiveness in European industry’. To the Commission ‘[i]t has become clear that industry will invest in creative activity only if it knows it can prevent the results from being improperly appropriated, and can enjoy the fruits of its investment over the period of protection conferred by copyright and related rights.’²⁶ With the exception of the Resale Right directive, all directives contain recitals on the need to improve protection so as to guarantee a return on investment for industry, or provide creators/performers with an adequate income.²⁷

Pursuance of a high level of copyright protection in and of itself, appears to go beyond what is required to realise a true common market. On the other hand, internal market integration is not an aim in itself; it rather serves to achieve such Community goals as ‘a harmonious, balanced and sustainable development of economic activities’ and ‘a high degree of competitiveness and convergence of economic performance’ ex article 2 EC Treaty. On the issue of what constitutes an adequate level of protection, much criticism has been voiced against the EC’s approach, which is thought to lead to overbroad protection rather than stimulating innovation and creation (see para. 1.2.3 below).

The position of European industry in relation to its competitors from third countries (e.g. USA, Japan) was an issue in the Commission’s past policy documents, but features only marginally in the stated objectives in the various directives. In the Database directive, the introduction of the *sui generis* right is put forward as necessary to help the European database industry grow in relation to the US industry (see para. 1.2.3 below).²⁸ The introduction of the *droit de suite* –which is optional under the Berne Convention– is seen to facilitate the position of the EU in ‘exporting’ a mandatory regime to third countries.²⁹ Such an extension, e.g. to the United States and Switzerland, could curb the displacement of sales of works of art from EU Member States which previously did not have a resale right, to third countries that still do not. The inclusion of reciprocity clauses (e.g. in the Term Directive, Database Directive) is another strategy to induce third countries to grant right holders from the EU a protection similar to that which they enjoy in the EU.

The promotion of competitiveness is also an objective of the Community under article 157 EC Treaty. However, article 157 does not provide a legal basis for harmonisation as such: the Community legislature is to contribute to competitiveness through the policies and activities it pursues under other Treaty provisions (such as art. 95).

The third objective that can be discerned in past Commission policy documents, is the prevention of misappropriation of productions of (EU) right holders in third countries. It plays no obvious role in the seven copyright and related rights directives.³⁰ Even in the Enforcement Directive, the focus is on intra-EU piracy.³¹

²⁶ Green Paper on Copyright and Related Rights in the Information Society (paras. 16-18).

²⁷ Computer Programs Directive, recitals 2-3; Rental Right Directive, recitals 4-7; Satellite and Cable Directive, recital 1; Term Directive, recitals 10-11; Database Directive, recitals 10-12; Information Society Directive, recital 4, 9-10.

²⁸ Recitals 11-12 Database Directive.

²⁹ Recital 7 Resale Right Directive.

³⁰ In the Satellite and Cable Directive, a safety clause (art. 1(2) sub d) ensures that satellite broadcasts originating from countries outside the EU which provide a lower level of protection, are subject to the standard of protection of the Directive nonetheless. The aim of this provision is to prevent EU broadcasters from relocating their activity to less protective states, not the prevention of piracy in third countries (which is why the safety clause only applies to broadcasts made by or on behalf of broadcasting organisations established in the EU).

³¹ See the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on measures and procedures to ensure the enforcement of intellectual property rights, COM (2003) 46 final, p. 4.

The fourth policy objective that has found its way from Green papers to a number of directives, concerns the role of copyright and related rights for culture. Purportedly, a high level of protection is a stimulator of intellectual and artistic creativity, which is regarded as ‘the source of Europe’s cultural identity and of each individual state’.³²

Culturally inspired considerations can be found in the Term Directive and the Information Society Directive, the preambles of which emphasise that a high level of harmonised copyright protection serves ‘the maintenance and development of creativity in the interest of authors, performers, producers, consumers, cultural industries, consumers and society as a whole’.³³ According to the Preamble to the Information Society Directive, ‘[a]dequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint’.³⁴ The preamble to the Rental and Lending Right Directive states that adequate protection of copyright works and subject matter of related rights ‘can [...] be considered as being of fundamental importance for the Community’s economic and *cultural* development’.³⁵

It should be noted however, that ‘culture’ is not among the general objectives of the EC which are listed in article 2 EC Treaty. Article 3 EC Treaty –which enumerates instruments by which Community objectives are to be attained– does specify that the EC will contribute to ‘the flowering of cultures of the Member States’ (art. 3(1) sub q). The EC has no legislative competence in the cultural field, see para. 1.2.2.1.

In its legislative endeavours, the EC has to respect international obligations of Member States under existing intellectual property treaties, notably the Berne Convention 1886, Rome Convention 1961, Geneva Convention of 1971, TRIPs and the WIPO treaties on Copyright and on Phonograms and Performances (WCT, WPPT 1996). The EC itself plays an increasingly dominant role in shaping such conventions, through the possibilities that arts. 300 (ex 228) and 133 EC Treaty concerning the common commercial policy offer to enter into agreements with other states.³⁶ Intellectual property treaties that are concluded by the EC itself (jointly with Member States) are part of the *acquis*. Under the terms of accession, new Member States must also become party to such agreements, e.g. to TRIPs, WPPT and WCT.

1.2.2 *Legislative competence*

Any community action must comply with three principles: attribution, subsidiarity and proportionality. It is the latter principle that is most relevant for the area of copyright and related rights, since it is the one likely to most affect the mode and intensity of Community harmonisation.

1.2.2.1 *Legal bases for action and the Attribution principle*

The attribution principle of article 5 EC Treaty requires that the Community act only in so far as the Treaty confers it powers to do so, and only to attain the EC’s objectives. The Court of Justice

³² Green Paper on Copyright and the Challenge of Technology, p. 3-6.

³³ Term Directive, recital 10; Information Society Directive, recital 9.

³⁴ Information Society Directive, recital 12.

³⁵ Rental Right Directive, recital 5 (emphasis added).

³⁶ Controversy over the exact scope of EC’s (exclusive) competence in the area of intellectual property in the international arena remains, also in relation to cultural, audiovisual and educational services (esp. the interpretation of arts. 133(5) and (6) EC Treaty; with equivalent in art. III-217 Draft European Convention). S. Meunier and K. Nicolaidis, ‘Who Speaks for Europe? The Delegation of Trade Authority in the EU’, *Journal of Common Market Studies* 1999 (vol. 37), p. 447-501 [Meunier/Nicolaidis 1999]. With respect to the TRIPs agreement the ECJ ruled that the EC has no exclusive competence (Opinion 1/94 of the Court of 15 November 1994 on the Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty, ECR [1994] I-5267 [WTO opinion 1/94]).

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

Article 253 EC Treaty requires every measure with intended legal effect to expressly refer to its legal basis in the EC Treaty.³⁷ The Court of Justice further demands that the application of the legal basis involved be well founded on objective grounds –particularly as regards the aim and content of the measure– in the statement of reasons.³⁸ Legal literature increasingly questions the substantiation of the need for harmonisation, signalling for instance that little economic analysis is done by the European legislator to back up its assertion that new regulation actually stimulates the internal market.³⁹

Article 95 EC Treaty grants power to harmonise the laws of the Member States to the extent required for the functioning of the internal market; it is the single most important legal basis for community action in the field of copyright and related rights. Article 95 speaks of ‘measures for the approximation of the provisions’ of national laws, but this does not mean that directives or regulations cannot introduce new rights for certain Member States. As it is there is a gliding scale between making existing provisions of national law substantively similar (harmonisation in a narrow sense) and introducing new rights, or extending the term of protection of these. Illustrative are the patent cases in which the ECJ ruled that article 95 is an appropriate basis for the extension of the term of protection for certain patents,⁴⁰ and the introduction of protection for biotechnological inventions (formerly excluded from protection in a number of Member States).⁴¹

As we have seen, disparities in national copyright laws are often cited in the statements of reasons of directives as causing impediments to the common market. The ECJ has however ruled that a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result thereof, are not sufficient to justify the choice of article 95 as a legal basis.⁴² There must therefore be a real and noticeable effect of diverging rules on the internal market. The question then becomes when such is the case (see paragraph below on proportionality).

Further legal bases for action are arts. 151 and 153.⁴³ Article 153 instructs the Community to contribute to protecting economic 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, but more importantly, consumer protection is to be attained by integrating the interests of consumers into the definition and implementation of the other Community policies and activities (art. 153(2) EC Treaty).

As has been noted, safeguarding or stimulating a European culture or the cultures of Member States is not a Community goal as such under article 2 EC Treaty, although article 3 does list as one of the EC’s activities ‘a contribution to [...] the flowering of the cultures of the Member

³⁷ It suffices if the legal basis follows unmistakeably from the statement of reasons accompanying the directive or regulation. See *Commission v Council*, ECJ 26 March 1987, case 45/86 ECR [1987] 1493 [*Generalized Tariff Preferences*].

³⁸ *Generalized Tariff Preferences*. See also *Commission v Council*, ECJ 11 June 1991, case C-300/89, ECR [1991] I-2867 [*Titanium dioxide*].

³⁹ See, inter alia, Hilty 2004; M. Bonofacio, ‘The Information Society and the Harmonisation of Copyright and Related Rights: (Over)Stretching the Legal Basis of Article 95(100a)?’, *Legal Issues of Economic Integration* 1999, 26, p. 1-90 [Bonofacio 1999].

⁴⁰ *Spain v Council*, ECJ 13 July 1995, case C-350/92, ECR [1995] I-1985 [*Supplementary Protection Certificate*].

⁴¹ *Netherlands v Parliament and Council*, ECJ 9 October 2001, case C-377/98, ECR. [2001], I-7079 [*Biotechnology directive*].

⁴² *Generalized Tariff Preferences*, para. 84.

⁴³ We leave the competence to legislate new property titles (based on art. 308 EC Treaty), and competence derived from the doctrine of implied powers, aside.

States'. Article 151 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 ⁴⁴ *artistic and literary creation* [emphasis added], including in the audiovisual sector.⁴⁵ Article 151(5) explicitly states that the Council has no competence to adopt harmonizing measures in the cultural sphere, although it can adopt recommendations.

However, from case law one would think article 151 is in effect interpreted as a thinly disguised basis for harmonisation. When asked to rule on the constitutionality of the rental right for phonograms, the ECJ acknowledged that the interest of stimulating artistic creation (then art. 128 EC Treaty) is one that is served by the introduction of an exclusive rental right.⁴⁶ This is a somewhat mystifying argument, also considering that article 151(4), instructs the EC to take cultural aspects into account in its actions under article 95 or other provisions, in particular in order to respect and promote the diversity of its cultures. Article 151 would therefore seem to curtail rather than strengthen the Community's possibilities of harmonising copyright for the purpose of internal market integration.⁴⁷

Article 151 could also 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 publishers, record companies and other intermediaries. 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.⁴⁸ Article 151 provides additional reason for the European legislator to reflect on the effect of its actions on the actual creators.

A further legal basis is to be found in article 308 EC Treaty. It provides a residual competence: 'If action by the Community should prove necessary to attain, in the course of the operation of the Common 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.'

In absence of a specific legal basis for European intellectual property titles, article 308 has been the basis for the regulations on Community trademarks,⁴⁹ Community plant variety rights,⁵⁰ and Community designs.⁵¹ These laws could not be based on article 95, which is intended to achieve harmonisation of (existing) national laws, because the Community wide rights do not harmonise nor replace similar rights in Member States, but exist side by side.⁵²

Considering the territorial nature of copyright and related rights and the fact that these rights exist ex lege as opposed to requiring registration, it stands to reason that a Community copyright

⁴⁴ The Community legislature may only adopt (non-binding) recommendations and incentive measures, cf. art. 151(5) EC Treaty.

⁴⁵ Art. 151(2) EC Treaty (emphasis added).

⁴⁶ *Metronome Musik v Music Point Holkamp*, ECJ 18 April 1998, case C-200/96, ECR [1998] I-1953 [*Metronome Musik*].

⁴⁷ For a more detailed analysis on the relevance of art. 151 EC Treaty to copyright harmonisation, see Würfel 2005, p. 130-132.

⁴⁸ E.g. Hilty 2004, p. 761-762, 765; Towse 2006.

⁴⁹ Council Regulation (EC) 40/94 of 20 December 1993 on the Community Trade Mark, OJ L 11, 14.01.1994 [Community Trade Mark Regulation].

⁵⁰ Council Regulation (EC) 2100/94 of 27 July 1994 on Community Plant Variety Rights, OJ L 227, 01.09.1994 [Community Plant Variety Regulation].

⁵¹ Council Regulation (EC) 6/2002 of 12 December 2001 on Community designs, OJ L 3/1, 5.01.2002 [Community Designs Regulation].

⁵² The GI Regulation (Council Regulation (EEC) No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, OJ L 208, 24.07.1992), does partly pre-empt national geographical indications, but is based on art. 43 (old) EC Treaty on agricultural policy. Geographical indications are of course quite different in nature from classic intellectual property rights such as copyright, notably, they are not transferable property interests.

(partially) replaces, rather than co-exists with, national titles, because there is no added value to a European title that does not pre-empt national rights. If a Community copyright (and related rights) were deemed necessary to ensure the functioning of the common market, it could however be argued that article 95 does constitute an adequate legal basis.⁵³ The level of protection enjoyed by right holders as a result of a process of ongoing harmonisation of national copyright law, would be largely similar to the protection offered by a European title. In that respect a European title can be said to harmonise rather than supplement existing national copyright and related rights, bringing it within the scope of article 95.

The principal difference between article 95 and 308 –aside from the ‘residual’ nature of the legislative competence of the latter– is that article 308 requires a unanimous vote in the Council, whereas for a regulation on the basis of article 95 a qualified majority suffices.

If the draft European Constitution is made into law, future community intellectual property rights will be based on a *lex specialis* of what is now article 95 (art. III-172), namely the newly drafted article III-176, which allows for the creation of European intellectual property rights to provide uniform intellectual property rights protection throughout the Union in the context of the establishment and functioning of the internal market.⁵⁴ Following the draft, article 176 would replace the present article 308 (and art. 95) as a legal basis for Community wide rights, requiring only a qualified majority vote.⁵⁵

Another matter is whether such a European title –under the current or future legal bases cited– can indeed pre-empt equivalent national rights, considering that legislative competence in this area is shared between Member States and the EC. It is standard case law that Member States are competent to legislate intellectual property in unharmonised areas. However, the ECJ has also repeatedly ruled that article 30 (ex 36) does not imply exclusive competence for the Member States in the field of industrial and intellectual property law. Nor does article 295 (ex 222) give Member States freedom to which would adversely affect the free flow of goods in the internal market.⁵⁶ It could be argued that where the rights introduced by a European title are substantially similar to pre-existing national rights, article 295 (nor its equivalent art. III-425 Draft constitution) is not violated. As to the shared competence, the question to be answered is whether shared competence extends to the field of intellectual property as a whole (i.e. all types of rights combined), or separately to each type of right that may be classified as intellectual property.

Any introduction of a Community copyright and related rights which pre-empts national rights, whether it be based on article 308 or 95 or possibly in the future on article III-176, of course has to conform to the proportionality principle.

Subsidiarity and Proportionality

If there is competence, the principle of subsidiarity then prescribes that the Community acts only to the extent that the objectives of the proposed action (1) cannot be sufficiently achieved by the individual Member States, and (2) can be better achieved by the Community.⁵⁷ Obviously, where the characteristics of *national* territorial copyright and related rights regimes cause real obstacles to

⁵³ Hans Von der Gröben/Jürgen Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union und zur Gründung der Europäischen Gemeinschaft*, Baden-Baden: Nomos-Verl.-Ges. 2003 [Von der Gröben/Schwarze 2003] argue that a regulation based on art. 95 EC Treaty is a suitable instrument where ‘die territoriale Abschottwirkung der nationalen Rechtsordnungen nur durch gemeinschaftsweit einheitlich geltendes Recht überwunden werden kann.’ (p. 1434).

⁵⁴ Text as laid down in the Constitution submitted to the Member States for approval in late 2004 (previously art. III-68).

⁵⁵ The language regime for community titles however, would be decided on a unanimous vote.

⁵⁶ See *inter alia* *Supplementary Protection Certificate* (on Regulation 1768/92, concerning the competence to create a supplementary protection certificate for medicinal products patented under national patent acts).

⁵⁷ See the guidelines in point 5 of the Protocol (30) on the application of the principles of subsidiarity and proportionality (1997), OJ C 340, 10.11.1997, p. 105 [Protocol on subsidiarity and proportionality].

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 (1) Community action must be fit to achieve its aims, (2) it may reach no further than necessary in this respect, and (3) the disadvantages caused shall not be disproportionate to the aims pursued.⁵⁸ These criteria have been elaborated upon in points 6 and 7 of the Protocol on subsidiarity and proportionality. These provide *inter alia* that where it concerns methods of harmonisation, framework directives are to be preferred to detailed measures, and directives to regulations. This preference for directives was already agreed with the European Single Act of 1986,⁵⁹ and also features in the draft Constitution.

Consequently, to date there are only directives but no regulations for copyright and related rights, 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 art. 308 EC Treaty). 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. There need not be a literal transposition of the directive’s provisions in a (new) national statute, as long as the Member States’ law conforms to the substance of the European rules. For this reason, harmonisation through directives leaves more room to respect the particular structure and terminology of national copyright acts, and the concepts underlying them. Regulations on the other hand, have the advantage of providing unified norms with direct effect.⁶⁰

An alternative to regulatory intervention by directive or regulation, is the promulgation of soft law,⁶¹ notably in the shape of Interpretative Communications or Recommendations. The recent On line Music Recommendation may be indicative of a shift from the use of directives as means to help create a functioning internal market with harmonised copyright and related rights, to a policy focus on the exercise of these rights, and action to be undertaken to ensure market access in order to promote European economy, e.g. rights clearance. The rapid technological development and corresponding market developments, combined with the deregulatory approach which is in vogue, invites the use of soft law instruments. The focus on how rights are exercised and how this affects the internal market is a return of sorts to the initial concern of the European Communities with how to reconcile exclusive territorial rights, or rather their exercise, with the demands of a common market. Recommendations have no binding legal effect, and are therefore

⁵⁸ See e.g. *Maizena v BALM*, ECJ 18 November 1987, case 137/85, ECR [1987] 4587 [*Maizena*]; *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and others*, ECJ 13 November 1990, case C-331/88, ECR [1990] I-4023 [*Fedesa*]; *ADM Ölmühlen v BALM*, ECJ 7 December 1993, case C-339/92, ECR [1993] I-6473 [*ADM Ölmühlen*]; *Union Deutsche Lebensmittelwerke*, ECJ 16 December 1999, case C-101/98, ECR [1999] I-8841 [*Union Deutsche Lebensmittelwerke*]; and *Käseerei Champignon Hofmeister*, ECJ 11 July 2002, case C-210/00, ECR [2002] I-6453 [*Käseerei Champignon Hofmeister*]. See also point 3 Protocol on subsidiarity and proportionality.

⁵⁹ Declaration no. 4 on art. 95, annexed to the final act of the Single European Act.

⁶⁰ Depending on the constitutional makeup of the member state involved, regulations may need to be transposed in a national statute.

⁶¹ On soft law generally, see: L.A.J. Senden, *Soft law in European Community law: its relation to legislation*, Nijmegen: Wolf Legal Publishers, 2003 [Senden 2003].

less intrusive instruments than either directives or regulations.⁶² The ECJ has ruled that the courts of Member States must take Recommendations into account where possible.⁶³

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 organisation and working of Member States’ legal systems’ (point 7 Protocol). Another issue that must be taken into account is the financial or administrative burden which comes with regulatory intervention, not only for the Community itself, but also for Member States and their citizens (point 9 Protocol).

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 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 which the competent institution is seeking to pursue.’⁶⁴ In practice the ECJ generally does not seem to look beyond the stated objectives in the recitals to query the actual effect of legislative intervention on notably the internal market. Not surprisingly, it is rare for the ECJ to rule that Community legislation runs afoul of the proportionality principle.⁶⁵

Obviously, the significance of the proportionality test then lies with its dutiful application by the Communities’ institutions prior to and during the legislative process, as well as with the monitoring of national parliaments of the Brussels process. Such *ex ante* diligence is the more important because once Directives are adopted and transposed in the Member States, a revocation of a directive will generally not affect the changes made in national law, unless the individual Member State decides to revise it or attaches a sunset clause to each implementing measure (e.g. as does the UK). Especially since Directives in the field of copyright and related rights have so far extended property interests of private parties, there seems to be little political and indeed legal opportunity to undo disproportionate levels of protection *ex post*.

1.2.3 The stated objectives of harmonisation and the proportionality test

Copyright and related rights harmonisation 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 which is regulated in different ways by the Member States, and then takes action to harmonise *that specific aspect*. The Community’s ‘piecemeal’ approach corresponds with this notion: the Community legislature acts only where the internal market clearly demands so.⁶⁶

The potential downside of course is that the consistency of the legal framework, both at the level of the *acquis* and at the level of national systems of intellectual property rights, becomes a concern. National laws on copyright and related rights have distinct structures, approaches and

⁶² Recommendations may be less intrusive than directives or regulations, they can have other drawbacks. Notably, the legitimacy of an interpretative *recommendation* or communication issued by the Commission appears questionable, as directives are legislated by Parliament and Council. The democratic accountability of such Commission recommendations is another issue.

⁶³ *Grimaldi v. Fonds des Maladies Professionnelles*, ECJ 13 December 1989, Case 322/88 ECR [1989] 4407 [*Grimaldi*].

⁶⁴ *British American Tobacco (Investments) and Imperial Tobacco*, ECJ 10 December 2002, case C-491/01, ECR [2002] I-11453 [*Tobacco advertising II*], see in particular para. 123; *Alliance for Natural Health and others*, ECJ 12 July 2005, joined cases C-154/04 and C-155/04, ECR [2005] I-6451 [*Natural Health*].

⁶⁵ Cases where proportionality test was not met are e.g. *Buitoni v. Fonds d’Orientation et de Regularization des marches Agricoles*, ECJ 20 February 1979, case 122/78 ECR [1979] 677 [*Buitoni*]; and *Bela-Muhle Josef Bergmann v. Growes-Farm*, ECJ 5 July 1977, case 114/76, ECR [1977] 1211 [*Bela-Muhle*]. More recently: *ABNA*, ECJ 6 December 2005, joined cases C-453/03, C-11/04, C-12/04 and C-194/04, ECR [2005] I-10423 [*ABNA*].

⁶⁶ Compare *Würfel* 2005, p. 163 *et seq.*

terminology, notwithstanding the 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.

Although harmonisation of copyright and related rights is the stated aim, the existing directives may in effect also contribute to the preservation and in theory even proliferation of differences between Member States’ laws. One reason is that sometimes only a minimum level of protection is prescribed (e.g. recital 20 Rental Right Directive on art. 8), or that Member States may be allowed to introduce new rights (compare recital 20 Term Directive). Another reason is that rights and limitations may be optional, as are for example the exclusive rights of publishers in critical editions of works in the public domain (art. 5 Term Directive) and all but one of the limitations of article 5 Information Society Directive (see para. 2.4).

But harmonisation efforts so far have also attracted criticism for other reasons. The proportionality principle especially seeks to ensure that a legislative measure is fit for its purpose. Various elements of directives have been criticised for failing precisely that test.⁶⁷ 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. Also, new business models based on limitations (such as information brokerage based on metadata and excerpts) seem difficult to develop considering limitations to copyright and related rights are not enforceable in the digital environment because of article 6(4) Information Society Directive.

A ‘fit for purpose’ criticism has also been voiced against the sui generis database right. It is exemplary of objections raised against the high level of protection that –until recently at least– was persistently promoted by the European institutions, as a means to strengthen the information industry and improve its position in relation to its main competitors. The sui generis database right was meant to stimulate database production in the EU to bring it up to par with investments in other major economies, notably the U.S. However, as the Commission Report on the Database Directive points out, there is no evidence that it has had that effect. This is not surprising, considering that the database industry in the U.S. has developed without sui generis protection.

The Commission has pointed to the restrictive effects of excessive copyright protection on legitimate competition,⁶⁸ and some of the recitals of the Directives speak merely ‘adequate protection’. However, in practice ‘adequate’ seems to be perceived as synonymous to ‘high’, and as is described above (para. 1.1), the harmonisation process does indeed lead to continuous expansion of exclusive rights. As recent as the Information Society Directive, securing a high level of protection was put forward as necessary because it will ‘foster substantial investment in creativity and innovation ...and lead in turn to growth and increased competitiveness of European industry.’⁶⁹ That argument is controversial, because ‘the link between copyright, creativity and economic growth is made to seem a causal one but in fact, there is little evidence on which to base the assertion’.⁷⁰

⁶⁷ Hilty 2004, p. 766; P.B. Hugenholtz, ‘Why the Copyright Directive is Unimportant, and Possibly Invalid’, EIPR 2000, p. 501-502 [Hugenholtz 2000].

⁶⁸ Particularly in respect of ‘functional’ industrial designs, computer programs, and (other) works consisting of objective information, see European Commission, ‘Copyright and the Challenge of Technology’, Green Paper, COM (88) 172 final, Brussels, 7 June 1988 [Green Paper on Copyright and the Challenge of Technology].

⁶⁹ Recital 4 Information Society Directive.

⁷⁰ R. Towse, *Copyright and Creativity: Cultural Economics for the 21st Century*, Erasmus University; Rotterdam 2006 [Towse 2006]; see also T. Morely, ‘Copyright term extension in the EC: Harmonisation or headache’, Copyright World 1992 (Sept/Oct) p. 10-17 [Morely 1992] at p. 14; A. Emilianides, ‘The author revived: harmonisation without justification’,

Another example where the stated objective of a directive does not square with the substance of the rules, is the Resale Right Directive. A harmonised resale right should –according to recital 7– make it easier for the EU to convince third countries to also introduce such a right. However, the need to push the issue on the international agenda in the first place, derives from the introduction of the resale right in the entire EU. Member States which previously did not recognise it (e.g. United Kingdom, the Netherlands, Austria, Ireland)⁷¹ are expected to lose art sales to third countries (USA, Switzerland), which may well cause the competitive position of European art selling industry as a whole to weaken.⁷²

There is reason to assume such imperfections will occur less in future instruments, although the realities of political decision making at the European level will continue to put a strain on the quality (in terms of fit for purposeness and consistency) of regulatory output in the field of copyright and related rights. In recent years the Community has embraced a renewed dedication to the principles of subsidiarity and proportionality, coupled with a programme which aims to increase transparency.⁷³ Relevant initiatives in this regard are the long term SLIM project (Simpler Legislation for the Internal Market), initiated in the late 1990s,⁷⁴ and from subsequent initiatives,⁷⁵ up to last year's Commission 'Communication on a Strategy for the Simplification of the Regulatory Environment'.⁷⁶ Focal points of said initiatives include simplification of legislation, exploration of alternatives to legislation and of the room for self regulation, and repeal of ineffective or superfluous legislation. Impact assessments are an important instrument in this respect.⁷⁷

The principles have also been harnessed in the framework of the proposed European Constitution. The 'upgraded' Protocol on subsidiarity and proportionality places a greater burden on the Commission as regards the justification of its proposals. According to point 4 of the Protocol any legislative proposal should be accompanied by a detailed statement containing some assessment of the proposal's financial impact and of its implications for the rules to be put in place by Member States. The Protocol also envisions a larger role for the Member States' national parliaments. They are empowered to review the Commission's proposals, and submit a reasoned opinion if they find a breach of the subsidiarity principle. The Commission must reconsider any

EIPR 2004 p. 538-541 [Emilianides 2004]; R. Hilty, 'Copyright in the Internal Market', IIC 2004, vol. 35, no. 7, p. 760-775 [Hilty 2004], p. 761.

⁷¹ Of the 15 Member States at the time of introduction of the proposal for a resale right, only 8 had an effective resale right. See European Parliament, Report on the proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art, PE 217.568/fin A4-0030/97 (rapporteur Palacio Vallelersundi, Committee on Legal Affairs and Citizens' Rights), 3.02.1997, p. 24.

⁷² For a critical analysis of the Directives objectives and expected effects, see: Th.M. de Boer, *Hersenschim krijgt juridisch gestalte: de invoering van het volgrecht in Nederland*, AMI 2005, no. 6, p. 181-190 [De Boer 2005]; D. Booton, 'A critical analysis of the European Commission's proposal for a directive harmonising the droit de suite', *Intellectual Property Quarterly* 1998, p. 165-191 [Booton 1998].

⁷³ See inter alia White Paper on a European Communication Policy, COM (2006) 35 final, Brussels 6.02.2006, Commission Action Plan on Communicating Europe, SEC (2005) 985 final Brussels, 20.07.2005, Green Paper on European Transparency Initiative, COM(2006) 194 final, Brussels 3.05.2006.

⁷⁴ 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, 8.05.1996. For an overview of associated documents, see http://europa.eu.int/comm/internal_market/simplification/index_en.htm.

⁷⁵ See in particular: Communication on Better lawmaking, COM(2002) 275 final; Communication on the Action plan 'Simplifying and improving the regulatory environment', COM(2002) 278 final; Communication on Updating and Simplifying the Community acquis [SEC (2003) 165], COM(2003) 71 final.

⁷⁶ Communication of the Commission to the European Parliament, the Council, the European Economic and Social committee and the Committee of the Regions, 'Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment', Brussels, COM(2005) 535 final [Communication on simplification of the regulatory environment].

⁷⁷ Communication on Impact Assessment, COM(2002) 276 final; the European Commission Impact Assessment Guidelines of 15 June 2005, SEC (2005) 97.

proposal if one third of the national parliaments find it in violation of the subsidiarity principle. Furthermore the Protocol gives national parliaments the right to bring actions before the Court of Justice, via their Member State, on grounds of infringement of the principle of subsidiarity by a legislative act.⁷⁸

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.⁷⁹

1.3 Convergence

An important precondition for a prospering knowledge economy is a clear and consistent legal framework. In highly dynamic markets, such as the market for entertainment and information goods and services where copyright plays its primary role, this is not an easy task for the legislature. Technological and economic developments are constantly evolving, and new ways of distributing, storing, marketing and using content are constantly introduced, thereby continuously challenging the legal framework. Over the past decade, European copyright law has been repeatedly adapted to respond to new technological and economic challenges. The Computer Programs Directive and the Database Directive pay tribute to the increasing importance of software and databases, as new forms of creations and investment in the knowledge economy. The Rental Rights Directive has responded to the proliferation of exploitation models based on commercial rental of aural and audiovisual works. The Satellite and Cable Directive acknowledges advances from terrestrial to cable and satellite broadcasting. Finally, the Information Society Directive responds to the explosion in the use of digital technologies and the resulting convergence of transmission means and media.⁸⁰ Its goal was to adapt the existing *acquis* to the economic and technological realities of digitised markets.

The result of these subsequent responses to technological development is a set of norms that can be typified as highly media or technological specific. Different rules apply depending on the technical nature of the subject matter concerned or the technical character of the medium used to exploit it. However, this technology specific approach inevitably leads to inconsistencies and unclarity as formerly distinct classes of subject matter or media types converge. As heterogeneous categories of works, media and platforms converge into a homogeneous multimedia environment, existing regulatory distinctions between specific work categories, media or technologies are increasingly difficult to maintain.

As Annex I to this report describes in some detail, copyright protected 'content' is currently being produced and exploited in an endless variety of media and platforms. The increased independence from the technical boundaries of platforms and infrastructure has inspired the development of new forms of presenting and marketing works and related subject matter. The example of broadcasting is particularly instructive. Some of the existing broadcasting services still

⁷⁸ < http://europa.eu.int/constitution/futurum/constitution/protocol/subsidprop_en.htm >

⁷⁹ 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 July 6, 2006, Kamerstukken II 2005-06, 30 587, nr. F and 6).

⁸⁰ Convergence was described in the Green Paper on Convergence as: 'the ability of different network platforms to carry essentially similar kinds of services, or the coming together of consumers devices such as telephone, television and personal computer.' European Commission, 'The convergence of the telecommunications, media and information technology sectors, and the implications for regulation towards an information society approach', Green Paper, COM (97) 623, Brussels, 3.12.1997 [Green Paper on Convergence].

appear to be similar to the broadcasting provided traditionally, such as near-video-on-demand, home shopping channels or subscription television. With others, particularly interactive services such as video on demand, interactive TV and 'Portal TV' it is difficult to assess whether they still fit the definition of broadcasting in the traditional sense. A related, and highly controversial issue is the qualification of broadcasters using the Internet as a medium for the transmission of their programmes (i.e. webcasting). In the beginning, this concerned mostly Internet radio broadcasting, but with the roll-out of broadband internet web-based radio and television, broadcasting has become a viable alternative to (now traditional) transmission channels, such as satellite and cable – the 'new media' that were confronted, some 13 years ago, in the Satellite and Cable Directive.

The ongoing process of convergence has revealed inconsistencies and disparities between legal rules that apply to formerly distinct products and services, such as software, databases, rental, broadcasting and acts of 'physical' distribution. In a converging environment a regulatory framework that regulates similar services differently (e.g. on the basis of the technical platform over which they are delivered) is likely to prevent market players from fully benefiting from the opportunities that technological progress offers them. This is, for example, the reason why in 2002 the regulation of the electronic communications (telecommunications) sector was subjected to a complete review and overhaul.⁸¹ It has also inspired the pending transformation of the Television without Frontiers Directive on broadcasting into the Audiovisual Media Services Directive.⁸²

For the sector of copyrights and related rights, a similar review was performed already in 1996.⁸³ In the course of the review it was observed that the arrival of new technologies may perhaps not change the nature of established notions and principles in European copyright law, but it does have implications for the way we interpret them.⁸⁴ The Commission concluded that the existing legal framework would need re-adjustment, as a consequence of the use of computer technologies, digitisation and convergence.⁸⁵ In response, the Information Society Directive harmonised a set of basic economic rights 'horizontally', to respond to new technological developments and make copyright and related rights as 'digital proof' as possible.⁸⁶ Unlike the initiatives for the communications sector, however, it did so parallel to the existing legal framework, leaving most of the existing *acquis* intact. In other words, a complete consolidation of the entire legal framework for copyrights and related rights was neither intended nor achieved. By not addressing the *acquis* of the 'old' directives, various problems have remained unsolved, which has led to many of the inconsistencies that will be identified in Chapter 2.

⁸¹ European Commission, Communication 'Towards a new framework for electronic communications infrastructure and associated services, The 1999 Communications Review', Brussels, COM (1999) 539 final, Brussels, 10.11.1999, p. iii.

⁸² Proposal for a Directive of the European Parliament and of the Council amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, COM (2005) 646 final, Brussels, 13.12.2005 [Proposal Audiovisual Media Services Directive].

⁸³ Green Paper on Copyright and Related Rights in the Information Society, and Follow-up to the Green Paper on Copyright and Related Rights in the Information Society.

⁸⁴ Green Paper on Copyright and Related Rights in the Information Society, p. 24.

⁸⁵ Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, p. 8.

⁸⁶ See Information Society Directive, recitals 5, 6 and 7.

2 Consistency & clarity: consolidating the *acquis*?

This chapter offers a systematic inventory of the ‘*acquis communautaire*’ in the field of copyright and related rights in the EU. Apart from two ‘horizontal’ directives (the Term Directive and the Information Society Directive) that concern copyright and related rights across the board, the legislative framework is made up of piecemeal and mostly media or technology specific rules. These directives concentrate on distinct aspects of copyright in terms of subject matter and scope, such as computer software and databases, lending and rental right, etc. The result is an impressive body of specialised rules that lacks, however, a measure of coherency. Homonymous economic rights such as the reproduction right or the right of distribution are defined differently, depending on the subject matter concerned. Media or intermediaries may fall under different, sometimes contradicting rules, depending on the subject matter that they carry. Older definitions might be outdated, arbitrary and incapable of being adapted to new market and technical developments, while other, more recent provisions drafted with digital technologies in mind are inconsistent with or might not apply to subject matter dealt with exclusively in older directives.

Recent technological developments tend to exacerbate these inconsistencies. In the digital environment formerly distinct media, media formats and infrastructures tend to converge, making it increasingly difficult to preserve traditional, media-specific approaches to regulation. These inconsistencies are likely to cause confusion and legal uncertainty amongst owners and users of protected content alike. Surely, they negatively affect the emerging internal market for knowledge goods and services.

The overall objective of the ‘Recasting’ exercise that is performed in this study is to examine the existing European legal framework for copyrights and related rights upon its consistency, coherence, clarity and accuracy.⁸⁷ An important element of this exercise is to examine whether the existing framework is capable of dealing with the transformation of traditional forms of marketing and distributing copyright works and related subject matter to modern online forms of exploitation and distribution. Keeping this in mind, this chapter will describe the ‘*acquis*’ in a structured way, following traditional categories: (1) subject matter; (2) exclusive rights, (3) exceptions and limitations and (4) collective rights management.

Preceding this analysis, a section will be devoted to the principle of territoriality that, despite the European legislature’s long-term goal to create an internal market for content-related goods and services, has remained one of the cornerstones of copyright law in the EU. Each section will conclude with an inventory of the most important inconsistencies and reflect on the possibilities of consolidation and alignment.

2.1 Territoriality

As we have seen in the previous chapter, the process of harmonisation of copyright and related rights in the EU has been primarily informed by the desire to remove disparities between national laws that might pose barriers to the free movement of goods and services.⁸⁸ Indeed, in its elaborate case law on the conflict between rights of intellectual property and the free movement of goods and services that preceded much of this harmonisation, the ECJ has regularly hinted at

⁸⁷ See Staff Working Paper on Copyright Review.

⁸⁸ Several harmonisation directives have their roots in ECJ decisions, see note 23.

the need to approximate the laws of the Member States.⁸⁹ While successfully removing many of these disparities at the national level, the harmonisation process has left largely intact a more serious impediment to the creation of an internal market: the territorial nature of copyrights and related rights. The exclusivity that a copyright or related right confers upon its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This is a core principle of copyright and related rights, which has been enshrined in the Berne Convention and other treaties.⁹⁰ Given the obligation under the EEA for Member States to adhere to the Berne Convention the principle can even be described as ‘quasi-acquis’.⁹¹ In its *Lagardère* ruling⁹² the ECJ has recently confirmed the territorial nature of copyright and related rights.

The process of harmonisation of copyright and related rights that has occurred over the last 15 years has been largely blind to this structural impediment to the free movement of goods and (particularly) services. Basing its harmonisation agenda primarily on disparities between national laws, the EU legislature has been aiming, as it would seem, at the wrong target. Disparities between national laws by themselves hardly amount to impediments of the free movement of goods or services, given that the copyrights and related rights that reflect these disparities are drawn along national borders. Indeed, for as long as the territorial nature of copyright and related rights is left intact, harmonisation can achieve very little.⁹³ By approximating the laws of the Member States harmonisation can perhaps make these laws more consistent and transparent to (foreign) providers of cross-border goods or services, and thereby –by enhancing legal certainty– promote the internal market indirectly, but removing the disparities does not do away with the territorial effect that constitutes a much more serious obstacle to the establishment of a single market.⁹⁴

Admittedly, the territorial nature of copyright and related rights also has certain positive effects on culture and the economy in the EU. In the first place, the continued existence of national copyrights and related rights may be beneficial to cultural development and ‘cultural diversity’ in the individual Member States. Marketing cultural goods in foreign countries often necessitates territorial licensing, for instance when the good needs to be customised to cater for local audiences. This may be the case, for example, for the publication of foreign books, or the cinema release and subsequent broadcasting of foreign films. More importantly, most (but not all) collective rights management societies currently derive their existence from rights granted or entrusted to them on a national (territorial) basis. Proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. By protecting and promoting local authors and performers, collecting societies play an important role in fostering

⁸⁹ See for instance the ECJ case *Patricia*.

⁹⁰ Green Paper on Television without Frontiers, p. 301.

⁹¹ J. Gaster, ‘Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts’, ZUM 2006, no.1, p. 8-14, p. 9 [Gaster 2006].

⁹² *Lagardère*, para. 46: ‘At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.’

⁹³ See ‘The Need for a European Trade Mark System. Competence of the European Community to Create One’, Commission Working Paper, III/D/1294/79-EN, Brussels, October 1979, p. 4, available at http://aei.pitt.edu/5618/01/002702_1.pdf.

⁹⁴ One might even go a step further and argue that the process of harmonisation, which has led almost inevitably to approximation at the highest level of protection found in the EU, has had a detrimental effect on the internal market by creating more and further-reaching rights that are exercised at the national level, and therefore serve as obstacles to the free movement of goods and services.

‘cultural diversity’ in the EU. Removing the territorial aspect of performance and communication rights would not only affect these cultural subsidies, but also – more seriously – undermine the societies’ very existence, except for a handful of societies large enough to compete at the European level. Indeed, under the influence of the Commission Online Music Recommendation that will be discussed elsewhere in this chapter (para. 2.5), a ‘struggle for survival’ among collecting societies is already apparent.

In the second place, and somewhat related, the territorial nature of copyright and related rights facilitates price discrimination, which may promote economic efficiency. Territoriality makes it easier for right holders to define, and split up, markets along national borders, and set different prices and conditions for identical products or services in different Member States. However, notwithstanding the possible efficiency increases gained by such price discrimination, it goes without saying that such uses of intellectual property are fundamentally at odds with the goal of achieving an internal market. As the ECJ has repeatedly stated, it is not within the ‘specific subject matter’ of rights of intellectual property to artificially partition markets.

Another caveat is in order here. Although the trans-border transmission of copyright protected content may affect rights in multiple Member States, in practice these rights are often held in one hand. Absent transfers or licenses, authors will usually own the rights in their works in all territories of the European Union. The problems of territoriality become acute only in cases where rights in a single work, performance or other subject matter are distributed over a variety of right holders in different Member States. This will typically be the result of rights transfers to publishers, producers, distributors, collecting societies or other intermediaries with territorially limited mandates. Distributed rights may also result from disparities in national laws on authorship, ownership or copyright contract law. Arguably, promoting rules that favour allocation of rights with the original creators, either at the national level or by way of harmonisation, might resolve some of the rights clearance problems associated with territoriality.⁹⁵

2.1.1 *Exhaustion*

Due to the rule of national treatment found *inter alia* in article 5(2) of the Berne Convention, works or other subject matter protected by the laws of the Member States are protected by a ‘bundle’ of 25 parallel (sets of) exclusive rights, the existence and scope of which is determined by the individual laws of the Member States. As a consequence, rights in several Member States will be concurrently affected by the cross-border trade in content-related goods and services. Whereas for the intra-Community distribution of goods, the resulting impediment to the internal market has been mitigated by the rule of intra-Community exhaustion of rights, which was first developed by the ECJ and much later codified (*inter alia*) in article 4(2) of the Information Society Directive, the provision of content-related services still remains vulnerable to the concurrent exercise of rights of public performance, communication to the public, cable retransmission or making available in all the Member States where the services are offered to the public.

In its *Coditel I* (or *Le Boucher*) decision, the ECJ refused to recognise a rule of Community exhaustion in respect of acts of secondary cable transmission. The Court of Justice opined:

‘15 Whilst article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the

⁹⁵ See discussion on clearance issues regarding works of multimedia ownership, elsewhere in this study, Ch. 5, esp. para. 5.2.3. See also Guibault/Hugenholtz 2002 (arguing that harmonisation of copyright contract law is premature).

protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

16 The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organised in the member states largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.

17 The exclusive assignee of the performing right in a film for the whole of a member state may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another member state, without thereby infringing community law.⁹⁶

In other words, the exercise of the performance right by a film producer was not exhausted by the authorised primary broadcast in a Member State. The right holder in the neighbouring Member State could legitimately oppose the unauthorised retransmission of the film via cable networks without unduly restricting trade between Member States. Note however that in arriving at this conclusion the Court expressly considered that the partitioning of markets along national borderlines in this specific case was legitimate because television broadcasting in the Member States was (then) traditionally organised on the basis of national monopolies.

To infer from the Coditel decision a general rule of non-exhaustion of performance or communication rights would therefore be unwarranted. Nevertheless, the European legislature has eventually codified such a general rule in respect of the rights of communication and making available to the public in article 3(3) of the Information Society Directive. Consequently, content-related services that are offered across the European Union require licenses from all right holders covering all the territories concerned. If a service is offered to all consumers residing in the European Union, as will be the case for many services offered over the Internet, rights for all 25 Member States will have to be cleared. This will be particularly problematic if the rights in the Member States concerned are in different hands. This may be the case, for instance, for rights in musical works that are exercised by national collecting societies, or for rights in cinematographic works that are often owned by locally operating distributors.

2.1.2 Home country rule

For providers of content-related services across the European Union the persistent fragmentation of rights along the national borders of Member States obviously presents a competitive disadvantage, particularly when compared to the United States, where copyright is regulated at the federal level and the constitutional rule of pre-emption does not allow copyrights or similar rights to exist at the level of the individual states.⁹⁶ Maintaining the territorial nature of

⁹⁶ One would find it hard to imagine that for a service that is offered over the internet in the United States, the relevant rights in some 50 states would have to be cleared. Interestingly, the formation of federal states has in the past led to a transfer of legislative competence for intellectual property from the local to the state level (e.g. in the U.S., Belgium, Germany, Switzerland).

copyright and related right in the EU thus implies high transaction costs, both for right holders and users.⁹⁷

The harmonisation of copyright and related rights in the EU has done relatively little to solve or alleviate this problem.⁹⁸ Apart from the codification of the rule of Community exhaustion, which permits the further circulation of copyrighted goods within the Community upon their introduction on the market in the EU with the local right holder's consent, the only structural legislative solution to the problem of market fragmentation by territorial rights can be found in the Satellite and Cable Directive of 1993. According to article 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, i.e. where the 'injection' ('start of the uninterrupted chain') of the program-carrying signal can be localised. Thus the Directive has departed from the so-called 'Bogsch theory', which held that a satellite broadcast requires licenses from all right holders in the countries of reception (i.e. within the 'footprint' of the satellite). Since the transposition of the Directive, only a license in the country of origin (home country) of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is created, and market fragmentation along national borders is avoided, by avoiding the cumulative application of several national laws to a single act of satellite broadcasting (see Recital 14).

But the ideal of a pan-European television market has not materialised. As the European Commission readily admits in its review of the Directive,⁹⁹ the market fragmentation that existed prior to the Directive's adoption has continued until this day. Market fragmentation along territorial borders persists, mainly through a combination of encryption technology and territorial licensing. Note that the Directive does not actually prohibit territorial licensing. Thus interested parties have remained free to persist in these age-old practices, and will continue to do so as long as broadcasting markets remain largely local, and the pan-European audiovisual space an utopia.¹⁰⁰ In retrospect, it must be admitted that the Satellite and Cable Directive's 'injection right' has largely remained a solution in search of a problem.

Paradoxically, in those markets where the problem of territoriality has now become acute, no similar legislative solution has been achieved or is being envisaged. As stated before, the deployment of new business models based on the pan-European (or global) reach of the Internet, is currently being hampered by the exercise of copyrights and related rights along the territorial boundaries of the Member States. But unlike in the realm of satellite broadcasting, content providers offering trans-border online services across the EU will have to clear the rights from all right holders concerned for all the Member States of reception.¹⁰¹

⁹⁷ K. Peifer, 'Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen', ZUM 2006, no. 1, p. 4 [Peifer 2006].

⁹⁸ See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *The Management of Copyright and Related Rights in the Internal Market*, Brussels, 16.04.2004, COM(2004) 261 final, p. 7 *et seq.* [Communication on the Management of Copyright and Related Rights in the Internal Market].

⁹⁹ Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM (2002) 430 final, Brussels, 26.07.2002 [Report on the Satellite and Cable Directive].

¹⁰⁰ P.B. Hugenoltz, 'Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?' in: *Die Zukunft der Fernsehrichtlinie / The Future of the "Television without Frontiers" Directive*, Proceedings of the conference organised by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29, Baden-Baden: Nomos Verlag 2005, p. 65-73 [Hugenoltz 2005].

¹⁰¹ Interestingly, the ECJ's decision in *Coditel I* to have a contractual provision for a territorially divided right of communication to the public prevail over the freedom of services enshrined in the Treaty, was justified, *inter alia*, by the fact that television broadcasting in the EU was largely organised on the basis of legal broadcasting monopolies. See *Coditel I*, para. 15 *et seq.* Clearly, no such justification can be found for a territorial division of 'online' rights.

Providers of services comprising musical works may find some comfort in the recent Online Music Recommendation. The (non-binding) Recommendation seeks to facilitate the grant of Community-wide licenses for online uses of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and grant them to a single collective rights manager operating at Community level. The Recommendation, however, does not address the more fundamental problem of territorially divided rights. Moreover, its scope is limited to musical works, phonograms and performances – subject matter that is traditionally exploited through collecting societies. The Recommendation does not concern existing contractual arrangements between, for instance, film producers and distributors or broadcasters, or writers and publishers.

2.1.3 Competition law

Even less structural, but sometimes effective nonetheless, are the remedies found in EC competition law (arts. 81 and 82 EC Treaty) against the exercise of intellectual property rights along national borders that result in the unjustified partitioning of the internal market. The ECJ has produced extensive case law on the issue, applying both articles 81 (anti-trust) and 82 (abuse of dominant position). With regard to the former article, the Court has held (in *Coditel II*) that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market.¹⁰²

In *Tiércé Ladbroke* the CFI ruled that an agreement by which two or more undertakings commit themselves to refusing third parties a license to exploit televised pictures and sound commentaries of horse races within one Member State ‘may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.’¹⁰³ The decisions delivered by the European Commission in the late 1980s and early 1990s in which it underlined that certain exclusive, territorially defined licences in the audiovisual sector can violate article 81 EC Treaty, fit in here as well. Such agreements will be exempted only where appropriate access rights are afforded to third parties.¹⁰⁴

The *GVL* case illustrates how article 82 EC Treaty may also restrict the territorial exercise of copyright. According to the ECJ, ‘a refusal by a collecting society having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of Article [82] of the Treaty.’¹⁰⁵ Issues of territorial exclusivity are also at the heart of several more recent competition cases concerning licensing practices of collecting societies.¹⁰⁶

¹⁰² *Coditel II*, para. 17 *et seq.*

¹⁰³ *Tiércé Ladbroke SA v Commission*, CFI 12 June 1997, case T-504/93 ECR [1997] II-923, para. 157 *et seq.* [*Tiércé Ladbroke*].

¹⁰⁴ See Commission Decision 89/467/EEC of 12 July 1989, UIP, OJ L 226, 3.08. 1989, p. 25; Commission Decision 89/536/EEC of 15 September 1989, Film purchases by German television stations, OJ L 284, 3.10.1989, p. 36; Commission Decision 91/130/EEC of 19 February 1991, Screensport/Members of the EBU, OJ L, 63 9.03. 1991, p. 32; Commission Decision 93/403/EEC of 11 June 1993, EBU/Eurovision System, OJ L 179, 22.07. 1993, p. 23. For a more recent case see Commission Decision 2003/778/EC of 23 July 2003, UEFA Champions League, OJ L 291, 8.11 2003, p. 25.

¹⁰⁵ *GVL v Commission*, ECJ 2 March 1983, case 7/82, ECR [1983] 483, para. 56 [*GVL*].

¹⁰⁶ Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 [*IFPI Simulcasting*]). A case currently pending before the Commission concerns the so-called Santiago Agreement: Notice published pursuant to Article

Interestingly, in the field of technology transfer the European Commission has provided for normative guidance by issuing so-called ‘block exemptions’, which prohibit in technology licenses between competitors (inter alia) the exclusive territorial allocation of markets, subject to certain well-defined exceptions.¹⁰⁷

In sum, it appears that territoriality, as an essential characteristic of copyright and related rights, is both a natural basis for the partitioning of the common market, and a major hindrance for an internal market in content-related services to have its full effect. As a consequence, as long as territorially defined national copyrights and related rights persist, no complete internal market will be possible, not even if total and perfect harmonisation of national laws were to be achieved.¹⁰⁸

2.1.4 Challenges and inconsistencies in the *acquis*

Whether or not the territorial nature of copyright and related rights should be maintained in the future, therefore, is not merely a purely economic issue, and will depend on an assessment of a variety of factors, including considerations of cultural policy. What is certain, nonetheless, is that the existing Directives deal with the problem of territoriality in an inconsistent manner. Whereas for the right of distribution a rule of Community-wide exhaustion has been codified, and the exclusive right of satellite broadcasting has been effectively reshaped into a Community-wide ‘injection right’, the other harmonised economic rights have remained essentially territorial. This is true for the ‘core’ economic rights that were harmonised in the Information Society Directive: right of reproduction, right of communication to the public, right of making available to the public and right of distribution.¹⁰⁹ It is equally true for the rights granted under the Database Directive to the makers of databases: rights of extraction and of reutilisation, as well as for the other economic rights of the *acquis*, such as rental and lending.

In view of the principal aim of this study, the question arises whether these diverging approaches towards territoriality can be maintained in the future, or whether they should be somehow aligned. This question has become particularly pressing in the light of the process of convergence that has been discussed in par. 1.3. The ongoing process of digitisation of media and platforms threatens to make legal distinctions based on the technical characteristics of the various forms of delivery, obsolete. For example, the over-the-counter sale of music records, which is subject to the exhaustion rule, is rapidly being substituted by online ‘download’ services (such as iTunes) that allow consumers to make (legal) copies at home, which however are not subject to exhaustion.¹¹⁰ Consequently, legally downloaded copies of musical works (e.g. recorded on a CD) may not normally be further circulated, except where user licenses so permit, whereas CD’s

27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (*Santiago Agreement* — COMP/C2/38126), OJ C 200/11.

¹⁰⁷ Commission Regulation (EC) No 772/2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements of 27 April 2004, OJ L 123/11, 27.4.2004 [Technology transfer agreements Regulation].

¹⁰⁸ See J. Bornkamm, ‘Time for a European Copyright Code’, conference speech at Management and Legitimate Use of Intellectual Property Conference of 10 July 2000, p. 20, available online at: http://europa.eu.int/comm/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf [Bornkamm 2000].

¹⁰⁹ Note that the right of adaptation has not been harmonised, and that an exhaustion rule in this respect is difficult to imagine in view of the moral rights undertones present in this right.

¹¹⁰ Recital 33 of the Database Directive and Recital 29 of the Information Society Directive clarify that exhaustion is ruled out even when copies are made at the user end by authorised users. See Walter in: M.M. Walter (ed.), *Europäisches Urheberrecht: Kommentar*, Vienna: Springer 2001, p. 1147-1149 [Walter 2001]; T. Jaeger, ‘Der Erschöpfungsgrundsatz im neuen Urheberrecht’, in R.M. Hilty & A. Peukert (ed.), *Interessenausgleich im Urheberrecht*, Baden-Baden: Nomos 2004, p. 53 *et seq.* [Jaeger 2004].

purchased over-the-counter may be resold pursuant to the exhaustion rule. This disparity is difficult to explain to consumers, and hard to justify from an economic perspective.¹¹¹ It has therefore attracted criticism in literature.¹¹²

The ‘media-specific’ rules on satellite broadcasting and cable retransmission in the Satellite and Cable Directive are especially vulnerable to convergence. Convergence is occurring here at all levels: analogue television services are ‘going digital’; radio and television programs are being ‘simulcast’ over the internet; cable operators are reinventing themselves as providers of broadband video services, transmitting television signals using the Internet Protocol. What will remain of the Satellite and Cable Directive if satellite and cable services can no longer be distinguished from Internet-based services to which ‘normal’ copyright rules, as laid down in the Information Society Directive, apply?¹¹³

The special rules of the Satellite and Cable Directive are indeed quite different from the ‘horizontal’ provisions of the Information Society Directive of 2001 that apply to all media, digital or analogue, across the board. Whereas the Satellite and Cable Directive mandates a Community-wide ‘injection right’, the Information Society Directive requires Member States to provide for a general right of communication to the public, including a right to make content available online, that is exercised at the national level and not subject to exhaustion. Whereas rights for satellite broadcasting have to be cleared only in the country where the ‘interrupted chain’ begins, rights for webcasting, if considered as a species of communication to the public, would need to be cleared for every territory where a work is made available.¹¹⁴

How to reconcile the Satellite and Cable Directive’s country of origin approach with the more traditional territorial solutions offered by the Information Society Directive, in a world where wired and wireless broadband media are rapidly converging? In the Green Paper that preceded the Information Society Directive,¹¹⁵ the European Commission had been playing with the idea of applying the ‘injection right’ (or ‘country of origin’) approach to the Internet. But the Commission’s suggestion to this effect was immediately and unequivocally rejected by all right holders consulted. Right holders feared they would lose control of copyrighted content once it would be offered online, under a license, somewhere within the European Union. More importantly, right holders rejected the application of the country of origin rule to the Internet out of fear that Member States offering lower levels of copyright protection or enforcement might become ‘copyright havens’ for service providers wishing to offer pan-European services at the expense of right holders. In a worst case scenario applying the country of origin rule to the Internet would result in a ‘race to the bottom’ between Member States seeking to attract service providers by offering the most lenient level of copyright protection.¹¹⁶

Indeed, the strength of any regime made subject to a country of origin rule is determined by its ‘weakest link’, i.e. the level of protection and enforcement offered in the least protective Member State. As was pointed out in the Green Paper,¹¹⁷ a high level of harmonisation of the rights concerned is a *sine qua non* for any further application of the country of origin rule in the realm of copyright. In view of the recent and forthcoming expansion of the European Union, the prospect of any such further application has, however, become unlikely. The fate of the recently

¹¹¹ Absent a second hand market for downloaded tracks, one would expect a considerably lower price than the current average of € 0,99 per downloaded track, which is roughly equal to the average retail price of a ‘mid-priced’ CD containing 15 tracks.

¹¹² See Walter 2001, Jaeger 2004.

¹¹³ Report on the Satellite and Cable Directive, p. 13-15.

¹¹⁴ Note that the legal status of webcasting is still unclear; see par. 2.3.3.

¹¹⁵ Green Paper on Copyright and Related Rights in the Information Society, p. 41 *et seq.*

¹¹⁶ See generally, N. Fichtner, ‘The Rise and Fall of the Country of Origin Principle’, *Essays in Transnational Economic Law*, No. 54, April 2006, p. 21 *et seq.* [Fichtner 2006].

¹¹⁷ Green Paper on Copyright and Related Rights in the Information Society, p. 41 *et seq.*

adopted Services Directive¹¹⁸ illustrates that in the current political climate expanding the scope of the country of origin rule is not a realistic option.

Moreover, several other legal and technical arguments militate against applying an ‘injection right’ in the digital networked environment. Whereas with satellite broadcasting, the locus of the ‘start of the uninterrupted chain’ that designates the Member States where the injection right is to be cleared can relatively easily be assessed, determining the ‘place of making available’ of a network-based service is by no means a straightforward task, and would probably require a set of complex rules of attachment. Another problem is that transmission over digital networks involves not only acts of ‘immaterial’ communication, but also of ‘material’ reproduction. This concerns not only the initial act of uploading a work to a server, but also various subsequent acts of temporary or transient copying. Presumably, the mandatory transient copying exception of article 5(1) of the Information Society Directive would preclude downstream copyright claims by local holders of reproduction rights, but the language of article 5(1), which is phrased as an exception or limitation, is not entirely clear in this respect. Preferably, the definition of a right of ‘digital injection’ should clarify *ex ante* that acts of (technical) copying that are incidental to the digital transmission of works, are no relevant acts of reproduction. Ideally, article 5(1) should be a ‘carve-out’ of the reproduction right, not an exception or limitation applied locally *ex post*.¹¹⁹

Yet another problem is that exceptions and limitations that apply locally to works made available online may differ significantly from Member State to Member State,¹²⁰ making the prospect of a ‘level playing field’ for content-related services unlikely. Note that article 5 of the Information Society has failed to provide for any meaningful harmonisation in this respect.¹²¹

A final argument against applying the satellite broadcasting model to the Internet can be derived from the Commission’s critical review of the Satellite and Cable Directive. If in the realm of satellite broadcasting a combination of encryption technology and territorial licensing is capable of emulating national borderlines and partitioning markets, the same will be true *a fortiori* for content delivered over the Internet.¹²² Undoubtedly, introducing a digital ‘injection right’ by itself will not be sufficient to create a single market. As the Commission rightly suggests in its review of the Directive and in its Communication on Rights Management, more would be needed to avoid this contractual or technological partitioning of markets. Clearly, there is a role to play here for EC competition law. For rights managed collectively, this problem has been addressed in the discussions leading up to the Online Music Recommendation. While not prohibiting territorial licensing, the Recommendation seeks to promote Community-wide licensing by requiring collective rights management organisations to permit right holders to withdraw their rights in order to entrust them to rights managers operating at the Community level.

2.1.5 Conclusions

The process of harmonisation that has resulted in seven directives in the field of copyright and neighbouring rights, has smoothed out some disparities between the national laws of the Member

¹¹⁸ Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, 10003/06, Brussels 17.07.2006 [Common Position Services Directive].

¹¹⁹ See para. 2.4 below. Drawing an analogy with the ECJ’s reasoning in *Dior/Evora*, one could argue that the ancillary right of temporary reproduction right may not undercut the right of communication to the public; *Dior SA v Evora BV*, ECJ 4 November 1997, case C-337/95 [1997] ECR I-1603.

¹²⁰ Th. Dreier, ‘The Cable and Satellite Analogy’, in P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*, Den Haag: Kluwer Law International 1996, p. 63 [Dreier 1996].

¹²¹ See para. 2.4 below.

¹²² See Communication on the Management of Copyright and Related Rights in the Internal Market, p. 7 *et seq.*

States, but largely ignored the single-most important obstacle to the creation of an internal market in products of creativity: the territorial nature of the economic rights. As a consequence, even in 2006 providers of content-related services aimed at European consumers need to clear rights covering some 25 Member States. This clearly puts service providers at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States.

While EC (case) law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, policies in respect of online services, as reflected mainly in the Information Society Directive, have been retrograde by leaving the territorial nature of rights of communication basically intact.

Since services offered online are pan-European (and, indeed, global) almost by definition, this disparity is counterintuitive and economically unjustified. While the Commission's most recent initiative, the Online Music Recommendation, seeks to redress the excesses of territoriality in the realm of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights in the EU.

Undoubtedly, this reluctance can be explained at least in part by the failure of the Satellite and Cable Directive. The Directive's 'country of origin' rule for satellite broadcasting was a brave and forward-looking, but in the end unsuccessful attempt to solve the problems of territoriality for the right of communication to the public by satellite. In hindsight, absent a clear market demand for pan-European satellite television services, the Directive's solution was wholly premature. Right holders simply circumvented or ignored its ground rules by emulating territoriality through contractual and technical means.

The unsuccessful satellite experiment teaches future and similarly ambitious EC legislatures important lessons. A single market for creative goods and services cannot be established merely by removing territoriality from the statute books. Some 'flanking measures', such as certain restrictions to freedom of contract, are in order here too. In that respect, the Online Music Recommendation does offer an important precedent.

For collecting societies, the prospect of abolishing the territorial nature of rights of communication is unattractive, to say the least. Territorial rights are the 'bread and butter' of most existing collective management societies. This might call for a comfort solution, to avoid implosion of, especially, the smaller societies that would suffer the most from abolishing territoriality. One possibility, which would comply with the Commission's aim of creating a Community-wide market for online rights, would be to create a distinction between traditional rights of public performance and broadcasting that might remain territorial, taking into account the necessity for societies to maintain a 'local presence' in order to effectively manage and monitor performance rights (a need that has been validated by the ECJ¹²³), and rights of making available online that need not be managed locally and would become Community-wide.

In the long run, the EC can certainly not ignore the problems of territoriality that obstructs the economy of content-related services in the EU. A truly structural and consistent solution, which would immediately solve the disparate treatment of goods and services in the realm of copyright, would be the introduction of a Community Copyright along the lines of the Community Trademark and Design Regulations that have been adopted in the past. This long-term solution will be further explored in Chapter 7 of this study.

¹²³ see the *Tournier* case.

2.2 Protected subject matter

The harmonisation efforts of the EC so far have focused on (the scope of) exclusive economic rights and not so much on the subject matter these pertain to, nor on issues of authorship, ownership or moral rights for that matter. One reason is that the harmonisation of economic rights is a more pressing matter, viewed from the perspective of the internal market. Politically, Member States would also find it more difficult to agree on precise common standards for creative subject matter, authorship and ownership, given the different approaches between copyright and *droit d'auteur* systems, and the close links between subject matter, moral rights of authors and performers, and (initial) ownership.

Another reason why the *acquis* contains relatively few rules on subject matter is that international copyright and related rights treaties already contain quite extensive definitions of what type of productions are protected and, especially for related rights, who the beneficiaries are. Since these treaties are 'quasi-acquis', the European legislator can easily refer to these norms. For subject matter of which eligibility for copyright protection under international norms was deemed controversial in the past (notably software and databases), harmonisation at EC level has indeed taken place.

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

2.2.1 *The international context*

For copyright proper, the Berne Convention is of central importance for the delineation of copyrighted subject matter. The BC departs from a broad notion of what constitutes a work of authorship, i.e. 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression' (art. 2(1) BC).¹²⁴ The Berne Convention repeatedly speaks of protection offered to 'original' works,¹²⁵ but contains no further definition of the requirement of originality, contrary to a number of European directives (see below).

The broad definition in the BC is accompanied by a non-exhaustive list of examples, to which new types of works (notably, photography and film works) were added in subsequent revisions. When revision of the Berne Convention no longer seemed a viable option, the international protection of more recent information products, notably computer software and databases, was actively and successfully pursued by the EC through the TRIPs Agreement and the WCT.¹²⁶ Only

¹²⁴ Article 2(1) Berne Convention: '[...] such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works [...]; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works [...]; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science'. Article 2(3) Berne Convention: 'Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works [...]' Article 2(5) Berne Convention: 'Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such [...]'

¹²⁵ In art. 2(3) on adaptations, in art. 14bis on film.

¹²⁶ Article 10 TRIPs: (1) 'Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). (2). Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall

for these two categories of works of authorship, as well as for photographs, does the *acquis* currently contain general purpose definitions.

In the area of related rights, the Rome Convention and the WPPT constitute the primary international sources. These treaties contain broad definitions of ‘performer’¹²⁷, but performers who have agreed to contribute to a visual or audio-visual fixation are not entitled to performer’s rights (art. 17 Rome Convention). This restriction is not present in EC law. The European legislator has not elaborated on the notion of performer or performance, but counts on the harmonizing effect that the Rome Convention and the WPPT have on Member States laws. The same goes for phonograms and phonogram producers¹²⁸, as well as for broadcasts.¹²⁹ Broadcasting organisations are not defined in any international instrument. This may change if the endeavours to adopt a Broadcasting Treaty under the auspices of WIPO are successful.¹³⁰

2.2.2 *The acquis communautaire*

The subject matter covered by the seven directives pertain to:

Copyrighted subject matter, i.e.

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

Related rights subject matter, i.e.

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

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

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

¹²⁷ Article 2(a) WPPT: ‘performers’ are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore. [underline marks difference with definition of] Article 3(a) Rome Convention: ‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

¹²⁸ Producer of a phonogram (art. 2d WPPT) means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds (other than in the form of a fixation incorporated in a cinematographic or other audiovisual work, which is not considered a phonogram under art. 2b WPPT).

¹²⁹ Art 3(f) Rome Convention, ‘broadcasting’ means the transmission by wireless means for public reception of sounds or of images and sounds.

¹³⁰ The latest draft (of 31 July 2006, doc WIPO SCCR/15/2) defines Broadcasting organisation as the ‘legal entity that takes the initiative and has the responsibility for the transmission to the public of sounds or of images or of images and sounds or of the representations thereof, and the assembly and scheduling of the content of the transmission’ (art. 2(a). ‘Broadcast’ is not defined separately, but described as ‘the program-carrying signal constituting the transmission’ by the broadcasting organisation.

2.2.2.1 Copyrighted subject matter

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

None of the directives contain a definition of the overarching notion of a work of authorship. They refer to subject matter protected by copyright as 'literary or artistic work within the meaning of Article 2 of the Berne Convention'¹³¹, 'copyright works'¹³² or 'works of authorship' or simply 'work'¹³³ without further specification.

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

A subcategory of works of authorship that features in article 2 BC, and in the Term directive, are *photographs*. Recital 17 of the Term directive qualifies as original within the meaning of the Berne Convention the photograph which is the 'author's own intellectual creation reflecting his personality'. Photographs meeting this criterion are to be treated as works of authorship in general, and consequently must also enjoy the corresponding term of protection.¹³⁴ The definition seeks to distinguish photographs as works of authorship from 'simple' or non-original photographs, such as are protected for a shorter period under the laws of for instance Denmark, Germany, Hungary and Finland. The protection of simple photographs is not regulated at the European (or international) level.

Another class of works governed by specific provisions are *works of graphic and plastic art*, the author of which enjoys a resale right. The Resale Right Directive sets out in article 2(1) that an original work of art for the purpose of the resale right means 'works of graphic or plastic art such as pictures, collages, paintings, drawings, engravings, prints, lithographs, sculptures, tapestries, ceramics, glassware and photographs, provided they are made by the artist himself or are copies considered to be original works of art.' Not all of these examples can be found in article 2 BC. Unlike article 14^{ter} (1) BC, the harmonised resale right does not pertain to original manuscripts of writers and composers, but Member States may provide for such a right.¹³⁵

The reason behind the introduction of a specific definition of *databases* and *computer programmes* in the relevant directive is because the standards of protection varied considerably across the EU and the extent to which these 'new' information products should be protected within the copyright regime was controversial. A computer program (software) is defined as a literary work within the meaning of the Berne Convention (art. 1 Computer Programs Directive). No further definition was given for fear of regulating a concept that could soon become obsolete,¹³⁶ except

¹³¹ Art. 1 Term Directive.

¹³² Art. 1(1) Rental Right Directive.

¹³³ Art. 2(1) Information Society Directive.

¹³⁴ Member states may no longer avail themselves of the possibility the BC offers to protect photographs for a shorter term (but no less than 25 years following production) than works in general (art. 7(4) BC).

¹³⁵ Under the BC the resale right is optional.

¹³⁶ The Explanatory memorandum did define it as 'a set of instructions the purpose of which is to cause an information processing device, a computer, to perform its functions', see Bently, in Dreier/Hugenholtz 2006, Comment on 91/250/EEC art. 1 at 2. According to Recital (7) the term computer program also includes 'preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage'.

that the Directive specifies that software only enjoys copyright protection if it constitutes the ‘author’s own intellectual creation, and that no tests as to the qualitative or aesthetic merits of the program should be applied (Recital 8).

Under the Berne Convention protection must be granted to ‘collections of literary or artistic works’ if the collection constitutes an intellectual creation by reason of its selection or arrangement (art. 2(5) BC). The Database Directive in article 3 sub 1 provides that a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible, is copyrighted as an original work if by reason of the selection or arrangement of the contents, on condition that it constitutes the author’s own intellectual creation. This definition is broader than the corresponding provision of the BC, since databases enjoy copyright protection irrespective of the type of content.¹³⁷ On the other hand, it is stricter than that of article 10(2) TRIPS and article 5 WCT, which only require an ‘intellectual creation’.

The Database Directive’s requirement that the items in the database be ‘independent’ (art. 1(2)) prevents a complete overlap with (other) works of authorship, which are also made up of various elements (e.g. the frames of an audiovisual work or the chapters of a novel).

Concerning derivative works the Berne Convention specifies that protection is due to translations and adaptations (art. 2(3)). There is no general European rule on adaptations as protected subject matter. The Computer Programs Directive does however indirectly recognise that adaptations of software can be copyrighted.¹³⁸

2.2.2.2 *Related rights subject matter*

The subject matter of related rights regulated in the *acquis* concerns *sui generis* databases, critical and scientific publications of works that have entered the public domain, first publications of works not published during the original term of protection (‘previously unpublished works of authorship’), and related rights in the strict sense: performances, phonograms, broadcasts and films (first fixations).

Databases are not only protected as works of authorship, but also by the *sui generis* right. This protection applies to databases that testify to a ‘qualitatively and/or quantitatively [...] substantial investment in either the obtaining, verification or presentation of the contents’ (art. 7(1) Database Directive). That it is more difficult to legislate new concepts than build upon the shared experience of Member States, is clear from the difficulties national courts have had with the interpretation of the ‘substantial investment’ criterion.¹³⁹ The ECJ has cut at least part of this Gordian knot, by ruling that this requirement excludes resources used for the creation of [pre-existing] materials which make up the contents of a database (*British Horseracing Board, Fixtures Marketing v. Svenska Spel*). In its report on the implementation of the Database Directive, the Commission admits that this interpretation was not what it had envisaged, but that this curtailment may at least pre-empt concerns that the *sui generis* right may negatively affect competition.¹⁴⁰

The Term Directive (art. 4) requires protection of *previously unpublished works of authorship* that have entered the public domain. The publisher of such a work is to be protected on a par with the economic rights of authors. Publishing means making available copies to the public. The new

¹³⁷ A literal reading of the BC limits the protection to databases of which the constituent elements are *copyrighted* material, unlike article 10(2) TRIPS and article 5 WCT, which speak of ‘compilations of data or other material’.

¹³⁸ The Computer Programs Directive specifies in art. 4(b) that adaptation/translation requires authorisation of the right holder, ‘without prejudice to the rights of the person who alters the program’. The Database Directive has no equivalent clause.

¹³⁹ For an overview of diverging case law, see IVIR, ‘The Database Right File’, available at www.ivir.nl; P.B. Hugenholtz, ‘The New Database Right: Early Case Law from Europe’, paper presented at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law, New York, 19-20 April 2001.

¹⁴⁰ Report on the Database Directive, p. 13-14.

right is therefore not limited to previously *unknown* works, as the work may have been performed in public.¹⁴¹

Of the traditional related rights in *performances*, *phonograms* and *broadcasts*, none of the directives define the subject matter more precisely than the relevant international treaties. The European legislator has consciously refrained from specifying who qualifies as performer and what constitutes a performance, so as not to interfere with the definition of the Rome Convention and national definitions.¹⁴² Article 9 of the Rome Convention explicitly leaves Contracting States room to protect performers that do not deliver literary or artistic works (art. 9), while the WPPT includes protection for performers who deliver expressions of folklore (art. 2(a) WPPT). The laws of several Member States, such as Hungary, Belgium and Finland, do not contain a definition of performers. Other Member States, such as Austria, Germany, Greece and the Netherlands, do, but have opted for a broader notion than article 3(a) of the Rome Convention. Yet others, such as Poland, refer to the notion of performances instead.¹⁴³

Film in the Rental Right Directive is defined as ‘a cinematographic or audiovisual work or moving images, whether or not accompanied by sound’ (art. 2(1)). This definition covers television features, video clips, commercials, concert registrations and other kinds of filmed material, whether original or not.¹⁴⁴ The definition has meaning only in relation to the rights of the producer of the first¹⁴⁵ fixation of a film, i.e. rights of rental and lending (art. 2(1) Rental Right Directive) and rights of reproduction and making available (arts. 2(d) and 3(d) Information Society Directive). The definition has no bearing on the protection of other right holders, notably the creative contributors that are considered co-authors of original audiovisual works.¹⁴⁶

2.2.3 Challenges and inconsistencies in the Acquis

Works of authorship

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

Quite a number of national copyright laws of the Member States are structured along the lines of the BC, i.e. they define the types of creations that qualify for copyright by using a broad definition of works of authorship, coupled with an enumerative list.¹⁴⁷ Other laws do not specify by type but are limited to a broad conception only (e.g. ‘literary and artistic works’).¹⁴⁸ Some laws distinguish between various larger categories of intellectual creations, such as literary works, artistic works, musical works and dramatic works and define these in more detail.¹⁴⁹

As we have seen, the *acquis* only makes reference to a few of the categories of works enumerated in article 2 BC (e.g. photographs and software). There are no harmonised criteria which set out the exact domain of works of authorship. But this is not problematic as such. On

¹⁴¹ For an interpretation of what constitutes ‘publication’, see OLG Düsseldorf 16.8.2005 (case 20 U 123/05) – *Montezuma* (distribution of a small number of copies of sheet music of Vivaldi’s opera qualify as publication, considering the prevalent practices at the time).

¹⁴² Krikke, in Dreier/Hugenholtz 2006, Comment on Directive 92/100/EEC art. 2 at 3.

¹⁴³ All but two Member States (Malta and Cyprus) are party to the Rome Convention.

¹⁴⁴ See Krikke, in Dreier/Hugenholtz 2006, Comment on Directive 92/100/EEC art. 2 at 5; Von Lewinski, in Walter 2001, Kommentar Vermiet- und Verleih-RL, at 21-22.

¹⁴⁵ i.e. not the producer of subsequent reproductions, for instance on DVD.

¹⁴⁶ Under the Term Directive, at least the principal director must be considered a (co)author, art. 2(1).

¹⁴⁷ E.g. France, Germany, Greece, Slovenia, Portugal, the Netherlands.

¹⁴⁸ E.g. Hungary and Belgium.

¹⁴⁹ E.g. United Kingdom, Sweden, Estonia.

the contrary, it has long been recognised that the use in legislation of detailed subclasses of works is not well suited for modern (digital) information products ('multimedia'), which are not easily categorised.¹⁵⁰ Also, the interpretation of what belongs to the realm of artistic and literary property has gradually expanded over time, including such functional productions as computer software and databases. It is difficult to imagine any potential 'gaps' in this respect. Some controversy remains in respect of atypical creations such as cooking recipes, and creations that appeal to the lesser senses, such as tastes and smells.¹⁵¹ The Dutch Supreme Court has recently held that perfume (i.e. the composition of the smell) can indeed be copyrighted.¹⁵²

Another dimension of the concept of works of authorship which the *acquis* does not address relates to the notion of joint or collective works (see also para. 4.3). The Term Directive, Computer Programs Directive and Database Directive contain only references to the existence of such works under diverse national copyright laws, but give no further definition.¹⁵³ This is not surprising as the definition of works to which more than one person contributes in essence regulates the question of (initial) ownership, i.e. the relations between the various parties involved in the production. Such issues have remained mostly outside the harmonisation process.

Author's own intellectual creation

A central though somewhat elusive and much deliberated criterion in copyright is that a production must be 'original' or creative in order to attract protection. Even though it is generally accepted that the Berne Convention only protects original productions,¹⁵⁴ the treaty itself gives no further guidance as to what constitutes originality, other than that it is related to an 'intellectual creation'.¹⁵⁵ As the Berne Convention only prescribes the *minimum* protection to be offered to (authors of) foreign productions, this is not a problem. But where in EC and national copyright legislation originality is a threshold for protection, its exact meaning does become relevant. It is therefore worthwhile to take a closer look at the definitions presently in the *acquis*.

As has been noted above, there are three provisions in the *acquis* that seek to define 'original'. The earliest and most debated definition is given in the Computer Programs Directive, which speaks of 'original in the sense that it is the author's own intellectual creation' (art. 1(3)). The Database Directive uses the same wording, which is generally accepted to mean that software and databases are subject to the same standard of protection.¹⁵⁶ In the Term directive, for photographs, the description used is 'author's own intellectual creation *reflecting his personality* [emphasis added]'. This wording seems to imply a stricter test than is laid down for software and

¹⁵⁰ In Anglo-American countries particularly, there is a call to simplify the structure of copyright acts and use broad concepts in stead of the current –quite inflexible– categories of productions. See A. Christie, Consolidating Copyright Subject Matters and Exclusive Rights, Fordham Ninth Annual Conference on International Intellectual Property Law & Policy, 2001 [Christie 2001].

¹⁵¹ See S. Balana, Urheberrechtsschutz für Parfüms, GRUR Int. 2005, 5, p. 979-991, E. Glemas, La protection du parfum par le droit d'auteur, Revue du Droit de la Propriété Intellectuelle 1997, nr. 82, p. 35-43 [Balana 2005]; A. Laborde, Les contrefacteurs de fragrances vont devoir se mettre au parfum: la fin de l'impunité? Revue Lamy Droit de l'Immatériel 2006 nr 14, p. 26-29 [Laborde 2006].

¹⁵² Hoge Raad (Dutch Supreme Court) 16 June 2006, *Kecofa v. Lancôme*, case C04/327HR, www.rechtspraak.nl (LJN: AU8940).

¹⁵³ Art. 2(1) Software Directive, art. 4 Database Directive, art. 1(2) Term Directive.

¹⁵⁴ WIPO Handbook at 5.171 *et seq.*

¹⁵⁵ This much can be deduced from art. 2(5) BC, which protects collections of work who 'by their selection or arrangement constitute intellectual creations'. This definition is also used in art. 10(2) TRIPs on the protection of databases.

¹⁵⁶ E.g. G. Karnell, 'European Originality: A Copyright Chimaera', in: J. Kabel and G. Mom, Intellectual Property and Information Law; Kluwer Law International: The Hague 1998 [Karnell1998]; Hugenholtz in Dreier/Hugenholtz 2006; Lucas 2001 at 98; Bently/Sherman 2004, p. 102-104.

databases.¹⁵⁷ It is therefore not entirely clear whether the two definitions are to be interpreted in the exact same way.

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

The originality test of the Computer Programs Directive, on the other hand, is primarily aimed at reconciling the strict continental test, especially as developed by German courts, with the more generous Anglo-Saxon 'skill and labour' standard. According to the Commission, as a result the 'droit d'auteur countries have had to lower their threshold for protection of software, while notably the UK¹⁵⁸ and Ireland have had to raise their standard.'¹⁵⁹ This suggests that the originality for photographs is indeed somewhat stricter.

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

The originality test has dual properties: it determines both the quality as a protected work and its scope of protection. The more 'creativity' is involved, the stronger the resulting copyright will be in terms of protection. In continental systems, the mere fact that a production is an intellectual creation does not in and of itself imply it is original. The work must also testify of a personal vision (personal mark, *Eigenart*) of the author.¹⁶⁰ In common law countries, originality requires that there is no copying and that in qualitative terms sufficient skill and labour are expended. Sometimes quantitative rather than qualitative investment in labour (i.e. substantial resources) also count towards originality even if there is little *intellectual* activity involved in the production.¹⁶¹ Over time, the standard of creativity required in droit d'auteur countries has gradually been lowered, especially due to the introduction of new categories of functional works, such as applied art and computer software, which has been largely inspired by their economic significance.¹⁶² In the United Kingdom courts have mitigated the danger of over-protection resulting from the skill and labour criterion, by devising the 'substantial parts' test. Under this test, to determine if there is infringement, courts consider the quality rather than quantity of what has been taken.¹⁶³ There

¹⁵⁷ See Karnell 1998, p. 203.

¹⁵⁸ The UK has not laid down the new criterion expressly in its Copyright act, as it has done for databases.

¹⁵⁹ Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs, COM(2000) 199 final, Brussels, 10.04.2000, p. 6 [Report on the Computer Programs Directive].

¹⁶⁰ In legal literature there is difference of opinion on the exact meaning of 'intellectual creation' and 'personal vision' and their relation; case law combines both elements, see inter alia: Cour de Cassation (Belgium Supreme Court) 27 April 1989, Pas. 1989 I, 908; Hoge Raad (Dutch Supreme Court) 4 January 1991, Nederlandse Jurisprudentie (NJ) 1991, 608 (*Van Dale v. Romme*).

¹⁶¹ For a discussion of the UK skill and labour test, see: Bently/Sherman 2004, p. 88 *et seq.*

¹⁶² J. Deene, 'Originaliteit in het auteursrecht', IRDI 2005, p. 223-237 [Deene 2005]; Lucas 2001, p. 76 *et seq.* (esp. at 98-99); J. Corbet, Het oorspronkelijkheidsbeginsel in het auteursrecht en de toepassing ervan op de vormgeving van een industriële machine, Auteurs & Media 2006, no. 2, p. 127-135, at p. 128-129 [Corbet 2006].

¹⁶³ G. Westkamp, 'Transient copying and public communications: the creeping evolution of use and access rights in European copyright law', George Washington International Law Review 2004, vol. 36, 1057, at p. 1065-66 [Westkamp 2004].

is therefore a certain ‘rapprochement’ between copyright and droit d’auteur countries in terms of practical outcome, though not in the conceptual methods used.

However, how the courts interpret the criterion of originality depends on other ‘local’ factors as well, such as the availability of actions in unfair competition.¹⁶⁴ The meaning of the criterion is dynamic, i.e. bound by time, place and local use,¹⁶⁵ which has implications for any attempt to legislate a single standard for all categories of works across the EU.

A preliminary question to be answered is whether the extension of the current notions of originality in the *acquis* to all copyright works, actually is required from the perspective of completing the internal market. The practical effect of any such harmonisation may be limited if the dynamic application of a harmonised criterion by national lawmakers and courts will persist.¹⁶⁶ Such a ‘homing trend’ is indeed not unlikely, especially where the common standards are laid down in directives. The flexibility of implementation that comes with legislating by directive (rather than regulation) enables member states to mould the European standard in their existing framework, which will often result in differing national standards. On the other hand, national variations may be so slight as to not cause any noticeable problem from an internal market perspective.¹⁶⁷ For example, in its evaluation of the Computer Programs Directive the Commission has not reported any problems with the originality test in practice, although many Member States have failed to literally transpose the Directive originality standard.

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

Definition of broadcast as subject matter of related right

Until quite recently the lack of a general definition for broadcasts as protected subject matter has caused little uncertainty as to who or what was protected. At most there was some discussion about the circumstances in which cable operators qualify as broadcasters, considering that their principal business is to transmit simultaneously programmes originating from over the air (terrestrial or via satellite) broadcasters (compare article 6(3) Rental Right Directive).¹⁶⁸ However, cable operators also disseminate their own programme signals, in which case they may be protected as broadcasting organisations.

If the situation was relatively clear cut in the past, it is much less so today, due to technological and market developments, which have resulted in a diversification of the means of dissemination

¹⁶⁴ For a general analysis of originality see P. Nordell, ‘The notion of originality- Redundant or not?’ ALAI Nordic Study Days 2000 Proceedings, p. 73 *et seq.* [Nordell 2000].

¹⁶⁵ P.B. Hugenholtz, ‘Protecting compilations of facts in Germany, the Netherlands’, in Dommering/Hugenholtz (eds.), *Information Law towards the 21st century*. Kluwer Law International: The Hague 1991 [Hugenholtz 1991]; G. Karnell 1998, p. 206-208.

¹⁶⁶ See also H. Schack, ‘Europäisches Urheberrecht im Werden’, ZEuP 2000, p. 799-819, at p. 808-809 [Schack 2000b].

¹⁶⁷ Whether a harmonised criterion in practice stimulates the information market is difficult to ascertain. For instance, the Database Directive evaluation report does not specify whether the envisaged level playing field (due to a harmonised criterion) has actually led to a change in the relative dominance of some member states (notably the UK) in database production.

¹⁶⁸ In terms of acts restricted by copyright (or related rights of performers and phonogram producers), Berne Convention, Rome Convention and WPPT distinguish broadcasting (wireless) from cable transmission, see art. 11ter BC, art 3(f) RC, art. 2(f) WPPT.

of broadcasts.¹⁶⁹ There is broadcasting in terms of terrestrial analogue or digital television, satellite television, via digital subscriber (telephone) lines, via cable, or via computer networks (e.g. webcast using streaming media). One could argue that essentially the same service is supplied over different platforms. The means of transport of broadcast signals are however a key element of the definitions of protected subject matter in international treaties.

The Rome Convention (art. 3(f)) defines the activity of broadcasting as the ‘transmission by wireless means for public reception of sounds or of images and sounds’. Consequently, a broadcaster is considered any organisation that is responsible for such activity.¹⁷⁰ Note that the proposed WIPO Broadcasting Treaty would apply to broadcasts over the air (via terrestrial transmitters and satellites) and via cable (cable casting), but not to broadcasts over computer networks (webcasting).

The current technology-dependent definitions of broadcasting – and by extension, of broadcasts and broadcasting organisations – do not appear appropriate in an environment where the means of transmission are converging and becoming increasingly interchangeable. This makes it difficult to classify services provided through new transmission techniques or converging media. While the transmission of programmes over computer networks is carried out through an unlimited number of point-to-point transmissions,¹⁷¹ from the point of view of the provider of the service the content is transmitted not to an individual user but to the public at large, i.e. ‘broadcast’.¹⁷²

Given technological developments, in the mid- or long term there may only be three relevant factors left to determine what constitutes a protected broadcast: (1) the extent of programming involved (prescheduled sequencing of contents or recipient-driven), (2) the intended audience (indeterminate or selected), and (3) timing of the transmission (simultaneous or on-demand).¹⁷³ However, simply extending broadcast rights to cover for instance webcasts may have the unintended effect of extending protection in broadcasts beyond its original rationale.

In this context it is important to recall that neighbouring rights protection of broadcasters originated in a time when public broadcasting was the norm and commercial broadcasting the exception. Herzian waves were the primary mode of dissemination, while cable transmission was in its infancy. Broadcasters typically also owned the studios and other technical infrastructure necessary to transmit the broadcasts. Neighbouring rights were granted chiefly to protect the considerable investments the broadcasters were required to make to deploy this equipment, and to employ their artistically and technically skilled personnel.¹⁷⁴ What is protected then is the broadcast signal, not the content of programmes (audiovisual productions) as such, which will normally attract separate copyright and related rights protection. It would require further

¹⁶⁹ For a more elaborate analysis, see N. Helberger, Report for the Council of Europe on the Neighbouring Rights Protection of Broadcasting Organisations: Current Problems and Possible Lines of Action, Amsterdam 1999 (doc. MM-S-PR(1999)009 def) [Helberger 1999].

¹⁷⁰ Although the Rome Convention does not contain a definition of broadcasting organisation, it is clear from the proceedings of the conference that to benefit from protection, an organisation need not own the technical facilities for transmission. Generalbericht zur Rom-Konferenz (1961), UFIT 1963, 40, p. 99, 107.

¹⁷¹ The use of multicast protocols allows the server to send just one copy through each path between network routers, instead of a separate copy for each client.

¹⁷² See G. Schricker, T. Dreier, S. von Lewinsky, *Urheberrecht auf dem Weg zur Informationsgesellschaft*, Gutachten für das Bundesministerium der Justiz, Baden-Baden, 1997, p. 125: ‘Problem der sukzessiven Öffentlichkeit.’ [Schricker et al. 1997].

¹⁷³ Compare the definition of webcasting as formerly proposed for the WIPO Broadcasting Treaty: Art. 2 SCCR/11/13: making sounds or of images or of the representations thereof accessible to the public, by wire or wireless means over a computer network at substantially the same time.

¹⁷⁴ E. Ulmer, *Der Rechtsschutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendegesellschaften in internationaler und rechtsvergleichender Sicht*, München: Beck 1957, p. 11 [Ulmer 1957].

(economic) analysis to assess whether the investments required of webcasters and other new media are substantially the same as those traditionally made by broadcasting organisations.

Various unharmonised subject matter in Member States

The current directives do not exhaustively determine which subject matter qualifies for protection under copyright or related rights. Member states have some freedom to provide for additional protection either because directives usually leave other intellectual property rights and remedies under unfair competition law intact, or treat rights in certain subject matter as optional.

The Information Society Directive is without prejudice to, *inter alia*, provisions on the protection of typefaces and unfair competition law. Unfair competition type protection is enjoyed by publishers in various countries. For instance, under Greek copyright law publishers can act against the commercial reproduction of their typesetting¹⁷⁵; the laws of Ireland, United Kingdom and Italy offer similar protection.

The Computer Programs Directive (art. 9) is without prejudice to alternative forms of protection for software through unfair competition law or otherwise. Article 7(4) Database Directive provides that the *sui generis* protection applies irrespective of protection under copyright (i.e. database as authors own intellectual creation as harmonised by the Directive itself) or *other rights*. Article 13 Database Directive specifies that the directive is without prejudice to provisions concerning *inter alia* copyright, related rights or any other rights or obligations subsisting in the data contained in the database, and remedies under unfair competition law. The *sui generis* right in databases was meant to supplant existing national regimes, but to what extent is not entirely clear.¹⁷⁶ The Nordic member states have adapted their so-called catalogue rules to meet the requirements of the *sui generis* right. Under the old-style catalogue rule the makers of non-original compilations (collections of ‘information items’) were protected against copying, without a substantial investment being necessary. The introduction of the *sui generis* database right has however not meant the end of Dutch ‘geschriftenbescherming’. This is a limited quasi-copyright protection for all non-original writings, the only condition being that they are published or destined to be published. German courts provide protection for writings with a very low standard of originality (*kleine Münze*).

Article 5 of the Term Directive gives member states the option to protect critical and scientific publications of works which have come into the public domain. Such related rights exist under for instance German and Estonian law.¹⁷⁷ Already mentioned is the protection of non-original *photographs*, which features in quite a number of member states law’s (e.g. Austria, Denmark, Sweden, Finland, Italy, Germany, Hungary, Spain). Article 6 Term Directive explicitly leaves member states the option to protect such ‘other’ (i.e. non-original) photographs.

Apart from these optional rights, some member states recognise related rights in various subject matter that is outside the *acquis*. For instance, the *organiser* of a performance is granted economic rights akin to the related rights of performers under German (art. 81) and Austrian copyright law (art. 66(5)). Italian law recognises a remuneration right with regard to the re-use of stage scenes (theatre) where these do not qualify as or embody works of authorship (art. 86 Italian copyright act).

The examples given illustrate that there is quite a range of subject matter the protection of which is either covered by the directives, but optional, or well outside the *acquis*. This is not to

¹⁷⁵ Note that typeface is normally understood as the design of a set of letters (alphabet, numerals plus symbols), whereas typesetting refers to the layout of print work.

¹⁷⁶ See Hugenholtz, ‘Implementing the Database Directive’, in: Jan J.C. Kabel and Gerard J.H.M. Mom (eds.), *Intellectual Property and Information Law, Essays in Honour of Herman Cohen Jehoram*, The Hague: Kluwer Law International 1998, p. 183-200 [Hugenholtz 1998].

¹⁷⁷ Art. 70 German Copyright Act, art. 74(2) Estonian copyright act.

say that rights in such productions should be removed or, conversely, be extended across the EU. These rights may have been introduced locally as a result of successful lobbies, or to cure local shortcomings in unfair competition law or misappropriation doctrines, etc. Without proper study of the rationale of each of such rights, of their economic significance in the common market and of their effects on the free flow of goods or services, the necessity to harmonise them will remain unclear.

2.2.4 Conclusions

Where the subject matter of copyright and related rights is concerned, the approach followed by the European legislator so far has caused only limited harmonisation. The protection of certain subject matter is often optional, or the directives lay down only minimum standards or allow for alternative protection (i.e. explicitly are declared without prejudice to alternative protection regimes). But even where protection of subject matter is an obligation for the Member States, as it is for works of authorship, databases, phonograms, broadcasts, performances, first fixations of films and previously unpublished works, the lack of harmonised definitions causes disparities.

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

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

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

2.3 Exclusive rights

In its harmonisation efforts so far, the EC has had to contend with the fact that Member States’ laws differ substantially in their approaches to regulating the exclusive rights that make up copyright and related rights regimes. On one end of the spectrum are national laws that contain broad and abstract descriptions of the author’s exclusive rights (e.g. the Belgium copyright act). On the other end are national laws that set out in intricate detail the acts restricted by copyright or related rights (e.g. UK Copyright Act). Each Member State also boasts its own copyright

terminology. For instance, under some laws the distribution of tangible copies is part of a wider right of ‘communication to the public’, whereas in others it is included in the reproduction right, or dealt with separately. Similarly, ‘making available’ may be part of the right of ‘communication to the public’ (or public performance right), whereas in other countries ‘making available’ is the overarching term.

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

Categories of exclusive rights

To help describe and analyse the *acquis* in the field of exclusive rights, it is worthwhile to categorise different classes of restricted acts. At the most general level, the common distinction is between moral rights and economic rights (also called exploitation rights). Particularly in the field of copyright, rights protecting the immaterial interests of the author are well developed, compared to the fledgling personality rights of performing artists that were introduced at the international level with the WPPT. Moral rights have as of yet not been the object of harmonisation, partly because the European Communities’ competence in the area of economic rights is more firmly established than in the realm of culture (see paragraph 1.2). Another reason is that moral rights are rooted much more firmly in continental systems than in the UK and Ireland, and therefore a politically sensitive issue.¹⁷⁸

Economic rights, in turn, can be distinguished in rights to authorise or prohibit on the one hand, and remuneration rights on the other. The latter are the exception, and as will be described below, the *acquis* only recognises four of such rights, three of which are optional.¹⁷⁹ A further distinction between economic rights is often made as follows:

- right of reproduction (e.g. copying of works/fixation)
- right of adaptation (e.g. translation)
- right of distribution (e.g. first sale, rental, lending, resale)
- right of communication to the public (e.g. public performance, making available, broadcasting)

Before we turn to a description of the *acquis* using the above distinction, it may be useful to remind us of the main drivers of the process of harmonisation of exclusive rights:

- The ECJ has sanctioned the existence of national (territorial) rights even though they constitute barriers to the free flow of goods and services, on condition that they meet the ‘specific subject matter’ (essential characteristic) test (see paragraph 2.2) and are granted in a non-discriminatory manner. The European legislator has responded by extending such rights across the EC (e.g. rental right, certain related rights and resale right).
- Novel information products, such as software and databases, have called for special rules of protection, and inspired the introduction of new rights.

¹⁷⁸ Already in its Follow-up to the Greenpaper on Copyright and Related Rights of 20 November 1996, (p. 27-29) the Commission signalled the growing internal market relevance of moral rights in the digital environment. However, the time was not considered ripe for harmonisation of moral rights.

¹⁷⁹ For broadcasting of phonograms (optional), for resale of works of art, for cable retransmission (strictly speaking not a mere remuneration right, but mandatory collective licensing which in practice amounts to the same) and public lending (optional).

- Developments in technology have enabled new business models, such as video rentals and commercial satellite television in the 1980s, and on line distribution of content over the internet in the 1990s. These have called for clarification of existing rights or the introduction of new rights (e.g. making available for related rights).
- New agreements on the international level, concluded in the context of WIPO (Copyright Treaty, Performances and Phonograms Treaty) and the WTO (TRIPs) have required amendment of the *acquis*.

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

2.3.1 *The international context*

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

2.3.1.1 *Reproduction rights*

The exclusive right to reproduce (copy) is traditionally at the heart of copyright and related rights. Article 9 Berne Convention speaks of the right to authorise reproduction of works of authorship in ‘any manner or form’, while the Rome Convention considers as reproduction ‘the making of a copy or copies of a fixation’ (art. 1(e)). For performers the RC guarantees only a limited reproduction right (art.7(1)c), whereas phonogram producers enjoy a general right of direct or indirect reproduction (art. 10). Broadcasters have the exclusive right to authorise reproduction of (unauthorised) fixations of broadcasts (art. 13 sub c Rome Convention).

For performers, the WPPT provides a general reproduction right (direct or indirect, in any manner or form) with regard to performances fixed in phonograms (art. 7), and to phonogram producers (art. 11 WPPT).¹⁸⁰ Under the controversial draft WIPO Broadcasting Treaty, broadcasters would have an exclusive right to ‘direct or indirect reproduction, in any manner or form, of fixations of their broadcasts’.¹⁸¹ The TRIPs agreement contains an optional reproduction right for broadcasters with respect to the reproduction of fixation of their broadcasts (art. 14(3) TRIPs).

2.3.1.2 *Adaptation rights*

A general right of adaptation is provided for in article 12 of the Berne Convention for authors of artistic and literary works (adaptation, arrangement and other alterations). In addition, article 8 specifies that authors have the exclusive right to translate their work.¹⁸² Another provision deals with the right to make cinematographic adaptations (article 14).

¹⁸⁰ An agreed statement specifies that the reproduction right fully applies in the digital environment.

¹⁸¹ WIPO doc SCCR/15/2, Revised Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations of 31 July 2006.

¹⁸² Translations were a very controversial issue in the earlier years of the Berne Convention, explaining their separate position (the right of translation was more limited in scope until the 1908 revision), see Van Eechoud 2003, p. 62-63.

2.3.1.3 *Distribution rights*

The Berne Convention comprises a distribution right in respect of cinematographic works, but stops short of a general distribution right.¹⁸³ The WCT in article 6 does guarantee a general distribution right, which is defined as the ‘making available to the public of the original and copies of their works through sale or other transfer of ownership’. This language clearly pertains to the dissemination of copies in tangible form. During the WCT negotiations no agreement could be reached on whether to classify the dissemination of works over digital networks as distribution or communication to the public.¹⁸⁴

Neither the Berne Convention nor the Rome Convention address rental rights. The WIPO Copyright Treaty, like TRIPS in articles 11 and 14, only requires a rental right for computer programs (where they are the essential object of rental), works of authorship embodied in phonograms, and (conditionally) cinematographic works. Article 7(3) WCT allows remuneration rights to continue to exist in case of rental of phonograms, as long as the rental does not materially impair the sale of physical copies. Articles 9 and 13 WPPT contain similar rules with respect to performances in phonograms.¹⁸⁵ The terminology in the WIPO Treaties is somewhat tautological, as it speaks of ‘commercial rental’. This is derived from TRIPs, which in article 11 and 14(4) requires WTO members to provide for at least an exclusive right of commercial rental of copyrighted computer programs and cinematographic works, and of phonograms, under the same conditions as the WCT and WPPT.

For works of art and (original) manuscripts, article 14ter of the Berne Convention mentions an optional resale right.

2.3.1.4 *Rights pertaining to communication to the public*

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

- Public performance, display and other exhibition to the public (i.e. where public is present physically);
- Broadcasting; and
- Making available to the public in a way so that members of the public can access the content at an individually chosen time and place.¹⁸⁶

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

Public performance

The right of public performance is one of the oldest communication rights. It concerns communicating a work to the public *in situ* (i.e. ‘on the spot’), e.g. in theatres, cinema, concert halls and the like. At the international level it is not regulated in a general manner, but rather for different types of works and related subject matter separately. Thus article 11 Berne Convention grants authors of musical works and dramatic works (e.g. plays) the right to authorise public

¹⁸³ Some authors assume that the reproduction right of article 9 BC implies the recognition of a distribution right; see Walter 2001, p. 1043.

¹⁸⁴ *WIPO Intellectual Property Handbook: Policy, Law and Use*, point 5.222-225.

¹⁸⁵ The Rome Convention does not address rental rights.

¹⁸⁶ Although on line transmission has been classified as communication to the public, WCT does leave room for states to regulate it as part of the distribution right or otherwise, see The WIPO Copyright Treaty (WCT) And the WIPO Performances and Phonograms Treaty (WPPT), WIPO/CR/RIO/01/2, at 27.

performance (and the communication to the public of such performance, art. 11(2) BC (ii)). Article 11ter regulates the performance rights in literary works, such as public recitation.

Broadcasting

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

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

The communication to the public right laid down in the WPPT does not include broadcasting (art. 3(g)), but in stead denotes any other transmission to the public by any medium. Broadcasting organisations were left out of the WPPT. In stead negotiations are still pending on a WIPO Broadcasting Treaty. Under the Rome Convention (art. 13), broadcasting organisations are protected against the simultaneous rebroadcasting (but not cable retransmission) of their broadcasts.¹⁸⁷ The latest draft proposal for the Broadcasting Treaty¹⁸⁸ grants exclusive rights of retransmission (by any means, including rebroadcast and retransmission by wire, by cable or over computer networks) and transmission of fixations of broadcasts (again by any means). The beneficiaries of protection would be traditional broadcasting organisations and cable casters, i.e. those legal entities that take the initiative and have the responsibility for a transmission and the assembly and scheduling of its content.¹⁸⁹ Webcasting organisations are excluded from protection under the current draft.

Making available

The general right of communication to the public that article 8 WCT grants to authors includes the ‘making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them’. The right essentially covers the online on-demand offering of protected subject matter. For performers and phonogram producers, the making available right with respect to (their performances fixed in) phonograms is found in article 10 and 14 WPPT. The Draft WIPO Broadcasting Treaty would give broadcasting organisations an exclusive right of authorizing (prohibiting) the making available to the public of their broadcasts from fixations or of unauthorised fixations.

2.3.2 The *acquis communautaire*

The three main clusters of economic rights (rights of reproduction, distribution and communication to the public) have been broadly harmonised for works of authorship and related

¹⁸⁷ Similar protection for broadcasting organisations is not required under TRIPs, on condition that the copyright owners of the content of broadcasts are granted the exclusive right to authorise broadcasting. and TRIPs (art. 14(3)).

¹⁸⁸ WIPO doc SCCR/15/2 of July 31, 2006 (Revised Draft basic proposal for the WIPO treaty on the protection of broadcasting organizations).

¹⁸⁹ Broadcasting is defined as ‘transmissions by wireless means, by radio waves propagating freely in space, i.e., radio waves or Herzian wave’. This does not include transmissions by wire via cable or fixed telephone lines, but includes satellite transmission (art. 2(a)). Cablecasting organisations are protected separately, cablecasting being the transmission by wire for the reception by the public, not including transmissions over computer networks (art. 2(b)).

subject matter in the Information Society Directive. The Directive leans heavily on the WIPO ‘internet treaties’ (WCT and WPPT), which in turn build on the BC, Rome Convention and TRIPs. The directives preceding the Information Society Directive have addressed some (subspecies of) economic rights for some categories of works, as is illustrated in the table below.

Table 1: Overview of Economic rights in EC Directives on copyright and related rights

Economic rights in EC Directives on copyright and related rights		
Reproduction of:	Distribution of:	Communication to the public of:
Works of authorship excluding databases and software: 2 (a) Information Society Directive	Works of authorship excluding databases and software: <i>any form</i> , 4 Information Society Directive	Works of authorship, <i>communication to the public by satellite</i> , art. 2 Satellite and Cable Directive
	Works of authorship excluding , applied art, buildings, rental of software: <i>rental and lending</i> , 2 Rental Right Directive	Works of authorship excluding databases and software: <i>wire(less) communication to the public (public not present), including making available at user chosen time and place</i> , 3 (1) Information society Directive
Software: 4(a) Computer Programs Directive	Software: <i>any form including rental, excluding lending</i> 4(c) Computer Programs Directive	
Database – copyrighted: 5(a) Database Directive	Database – copyrighted: <i>any form</i> , 5(a) Database Directive	Database – copyrighted: <i>any communication, display or performance</i> , 5(d) Database Directive
Fixation of performances, broadcasts; films, phonograms: 2 (b-e) Information Society Directive (replaced 7 Rental Right Directive)	Fixation of performances; films, phonograms, <i>rental and lending</i> : 2 Rental Right Directive	Fixation of performances, broadcasts; films, phonograms: <i>making available at user chosen time and place</i> , 3 (2) Information Society Directive
First fixation of performances, broadcasts: 6 Rental Right Directive	Fixation of performances, broadcasts; films, phonograms, <i>making available copies to public by sale or otherwise</i> : art. 9 Rental Right Directive	Broadcast: wireless rebroadcast <i>and communication to public*</i> (in paid publicly accessible place), art. 8 Rental Right Directive
		Phonograms, for <i>wireless broadcasting or any communication to the public*</i> : remuneration right for performer and phonogram producer, art. 8 Rental Right Directive
		Live performance: <i>wireless broadcast and communication to public*</i> , art. 8 Rental Right Directive
Database – sui generis: <i>extraction and/or re-utilisation substantial part</i> , art. 7 Database Directive	Database – sui generis: <i>re-utilisation substantial part</i> , art. 7 Database Directive	Database – sui generis: <i>re-utilisation substantial part</i> , art. 7 Database Directive
Database – sui generis: <i>systematic extraction and/or re-utilisation insubstantial part</i> , art. 7 Database Directive	Database – sui generis: <i>systematic re-utilisation insubstantial part</i> , art. 7 Database Directive	Database – sui generis: <i>systematic re-utilisation insubstantial part</i> , art. 7 Database Directive
	[exhaustion]	
Adaptation: Software: art. 4(b) Computer Programs Directive Database copyrighted: 5(b) Database Directive		

* including via satellite: 4 Satellite and Cable Directive

A right not included in the above table is the protection for previously unpublished works of authorship that have entered the public domain (see par. 2.2.2). Because the economic rights

involved for the publisher are the same as those for authors, they will not be discussed here separately.

2.3.2.1 *Reproduction rights*

As we have seen, despite its central importance in copyright, the WCT does not include a broad reproduction right. Although there was international agreement¹⁹⁰ that, in principle, reproduction rights apply in the digital environment, there was no consensus as to its scope. A large number of countries favoured a carve-out for acts of temporary or transient reproduction, rather than a mere (optional) limitation.¹⁹¹ The EC's proposal for a broad reproduction right to be included in the WCT met with strong opposition from other parties, including some EU Member States,¹⁹² although for obvious political reasons these did not themselves propose amendments. Following the Information Society Directive, European law provides for broader protection than is required on the basis of the WCT and other international instruments to which it and its members have adhered.

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

An important objective of the Information Society Directive was to update the *acquis* to meet the requirements of the WCT and WPPT. The terminology used in the Directive however, does not follow WPPT's definition, but rather sweeps together terms from various instruments by speaking of *direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part*. The reproduction of databases and software remains governed by the respective directives, which contain definitions that appear to be more narrow: permanent or temporary reproduction by any means and in any form, in whole or in part (art. 4 sub a Computer Programs Directive, art. 5(a) Database Directive).

Already well before the codification of a broad-ranging reproduction right in the Information Society Directive, scholarly pleas could be heard for a normative approach to the reproduction right, rather than the technical criterion that was adopted in the Information Society Directive.¹⁹³ It was feared that an extensive reproduction right would encompass the transient copying that is

¹⁹⁰ Agreed statement to WCT: 'The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.'

¹⁹¹ See Records of the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, WIPO Publication 348, WIPO: Geneva 1996, docs. CRNR/DC/22, CRNR/DC/53, CRNR/DC/54, CRNR/DC/56, CRNR/DC/73 containing amendments for a carve-out on the reproduction right by Norway, Australia, a coalition of 30 African states, and a coalition of 20 Latin American states respectively [Records Diplomatic Conference WCT/WPPT 1996].

¹⁹² Anil Samtani, 'The Right of Reproduction and the Right of Making Available and the Limits of Liability of Network Service Providers', WIPO/CR/EC/MNL/01/2, Manila, October 17, 2001, p. 4-5.

¹⁹³ E.g. Reply to the Green paper on copyright of 20 November 1996 of the LAB (Legal Advisory Board of the European Commission, formerly DGXIII), Hugenholtz, 'Adapting copyright to the information superhighway', in: P.B. Hugenholtz (ed.), *The future of copyright in a digital environment*. The Hague: Kluwer Law International 1996, p. 81-102 at p. 92-93 [Hugenholtz 1996], J. H. Spoor, *The copyright approach to copying on the internet: (over)stretching the reproduction right?*, in Hugenholtz (ed.) 1996, p. 67-79 [Spoor 1996]. More recently, G. Westkamp, 'Towards access control in UK Copyright law?', *CRi* 2003-1, p. 11-16 [Westkamp 2003a]; M. Hart, *The Copyright in the information society directive; an overview*, *EIPR* 2002, p. 58-64 [Hart 2002], J-P Triaille, 'La directive sur le droit d'auteur du 22 mai 2001 et l'acquis communautaire', *Auteurs & Media* 2002, no. 1, p. 8-13, at p. 11 [Triaille 2002].

inherent to acts of communication in digital networks, and thereby lead to untoward liabilities for intermediaries. The Information Society Directive seeks to address such overprotection through the limitation of article 5(1) on transient and incidental copying (see paragraph 2.4.2). It is doubtful however that the provision will prevent the undesirable overlap of rights reproduction and communication to the public (see paragraphs 2.1.2 and 2.4.3).

A strange bedfellow in the *acquis* is the *sui generis* protection of databases. This is framed not in terms of reproduction, distribution and communication, but uses terms alien to copyright and other related rights: extraction and re-utilisation.¹⁹⁴ To the extent that extraction invariably involves copying in temporary or permanent form, the extraction right could be characterised as a reproduction right. The language used in article 7 Database Directive indicates as much, where it considers ‘extraction’ to mean permanent or temporary transfer of the contents of a database to another medium ‘by any means or in any form’, but without making a distinction between direct and indirect copying. No mention is made of reproducing ‘in whole or in part’, because a key characteristic of the *sui generis* right is that it protects only against copying of *substantial* parts of the contents (or systematic copying of insubstantial parts). For this reason alone, no alignment with other related rights and copyright seems possible.

2.3.2.2 *Distribution rights*

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

The distribution right mentioned in article 4 sub c of the Computer Programs Directive and article 5 sub c of the Database Directive (‘any form of distribution to the public’), could be read as encompassing online transmission. The legislative history of the Computer Programs Directive¹⁹⁵ does not however support such an interpretation. In addition, the Information Society Directive also speaks of ‘any form’ of distribution, but clarifies that this entails any distribution of the work in tangible media. The WIPO commentary on the WCT also portrays the distribution right as ‘an indispensable corollary to the right of reproduction’.¹⁹⁶

As has been noted above, the *sui generis* right for databases is phrased in terms alien to copyright and other related rights. One could regard the right to prevent re-utilisation to encompass the distribution of physical copies. But again, since the *sui generis* right only protects against the re-utilisation of substantial parts of the content, i.e. not copies of all types of reproductions, it is difficult to equate re-utilisation with distribution (or communication to the public).

¹⁹⁴ These rights do not cover consultation by third parties of the contents of a database if that has been made accessible to the public by or with permission of the right holder, ECJ *British Horseracing*, n. 54, 55.

¹⁹⁵ Bently in Dreier/Hugenholtz 2006, Comment on Directive 91/250/EEC, art. 4 at 4.

¹⁹⁶ WIPO *Intellectual Property Handbook: Policy, Law and Use*, at 5.238.

Rental and Lending

The harmonised rental and lending right pertains to the distribution of physical copies only.¹⁹⁷ It goes well beyond what the relevant international instruments require. Rental and lending are regulated by three directives. The Information Society Directive brings no material changes, as it is without prejudice to both the Rental Right Directive and the Computer Programs Directive (art. 1(2), recital 20, 28), which are the two earlier directives that deal with rental and lending. The Information Society Directive reaffirms that rental and lending are part of the wider distribution right, by providing that right holders must be granted the right to control ‘any form of distribution to the public by sale *or otherwise*’ (art. 4(1) Information Society Directive).

The Rental Right Directive contains the general rule but leaves intact¹⁹⁸ the rental right in computer programmes as provided earlier by the Computer Programs Directive. The wording of the definition is slightly different, where the Computer Programs Directive speaks of ‘making available for use, for a limited period of time and for *profit-making purposes* [italics added]’ (recital 16 Computer Programs Directive), whereas the Rental Right Directive speaks of ‘for direct or indirect economic or commercial advantage’ (art. 1(2)). Although the latter term seems broader, it is doubtful whether it reflects a substantive difference rather than a mere clarification.¹⁹⁹

The Rental Right Directive lists as beneficiaries of the rental right: the author, the performer in respect of the fixation of his performance, the phonogram producer in respect of his phonograms, and the producer of the first fixation of a film. As has been successfully argued by the Commission and Advocate-General in *Commission v. Portugal*, since rental and lending rights constitute barriers to the free flow of goods, Member States may not unilaterally extend the rights to other interested parties.²⁰⁰ However, from the explanatory memorandum it can be deduced that Member States may maintain or possibly extend the rental and lending right to other groups of neighbouring right owners (related rights in non-original photographs are mentioned), but probably only where there is no (or only minor) effect on the common market.²⁰¹

The difference between rental and lending is that the latter is done by institutions accessible to the public, such as public libraries and archives, school libraries, research libraries, on a non-profit basis. Like the rental right, the right of lending does not extend to works of applied art, buildings and databases protected under the sui generis right. Although the Rental Right Directive is without prejudice to the Computer Programs Directive, its rules on lending do apply to software, because lending is outside the scope of the Computer Programs Directive, i.e. left unregulated.²⁰² Because the lending of software is not specifically addressed in either directive, there is some uncertainty as to the scope of the lending right. Given the fact that software is routinely integrated with digital content to enable access to it (music, film, database), it stands to reason that there is only a rental or lending right for the owner of copyright in software that constitutes the essential object of rental or lending.²⁰³

Lending is not fully harmonised, as article 5 of the Rental Right Directive allows Member States a fair amount of leeway in dealing with the remuneration of authors and related rights holders. Rather than providing for an exclusive right to authorise, Member States may opt for a

¹⁹⁷ See Preamble to the Rental Right Directive at 12-14.

¹⁹⁸ Art. 4 Rental Right Directive.

¹⁹⁹ Compare Krikke, in: Dreier/Hugenholtz 2006, Comment on Directive 92/100/EEC, art. 3 at 1 and Bently, in: Dreier/Hugenholtz 2006, Comment on Directive 91/250/EEC, art. 4 at f.

²⁰⁰ *Commission v Portugal*, ECJ 13 July 2006, case C-61/05; opinion Advocate General of 4 April 2006.

²⁰¹ Explanatory Memorandum, paragraphs 2.1.3 and 2.1.4; J. Reinbothe and S. von Lewinski, *The E.C. directive on rental and lending rights and on piracy*, London: Sweet & Maxwell 1993 [Reinbothe/Lewinski 1993].

²⁰² See J. Reinbothe, Die EG-Richtlinie zum Urheberrecht in der Informationsgesellschaft, GRUR Int. 2001, no. 8/9, p. 735 [Reinbothe 2001].

²⁰³ Art. 11 TRIPS and art. 7(2)i WCT demand a rental right only where software is the essential object. See Bently, in: Dreier/Hugenholtz 2006.

system of remuneration for public lending, and exempt *certain* establishments from payment thereof (art. 5 Rental Right Directive). The ECJ has ruled that ‘if the circumstances prevailing in the Member State in question do not enable a valid distinction to be drawn between categories of establishments, the obligation to pay the remuneration in question must be imposed on all the establishments concerned’.²⁰⁴ The controversial nature of the lending right shows in the attempts by a number of Member States to limit as much as possible its scope for public institutions. In three recent cases before the ECJ, against Ireland, Portugal and Spain respectively, the Commission has argued that said countries have not implemented the Rental Right Directive correctly by effectively exempting all (or too large a number of) public libraries, archives, and educational and academic institutions from having to pay remuneration for lending.²⁰⁵ In yet another case, the ECJ recently ruled that Italy has not transposed the Directive correctly either, as Italy has limited in time the obligation to pay remuneration for public libraries.²⁰⁶

Exhaustion

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

No international treaty requires signatories to introduce exhaustion. TRIPs explicitly provides that it does not address exhaustion (art. 6). It is a limitation in the interest of the free flow of goods that has consistently been applied by the ECJ to intellectual and industrial property rights alike.²⁰⁷

Since the Information Society Directive does not pre-empt earlier directives, older exhaustion rules have remained intact for software (art. 4(c) Computer Programs Directive),²⁰⁸ databases subject to copyright (art. 5 (c) Database Directive), sui generis databases (art. 7(2) sub b Database Directive) and performances on phonograms, phonograms, films and broadcasts (art. 9(2) Rental Right Directive).

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

²⁰⁴ *Commission v Belgium*, ECJ 16 October 2003, Case C-433/02 ECR [2003] I-12191.

²⁰⁵ *Commission v Portugal*, ECJ 6 July 2006, Case C-53/05 [Public lending Portugal], and *Commission v Spain*, ECJ 26 October 2006, Case C-36/05 [Public lending Portugal]. The Portuguese copyright act exempts from remuneration ‘... public, school or university libraries, museums, public archives, public foundations and private non-profit making institutions.’ The ECJ has earlier declared Luxembourg has not met its obligations by failing to apply the provisions on public lending right (ECJ 27 April 2006, Case C-180/05). The case C-175/05 against Ireland is still pending.

²⁰⁶ *Commission v Italy*, ECJ 26 October 2006, Case C-198/05. Article 69(1)(b) of the Italian Law No 633/41 exempts all State book and record libraries from lending right in so far as it lays down that lending is not subject to any authorisation or remuneration after at least 18 months from the first act of the distribution period, or after at least 24 months from the realisation of those works if the right of distribution is not exercised.

²⁰⁷ For copyright see *Deutsche Grammophon, Dansk Supermarked, Laserdisken* (no exhaustion with regard to rental right).

²⁰⁸ For a critical evaluation of the arguments against exhaustion in case of software which is distributed by downloads, see Blocher, in Walter 2001, *Kommentar Software-RL*, p. 171-174.

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

Because for harmonised industrial property rights Community-wide rather than international exhaustion is the norm,²⁰⁹ this was also the approach taken for copyright and related rights in the Information Society Directive. Even though the Information Society Directive does not expressly forbid parallel imports from outside the EC, the choice made for Community exhaustion seems difficult to reconcile with a rule of international exhaustion maintained at the national level.²¹⁰ The *Laserdisken* ruling²¹¹ confirms that Member States who have traditionally adhered to international exhaustion, have to switch to community exhaustion for works of authorship and related rights which are harmonised. The issue of Community v. international exhaustion is to be revisited by the European legislature in the near future. A statement to that effect was made in the protocol of the Council meeting in which final agreement was reached on the Information Society Directive.

Resale

Until the introduction of the Resale directive, few member states had a working system whereby artists are entitled to remuneration with each subsequent sale of copies of their work of graphic or plastic art (paintings, etches, sculpture and the like). The introduction of a largely harmonised *droit de suite* was done to ensure that artists are treated the same throughout the EU. The art markets in member states (trade fairs, auction houses, etc.) in countries with a functioning *droit de suite* had a relative disadvantage compared to those in member states without a resale right, causing (a fear of) displacement of art sales. The resale right directive seeks to rectify this possible distortion and increase competitiveness in the art markets. Whether the EU wide introduction of a resale right can actually achieve this is highly debated.²¹²

There is little to remark about the effect of the directive on the legal framework of copyright. This is due in part because the *droit de suite* is conceptually distinct from the core economic rights of reproduction, distribution and communication to the public. Also, the term for implementation of the directive has only recently expired (1 January 2006), and it will be six to eight years before the remuneration right has to be extended to the estates of deceased artists (art. 8(2) and (3) Resale Directive).

2.3.2.3 Communication to the public rights

In line with the interpretation it is given in the Information Society Directive, communication to the public is used here to indicate ‘any means or process other than the distribution of physical copies’ to the public.²¹³

The general right of communication to the public with respect to all works of authorship was laid down in article 3 Information Society Directive. Previously, only for databases a similarly

²⁰⁹ ECJ 16 July 1998, case C-355/96 [*Silhouette*], see also article 7(1) of First Council Directive on Trademarks, 89/104/EEC.

²¹⁰ See also Staff Working Paper on Copyright Review, p. 17; Bechtold in Dreier/Hugenholtz 2006, Comment on Directive 2001/29/EC art. 4 at 3f.

²¹¹ *Laserdisken* ApS v Kulturministeriet, ECJ 12 July 2006, Case C-479/04 [*Laserdisken II*].

²¹² See De Boer 2005, also Karl Eckhart Heinze, Das sogenannte Folgerecht (“droit de suite”) als künftige europaweite Regelung? – Zur Theorie des urheberrechtlichen Eigentums, GRUR 1998, no. 10, p. 786-792 [Heinze 1998].

²¹³ Explanatory Memorandum to the Information Society Directive, Comment on art. 1 at par. 3.

broad communication right existed. Article 5(d) Database Directive defines it as ‘any communication, display or performance to the public’. As *lex specialis*, this rule trumps article 3 Information Society Directive (see art. 2(1) Information Society Directive). Given the explicit reference to display and performance,²¹⁴ the rights appear to be broader for databases.

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

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

Public performance

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

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

The language of article 3(1) has been criticised²¹⁵ because it uses terminology which in the (copyright) laws of a number of member states has a broader meaning, covering the communication of works of authorship both to audiences present or at a distance (e.g. *öffentliche Wiedergabe* in German law and *openbaarmaking* in Dutch law). It would have been more precise to exclude the communication of works of authorship to ‘on the spot’ audiences (i.e. performance) in article 3 itself. The present terminology is particularly confusing since the remuneration right awarded to performers and phonogram producers by article 8(2) Rental Right Directive, for the use of a phonogram ‘for any communication to the public’, does cover playing a phonogram in a public place and similar ‘on the spot’ communications.²¹⁶

Broadcasting

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

²¹⁴ The practical significance of a ‘performance’ right for databases seems limited.

²¹⁵ Walter in Walter 2001, Kommentar Info-RL at 77.

²¹⁶ Krikke in Dreier/Hugenholtz, Comment on art. 8, Directive 92/100/EEC, at 3.

rights pertaining to broadcasting. However, they will normally have acquired rights from the authors that have contributed to the film.

For authors, the Satellite and Cable Directive contains the exclusive right to authorise satellite broadcasts of copyrighted works (art. 2 Satellite and Cable Directive). For owners of related rights, the Information Society Directive does not introduce additional broadcasting rights, as article 3(2) speaks only of a right of making available.²¹⁷

The Information Society Directive has however broadened the exclusive rights of authors to any type of broadcast (art. 3(1)), e.g. via cable or webcast, although unlike the Rental Right Directive it does not deploy 'broadcast' as a separate term. The general right of communication of article 3(1) also includes retransmission via cable, i.e. the simultaneous and unaltered transmission by a cable operator of a broadcast originating from another organisation. The Satellite and Cable Directive prescribed collective licensing for cable retransmission of broadcasts originating from another member state²¹⁸, only to the extent national laws did recognise such a right in the first place. For works of authorship, a cable retransmission right was generally in place throughout the EU, as it is also included in article 11bis(1)sub ii Berne Convention.

Making available

Articles 3(1) and (2) of the Information Society grants authors, performers, phonogram producers, the producers of the first fixations of films, and broadcasting organisations the exclusive right of making available to the public their works and related rights subject matter²¹⁹ 'in such a way that members of the public may access them from a place and at a time individually chosen by them'. As was indicated above, for related rights the making available right is regulated separately and not as part as a broad communication to the public right, because only authors have been granted the latter (in article 3(1) Information Society Directive).

2.3.2.4 Adaptation

Within the *acquis*, the only directive dealing explicitly with adaptation is the Computer Programs Directive. In article 4(b) it provides for an exclusive right of adaptation, translation or arrangement. The laws of member states all recognise the right to adaptation, but place it differently. In most member states, including the United Kingdom, Spain, Ireland, Estonia, Greece, it is regarded as a separate restricted act. In for instance the Netherlands, Belgium, Finland, Sweden and Denmark it is seen as part of a general broad-ranging reproduction right.²²⁰

The mere fact that a number of countries consider adaptation as a form of reproduction, does not however imply that the broadly defined reproduction right of the Information Society Directive ('in any manner or form') includes adaptation. The adaptation right is essentially left unregulated at the EC level.²²¹ At first sight, this may seem a striking gap in the *acquis*, but upon

²¹⁷ Bechtold, in: Dreier/Hugenholtz 2006, Comment on Directive 2001/29/EC art. 3.

²¹⁸ See *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v Hostelería Asturiana SA (Hoasa)*, ECJ 8 February 2000, case C-293/98, ECR [2000] I-629: '[the Satellite and Cable directive] neither requires the Member States to introduce a specific cable retransmission right nor defines the scope of any such right. It merely imposes an obligation upon the Member States to ensure that when programmes from other Member States are retransmitted by cable in their territory the applicable copyright and related rights are observed.' [*Egeda*].

²¹⁹ For fixations of performances, phonograms, the original and copies of films, and fixations of broadcasts respectively.

²²⁰ Art 16(1)sub e and 21 UK Copyright Act, art. 21 Spanish Copyright Act, art. 37(1) Irish Copyright Act, art. 3(1) sub b and c (translation and adaptation respectively) Greek Copyright Act, art. 13(1) sub 4 and 5 (translation and adaptation respectively) Estonian Copyright act, art. 13 Dutch Copyright Act, art. 12 Italian Copyright act, art. 1 Belgium Copyright Act, art. 2 Swedish Copyright Act.

²²¹ This also concerns the exceptions and limitations enumerated in art. 5 of the Information Society Directive. These do not apply to the rights of adaptation granted by the Member States.

further reflection leaving this right unharmonised makes sense, considering that the issue has a strong moral rights undertone, and more importantly, that the criteria for protected subject matter have not been harmonised either. The question what constitutes an adaptation, and what a new and independent work, is linked closely to the originality criterion one applies. Thus any harmonisation of the right of adaptation would ideally go hand in hand with the introduction of a harmonised concept of the work of authorship (see para. 2.2).

2.3.3 Challenges and inconsistencies in the *acquis*

(Partly) Unharmonised exclusive rights

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

Scope of the reproduction right

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

The sweeping reach of the reproduction right has been the subject of intense debate, because in the digital environment it covers virtually any use of a work or other subject matter, even where similar acts of usage in the analogue realm (such as receiving a television signal or reading a book) would have fallen well outside the scope of what intellectual property aims to protect.²²² The broad scope of the reproduction right also draws in virtually all parties involved in the dissemination and use of protected subject matter, where in the world of physical distribution their roles –especially those of mere carriers– would not have involved restricted acts. The exemption for incidental and transient copying of article 5(1) Information Society Directive may provide some relief for mere passive 'transporters' (see para. 2.4). But the broad scope of the reproduction right also multiplies the number of restricted acts performed by content providers, such as broadcasters or online distributors, require multiple licenses for unitary acts of usage. This leads to unnecessary transaction costs, and may impede the deployment of new business models (see para. 2.4).²²³

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

For new distribution models which are reminiscent of broadcasting, the concurrent application of reproduction and communication rights can seem counter intuitive. In case of podcasting for instance, both mechanical and performance rights societies may claim rights,

²²² See inter alia, Hugenholtz 1996, p. 92-93, Westkamp 2003a, p. 11-16; Hart 2002, p. 58-64, Spoor 1996, p. 67-79.

²²³ This problem is discussed *in extenso* in the IViR Study on the Information Society Directive.

whereby the reproduction/mechanical license covers both the reproductions made at the beginning of the chain of communication (on the server) and the copies made at the user end of the chain (on the users equipment).²²⁴ Similarly, right holders have claimed remuneration for webcasting based on the argument that it not only constitutes communication to the public, but also reproduction because of the intermediate copies made during the streaming process.²²⁵ Some performing rights organisations representing authors and music publishers have taken the position that any transmission is a public performance (i.e. communication to the public), regardless of whether the purpose of the transmission is aimed at selling a copy of a work, as opposed to merely enabling an audience to listen to it.²²⁶ This raises the question whether the reproduction right is not in danger of being overstretched. Clearly a broad reproduction right and a broad communication to the public right, including a right of making available online, cannot co-exist.

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

The cumulation of rights does not contribute to a transparent system. From that perspective also it seems advisable that a normative approach be developed whereby the purpose of a reproduction determines whether there is an independent act of exploitation, or whether there is not, because the sole purpose of copying is allowing public communication for which the right holder has obtained a licence.²²⁷ Such an interpretation could be included in an Interpretative communication that the European Commission might issue to clarify certain issues of interpretation concerning the *acquis*.

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

Definition of distribution right

There appear to be few discrepancies in the existing framework where the distribution right is concerned. An inconsistency of probably minor practical importance is the narrower term used for exhaustion (sale only) with regard to copyrighted software and databases and for related rights. There seems to be no justification for this differential treatment. This may be a reason to align the definitions on exhaustion in the Computer Programs Directive and Database Directives with that of the Information Society Directive.

Alignment could be achieved by revising the definitions in the Database and Computer Programs Directives. Alternatively, article 4(c) Computer Programs Directive and article 5(c) last sentence Database Directive could be repealed while article 4(2) Information Society Directive would be revised, so that the scope of the general exhaustion clause extends to databases and

²²⁴ Another question is how a broad reproduction right exercised through the distributor of content relates to private copying exemptions, and the charging of levies to storage media.

²²⁵ In the US the status of webcasting (especially of sound recordings) under the reproduction right has been the object of fierce debate and has led to diametrically opposed legislative initiatives (H.R. Bills 5469 and 5258).

²²⁶ Report From Broadcast to Webcast, p. 7.

²²⁷ Compare the normative approach put forward in P. B. Hugenholtz/K. Koelman, Copyright Aspects of Caching. Digital Intellectual Property Practice Economic Report, Institute for Information Law, Amsterdam 30 September 1999 [Hugenholtz/Koelman 1999].

software. Another alternative is to revise article 4 Information Society Directive so as to bring under it all distribution rights pertaining to copyrighted subject matter. The drawback of this solution is that the exclusive rights pertaining to software and databases would no longer be concentrated, as they are now in articles 4 Computer Program Directive and 5 Database Directive. In sum, the first alternative seems the most suitable in terms of clarity and consistency. As an alternative to regulation, an interpretative communication to be issued by the Commission might clarify that the distribution rights in all directives have identical meaning.

Rental and lending rights

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

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

Making available versus broadcasting

One of the most challenging aspects of the making available right, is its delineation vis à vis broadcasting. The acquis does not provide a harmonized concept of broadcasting as an act restricted by copyright and related rights. The Rental Right Directive does deploy the term broadcasting. The Satellite and Cable Directive specifies what is to be understood as satellite broadcasting and cable retransmission, but according to the ECJ leaves the interpretation of the central notion of what is 'public' to national courts (see below). The Information Society Directive merely refers to communication to the public by wire or wireless means. In practice there is a need for a clear distinction, which would provide legal certainty for stakeholders who need to know which rights they have acquired or have to clear. But more importantly, for (commercial) users of notably music content, qualification of their activities as broadcasting means clearing rights is easier²²⁸ because the rights of authors, performers and phonogram producers with respect to broadcasting are usually managed collectively, while making available rights typically are not. However, an all too narrow interpretation of the making available right would erode some right holders' exclusive rights.

With digital distribution technology still developing, it is difficult to conceive of a precise definition of 'on demand' distribution, i.e. delivery at a time and place individually chosen by the user (i.e. through pull rather than push technology).²²⁹ Precisely what level of interactivity it implies is not quite clear. In practice, dissemination on line is done through models along a sliding scale of interactivity.

For instance, near-on-demand music via internet radio may be transmitted at very short intervals, consisting of multi-channel broadcasts with a highly specific content (e.g. only certain

²²⁸ See OECD Report from Working Party on the Information Economy, *Digital broadband content, Digital content strategies and policies* (May 2006), doc DSTI/ICCP/IE(2005)3/FINAL p. 25 .

²²⁹ According to the Explanatory memorandum to the Information Society Directive, near video on demand, pay per view and pay TV are not making available.

artists, or a genre, or period music) per channel, making it much alike ‘true’ music on demand.²³⁰ But internet radio can also be much less sophisticated, displaying no or hardly any interactivity at all. Another dissemination method which is difficult to qualify as either broadcasting or making available is podcasting. Unlike webcasting it is not merely streaming (ephemeral, not destined to be saved) content, which signals application of the making available right. On the other hand, podcasts have characteristics of push technology because new content is –through feeds, i.e. machine readable files containing the location of the content– automatically distributed to subscribers.

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

The notion of ‘public’ in the communication to the public right

A central characteristic of the rights described in article 3 Information Society Directive is that they only concern communication to the *public*, but the European legislator has chosen not to define the notion of ‘public’.²³¹ Neither do any of the directives on copyright and related rights, nor the relevant international instruments define what the ‘public’ is, in terms of communication to the public (broadcasting or making available). Consequently it is left to Member States to determine the meaning of the word. Not surprisingly, this leads to various definitions and interpretations.²³²

Already in the Green Paper on Copyright and Related Rights in the Information Society the issue was raised how public and private communication could be distinguished. In its reply, the Legal Advisory Board (LAB) advocated a normative approach, i.e. the borderline should be drawn on the basis of economic considerations, leaving acts of exploitation in the private sphere outside the reach of copyright.²³³ Determining whether the communication is private or public could be aided by considering the commercial circumstances in which communication takes place.²³⁴ For the making available right especially, the test developed for broadcasting by the ECJ appears unsuitable.

In *Egeda* (2000) the ECJ had ruled that the Satellite and Cable Directive does not define what constitutes an ‘act of communication to the public’ or ‘reception by the public’ in the sense of

²³⁰ O. Schwenzer, ‘Töntrageauswertung zwischen Exklusivrecht und Sendeprivileg im Lichte von Internetradio’, GRUR Int. 2001 no. 8/9, p. 722-732 [Schwenzer 2001].

²³¹ Explanatory Memorandum to Information Society Directive, comment on art. 3; Staff Paper on Copyright Review 2004.

²³² For example, under the German Copyright act, the communication is public if it is intended for a plurality of persons, unless such persons form a clearly defined group and are connected by personal relationship with each other or with the organiser (art. 15(3) German Copyright Act). Dutch courts consider a communication for the purposes of (retransmission of) broadcasts as public if it is directed at a group wider than a ‘closed circle’ of relatives, friends or people with similar personal relations. The Italian copyright act (art. 15), defines non-public wider, as the normal circle of family, a community, a school or retirement home (on condition the communication is not for profit). In Greece a stricter concept is used, limited to a narrow circle of relatives or the immediate social circle of the author (art. 3(2) Greek Copyright act).

²³³ Reply to the Green paper on copyright of 20 November 1996 of the LAB.

²³⁴ Westkamp 2003a, p. 13, advocates an approach more along the lines of commercial/private, rather than public/private.

articles 1(2)(a) and (3).²³⁵ But the ECJ has recently revisited the issue.²³⁶ In its 2005 *Lagardère* ruling on article 2(a) Satellite and Cable Directive, the court observed that a limited number of persons who can receive satellite signals with professional equipment only, do not qualify as 'public'. The public 'must be made up of an indeterminate number of potential listeners'. The ECJ referred to its *Multikabel* decision on the Television without frontiers Directive, which shares its legal history with the Satellite and Cable Directive.²³⁷ In that decision the ECJ had held that television broadcasting is the 'initial transmission of television programmes intended for reception by the public, that is, an *indeterminate number of potential television viewers* [emphasis added], to whom the same images are transmitted *simultaneously*.'

The *Lagardère* decision provides a useful criterion for distinguishing broadcasting from other information services, and in this respect could be of some use to interpret what constitutes a broadcast as species of communication to the public under article 3 Information Society Directive. However, qualifying as 'public' only a communication to an audience of indeterminate size, is far too broad a test to apply to the other communication rights of authors and making available right of related right holders.

A more useful test would be to incorporate notions from the law of privacy into the definition of 'public'. For example, in many Member States a performance no longer 'public' when it is directed solely at a group of persons with close personal relations (typically family or friends). There does not, however, appear to be an urgent need for codifying a definition of 'public' at the EC level, since the effects on the internal market of disparate interpretations by national lawmakers and courts appear to be quite limited.

2.3.4 Conclusions

At a general level, one may conclude that although the core economic rights of authors and owners of related rights are regulated by the current Directives, there are substantial areas in which national laws remain unharmonised. An important reason lies not in what is squarely or fairly outside the *acquis* (e.g. moral rights, right of adaptation, public performance), but what is provided in the directives. Often only a minimum level of protection is provided for, leaving member states room to extend exclusive rights to other groups of right holders (e.g. article 2 Information Society Directive) or provide for more or broader exclusive rights (e.g. article 8 Rental Right Directive). Also, member states may have a choice as to the type of right they introduce, e.g. an exclusive right or a right of remuneration for public lending (art. 5 Rental Right Directive).

There appear to be only minor inconsistencies in the *acquis*. One concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction, which although it is described more broadly in the Information Society Directive, does not seem to have a different meaning from the definitions used in either Computer Programs or Database Directive.

Where it concerns legal uncertainties, the important ones are closely linked to the difficulties that arise with categorising certain acts of exploitation or distribution methods in terms of the

²³⁵ *Egeda*, on the question whether the reception by a hotel establishment of satellite or terrestrial television signals and their distribution by cable to the various rooms of that hotel is an 'act of communication to the public or 'reception by the public' within the meaning of the Satellite and Cable directive.

²³⁶ The preliminary question asked is whether a hotel room qualifies as public because successive viewers have access to the work, or as strictly domestic location. Pending case C-306/05 [*SGA*].

²³⁷ ECJ 2 June 2005, Case C-89/04, ECR [2005] I-4891, paragraph 30 [*Mediakabel*].

acts currently restricted by the relevant directives. This is caused by the convergence of platforms and media, and the transition of traditional exploitation models to new business models.

The advent of new (on line) dissemination models that share the characteristics of broadcasting and on demand delivery, cause uncertainty whether they come under the broadcasting or making available right. For purposes of rights clearance this is however a relevant distinction to make. However, precisely because particularly in the area of broadcasting the transition to new forms of transmission, distribution and business models is in full swing, it seems advisable to opt for the most flexible solution, i.e. to leave the interpretation to the courts of member states and ultimately to the European Court of Justice.

Another issue which has come to the fore because of developments in distribution methods, concerns the definition of what constitutes a ‘public’ for the purpose of the rights of communication as laid down in article 3 Information Society Directive. Possibly a distinction between commercial (for economic gain) versus private use can be helpful to distinguish private from public communication,²³⁸ in combination with a qualitative rather than quantitative test, i.e. whereby the presence of personal relationships is relevant rather than the number of persons that (potentially) may be reached.

Where the reproduction right is concerned (esp. art. 2 Information Society Directive), there may be a need to clarify the exact scope of the limitation for temporary reproduction as laid down in article 5(1) Information Society Directive (see paragraph 2.4 below). On a more general note, the various definitions of the reproduction right in the *acquis* give the impression of a quite technical approach to reproduction. A more normative approach would do more justice to the legitimate interests of right holders and users, i.e. whereby the purpose of a copying is taken into account to determine whether there is a relevant act of reproduction.

2.4 Coherence of exceptions and limitations

Limitations on copyrights and related rights are an integral part of the copyright and related rights system, for they are the recognition in positive law of the users’ legitimate interests in making certain unauthorised uses of copyrighted material and other subject matter.²³⁹ Such legitimate interests may include the protection of the users’ fundamental rights, the promotion of free flow of information and the dissemination of knowledge. However, the notion of ‘legitimate interest’ or ‘public interest’ is mostly a matter of national policy. What is in the public interest in one country is not necessarily the same in another. Limitations reflect each legislator’s assessment of the need and desirability for society to use a work against the impact of such a measure on the economic incentive of the rights holders. The outcome of this evaluation will most often determine which limitations are laid down in national legislation and the form that each particular limitation takes.

This weighing process often leads to varying results from one country to the next.²⁴⁰ The legal tradition underlying a Member State’s copyright regime certainly constitutes a contributing factor to the difference of approach between Member States with respect to limitations on copyright and related rights. Indeed, countries following a *droit d’auteur* regime, like France and Belgium, will tend to adopt a limited set of exceptions on copyright, while countries of the copyright tradition, like the United Kingdom and Ireland, will be inclined to provide for elaborate limitations. In

²³⁸ This is in effect a relevant criterion in UK law prior to the Information Society Directive, see Westkamp 2003a, p. 12-13.

²³⁹ L.M.C.R. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, The Hague: Kluwer Law International 2002, p. 109 [Guibault 2002].

²⁴⁰ J.C. Ginsburg and S. Ricketson, *International Copyright and Neighbouring Rights*, Oxford, Oxford University Press 2006, p. 756 [Ginsburg/Ricketson 2006].

practice, the limitations on copyright and related rights generally take, in the national legislation, either one of two forms: either a full exemption from the exclusive right, or a statutory licence, where a work may be used without authorisation from the rights owner but against payment of an equitable remuneration.

In view of the mosaic of limitations on copyright and related rights currently in force in the Member States, the question arises how these limitations are regulated at the European level. In this section, we first set the limitations on copyright and related rights in their international context, before giving an overview of the European *acquis communautaire*. Thereafter, we identify the main challenges and inconsistencies still remaining in the European *acquis* and provide, in the last subsection, a number of recommendations designed to solve these inconsistencies and to ensure that the European system of limitations on copyright and related right is properly adapted to the needs of the digital knowledge economy.

At the outset, it is important to stress that the topic of limitations on copyright and related rights constitutes an important aspect of an ongoing IViR study commissioned by the European Commission on the implementation and effect in Member States' laws of the Information Society Directive. Several of the issues addressed in this section will be the object of extensive treatment in the context of said study. For this reason, some of the recommendations made in this report regarding limitations on copyright and related rights are only tentative, subject to the findings of the second study.

2.4.1 *International context*

Whereas many limitations on copyright and related rights are intrinsically connected to the cultural and social identity of a country, harmonisation efforts at the international and regional levels have so far remained mostly unsuccessful. The limitations listed in the Berne Convention of 1971 are the result of serious compromise on the part of national delegations – between those that wished to extend user privileges and those that wished to keep them to a strict minimum – reached over a number of diplomatic conferences and revision exercises. The Berne Convention establishes a set of minimum standards of copyright protection for foreign right holders that Union Members must respect when adopting limitations on copyright in their national legislation. The limitations provided for under the Berne Convention permit quotation (article 10(1)), uses for teaching purposes (article 10(2)), press usage (arts. 10*bis*(1) and (2)), reservations and conditions on the exercise of mechanical reproduction rights under article 13, and conditions for the exercise of broadcasting and other rights under article 11*bis*.

One of the most important provisions introduced in the Berne Convention during the Stockholm Revision Conference of 1967 is article 9(2), which establishes a three-step-test for the recognition of limitations on the reproduction right. This test has become the international norm for the adoption and application of limitations on copyright and related rights. Indeed, article 13 of the TRIPS Agreement extends the application of the three-step test to all exclusive rights that the agreements sets minimum standards for. Article 10 of the WIPO Copyright Treaty (WCT) and 16 of the WIPO Performances and Phonograms Treaty (WPPT) similarly apply the Berne formula to the minimum rights established by their texts. Because article 20 of the Berne Convention reserves the right of Union countries to enter into special agreements among themselves, only 'in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention', neither TRIPs nor the WIPO treaties can be used by a Berne Union member to justify derogation of any minimum right established by Berne. However, new minimum treaty rights not guaranteed by Berne, such as the rental right, may be subjected to these more extensive limitations.²⁴¹

²⁴¹ P. Goldstein, *International Copyright*, Oxford: Oxford University Press 2001, p. 294 [Goldstein 2001].

According to this test, limitations must (1) be confined to special cases; (2) they must not conflict with normal exploitation of the protected subject-matter; and (3) they must not unreasonably prejudice the legitimate interests of the author. Each element of the test raises its own problems of interpretation.

Some assistance in their interpretation is provided by the decision of the World Trade Organisation's dispute resolution panel which, in 2000, considered their application in the context of the TRIPS Agreement dealing with the 'home style' and business exemptions for public performances of musical works under the US Copyright Act 1976.²⁴² According to the WTO Panel's decision, a proposed exception meets the first step if it is both clearly defined and narrow in its scope and reach.²⁴³ An exception does not conflict with the normal exploitation of the work, if it does not enter into economic competition with non-exempted uses; and it does not unreasonably prejudice the legitimate interests of the author, if the prejudice to the author's interests is proportionate to the objectives underlying the limitation.²⁴⁴ Unreasonable prejudice may be avoided by the payment of equitable remuneration under a statutory license.²⁴⁵

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

As a consequence of the adoption of article 16 of the WPPT, however, the three-step test now serves as a general restriction to *all* exemptions to the conventional minimum rights, which are presently found, or to be introduced, in the copyright and related rights laws of states that have ratified that Treaty.²⁴⁶ Even if an exemption falls within one of the enumerated categories of permitted exceptions, it is still for the national legislatures (and, eventually, the courts) to determine on a case-by-case basis whether the general criteria of the three-step test are met.

The limitations set out in article 15 of the Rome Convention are applicable to all three categories of beneficiaries, i.e. performing artists, phonogram producers and broadcasting organisations, but only insofar as they are implemented in national legislation.²⁴⁷ Furthermore, as evidenced by the second paragraph of the same provision, the list of possible limitations on related rights permitted under the Rome Convention is non-exhaustive. This paragraph allows Contracting States to provide for exemptions other than those enumerated in the first paragraph, if their copyright laws already contain such limitations. As specified in the WIPO *Guide to the Rome Convention*, the four specific limitations in the first paragraph are those mainly used to limit authors' rights, but there may be other minor ones. Hence, the second paragraph avoids the risk that related rights owners are treated better than authors, with respect to limitations.

2.4.2 *The acquis communautaire*

At the European level, the limitations on copyright and related rights are regulated in four of the eight directives adopted in the field of copyright law, namely the Computer Programs Directive, the Rental Right Directive, the Database Directive and the Information Society Directive. As

²⁴² Report of the Panel, 15 June 2000, document WT/DS/160/R.

²⁴³ Ginsburg/Ricketson 2006, p. 764.

²⁴⁴ M. Senftleben, *Copyright, limitations and the three-step test: an analysis of the three-step test in international and EC copyright law*, Information law series 13, The Hague: Kluwer Law International 2004, p. 236 [Senftleben 2004].

²⁴⁵ Ginsburg/Ricketson 2006, p. 775.

²⁴⁶ At the time of writing, only a small number of recently acceded Member States had ratified the WCT and WPPT.

²⁴⁷ WIPO, *Guide to the Rome Convention*, Geneva, WIPO, p. 57.

their titles suggest, the Computer Programs Directive and the Database Directive deal respectively with the limitations on rights in respect of computer software and databases. The scope of the Rental Right Directive is broader for it sets out the limitations on all related rights recognised in the *acquis*. Of the four directives containing limitations on rights, the Information Society Directive has by far the broadest scope, for its limitations in principle apply to subject matter protected by copyright and related rights in general, with the exception of software and databases. Since it is the European legislator's intention to let these directives co-exist, it is useful to give brief overview of the limitations contained in each of them before turning, in the following subsection, to the challenges and inconsistencies remaining in the *acquis*.

Article 5 of the Computer Programs Directive grants the lawful acquirer of a copy of a computer program the right to perform the acts necessary for the use of that program in accordance with its intended purpose, including error correction, to make a back-up copy of the program, as well as to test and observe the program. Article 6 of the same directive regulates the circumstances under which a user may decompile a computer program for purposes of interoperability. Article 9(1) of the Directive expressly provides that any contractual provisions preventing a user from making a back-up copy, testing and observation of the program, or decompiling it for purposes of interoperability shall be null and void.

Article 6(1) of the Database Directive confers lawful users of databases the right of performing the acts listed in article 5 which are necessary for the purposes of access to the contents of the databases and normal use of the contents without the authorisation of the author of the database.²⁴⁸ Article 15 of the Directive declares any contractual provision contrary to article 6(1) null and void. Apart from the imperative limitation of article 6(1) of the Database Directive, Member States are free under article 6(2) to adopt limitations in respect of:

- a) acts of reproduction for private purposes of a non-electronic database;
- b) of the use of a database for the sole purpose of illustration for teaching or scientific research;
- c) for the purposes of public security or for the purposes of an administrative or judicial procedure; and
- d) where other exceptions to copyright which are traditionally authorised under national law are involved, without prejudice to points (a), (b) and (c).

The likely meaning of article 6(2)d) is that it allows the continued application in national law of exceptions that already applied to databases prior to the adoption of the Directive. However, the provision could also be interpreted more broadly as permitting all exceptions that are generally applicable to copyright works.²⁴⁹ Whatever may be the correct reading of this paragraph, the fact remains that in view of the last sentence of article 6(2)d), Member States may not go beyond the limits set in paragraphs a) to c).

Article 10 of the Rental Right Directive lays down the limitations on the rights of performing artists, phonogram producers, film producers and broadcasting organisations. This provision is the equivalent of article 15 of the Rome Convention and allows Member States to provide for limitations in respect of private use; use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research. According to article 10(2) of the Rental Right Directive a Member State may provide for the same kinds of limitations with regard to the protection of related rights, as it provides for in connection with the protection of copyright. As a result of a modification introduced by the

²⁴⁸ J. Gaster, *Der Rechtsschutz von Datenbanken: Kommentar zur Richtlinie 96/9/EG mit Erläuterungen zur Umsetzung in das deutsche und österreichische Recht*, Munich: Carl Heymanns Verlag, 1998, p. 186 [Gaster 1998].

²⁴⁹ Hugenholtz in Dreier/Hugenholtz 2006, p. 325.

Information Society Directive, article 10(3) of the Rental Right Directive now also incorporates the three-step test.

Whereas the limitations listed in the Rental Right Directive are all optional, no harmonisation has been achieved in relation to the limitations on related rights in the European Union. As appears from the Explanatory Memorandum to the Rental Right Directive, the European Commission deliberately refrained from introducing a detailed framework for the limitations in this area, because it believed that such harmonisation would adversely affect the system of reference to the Rome Convention and the provisions on copyright prevailing in the national legislation.²⁵⁰

The decision of the Community legislator to address the issue of limitations on copyright and related rights in the Information Society Directive came as a surprise to many commentators.²⁵¹

Let us recall that the original aim of the Directive was twofold. First, to bring the laws on copyright and related rights in the European Union in line with the WIPO Internet Treaties, in order to set the stage for joint ratification of the Treaties by the Member States and the European Community. The second, largely unrelated goal of the Directive was to harmonise certain aspects of substantive copyright law across the board; a departure from the Commission's previous policy of piecemeal approximation. This aim was already partly visible in the Commission's Green Paper of July 1995. The Green Paper identified a number of key issues (some 'digital', some 'analogue') presumably requiring harmonisation: applicable law, exhaustion, the scope of the economic rights, moral rights, administration of rights and technical protection.

Unexpectedly, the Directive ended up dealing extensively with an issue mentioned only incidentally in the Green Paper: copyright limitations. The harmonisation of limitations proved to be a highly controversial issue, which explains in large part the delay experienced not only in the adoption of the Directive itself, but also in its implementation by the Member States. The difficulty of choosing and delimiting the scope of the limitations on copyright and related rights that would be acceptable to all Member States also proved to be a daunting task for the drafters of the Information Society Directive.²⁵² Between the time when the Proposal for a directive was first introduced in 1997 and the time when the final text was adopted in 2001, the amount of admissible limitations went from seven to twenty.

The limitations listed in the Information Society Directive apply to any category of work and are modelled either on the provisions of the Berne Convention or on the provisions found in the legislation of many Member States. Article 5 of the Information Society Directive contains a detailed list of limitations on the exclusive rights granted under articles 2 to 4 of the Directive, namely the reproduction right, the right of communication to the public and the distribution right. It goes without saying that the limitations of the Information Society Directive only relate to the rights granted therein. The limitations listed in the Directive in no way extend to rights provided for under previous directives or to rights that have yet to be harmonised at the European level, such as the author's moral rights or the right of adaptation or public performance.²⁵³ This may give rise to some tension where the exercise of certain specific limitations included in the Information Society Directive may actually involve the making of an adaptation of a work rather than just a reproduction. This would be the case, for example for the making of a parody and an incidental use.

In view of the wide scope of application of the Information Society Directive, the relationship of this Directive to previous directives had to be clearly regulated in order to avoid conflicts or

²⁵⁰ Explanatory Memorandum to the Rental Right Directive, p. 58.

²⁵¹ Hugenholtz 2000, p. 501; Guibault 2002, p. 540; H. Cohen Jehoram, 'Some Principles of Exceptions to Copyright', in P. Ganeva, C. Heath, and G. Schricker (eds.), *Urheberrecht – Gestern – Heute – Morgen*, Munich: Beck Verlag 2001, p. 381-388, 387 [Cohen Jehoram 2001].

²⁵² Explanatory Memorandum to the Proposal for the Information Society Directive, p. 35.

²⁵³ See para. 2.3 above.

overlap. The solution put forward by the European legislator appears at article 1(2) of the Information Society Directive, which states that unless provided otherwise in this Directive the provisions of all five previous directives are left intact. While this solution also applies to limitations on copyright and related rights, it has not necessarily contributed to clarifying how the respective limitations regimes of the different directives must co-exist. For example, does article 5 of the Information Society Directive apply in addition to the limitations found in earlier directives?

In the case of computer programs, Bechtold argues that many of the limitations of the Information Society Directive cannot be applied due to the particular nature of computer programs. In the case of databases, Bechtold comes to the same conclusion, considering that in the European Commission's own admission, the list of limitations found in the Database Directive is exhaustive.²⁵⁴ In the case of limitations on related rights, Bechtold argues that since article 10(2) of the Rental Right Directive allows Member States to provide for the same kinds of limitations with regard to related rights as they provide with regard to copyright, the limitations of article 5 of the Information Society Directive apply in addition to the limitations of article 10(1) of the Rental Right Directive. There may be some overlap between the two lists, however. Furthermore, since the reproduction right provided for under the Rental Right Directive has been replaced by that of article 2 of the Information Society Directive, the logical consequence is that the limitations of article 5 of the latter directive are applicable to related rights owners.²⁵⁵

2.4.3 *Challenges and inconsistencies in the acquis*

The current landscape of limitations on copyright and related rights in Europe suffers from several inconsistencies and faces important challenges with respect to the proper functioning of the copyright system in a digital knowledge economy. Probably the biggest source of inconsistency in the regime of limitations on copyright and related rights at the European level comes from the fact that article 1(2) of the Information Society Directive has left the limitations of previous directives unaffected. The concurrent application of different regimes of limitations with distinct requirements is bound to lead to incompatibilities and gaps between directives.

In the pages below, we propose the following eight elements for further consideration: the exhaustive character of the list of limitations in the Information Society Directive; the optional character of most limitations on copyright and related rights in the *acquis*; the lack of clear guidelines regarding the contractual overridability of limitations; the question of transient and incidental copies; the three-step test; equitable remuneration vs. fair compensation; the notion of lawful acquirer/ user; and the discrepancies regarding the private copy exception. Since the forthcoming study on the Information Society Directive will address the more specific question of the implementation of the Directive by the Member States and its impact on the development of online business models, we find it appropriate here to concentrate on the general coherence of the European system of limitations on copyright and related rights. The eight elements discussed below represent actual or potential sources of tension both for the consistency of the system and its capacity to meet the needs of the digital knowledge economy.

Exhaustive list of limitations

A first source of uncertainty lies in the question whether the system of limitations on copyright and related rights as laid down in the four European directives is open or closed. In other words, does the system of limitations on copyright and related rights allow Member States to adopt

²⁵⁴ Staff Working Paper on Copyright Review 2004, p. 7.

²⁵⁵ Bechtold in Dreier/Hugenholtz 2006, p. 370.

other limitations in their national legal order than those mentioned in the directives? Neither the texts of the directives nor the intention of the Community legislator is entirely clear on this point. Moreover, opinions in the literature are strongly divided. Some firmly believe that the regime of limitations set out in the European legislation indeed forms a closed system,²⁵⁶ while others see a possibility for Member States to adopt, either through legislation or by judicial interpretation, other limitations that do not appear in the texts of the directives.

The Computer Programs Directive requires Member States to recognise that certain specified persons may use computer programs in particular ways without infringing copyright. The exact relationship between these exceptions and those provided for in national law is left unclear. The last Recital of the Computer Programs Directive states that the Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive. According to Bently, where the limits of legitimate uses have been carefully defined in the Directive, Member States should not maintain broader exemptions.²⁵⁷ On the other hand, this Recital could also be interpreted as allowing Member States to apply other limitations with respect to rights in computer programs, as long as these limitations are not covered by the Directive. One could think, for example, of a limitation allowing the use of computer programs for the sole purpose of illustration for teaching or scientific research, of a limitation for the purpose of public security, or of a limitation in connection with the demonstration or repair of equipment.

A clear example of an open-ended provision regarding limitations can be found in article 10(2) of the Rental Right Directive, which permits Member States to provide for the same kinds of limitations with regard to the protection of related rights, as it provides for in connection with the protection of copyright. As mentioned in subsection 2.4.2 above, this provision finds its source in article 15(2) of the Rome Convention, and is meant to ensure that neighbouring rights holders are not treated more favourably than copyright owners in respect of their works. This article also reflects the ongoing practice in Member States of declaring, by reference, the limitations on copyright in their national act applicable to the related rights. In principle, nothing in the Rental Right Directive precludes Member States from adopting new limitations on copyright and, thereafter, from declaring them applicable to related rights. Any such action would be subject to the provisions of the Information Society Directive, however.

The open or closed character of the list of limitations on copyright in databases is less obvious. Recital 35 of the Database Directive declares that ‘whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database’. Article 6(2) allows Member States to adopt limitations in respect of: acts of reproduction for private purposes of a non-electronic database; of the use of a database for the sole purpose of illustration for teaching or scientific research; and for the purposes of public security or for the purposes of an administrative or judicial procedure. However, in view of its wording, article 6(2)d) of the Database Directive has generally been interpreted as preventing Member States from going beyond the limits set in paragraphs a) to c).²⁵⁸ This interpretation of article 6(2)d) of the Database Directive essentially takes all practical meaning away from Recital 35.

Similarly, the Information Society Directive does not unequivocally provide for a closed list of limitations. Although Recital 32 of the Information Society Directive specifies that the list of

²⁵⁶ Cohen Jehoram 2001, p. 388.

²⁵⁷ Bently, in Dreier/Hugenholtz 2006, p. 226.

²⁵⁸ Hugenholtz, in Dreier/Hugenholtz 2006, 326; Von Lewinski in Walter 2001, p. 751; Gaster 1999, p. 105.

limitations on copyright and related rights provided in article 5 is exhaustive, Member States are allowed, pursuant to article 5(3)o), to provide for limitations for certain uses of minor importance where limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community. Clearly, the ‘grand-father clause’ of article 5(3)o) reflects the principles of subsidiarity and proportionality, and removes some of the rigidity inherent to an exhaustive list of limitations.²⁵⁹

The European legislator’s apparent decision to restrict the limitations to those cases enumerated in article 5 of the Information Society Directive has given rise to severe criticism in the literature. At least three reasons may be advanced cautioning the use of an exhaustive list. First, as the Legal Advisory Board (LAB) already pointed out early on, harmonisation does not necessarily mean uniformity.²⁶⁰ According to the LAB, rules at EC level should allow distinctive features found in national legislations to subsist, as long as they do not hinder the internal market.

Second, previous efforts at the international level to come up with an exhaustive catalogue of limitations on copyright and related right have consistently failed. The Berne Convention provides a clear illustration of such unsuccessful efforts, for the possibility of introducing a complete and exhaustive list of exemptions into the Berne Convention had been considered at the Stockholm Conference. The proposal was rejected for two main reasons: 1) because in order to encompass all the principal exemptions existing in national laws, such a list would have had to be very lengthy, and it would still not have been comprehensive; and 2) since not every country recognised all the possible exemptions, or recognised them only subject to the payment of remuneration, experts feared that by including an exhaustive list of limitations, States would be tempted to adopt all the limitations allowed and abolish the right to remuneration, which would have been more prejudicial to the rights owners.²⁶¹

A third, and probably decisive argument against an exhaustive list of limitations, is that a fixed list of limitations lacks sufficient flexibility to take account of future technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework.²⁶²

Optional character of the limitations

Just as most limitations in the Rental Right Directive and the Database Directive, the vast majority of the limitations listed in article 5 of the Information Society Directive is optional. While Member States may not provide for any exceptions other than those enumerated in article 5, one can have serious doubts as to the harmonising effect of an optional list of limitations on copyright and related rights, from which Member States may pick and choose at will.²⁶³ Although some measure of harmonisation has been achieved because lawmakers in some Member States were tempted to select limitations from the European menu that they would not otherwise have entertained, the harmonising effect will be very modest at best. In practice, not only are Member States free to implement the limitations they want from the list, but they are also free to decide how they will implement each limitation. Note that most of the provisions of articles 5(2) and 5(3) are phrased in very broad terms, rather as categories of permitted limitations than as detailed norms, which has left Member States with a wide measure of discretion.

²⁵⁹ Walter in Walter 2001, p. 1065.

²⁶⁰ LAB, *Commentaires du Legal Advisory Board sur la Communication de la Commission du 20 novembre 1996: Suivi du Livre vert*, § 9A.

²⁶¹ Ginsburg/Ricketson 2006, p. 761.

²⁶² Hugenholtz 2000, p. 502.

²⁶³ Guibault 2003, p. 558; Bechtold in Dreier/Hugenholtz 2006, p. 370.

The result is that Member States have implemented articles 5(2) and 5(3) very differently, selecting such exceptions as they saw fit, and implementing specific categories in diverse ways. With such a mosaic of limitations throughout the European Community, the aim of harmonisation most likely has not been achieved, and legal uncertainty persists.²⁶⁴

Contractual overridability of limitations

The European Commission put much importance in the Information Society Directive on the development of contractual practices, as a means for information producers, intermediaries and end users to determine directly the conditions of use of protected material. This intention clearly transpires from Recital 30 and article 9 of the Directive, which underscore that nothing in the Directive shall affect the law of contract. Moreover, Recital 45 of the Directive declares that ‘the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the right holders insofar as permitted by national law’.

The Commission’s stance on the need to promote the development of contractual agreements for the use of copyright protected material is particularly evident in the face of article 6(4), fourth paragraph, of the Information Society Directive, which deals with the intersection between technological protection measures and limitations on copyright and related rights.

Article 6(4) paragraph 1 of the Directive provides that, in the absence of voluntary measures taken by right holders, including agreements between right holders and other parties concerned, Member States must take appropriate measures to ensure that right holders make available the means of benefiting from a certain number of limitations, to the extent necessary to benefit from these limitations and where that beneficiary has legal access to the protected work or subject-matter concerned. However, the fourth paragraph of the same article declares that the obligation of the first paragraph does not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.²⁶⁵

If technological measures are prone to undermine essential user freedoms, the same is true *a fortiori* for standard form licenses.²⁶⁶ The LAB in its *Reply to the Green Paper* had already warned that ‘there is good reason to expect that in the future much of the protection currently awarded to information producers or providers by way of intellectual property will be derived from contract law’.²⁶⁷ In this context, there is also serious reason to fear that, without appropriate contractual boundaries, users may be forced to forego some of the privileges recognised by law, in order to gain access to protected material.²⁶⁸

Whereas the Computer Programmes Directive and the Database Directive both specify which exemptions may not be circumvented by contractual agreement, the Information Society Directive remains silent on this issue.²⁶⁹ Here, the *acquis communautaire* of the Computer Programs and Database Directives, both providing for mandatory user freedoms, would seem to have suddenly become irrelevant. In view of the silence of the Information Society Directive on this point, the only remedies available against abusive contractual clauses are to be found in the

²⁶⁴ See *in extenso* the ongoing IViR ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’, which will be submitted to the Commission by the end of 2006.

²⁶⁵ The issue of the intersection between technological protection measures and limitations, will be treated *in extenso* in the ongoing IViR study mentioned above, note 264.

²⁶⁶ Hugenholtz 2000, p. 502.

²⁶⁷ Reply to the Green paper on copyright of 20 November 1996 of the LAB, § 9A.

²⁶⁸ On the issue of the impact of contractual practices on limitations, see *in extenso* IViR Study on Information Society Directive.

²⁶⁹ See: Guibault 2002, 203; Bechtold in Dreier/Hugenholtz 2006, p. 371-372.

general rules of law, such as competition law or consumer protection law, which are, at present, poorly suited to meet the needs of users of copyrighted material in the digital networked environment.

Transient and incidental acts of reproduction

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

According to Recital 33 of the Directive, this limitation is meant to cover such acts as browsing and caching on the Internet. The Community legislator felt the need to introduce this rather technical limitation in view of the very broad definition given to the right of reproduction in article 2 of the Information Society Directive, which encompasses any temporary or permanent reproduction by any means and in any form, in whole or in part. A first question that arises in relation to this mandatory limitation is whether it is absolutely necessary to specify that transient or incidental acts of reproduction are exempted from the right of reproduction provided for in article 2 of the Directive and if so, whether this exemption should be introduced as a limitation on rights or as a restriction of the concept of reproduction. Although this issue will be examined in greater detail in the context of the upcoming Study on the implementation of the Information Society Directive, it is worth discussing it briefly in the context of this study.

Before the adoption of the Information Society Directive, the scope of the reproduction right in the digital networked environment had in fact been the object of intense debate at the WIPO during the negotiations and discussions leading to the adoption of the WCT and WPPT in 1996. The Basic Proposal for the future WCT initially contained a provision covering the right of reproduction, including a second paragraph which was in many respects comparable to article 5(1) of the Information Society Directive. While a majority of delegations agreed that article 9(1) of the Berne Convention was broad and flexible enough to encompass the (temporary) storage of a work in any electronic medium, the delegations could not agree on the text of an appropriate limitation with respect to transient and incidental acts of reproduction.²⁷⁰

The main argument for the introduction of such a limitation was the danger that, if not *all* member states included such a provision exempting transient and incidental reproductions, the broadest interpretation of the reproduction right would prevail, whereby such temporary reproductions would always be covered by the exclusive right.²⁷¹ On the other hand, a specific limitation on transient and incidental acts of reproduction would reinforce the broad scope of the reproduction right as such, especially considering limitations on copyright generally receive a restrictive interpretation. This very issue became so contentious that the negotiations almost stranded. In the end, the entire provision was deleted from the final text of the WCT. By contrast, the WPPT does grant performers and phonogram producers an exclusive right of reproduction because, contrary to authors who benefit from article 9 of the Berne Convention, these related rights owners did not enjoy an exclusive right of reproduction under the Rome Convention. However, the provision of the WPPT contains no restriction or limitation on the right of reproduction.

A provision in the law exempting acts of transient and incidental reproductions from the scope of the right of reproduction was probably not even needed at all. Some commentators have argued that a common sense judicial interpretation of the reproduction right would have

²⁷⁰ See notes 191 and 192.

²⁷¹ Ginsburg/Ricketson 2006, p. 685.

been sufficient, if not much better.²⁷² Other commentators have suggested that transient and incidental acts of reproduction would hardly ever amount to a problem, since rights holders are sensible enough to avoid unnecessary and counterproductive lawsuits over temporary copying.²⁷³ Nevertheless, although the European Commission had no international obligation to fulfil in this sense, it chose to introduce article 5(1) in the Information Society Directive for fear that Member States may give diverging interpretation of the reproduction right.

Arguably, since transient and incidental acts of reproduction primarily concern the interpretation of the concept of reproduction,²⁷⁴ the provision should have been adopted as a restriction of the concept itself, rather than as a limitation on the right. The definition of the reproduction right should therefore follow a normative approach: not all technically possible acts of reproduction necessarily constitute a reproduction in the sense of the copyright act. In other words, acts of short-lived copying that are mere by-products of a technical communication process should not qualify as acts of reproduction (see para. 2.3.2.1 above).²⁷⁵ This is in fact the view adopted by the Parliament of The Netherlands, where article 5(1) of the Information Society Directive was transposed in the Dutch Copyright Act 1912 as a carve out of the right of reproduction rather than as a limitation on that right.

A second more practical question involving the exception on transient and incidental reproductions is whether the mandatory limitation of article 5(1) of the Directive applies to computer programs and databases. Let us recall that pursuant to article 1(2) of the Information Society Directive, unless provided otherwise in this Directive, the provisions of all five previous directives are left intact. In Bechtold's opinion, the answer to the question is no, since articles 4 to 6 of the Computer Programs Directive create a comprehensive framework for reproducing computer programs, which does not cover the situation described in article 5(1) of the Information Society Directive. The same remark holds true with respect to databases.

However in view of the ongoing process of digital convergence that has resulted in multimedia products and services incorporating both 'normal' works, software and databases, there is an obvious need for alignment here, as the European Commission already suggested in its Staff Working Paper on Copyright Review of 2004.²⁷⁶

Three-step test

As mentioned in section 2.3.1, the rule known as the three-step test has become an international standard with which limitations on rights must comply, both at the national and the European level. The three-step test is now incorporated in all four European directives dealing with limitations on copyright and related rights. Although all explicitly or implicitly refer to the test laid down in article 9(2) of the Berne Convention, the four provisions in the European directives show significant differences among each other, which may ultimately give rise to legal uncertainty.

Paragraph 6(3) of the Computer Programs Directive on decompilation states that 'in accordance with the provisions of the Berne Convention (...), the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program'. The question does arise why the European legislator has chosen a different formulation for the three-step-test than under the Berne Convention²⁷⁷ and

²⁷² Hugenholtz 2000, p. 502.

²⁷³ Hansen/Dixon 1996, p. 609.

²⁷⁴ See the Explanatory Memorandum to the Proposal for Information Society Directive.

²⁷⁵ Hugenholtz 1996, p. 89.

²⁷⁶ Staff Working Paper on Copyright Review 2004, p. 7; Walter in Walter 2001, p. 1062.

²⁷⁷ Blocher in Walter 2001, p. 231.

why this test only applies to acts of decompilation and not to acts covered by other limitations under the Directive.

The wording of article 6(3) of the Database Directive closely resembles that of article 6(3) of the Computer Programs Directive, except that the restriction of the three-step-test applies to all limitations listed in the Database Directive. By contrast, article 5(5) of the Information Society Directive provides that ‘the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’ As mentioned in paragraph 2.3.3 above, article 10(3) of the Rental Right Directive now contains a three-step test applicable to limitations on related rights that is phrased in essentially the same terms as article 5(5) of the Information Society Directive.

Not only is there a certain inconsistency in the scope and formulation of the test throughout the directives, but there is also a definite uncertainty with respect to the intended addressee of the test. While the Computer Programs and Database Directives speak of the ‘interpretation’ of the limitations in such a way as not to unreasonably prejudice the rights holder’s legitimate interests or to conflict with the normal exploitation of the work, the Rental Right and the Information Society Directives restrict the ‘application’ of the limitations to certain special cases which do not conflict with a normal exploitation of the work and which do not unreasonably prejudice the legitimate interests of the rights holder. Does this distinction point to the fact that the provision is addressed to different entities – in the former case to the judge and in the latter case to the legislator?²⁷⁸

With respect to the Information Society Directive, the argument has been made that the legislator is required to take the test into account when implementing the limitations listed in articles 5(1) to 5(4). According to Bechtold, if a national court applies a national implementation of one of the limitations listed in the Directive, it should also interpret this provision as applied in the particular case in the light of article 5(5). However, Member States are not required to transpose the three-step-test into their national copyright laws.²⁷⁹ As a result, it is fair to say that the question of the true addressee of the three-step test remains uncertain and thereby, that the role of the three-step test either as a guideline for legislative action or as a rule of interpretation also remains undecided.²⁸⁰

Fair compensation or equitable remuneration?

The Information Society Directive foresees the possibility to pay remuneration to the rights holder for certain of the uses covered by the limitations of article 5. As finally adopted, the Directive provides for a right to ‘fair compensation’ in three instances: for reprographic reproduction (Art. 5.2 (a)), for private copying (Art. 5.2(b)), and for reproduction of broadcast programs by social institutions (Art. 5.2(e)). Apart from these three limitations, Recital 36 states that the Member States may provide for fair compensation for rights holders also when applying the optional provisions on exceptions or limitations, which do not require such compensation.

The notion of ‘fair compensation’ is a novelty in European copyright law. Until the adoption of the Information Society Directive, the payment of a fee to the rights holder for the unauthorised use of copyright protected works was referred to in terms of ‘equitable remuneration’. The notion of ‘equitable remuneration’ is an internationally recognised concept,²⁸¹ rooted in notions of natural justice and based on the theory that authors have a right to

²⁷⁸ Hart 1998, p. 61.

²⁷⁹ Bechtold in Dreier/Hugenholtz 2006, p. 381.

²⁸⁰ See: Senfleben 2004, p. 279.

²⁸¹ Berne Convention, art. 11*bis*(2) and 13(2).

remuneration for every act of use of their copyrighted works, notwithstanding any consideration of harm to the rights holder.²⁸²

At the European level, articles 4(4) and 8(2) of the Rental Right Directive provide for the payment of a single equitable remuneration by the user for the public lending of a work and for the broadcast of a commercial phonogram, respectively. However, because the notion of 'equitable remuneration' is nowhere defined in the Rental Right Directive, the European Court of Justice was asked to give an interpretation of article 8(2) of Directive in a preliminary ruling.²⁸³ The Court concluded that the term equitable remuneration used in this provision represents a Community concept which must be interpreted and applied in the same way in all the Member States of the European Community. However, the Court went on to declare that 'it is for each Member State to determine, in its own territory, the most appropriate criteria for assuring, within the limits imposed by Community law and the Rental Right Directive in particular, adherence to that Community concept'.²⁸⁴

In view of its distinct wording, the concept of 'fair compensation' must be distinguished from the notion of 'equitable remuneration', which prevailed until then in European copyright law. One of the main differences between the two notions lies in the fact that, according to Recital 35, the level of 'fair compensation' can be related to the possible harm to the rights holders resulting from the act in question. In cases where rights holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. By introducing the notion of 'fair compensation' the framers of the directive have attempted to bridge the gap between those (continental-European) Member States having a levy system that provides for 'equitable remuneration', and those (such as the United Kingdom and Ireland) that have so far resisted levies altogether.²⁸⁵

In practice, the co-existence of the two concepts of 'equitable remuneration' and 'fair compensation' is likely to lead to frictions in the application of particular limitations, since the criteria for the calculation of an 'equitable remuneration' and a 'fair compensation' differ. According to what criteria should a legislator choose for the grant of a fair compensation, as required for three specific limitations or as permitted under Recital 36 of the Directive for all other optional limitations, or for the grant of an equitable remuneration as might be required by the third step of the test of article 5(5) of the Directive? Is the payment of a fair compensation in respect of a particular limitation always sufficient to pass the third step of the three-step test?

Lawful acquirer or user?

With the co-existence of four directives containing provisions dealing with limitations on copyrights and related rights, it is almost inevitable to come across certain drafting inconsistencies between directives with respect to identical or substantially similar concepts. One example of such a difference in drafting language relates to the notions of 'lawful acquirer', 'lawful user' and 'lawful use'. These concepts are primarily invoked in relation to the use of digital works and are therefore to be found in the Computer Programs Directive, the Database Directive and the Information Society Directive, respectively. In view of the differences in terminology used in the three directives, the question arises whether these differences bear any substantive meaning or if they merely denote an inadvertent oversight on the part of the European legislator.

²⁸² Bechtold in Dreier/Hugenholtz 2006, p. 371.

²⁸³ Stichting ter Exploitatie van Naburige Rechten v Nederlandse Omroep Stichting, ECJ 6 February 2003, Case C-245/00, ECR I-1251 [*Sena*].

²⁸⁴ *Id.*, para. 38.

²⁸⁵ Bechtold in Dreier/Hugenholtz 2006, p. 373.

Article 5(1) of the Computer Programs Directive grants the ‘lawful acquirer’ of a computer program minimum rights of use. This wording differs from that of articles 5(2) and 5(3) of the same Directive, which refer to the ‘person having a right to use’ a copy of a computer program. Who is a ‘lawful acquirer’ of a computer program? How must one interpret the ‘lawful’ character of the acquisition? Must the ‘lawfulness’ be assessed in relation to the authorisation to use the software granted under licence by the copyright holder, or in relation to the acquisition of the copy of the software, where the lawfulness is considered from a perspective of property law? In the first case, a user who acquires in good faith an infringing copy of the software would not be considered a ‘lawful’ acquirer of the program in the sense of the Directive, while it could be true in the second case. Following the majority opinion,²⁸⁶ the concept of ‘lawful acquirer’ is understood to cover a purchaser, renter, licensee from the right holder, as well as persons who purchase copies legitimately in circulation. According to Bently, ‘the notion of ‘lawful acquirer’ may be broader in some important respects than these other provisions, since legality is only assessed in relation to acquisition rather than conditions of use. A purchaser of a computer program in Japan will be a lawful acquirer under UK law even if the licence accompanying the sale purports only to permit use of the program in Japan.’²⁸⁷

By contrast, article 6(1) of the Database Directive uses the expression ‘lawful user’. Despite its importance, there is no definition of the expression in the text of the Directive, nor in the recitals. Again, the question arises as to who may be considered a lawful user. Is it the person who uses the database according to a contract or the law, or can a database only be lawfully used if it has been legitimately acquired? Recital 34 of the Directive describes the ‘lawful user’ as a ‘person having acquired a right to use the database’. This definition fails to explain how a person acquires the right to use the database. In any case, the lawful user of a database can be understood as any person using the database within the limits drawn by a contract from the right holder of the database. This will include users implicitly licensed, as will be the case for most website offered freely on the Internet. But the term most likely also applies to persons having legally acquired copies of the database, such as the purchaser of a database in paper form or on CD-ROM.²⁸⁸

Would the notion of ‘lawful user’ extend to a person using a database within the limits drawn by the law? In copyright law, it is traditionally accepted that a contract is not always needed to make a lawful use of a copyright protected work. According to Vanovermeire, if a user does not have a licence setting out the conditions of use, he may be allowed to make use of the protected work within the bounds of the exceptions provided for in the national copyright act. The main criticism against this interpretation is that it is circular: one becomes a lawful user by relying on the exceptions, but these are only provided for lawful users. This element of the interpretation is thus incapable of providing a satisfactory meaning to the expression. As Vanovermeire points out, ‘one cannot become a lawful user by relying on the exceptions, because the exceptions contained in the Directive state that only lawful users can rely on them. One should first be categorised as a lawful user, before being able to rely on the exceptions to the right holder’s authorisation right.’²⁸⁹

Article 5(1) of the Information Society Directive exempts temporary and transient or incidental copies the sole purpose of which is to enable a lawful use, such as browsing and caching. Contrary to the provisions of the Computer Programs and Database Directives, the Information Society Directive does not refer to the person of the user, but to the actual use of

²⁸⁶ See: Guibault/Van Daalen 2006, p. 72; Walter 2001, p. 185.

²⁸⁷ Bently in Dreier/Hugenholtz 2006, p. 237, Report on the Computer Programs Directive, p. 12.

²⁸⁸ Hugenholtz in Dreier/Hugenholtz 2006, p. 324; Von Lewinski in Walter 2001, p. 746.

²⁸⁹ V. Vanovermeire, ‘The Concept of the Lawful User in the Database Directive’, IIC 2000, no.1, p. 63-81, at p. 68 [Vanovermeire 2000].

the work. The ‘lawfulness’ must be assessed therefore not in relation to the status of the user, but rather to the purpose of the act of reproduction.²⁹⁰ Recital 33 of the Information Society Directive declares that a ‘use should be considered lawful where it is authorised by the right holder or not restricted by law’. This definition of a ‘lawful use’ would therefore cover uses that are expressly or implicitly authorised by the right holder. Offering a protected work on a website without any restrictions could be interpreted as a form of implicit consent of the right holder to download his work.

Does the expression ‘lawful use’ in the Information Society Directive extend to uses relying on the limitations? In all likelihood, it does. According to Bechtold, if a Member State has implemented a particular copyright limitation of those listed in articles 5(2) and 5(3), and a transient copy is made to enable a user to benefit from this limitation, such reproduction does not violate the right of reproduction since the copy is not restricted by law. In this regard, article 5(1)b) ensures that the right of reproduction cannot be used by right holders to undermine the copyright limitations listed in articles 5(2) and (3) of the Directive.²⁹¹ This precision would not be necessary if the exemption covered by article 5(1) were adopted as a restriction on the concept of reproduction rather than as a limitation. Clearly, there is some inconsistency in the similar terms used in the three directives. The legal uncertainty which is likely to arise from this inconsistency may have important practical consequences for both right holders and users, when trying to establish who is a lawful acquirer or user, in the case of computer programs and databases, and what constitutes a lawful use under the Information Society Directive.

Private copying

The wording and scope of private copying exemptions differ substantially from one directive to another. For instance, the Computer Programs Directive expressly precludes the adoption of any limitation that would allow the making of a copy of a computer programme for private purposes.

The Database Directive restricts the possibility of making a private copy only to non-electronic databases without providing for fair compensation as in other cases where private copying is regulated. The last sentence of Recital 35 of the Database Directive states that ‘a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment’.

By contrast, article 5(2)(b) of the Information Society Directive allows Member States to adopt a limitation on the right of reproduction in respect of reproductions of all other categories of works (except computer programs and databases) on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation. The provision makes no distinction between analogue and digital copies made for private purposes, although its obligation to phase out levies as technical measures become available is clearly geared towards digital private copying.

The difference in treatment of the private copying exemption depending on the category of work involved may need to be reassessed, particularly in the light of digital convergence. Increasingly, digital information (‘multimedia’) products incorporate a variety of types of works, including sound, images, databases and software applications. Clearly, such products should become subject to a single rule of private copying.

²⁹⁰ S. Dusollier, *Droit d’auteur et protection des oeuvres dans l’univers numérique*, Brussels: Larcier 2005, p. 449 [Dussollier 2005].

²⁹¹ Bechtold in Dreier/Hugenholtz 2006, p. 373.

2.4.4 Conclusions

As shown in the previous subsection, the current regime of limitations on copyright and related rights in Europe suffers from several inconsistencies and faces important challenges with respect to the proper functioning of the copyright system in a digital economy. In the light of the eight elements analysed above, we draw the three following conclusions: (1) the issue of transient and incidental acts of reproduction should be reassessed, and a legal solution applied to all categories of works capable of being transmitted; (2) the limitations on related rights and database rights permitted by the directives should be aligned with the permitted limitations on copyright; and (3) the EC legislator should strive to establish a flexible and forward looking regime of limitations on copyright and related rights.²⁹²

Transient and incidental acts of reproduction

Since transient and incidental acts of reproduction primarily concern the interpretation of the concept of reproduction, the provision in the Information Society Directive on transient and incidental acts of reproduction should be ideally framed as a carve-out to the reproduction right itself, rather than as a limitation on the right. The definition of the reproduction right should reflect a normative approach. Not all technically possible acts of reproduction necessarily constitute a reproduction in the sense of the copyright act. Following the example set by the Dutch implementation act, acts of short-lived copying that are mere by-products of a technical communication process should not qualify as acts of reproduction in the first place. In addition, as the European Commission justly pointed out in its Staff Working Paper of 2004, the exclusion of transient and incidental acts of reproduction from the concept of reproduction should be extended to computer programs and databases as is currently the case for all other categories of works.

Limitations on related rights and database right

As the European Commission justly pointed out in its Staff Working Paper of 2004, the horizontal nature of the Information Society Directive itself is not a sufficient argument for incorporating or extending the application of the list of exceptions as a whole to each of the other Directives that were adopted earlier.²⁹³ For instance, the specific character of the Computer Programs protection regime may not warrant the extension to computer programs of the general framework laid down in the Information Society Directive with respect to limitations on copyright. On the other hand, the convergence of electronic databases with other categories of digital works and subject matter would require that the limitations of the Information Society Directive be extended to databases.²⁹⁴ Thus a single multimedia product containing different categories of works, including a database, would be subject to the same set of limitations.

With respect to the limitations on related rights, there is in principle no reason why the limitations on the rights of performing artists, phonogram producers, broadcasting organisations and film producers should be governed by two distinct instruments. This only creates confusion and unnecessary duplication. Since all limitations appearing in the Rental Right Directive are also contained in the more recent Information Society Directive, the limitations of the Rental Right Directive could be abrogated as far as they relate to rights granted under the Information Society Directive.

²⁹² Note that some of the recommendations made below regarding limitations on copyright and related rights are only tentative, subject to the findings of the IViR Study on the Information Society Directive.

²⁹³ Staff Working Paper on Copyright Review 2004, p. 7.

²⁹⁴ Von Lewinski in Walter 2001, p. 751.

Towards a flexible and forward looking regime of limitations

Subject to the findings of the ongoing study commissioned by the European Commission on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, certain measures could be considered in the long term in order to foster a flexible and forward looking regime of limitations on copyright and related rights which would be capable of taking technological changes and new business models into account. To this end, it could be envisaged to remove the requirement laid down in Recital 32 of the Information Society Directive that the list of limitations included in the Information Society Directive be exhaustive. A non-exhaustive list of limitations would allow Member States to adopt *ad hoc* solutions in answer to pressing situations. In this sense, it would deserve consideration to clarify the role of the three-step test, i.e. whether the test must be seen not only as a guideline for the legislator, but also as a rule of interpretation for the courts. In addition, the meaning and scope of application of the notions of 'fair compensation' and 'equitable remuneration' in European copyright law should also be clarified. Finally, since a list of optional limitations has led to such a mosaic of different limitations across the Member, the Community legislator could consider declaring a small number of strictly worded limitations mandatory for all Member States. With respect to such mandatory limitations, it would be advisable to declare any non-negotiated contractual agreement to the contrary null and void.

2.5 Collective rights management

The creation at the European level of a level playing field for collective management societies has been an item on the European Commission's agenda at least since the Green Paper of 1995.²⁹⁵ In recent years discussions have intensified, as evidenced by the European Parliament's Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights²⁹⁶ and the European Commission's Communication on the Management of Copyright and Related Rights in the internal market. Consequently, the establishment of a regulatory framework for collective management societies was included in the Commission's Work Programme for 2005.²⁹⁷ In this context, the Commission published a comprehensive study on the cross-border collective management of legitimate online music services setting out the possible options for regulation.²⁹⁸ However, the broad-ranging directive that the Communication seemed to promise, has not materialised. Instead, the Commission has opted for the less ambitious instrument of a Recommendation to deal with what it perceives as the most urgent issue: the management of online rights in musical works and related subject matter.²⁹⁹

For the time being, national rules governing the collective management of rights remain largely unharmonised, albeit a measure of control is exercised by the EC by virtue of the Treaty rules on competition. Over time, the European Court of Justice and the European Commission

²⁹⁵ Guibault/Van Gompel 2006; J. Reinbothe, 'Die kollektive Wahrnehmung von Rechten in der Europäischen Gemeinschaft', in: P. Ganeva et al. 2001, p. 526-528; Deloitte & Touche, 'Étude sur la gestion collective des droits d'auteurs dans l'Union Européenne', Brussels 2000.

²⁹⁶ The European Parliament, European Parliament Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights, (2002/2274(INI)), 15.01.2004.

²⁹⁷ Commission of the European Communities, Commission Work Programme for 2005 – Communication from the President in agreement with Vice-President Wallström, January 26, 2005, COM (2005) 15 final.

²⁹⁸ Commission Staff Working Document, Study on a Community Initiative on the Cross-Border Collective Management of Copyright, Brussels, 07.07. 2005 [Staff Working Document on Cross-Border Collective Management of Copyright].

²⁹⁹ Online Music Recommendation 2005.

have developed an impressive body of decisions and case law, putting the allegedly anti-competitive behaviour of collective management societies to the test of articles 81 and 82 of the EC Treaty.³⁰⁰

The international treaties in the field of copyright and related rights are also mostly silent on the issue of collective rights management, except for arts. 11bis(2) and 13(1) of the Berne Convention and article 12 of the Rome Convention. These provisions implicitly refer to collective rights management by stating that Contracting Parties may determine the conditions under which certain rights are exercised.³⁰¹

Nevertheless, the harmonisation directives in the field of copyright and related rights do contain a number of rules relating to the issue, the most of important of which are found in the Satellite and Cable Directive's chapter on cable retransmission. In this section, these provisions will be summarised, and thereafter tested for their consistency.

2.5.1 *Compulsory collective management of cable retransmission rights*

The most far-reaching rules relating to collective rights management found in any directive are surely those on cable retransmission of the Satellite and Cable Directive. Like the chapter on satellite broadcasting, the cable provisions seek to foster a 'European audiovisual space', i.e. a common market for audiovisual (television) services. But its means are entirely different. Whereas the satellite provisions provide for a Community-wide 'injection right' that pre-empts territorial rights of satellite broadcasting in the countries of reception, the cable rules provide for a system of compulsory management of territorial rights of cable retransmission, in order to facilitate the free flow of television services across the Europe. This regime of mandatory collective rights management, which does not exist elsewhere in European copyright law, seeks to ensure that cable operators are in a position to acquire all rights necessary to allow cable retransmission of broadcast programs. Its particular aim is to avoid that right holders in parts of broadcast programs that are not represented by a collecting society enforce their exclusive rights individually vis-à-vis cable operators, thereby causing 'black-outs' in retransmitted programs.³⁰²

The main justification for such a far-reaching limitation to the right holders' freedom of contract lies in the peculiarities of cable television. Cable operators retransmitting radio or television programs are normally not in a position to negotiate all necessary licenses prior to the initial act of broadcasting. Usually, a cable operator will have only a few days' notice of the programs to be broadcast. Since national broadcasting law will often impose upon cable operators the obligation to retransmit programs simultaneously and without abridgement, cable operators have only a very limited freedom to actually negotiate with the right owners concerned.

Moreover, cable operators would have to trace, and deal with, a multitude of right holders in each program to be retransmitted: broadcasting organisations, film producers, free lance authors, performing artists, musical and mechanical rights organisations, etc. This structural problem of rights management is exacerbated by the fact that not all owners of rights in broadcast programs will be represented by a collecting society. Contracts concluded with collecting societies will, therefore, never guarantee that retransmission rights are cleared for 100%. Indemnifications provided by collecting societies will protect cable operators against claims for damages, but not against injunctions.

³⁰⁰ See, inter alia, *Belgische Radio en Televisie (BRT) v. SABAM*, ECJ 30 January 1974, case 127/73, ECR [1974] 51 [SABAM II]; *Musik-Vertrieb Membran, GVL, IFPI Simulcasting*.

³⁰¹ Communication on the Management of Copyright and Related Rights in the Internal Market, p. 6.

³⁰² European Commission, *Broadcasting and copyright in the internal market. Discussion paper*, III/F/5263/90-EN, Brussel, november 1990, par. 3.29 *et seq.*; Recital 28 Satellite and Cable Directive, Recital 28.

In this respect, the problems the Directive intends to solve are somewhat related to the ‘orphan works’ issue that will be discussed in Chapter 5 of this study. However, it must borne in mind that while cable operators are often under a statutory or economic obligation to retransmit broadcast programs simultaneously and integrally, and thereby unable to engage in negotiations with individual right holders or to undertake extensive rights clearance exercises, those users wishing to reutilise pre-existing works in other circumstances, such as making available online an entire film or television archive, are under no similar constraint.

The unique legal mechanism of the Satellite and Cable Directive replaces the statutory license scheme that was originally envisaged by the European Commission in its Green Paper on Television without Frontiers. In principle, article 9(1) leaves the authorisation right intact,³⁰³ and therefore does not qualify as a statutory or compulsory license that article 8 expressly prohibits. A collecting society may still deny permission to cable operators to retransmit certain works represented by the society, albeit that article 12 prohibits bad faith refusals to license. Black-outs, therefore, may still occur in practice. Indeed, contracts between collecting societies and cable operators often contain special clauses allowing for black-outs under special circumstances. Nevertheless, viewed from the angle of the individual right owner, the mandatory collective exercise of rights does somewhat resemble a compulsory license.³⁰⁴ An individual film producer, for instance, will not be able to control cable retransmission in a foreign market, once he has licensed the film for television broadcasting.

Article 1(4) of the Satellite and Cable Directive provides a definition of ‘collecting society’. The definition is very broad, encompassing ‘any organisation which manages or administers copyright or rights related to copyright as its sole purpose or as one of its main purposes.’ It includes collecting societies of all sorts, whether unregulated or operating under a statutory license or monopoly. In addition, it includes other organisations, such as trade unions, that engage in the collective rights management of their members.³⁰⁵ A literal reading would even allow organisations dealing with *individual* rights management, such as music publishers or agents, to qualify as ‘collecting societies’.

Article 9 (1) is the centrepiece of the Directive’s rules on cable retransmission. The right of cable retransmission may not be exercised by right owners individually, but only through a collecting society. In practice, even before the Directive was adopted, collective management of cable rights had already become normal practice in many Member States. But article 9(1) does not prevent right holders from individually assigning (transferring) their cable retransmission rights to other parties,³⁰⁶ for instance to broadcasting organisations wishing to clear cable rights up-front, so they can offer their programs to cable operators as ‘clean products’. As an exception to the general rule of article 9(1), article 10 of the Directive specifically allows broadcasters to exercise retransmission rights on an individual basis. Excepted cable retransmission rights are rights that are initially owned by the broadcasters themselves, such as related rights in the transmissions or copyrights in programs produced by the broadcasters themselves. Excepted rights also include rights that have been ‘transferred’ to the broadcaster. The term ‘transfer’ is not defined, and leaves room for considerable uncertainty as to its scope. It obviously refers to the assignment of rights, but is probably broad enough to encompass exclusive licences as well. This terminological unclarity is directly related to the undefined status of the ‘right holder’ in the directives.³⁰⁷

Another novelty that was introduced by the Satellite and Cable Directive is a system of mediation between right holders and cable operators, with the goal of reducing the risk that

³⁰³ Recital 28 Satellite and Cable Directive.

³⁰⁴ Dillenz, in Walter 2001, p. 800.

³⁰⁵ Dreier in Walter 2001, p. 429, par. 37.

³⁰⁶ Recital 28 Satellite and Cable Directive.

³⁰⁷ See Bechtold, in Dreier/Hugenholtz 2006, Information Society Directive art. 1, note 3.

negotiations between right holders and cable operators collapse, or not even take place. This has become a particularly urgent and difficult problem in several Member States in recent years. In some countries negotiations between right holders and cable operators have been dragging on for years.

The mediation system that the Directive prescribes does not really solve these problems. As the Commission acknowledges in its report, the current system relies too much on voluntary cooperation of the parties concerned, does not impose deadlines on unwilling parties, and allows those endless legal battles that we are seeing in the court rooms today. The Commission suggests to ‘upgrade’ the mediation system, inter alia by imposing negotiation deadlines upon the parties concerned: This proposal deserves serious consideration. Clearly, to solve the current stalemate between right holders and cable operators some form of binding arbitration, such as the system provided under the German law on collective rights management (*Urheberrechtswahrnehmungsgesetz*), is in order. Another model to consider is the Copyright Tribunal of the United Kingdom. Where parties cannot agree between themselves, the Tribunal unilaterally sets the terms and conditions of licences offered by collective rights organisations.

2.5.2 Other harmonised rules on collective rights management

Except for the rules on cable retransmission found in the Satellite and Cable Directive, direct references to collective administration of rights in the seven directives are relatively scarce.

Art. 4(3) of the Rental Right Directive provides that the authors’ and performers’ (unwaivable) right of equitable remuneration for rental ‘may be entrusted to collecting societies representing authors and performers.’ More importantly, article 4(4) provides: ‘Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.’ In other words, the remuneration right can be subjected to compulsory collective management, as indeed is the case in many Member States.

Besides its rules on cable retransmission the Satellite and Cable Directive also deals with collective rights management in the context of satellite broadcasting. According to article 3(2) of the Directive, the system of ‘extended’ collective licensing that already existed in the Nordic countries prior to the adoption of the Directive, may be applied to the right of communication to the public by satellite, but only in case of simulcasting by satellite of a terrestrial broadcast. According to para. 2 unrepresented right holders (so-called outsiders) must be allowed to withdraw their works from the extended license at any time. Rights in cinematographic works are excluded from extended licensing altogether. Member States concerned must inform the European Commission to which broadcasting organisations the extended licence applies.

The Information Society Directive does not expressly deal with collective rights management, but does contain several relevant references in its recitals. The most important of these is probably Recital 18: ‘This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.’ Presumably, this Recital leaves Member States broad discretion to provide for limitations of exclusive rights insofar as these are framed as ‘arrangements [...] concerning the management of rights’. Arguably, this could even permit the introduction at the national level of a system of statutory licensing of P2P file sharing between non-commercial users.³⁰⁸

³⁰⁸ See Carine Bernault & Audrey Lebois, ‘Peer-to-peer File Sharing and Literary and Artistic Property. A Feasibility Study regarding a system of compensation for the exchange of works via the Internet’, University of Nantes, June 2005, <http://alliance.bugiwweb.com/usr/Documents/RapportUniversiteNantes-juin2005.pdf> [Bernault/Lesbois 2005].

Recital 26 of the Information Society Directive seeks to encourage collective licensing arrangements to facilitate right clearance with regard to on-demand services provided by radio or television broadcasters that incorporate music from commercial phonograms. The recital is intended to provide a measure of comfort to broadcasters not used to being confronted with exclusive rights of phonogram producers. In addition, its complicated recitals on existing ‘remuneration schemes’ for private copying in recitals 35-39 clearly refer to the levy schemes that currently exist in many Member States, and which are administrated collectively. Recital 17 admonishes that the operations of collecting societies become more rational and transparent, particularly in the light of requirements of the digital environment. The Resale Right Directive contains similar language in Recital 28. Article 6(2) of the Resale Right Directive allows Member States to ‘provide for compulsory or optional collective management of the [resale] royalty’, but leaves the modalities of such collective management to the discretion of the Member States. The Directive also leaves Member States free to make arrangements for the collection and distribution of royalties, but in any case they must ensure that sums intended for authors who are nationals of other Member States are collected and distributed (recital 28).³⁰⁹

2.5.3 *Inconsistencies in the acquis*

As already noted in para. 2.1 of this study, the ‘media-specific’ norms of the Satellite and Cable Directive are highly vulnerable to the ongoing process of convergence. Several convergence-related problems concerning the Directive’s regime of compulsory collective management of cable retransmission rights, can be pointed out.

In its review of the Directive the Commission queries whether the system of compulsory collective management should be extended to satellite retransmission. This was a possibility not contemplated when the Directive was adopted in 1993. However, in recent years satellite services offering ‘bouquets’ of repackaged programs, much like cable networks, have emerged all over Europe. Why not subject these satellite providers to a similar system of collective management of rights? Indeed, some market players have advocated such an extension, which would then create a level playing field between providers of satellite and cable services, and similar content aggregators, such as providers of IPTV.³¹⁰

Rather surprisingly, the Commission does not endorse such an extension. On the contrary, in its review of the Directive it raises various objections that seem to indicate that the Commission no longer really believes in the system of compulsive collective management of rights it devised in 1993.³¹¹ Admittedly, many of the arguments mentioned by the Commission (loss of control by right holders; undermining the ‘media chronology’ of film exploitation) are valid, but do they not apply equally to cable retransmission? Also, the Commission appears to have forgotten that the ‘injection right’ it introduced in 1993 was precisely designed to prevent the partitioning of national markets for reasons of ‘media chronology’, that it now considers so important.

The Commission’s review fails to address another convergence-related issue: copyright liability. The Satellite and Cable Directive presumes full (direct) copyright liability for cable operators. Although the provisions of the Directive do not state so specifically, its system of collective management of retransmission rights is based on the assumption that cable retransmission constitutes a restricted act, as is illustrated by its Recital 27.³¹² Indeed, prior to the

³⁰⁹ Vanhees, in Dreier/Hugenholtz 2006, Resale Dir. art. 6, note 2.

³¹⁰ See the discussion in WIPO SCCR/11/3, Consolidated text for a treaty on the protection broadcasting organizations, 29 February 2004.

³¹¹ Report on the Satellite and Cable Directive, p. 14-15.

³¹² Recital 27 reads as follows: ‘Whereas the cable retransmission of programmes from other Member States is an act subject to copyright [...]; whereas the cable operator must, therefore, obtain the authorization from every holder of rights in each part of the programme retransmitted; [...].’

adoption of the Directive, many national courts had produced case law to this effect. The Information Society Directive confirms that cable retransmission falls within the ambit of ‘communication to the public’, as clarified in Recital 23.³¹³

In marked contrast to the full copyright liability imposed upon cable operators, the Information Society Directive states in Recital 27 that ‘the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive’. Obviously, these words were meant to apply primarily to Internet service providers (ISP’s). But the Directive’s language is not limited to ISP’s, so the question arises: what about cable retransmission? Is that *not* a case of ‘mere provision of physical facilities for enabling or making a communication’, especially in situations where the cable operator is subjected to a contractual or statutory must-carry obligation? Moreover, now that cable operators are migrating to the IP protocol, and gradually transforming themselves into becoming broadband video providers, how to make the distinction?³¹⁴

Another question inspired by digital convergence is whether ‘simulcasting’ broadcast programs over the internet is subject to the Directive’s rules on mandatory collective management. Article 1(3) defines the act of ‘cable retransmission’, a notion that is central to the cable chapter of the Directive, as ‘the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.’ When adopted in 1993, the Directive clearly could not take into account the use of the Internet as a programme-carrying medium. Whether the term ‘cable or microwave system’ is to be interpreted as to encompass the Internet is another unanswered question that might merit clarification.

Yet another convergence-induced issue relates to the evolving role of cable operators. In countries such as Belgium and the Netherlands where cable penetration is close to 100%, traditional terrestrial broadcasting is soon to be terminated as a public service.³¹⁵ Already broadcast signals are injected directly into cable systems, as is happening on a smaller scale with ADSL-based distribution networks (IPTV). In other words, the end of old-fashioned ‘cable retransmission’ is rapidly approaching. In the very near future, a broadcast signal will be distributed concurrently by an array of competing content aggregators employing parallel or overlapping infrastructures, such as cable, satellite television, internet and mobile networks. This would make it artificial to treat retransmission via cable different from similar acts of communication to the public via IPTV and similar networks.³¹⁶

From a legal perspective, this development will mean that increasing numbers of cable operators will fall outside the scope of the Satellite and Cable Directive regime of compulsory collective rights management, and will need to seek voluntary contractual arrangements with the right holders concerned. Whether a need for legislative intervention will once again arise, remains to be seen.

³¹³ Recital 23 reads as follows: ‘This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.’

³¹⁴ The scope of the IPS immunity rule will be discussed in-depth in the IViR Study on the Information Society Directive.

³¹⁵ See <http://www.signaalopdigitaal.nl>.

³¹⁶ A. van Loon, ‘The End of the Broadcasting Era’, Tolley’s Communications Law 2004, vol 9, no. 5, p. 172-186 [Van Loon 2004]; Solon, Economic Impact of Copyright for Cable operators in Europe, May 2006, http://www.ecca.be/pdf/May2006-Solon_copyright_ECCA.pdf [Solon 2006].

2.5.4 *Conclusions*

In the field of collective rights management there is not much ‘acquis’ to report or scrutinise. Now that the promise of a harmonisation directive on transparency and governance has failed to materialise, the most important sources of community law in this field are the ad hoc decisions of the Commission and subsequent ECJ decisions applying the rules of EC competition law, and the recent Online Music Recommendation.

And then there is the Satellite and Cable Directive and its system of compulsory collective management of cable retransmission rights. As we have seen, the provisions of the Directive give rise to a number of questions that are best answered by the Commission in the form of an interpretative communication. Such a communication might serve to clarify a number of issues.

In the first place, there is a need for clarification of the term ‘transfer’ used in article 10 of the Directive. It is submitted here that ‘transfer’ should include exclusive licenses, but not encompass non-exclusive grants. Second, an interpretative communication might make the mediation system that the Directive imposes upon the Member States, without providing any detail, operational, for instance by imposing mandatory negotiation deadlines upon the parties concerned. Third, an interpretative communication might define the scope of the notion of ‘cable retransmission’, and clarify whether it covers simulcasting via the internet.

This brings us to the Achilles’ heel of the Satellite and Cable Directive, which has been pointed out in this report before. The Directive’s legal instruments are geared towards media (satellite broadcasting and cable retransmission) that have become increasingly difficult to distinguish from other media providing similar services. More than any other directive, the Satellite and Cable Directive appears to be a victim of convergence. In this context several problems have been mentioned, including the interface between the Directive’s presumption of full (direct) liability for cable retransmission and the presumption of immunity found in the Information Society and E-Commerce Directives. Now that cable operators are converging into broadband ISP’s this distinction will be very difficult to maintain in legal practice. This issue, however, exceeds the scope of the present study.

In the long run, the future of the Satellite and Cable Directive looks bleak. The collapse of its satellite broadcasting rules, already described in paragraph 2.1, will eventually be followed by the gradual becoming irrelevant of its rules on cable retransmission. In several Member States terrestrial public broadcasting will cease to exist in the immediate future. As a consequence, cable operators will gradually become primary distributors of radio and television programs. In the end, they may have nothing left to ‘retransmit’ in a traditional sense. Already, the roles of cable operators, internet-based content providers and satellite aggregators are rapidly converging. Consequently, rules that are currently applicable only to cable operators should be extended to other aggregators, or be completely lifted. In the light of the limited practical importance that the cable retransmission rules of the Satellite and Cable Directive have had since their adoption in 1993, the latter scenario appears the more likely.

3 Extending the term of protection for related (neighbouring) rights

3.1 Introduction

In the European Union the duration of related rights has been harmonised by the Term Directive of 1993. The Term Directive sets the term of protection for related rights at 50 years. At present, performers, phonogram producers, film producers and broadcasting organisations enjoy protection for the term of 50 years, calculated from the first fixation or other triggering event, in each of the Member States (art. 3 Term Directive).

For some time, certain stakeholders have been making calls to extend the 50-year term of protection. This was demonstrated in the Staff Working Paper on Copyright Review³¹⁷ and during the consultation of interested parties that was held on the basis thereof (for the purpose of this chapter, hereinafter referred to as: the consultation).³¹⁸ Phonogram producers have called for the term of protection of related rights in phonograms to be extended to 95 years, ‘in line with the highest international standards’.³¹⁹ Performers would like to see the term of protection to be aligned to that of authors, who enjoy a term of protection under copyright law of life plus 70 years.³²⁰ Others have urged the Commission to consider extending the term of protection of performers’ related rights to last for 70 years from the first communication to the public or publication of the performers’ recordings,³²¹ or for at least the lifetime of the artists whose performances are embodied on the recordings.³²² As far as the submissions to the consultation have revealed, film producers and broadcasting organisations have made no claims for a term extension.

By contrast, several groups of stakeholders have asked the Commission not to proceed towards a term extension and to maintain the status quo. These stakeholders state that the term of protection of related rights is already more than long enough.³²³

This chapter examines the question whether the various calls for an extension of the term of protection of related rights are justified or not, and, whether there is sufficient evidence to consider a term extension on the European level. This question shall be analysed both from a legal and an economic perspective. In this analysis, the primary focus shall lie on related rights of phonogram producers and performers, since these are the only stakeholders who have specifically called for an extension of the terms of protection.

Methodology

A first step in our analysis has been to compile the various arguments made in favour of and against extending the existing terms. To this end, a thorough examination was conducted of the

³¹⁷ Staff Working Paper on Copyright Review, p. 10-11.

³¹⁸ See, for the text of the Staff Working Paper on Copyright Review as well as the contributions to the consultation: <http://ec.europa.eu/internal_market/copyright/review/consultation_en.htm>.

³¹⁹ Responses to the Staff Working Paper on Copyright Review by BPI (part 1) and the various national departments of IFPI.

³²⁰ Responses to the Staff Working Paper on Copyright Review by ARTIS GEIE, BECTU and GIART.

³²¹ Response to the Staff Working Paper on Copyright Review by AEPO.

³²² Response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

³²³ See, for instance, the responses to the Staff Working Paper on Copyright Review by BAK, BEUC, CRID, EDRI, FIPR & VOSN, EFFI, Foundation for a Free Information Infrastructure, and NAXOS.

contributions to the EC consultation that were submitted by the stakeholders. In addition, a small-scale consultation was held with various stakeholders, which were selected on the basis of their particular expertise, experience and interest in the field. Furthermore, extensive desk research was carried out to evaluate the most important legal and economic literature.

On the basis of the information gathered from these different sources, the relevant questions were defined. A distinction was made, where possible, between legal and economic arguments. These arguments were then studied and analysed respectively from a legal and an economic perspective.

In our legal analysis, the first step was to produce a survey of the terms of protection in the main international treaties, the EC Term Directive and the national laws of those non-EU countries where EU right holders are expected to find important markets. It was found that the arguments in favour of a term extension generally relate to the nature and objectives of related rights, on the one hand, and to the competitive position of EU right holders in the global market, on the other. As regards the nature and objectives of related rights, an analysis was made of the history, rationale, subject matter and scope of protection of related rights. To that end, a distinction was drawn between related rights of performers and related rights of phonogram producers, film producers and broadcasting organisations, as arguments for both groups of rights differ significantly. In addition, a comparison was made with other rights of intellectual property with similar objectives. As regards the arguments concerning the competition with non-EU market players, the question of the ‘comparison of terms’ and how this relates to the principle of national treatment in the main international treaties was dealt with.

In our economic analysis, a preliminary overview and discussion of the relevant law and economics literature is given as a theoretical framework for the following extensive analysis of the economic costs and benefits of a term extension for phonogram producers and performers in the EU. It was examined whether and to what extent a term extension may promote the goals of related rights of phonogram producers, such as the ability to recoup investment, and of performers, i.e. to receive an adequate income, and whether and to what extent a term extension may provide an incentive for phonogram producers to invest in new talent and repertoire. Moreover, it was considered what possible consequences a term extension may have on the access to and the diversity of culturally important repertoire, on competition, innovation, as well as on transaction costs and consumer prices. In this respect, possible changes due to digitisation were also taken into account. Lastly, it was considered what the impact of a term extension would be on the competitiveness of EU right holders in the global market.

In our concluding assessment, the different arguments were weighted, based on the outcomes of the legal and economic analysis. This assessment has resulted in concrete policy recommendations on the terms of protection.

Content of the chapter

This chapter is composed of six main parts. Following this introduction, an initial section describes the terms of protection of related rights at the international, European and national levels (para. 3.2). The next three sections provide an analysis of the main categories of arguments on term extension. These are, first, arguments concerning the nature and objectives of related rights (para. 3.3), second, economic arguments (para. 3.4), and third, arguments concerning the competition with non-EU market players (para. 3.5). Finally, this chapter shall be concluded by a final assessment of all the different arguments made (para. 3.6).

3.2 Terms of related rights at the international, European and national levels

3.2.1 *Main international treaties*

In the field of related rights, the main international treaties are the Rome Convention (1961), the Geneva Convention (1971), the TRIPS Agreement (1994) and the WIPO Performances and Phonograms Treaty (1996).

3.2.1.1 *Rome Convention*

The Rome Convention is the first international convention in which related rights for the protection of performers, producers of phonograms and broadcasting organisations have been recognised. It provides for a minimum duration of protection of 20 years (art. 14). That term is to be computed from the end of the year in which (a) the fixation was made, as regards phonograms and performances embodied thereon, or (b) the performance has taken place, as far as performances not incorporated in phonograms are concerned, or (c) the broadcast has taken place, for broadcasts. Practically all EU Member States (except for Cyprus and Malta) are party to the Rome Convention. Other contracting states to the Rome Convention include Bulgaria and Romania and Argentina, Australia, Brazil, Canada, Chile, Japan, Mexico, Russia and Turkey. The United States of America are not a party to the Rome Convention.

3.2.1.2 *Geneva Convention*

Compared to the Rome Convention, the scope of the Geneva Convention is very limited. The sole objective of this convention is to protect the record industry against piracy of sound recordings. Therefore, the sole beneficiaries of this Convention are the phonogram producers. The Convention offers protection only against the making of illicit duplicates, and the importation and distribution of such duplicates. The Convention does not require the granting of specific (private) rights to achieve this goal. According to article 4 of the Convention, insofar as private rights are granted, the minimum term of protection shall be 20 years calculated from the end of the year of the fixation or first publication of the phonogram. Contracting states to the Geneva Convention include most of the EU Member States (except for Belgium, Ireland, Malta, Portugal and Poland) as well as Bulgaria and Romania. Other contracting states are Argentina, Australia, Brazil, Chile, China, Japan, Mexico, Russia and the United States.

3.2.1.3 *TRIPS Agreement*

The TRIPS Agreement also provides for the protection of related rights for performers, producers of phonograms (sound recordings) and broadcasting organisations (art. 14). The scope of protection is less far-reaching than that provided for in the Rome Convention.³²⁴ However, the

³²⁴ For a full elaboration on the differences in the level of protection between the TRIPS Agreement and the Rome Convention, see D. Gervais, *The TRIPS Agreement: Drafting history and analysis*, London: Sweet & Maxwell 2003, p. 156-162 [Gervais 2003]. In short, one of the main differences in protection lies in the fact that the TRIPS Agreement does not provide for any protection on behalf of phonogram producers and performers with respect to the broadcasting or communication to the public of a commercially published phonogram (cf. art. 12 Rome Convention, which provides for a right to an equitable remuneration). Furthermore, with respect to the protection of performers, as far as the fixation of their performance is concerned, protection is limited to the fixation on a phonogram, thus excluding any other mode of fixation (e.g. audiovisual fixations). By merely focusing on ‘music performers’, the protection granted under TRIPS is significantly narrower compared to the Rome Convention (cf. art. 7(1)(b) and 7(1)(c) in conjunction with art. 3(a) Rome Convention). Finally, with respect to broadcasting organisations, the

TRIPS Agreement has substantially increased the minimum term of protection available to performers and producers of phonograms. That term is 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The minimum term of protection for broadcasting organisations, on the other hand, has not been increased in comparison to the Rome Convention, and remains at 20 years from the end of the year in which the broadcast has taken place (art. 14(5)). Because the TRIPS Agreement is annexed to the WTO Agreement, all WTO Members are automatically bound by the TRIPS Agreement. Currently there are 149 WTO Members, including all EU Member States, Romania, Bulgaria, Argentina, Australia, Brazil, Canada, Chile, China, Japan, Mexico, Turkey and the United States.

3.2.1.4 *WIPO Performances and Phonograms Treaty*

The most recent international treaty that deals with the protection of related rights is the WIPO Performances and Phonograms Treaty. Unlike the Rome Convention and the TRIPS Agreement, the WPPT does not cover the rights of broadcasting organisations. Moreover, as regards the related rights of performers in their performances, the WPPT is limited to performances fixed in phonograms. The minimum term of protection for performers is 50 years, computed from the end of the year in which the performance was fixed in a phonogram (art. 17(1)). For phonogram producers, on the other hand, the 50-year term of protection is to be computed from the end of the year in which the phonogram was published, or failing such publication, from the end of the year in which the fixation was made (art. 17(2)).

At present, most EU Member States have yet to ratify the WPPT. The Community and the Member States intend to adhere to the WPPT simultaneously as from the date by which the measures necessary to adapt the existing Community legislation to the obligations deriving from the WPPT have been brought into force.³²⁵ Currently, only Cyprus, Czech Republic, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Bulgaria and Romania are contracting parties. Recently, Belgium also adhered to the WPPT.³²⁶ Other parties to the WPPT include Argentina, Chile, Japan, Mexico and the United States.

3.2.2 *Term Directive*

In the EU, the duration of related rights has been harmonised by the Term Directive, which prescribes a fixed term of 50 years, to be calculated from the 1st of January following the event which triggers the term running.³²⁷ For performers, the term expires 50 year after the performance. However, if within this period, a fixation of the performance is lawfully published or lawfully communicated to the public, the term runs from the first publication or first communication to the public, whichever is the earlier. For phonogram and film producers, the term expires 50 year after the fixation of the phonogram or film. However, if within this period, the phonogram or film is lawfully published or lawfully communicated to the public, the term runs from the first publication or first communication to the public, whichever is the earlier. Finally, for broadcasting organisations, the term runs from the first transmission of the broadcast.

TRIPS Agreement allows countries not to grant specific related rights to broadcasters at all, provided countries grant similar rights to copyright owners of the broadcast (see the last sentence of art. 14(3) TRIPS).

³²⁵ Council Decision No. 2000/278/EC of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, OJ L 89/6, 11.04.2000.

³²⁶ Despite the intention of the Community and the Member States to adhere to the WCT and WPPT simultaneously, Belgium already ratified both these treaties, entering into force with respect to Belgium on 30 August 2006.

³²⁷ Art. 3 in conjunction with art. 8 Term Directive.

In 2001, the Information Society Directive amended the Term Directive, by changing the triggering event from which the term is to be calculated in respect of phonogram producers. This was done to bring the Term Directive in line with the WPPT.³²⁸ For phonogram producers, the term now expires 50 years after the fixation of the phonogram. However, if within this period the phonogram is lawfully published, the term expires 50 years from the first publication, or if no lawful publication has taken place but the phonogram has been lawfully communicated to the public, from the first communication to the public.

A consequence of this amendment is that the terms are now calculated in different ways for performers and phonogram producers. For instance, where a recording from a broadcaster's archive is first published in 2005, whereas it was broadcast in 1960, the 50 year term of protection would run for the phonogram producer from the moment of publication (2005), but for the performers from the moment of broadcasting (1960). Hence, the performers' rights in the recording would already be in the public domain, while the phonogram producer would still be protected. Although this discrepancy is not directly related to the question of term extension, it is meaningful to mention it here, as it is a disparity that might affect the exploitation of phonograms in the Internal Market. For instance, it might cause difficulties in applying the remuneration right for the secondary use of commercial phonograms, which according to article 8(2) Rental Right Directive³²⁹ is to be shared between performers and phonogram producers.³³⁰

In general, this current inconsistency could simply be repaired by equating the calculation of the terms of protection for performers to that of phonogram producers. Since the WPPT has set the minimum term of protection for performers at 50 years, calculated from the first fixation of the performance, this small correction would be fully compatible with the WPPT. In effect, however, an alteration of this kind would already mean a levelling up of the terms of protection for performers, as in theory, their rights are protected for a longer period of time if the term of protection would be calculated on the basis of the first publication (within 50 years from the performance) instead of on the basis of the first communication to the public *or* the first publication (within 50 years from the performance), whichever is the earlier.³³¹

³²⁸ Recital 61 Information Society Directive.

³²⁹ Rental Right Directive. See para. 3.3.2.2 for more discussion of art. 8(2) Rental Right Directive.

³³⁰ For this reason, several collective management societies administering the remuneration right (e.g. GEMA) have expressed their concerns that this inconsistency may prevent them from adequately performing their obligations flowing from national legislation that implements art. 8(2) Rental Right Directive. At present, however, the situation may still not be too pressing, as the discrepancy only concerns performances that are at least 50 years old (cf. Chapter 4 on Term Calculation). But in the longer term, especially when old live performances broadcasted in the 60s or 70s will be first published on phonogram, the number of problematic instances may increase.

³³¹ This can be illustrated by the example given in the preceding paragraph: if a performance, which was broadcasted in 1960, would be first published in 2005, the term of protection would end, in the current situation, on 1 January 2011, and with the adjustment mentioned, on 1 January 2056 only.

Table 1: Terms of related rights in the international treaties and the EC Term Directive

	performers	phonogram producers	film producers	broadcasting organisations
Rome Convention	≥ 20 years from performance, or fixation thereof	≥ 20 years from fixation	-	≥ 20 years from broadcasting
Geneva Convention	-	≥ 20 years from fixation / publication	-	-
TRIPS Agreement	≥ 50 years from performance, or fixation thereof	≥ 50 years from fixation	-	≥ 20 years from broadcasting
WPPT	≥ 50 years from fixation	≥ 50 years from publication or, absent publication, fixation	-	-
EC Term Directive	50 years from publication / communication to the public or, absent publication / communication to the public, performance	50 years from publication or, absent publication, communication to the public or, absent communication to the public, fixation	50 years from publication / communication to the public or, absent publication / communication to the public, fixation	50 years from broadcasting

3.2.3 Terms of protection in certain non-EU countries

In the global market of creative goods, European right holders have many competitors outside the EU. Obviously, a full review of the relevant law in all the countries where EU right holders compete would go beyond the scope of this study. We shall therefore focus on the terms of protection as laid down in the laws of some of the EU's 'main competitors': Australia, Brazil, Canada, China, Japan, Mexico and the United States.

3.2.3.1 Australia

The Australian Copyright Act 1968 protects sound recordings, cinematographic films and radio and television broadcasts (art. 84 and following) and also grants performers' protection (art. 248A and following). The terms of protection of a sound recording or cinematographic film is 70 years, calculated from the end of the calendar year in which the recording or film is first published (arts. 93 and 94). The term of protection of a television broadcast or sound broadcast is 50 years, calculated from the end of the calendar year in which the broadcast was made (art. 95). Finally, the protection period for performers is 20 or 50 years after the performance was given (art. 248CA).

3.2.3.2 Brazil

The Brazilian Law on Copyright and Neighbouring rights 1998 protects performers, phonogram producers and broadcasting organisations. The term of protection is 70 years, calculated from the year after the public performance, the fixation of the phonogram or the transmission of the broadcast took place (art. 96).

3.2.3.3 Canada

Under the Canadian Copyright Act, the protection of performances, sound recordings and communication signals broadcast endures for a term of 50 years, to be calculated differently for each subject matter (art. 23(1)). In the case of a performance, the rights terminate 50 years after it has been first fixed in a sound recording, or, if it is not fixed in a sound recording, 50 years after

the performance occurred. In the case of a sound recording, the rights terminate 50 years after its first fixation. Finally, the rights in a communication signal terminate 50 years after broadcasting.

3.2.3.4 *China*

Under the Copyright Law of the People's Republic of China, protection is provided for performers, producers of sound and video recordings and broadcasting organisations. The protection expires 50 years from the end of the year in which the performance took place (art. 38), the sound or video recording was first produced (art. 41) or the first broadcast took place (art. 44).

3.2.3.5 *Japan*

The Japanese Copyright Law provides for the protection of related rights of performers, phonogram producers, broadcasting organisations and wire diffusion organisations. The term of protection expires 50 years from (i) the year of performance, (ii) the year in which the phonogram was published or the sounds were first fixed if the phonogram was not published within a period of 50 years after fixation, (iii) the year of broadcasting, or (iv) the year in which the wire diffusion took place (art. 101(2)).

3.2.3.6 *Mexico*

The Federal Copyright Law of Mexico protects performers, phonogram and videogram producers and broadcasting organisations. For performers, the term of protection is 75 years, calculated from the first fixation in a phonogram, the first execution if the performance was not recorded in a phonogram, or the first transmission on TV, radio or by other means (art. 122). Phonogram producers are protected for 75 years from the first fixation of the sounds in the phonogram (art. 134). Producers of videograms are protected for 50 years from the first fixation of the associated images, with or without sound (art. 138). Finally, for broadcasting organisations, the term of protection is 50 years from the first emission or transmission of the original program (art. 146).

3.2.3.7 *United States*

In contrast to Europe and the other countries mentioned, the US Copyright Act protects sound recordings under copyright (art. 102(a) under 7). Only those who have made original contributions to the sound recording may claim being an author.³³² In the US, the necessary degree of originality can emanate from either the performers whose performances are captured, or from the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording, or from both.³³³ In the US, different measuring points are handled in order to determine the term of protection for sound recordings. In general, sound recordings created before 1 January 1978 enjoy a 95 year term of protection, calculated from the year in which the copyright was first secured.³³⁴

³³² M.B. Nimmer and D. Nimmer, *Nimmer on copyright* (loose-leaf), New York: LexisNexis Matthew Bender, updated edition, 2004 [Nimmer/Nimmer 2004], § 2.10[A][3].

³³³ Nimmer/Nimmer 2004, § 2.10[A][2]. It is argued that it is not really the record producer who makes the original contribution, but rather the sound engineer and the sound editor. The record producer's right to claim the copyright in the sound recording should therefore be derivative, either through an assignment of the copyright or through the qualification of the sound recording as a 'work made for hire'.

³³⁴ Note that there are also different measuring points for sound recordings created before 1 January 1978. Sound recordings first fixed prior to 15 February 1972 are not eligible for US federal copyright protection, but may be protected by various state laws or doctrines of common law. See e.g. *Capitol Records v Naxos*, New York Court of

As for sound recordings created on or after 1 January 1978, the main rule is that if an individual author owns the copyright in the sound recording, the term of protection equals the life of the author plus 70 years (art. 302(a)). Where a commercial sound recording is a work of joint authorship (which often is the case), article 302(b) provides that the term consists of the life of the last surviving author and 70 years after that author's death. However, if the sound recording is a 'work made for hire', the copyright endures for a term of 95 years from the year of its first publication, or 120 years from the year of its creation, whichever expires first (art. 302(c)). A 'work made for hire' is either a work prepared by an employee in the course of employment, or a work prepared on commission that falls within one of the categories specified in the Act (art. 101). The statutory list of commissioned works does not however mention sound recordings.³³⁵ Therefore, a sound recording is usually considered as a 'work made for hire' if it is made in the course of employment by a record company. In that case, the employer (the record company) and not the employee (the performer) is considered to be the author and, unless agreed otherwise, owns all of the rights comprised in the copyright (art. 201(b)). Since it is common practice in the US that recording contracts between record companies and performers contain clauses specifying that the works produced by performers are 'works made for hire',³³⁶ the common term of protection for sound recordings is 95 years from the first publication of this sound recording, or 120 years from the creation thereof.

In the same way, the US Copyright Act protects motion pictures (films) and other audiovisual works (including broadcasts) (art. 102(a) under 6 US Copyright Act). Accordingly, unlike the situation in the EU, film producers, broadcasting organisations and performers in the US do not enjoy specific protection, unless they can be regarded as authors of the film or the broadcast. That means that they enjoy protection only if - and to the extent that - they have made an original contribution to a film or broadcast, or if they own the copyright by virtue of the application of the 'work made for hire' doctrine.³³⁷ In paragraph 3.5.3, the relevant differences in scope of protection between the US and the EU are dealt with in more detail. As regards the terms of protection of copyright in films and broadcasts, the same applies as with respect to sound recordings.

Appeals, 5 April 2005, 2005 N.Y. Slip. Op. 02570 (J. Graffeo), ruling that pre-1972 published sound recordings are subject to common law copyright under New York state law. Pursuant to art. 301(c) US Copyright Act, the protection of these sound recordings shall maximally endure for a period of 95 years. Sound recordings fixed between 15 February 1972 and 1 January 1978 only benefit from federal copyright protection if they were registered or published with a notice of copyright. The law in effect before 1978 provided that the copyright endured for a first term of 28 years from the date of publication or registration. During the last year of the first term, the copyright was eligible for renewal. Pursuant to art. 304 US Copyright Act, the renewal term is now extended from 28 to 67 years, hence also resulting in an effective term of protection of 95 years from the year in which the copyright was first secured.

³³⁵ Although 'sound recordings' were added to the list of commissioned works by the Satellite Home Viewer Improvement Act 1999 (Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-544), the Work Made for Hire and Copyright Corrections Act 2000 (Pub. L. No. 106-379, 114 Stat. 1444) deleted 'sound recordings' from this list. This was because this 'technical amendment' raised a lot of concerns among recording artists and other stakeholders in the music industry, who demanded successfully the amended to be repealed. See e.g. S.T. Okamoto, 'Musical sound recordings as works made for hire: Money for nothing and tracks for free', *University of San Francisco Law Review* 2003, vol. 37, p. 783-812, at p.792-794 [Okamoto 2003].

³³⁶ M. Peters, 'Sound Recordings as Works Made for Hire', [2000] United States House of Representatives, 106th Congress, 2nd Session, May 25, 2000, <<http://www.copyright.gov/docs/regstat52500.html>> [Peters 2000].

³³⁷ Note, however, that under art. 1101 US Copyright Act, performers enjoy some protection against bootlegging, i.e. the making and distributing of unauthorised sound or video recordings of live musical performances.

Table 2: Terms of related rights in certain non-EU countries

	Performers	Phonogram producers	Film producers	Broadcasting organisations
Australia	20-50 years from performance	70 years from publication	70 years from publication	50 years from broadcasting
Brazil	70 years from performance, or fixation thereof	70 years from fixation	-	70 years from broadcasting
Canada	50 years from performance, or fixation thereof	50 years from fixation	-	50 years from broadcasting
China	50 years from performance	50 years from production	50 years from production	50 years from broadcasting
Japan	50 years from performance	50 years from publication or, absent publication, fixation	-	50 years from broadcasting
Mexico	75 years from performance, or fixation thereof	75 years from fixation	75 years from fixation	50 years from broadcasting
United States *	Performers have no rights under copyright unless authors / assignees of authors *	95 years from publication, or 120 years from creation * (work made for hire)	Film producers have no rights under copyright unless authors / assignees of authors *	Broadcasting organisations have no rights under copyright unless authors / assignees of authors *
* Note that in the United States phonograms, films and broadcasts are protected under copyright				

3.3 Arguments concerning the nature and objectives of related rights

3.3.1 Introduction

A first category of arguments in favour of term extension relates to the nature and objectives of related rights protection. According to those who support a term extension, an unreasonable discrimination would exist between the duration of protection of related rights on the one hand, and that of copyrights in literary, dramatic and musical works and films on the other. As regards related rights in performances, for instance, it has been argued that performances would reflect a similar element of creativity.³³⁸ Moreover, a term extension would also be necessary to remedy the discrimination currently existing between the protection of phonogram producers and film producers, the latter being considered as authors in some countries and therefore benefiting from the term of protection of life plus 70 years. It is argued that there appears to be no logical basis for this distinction.³³⁹

Phonogram producers have advanced a different line of reasoning in favour of a term extension for phonograms. They argue that they need a longer period of time to gain a proper return on their creative work and investments. According to the phonographic industry, the costs of producing and marketing original material have increased and losses due to piracy have considerably reduced the redress of investment in the short to medium term.³⁴⁰ It is stated that the existing terms of protection for related rights are intended to provide a protection that is

³³⁸ Response to the Staff Working Paper on Copyright Review by GIART.

³³⁹ Responses to the Staff Working Paper on Copyright Review by BPI (Part I) and the various national departments of IFPI.

³⁴⁰ Responses to the Staff Working Paper on Copyright Review by the various national departments of IFPI.

sufficiently long to allow them to recoup the investment they have made in a recording, and to participate in the commercial success it generates.³⁴¹

In addition, the proponents of a term extension argue that it does not seem fair and does not respond to the objectives of the protection granted to performers that some of the very famous artists of the 20th century are going to see how their first recordings fall into the public domain during their lifetime. Not only would this result in a loss of income, the performers are also concerned that after they lose protection, their recordings can be altered and exploited by anyone and everyone in whatever manner they choose without reference to them.³⁴² This is why several stakeholders would like to see the term of protection of performers to be extended so that it would cover at least the performer's lifespan. There is some support for this argument in legal writing.³⁴³

To understand the objectives, scope and difference in terms of protection of the beneficiaries of copyright, the authors, on the one hand, and the beneficiaries of related rights, the performers, phonogram and film producers and broadcasting organisations, on the other, the next sections will describe the distinctive features of the two categories of rights, copyright and related rights respectively. First, a brief overview of the legal history of related rights shall be provided, which clarifies the circumstances and reasons that have led to the international recognition of related rights, and how they are distinct from copyright (para. 3.3.2). Closely related issues concern the subject matter and scope of protection (para. 3.3.3) and the objectives of protection (para. 3.3.4). The latter shall be dealt with quite extensively.

3.3.2 Legal history

3.3.2.1 International recognition of related rights

In comparison to the protection of authors under copyright, the related rights protection of performers, phonogram producers and broadcasting organisations is relatively new. Whereas, at the international level, the protection of authors was already recognised by the 1886 Berne Convention, the recognition of related rights at the international level was first achieved in 1961 by the adoption of the Rome Convention. The need for protection of performers, phonogram producers and broadcasting organisations became imminent only after the proliferation of phonographic technology, the subsequent development and expansion of the recording industry and the advance of radio and television broadcasting. At that time, the protection of authors had already been well established.

Although prior to the adoption of the Rome Convention several proposals were made to include phonograms, broadcasts and the interpretations of performing artists in the Berne Convention, none of these proposals found sufficient support.

In the case of phonogram producers, the main objection was that phonograms were productions on the borderline between 'industrial property' and copyright. Because the skills needed to produce a phonogram were mainly of a mechanical and industrial nature and did not constitute a literary or artistic creation, it was argued that the interests of phonogram producers were different than those of authors and might conceivably be held to belong more properly to

³⁴¹ Response to the Staff Working Paper on Copyright Review by IFPI.

³⁴² See in particular the response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

³⁴³ See, for instance, S.M. Stewart, *International Copyright and Neighbouring Rights - second edition*, London [etc.]: Butterworths 1989, p. 249 [Stewart 1989] and F. Brison, *Het naburig recht van de uitvoerende kunstenaar*, Brussels: De Boeck & Larcier 2001, p. 94 [Brison 2001].

the sphere of industrial property.³⁴⁴ Hence, phonogram producers were denied protection under the Berne Convention.

In the case of broadcasters, the history of claims for protection shows that these were advanced by the corporate bodies that owned and operated the transmitters and employed the persons making the broadcasts. Rather than protection of the kind accorded to authors, what broadcasting organisations sought was protection for their financial investment in making the broadcast. Accordingly, these organisations were less interested in obtaining copyright protection. Eventually, they became more actively involved in the preparations that finally led to the establishment of the Rome Convention.³⁴⁵

The position of performers, on the other hand, differed considerably from that of the phonogram producers and broadcasting organisations. What performers sought was protection in respect of the particular interpretation or rendition of a pre-existing literary or artistic work. This required more personalised and intellectual skills, in contrast to the highly mechanical and industrial skills involved in the making of a phonogram or broadcast.³⁴⁶ Indeed, performers' skills do not seem to be qualitatively all that different from those of other kinds of derivative authors such as translators, screenwriters and other creative 'adaptors'. However, because performers began to seek protection only after the fruition of technologies that made it possible to record their performances and reproduce them on a larger scale –decades after the author's rights paradigm found international recognition in the Berne Convention– they were too late, and perhaps also too weakly organised, to gain protection as authors. As a consequence, their rights were grouped with the rights of phonogram producers and broadcasting organisations, although it is generally acknowledged that they merit protection on quite different grounds.³⁴⁷ This can be illustrated by the different objectives of protection for performers in comparison with the other categories of related rights holders (see paras. 3.3.4.2 and 3.3.4.3).

This brief overview of the circumstances prior to the recognition of related rights in the Rome Convention does not only explain, from a historical perspective, the difference between the concepts of copyright and related rights, it also makes clear that the Rome Convention is characterised by the juxtaposition of provisions in favour of three groups of right holders. In general, of these heterogeneous interests protected by the convention, the interests of phonogram producers and broadcasting organisations are related, whereas the performers constitute a special case. This difference has also been recognised in many national statutes. A first symptom thereof is, for example, that moral rights are conferred on performers and not on the other holders of related rights (see also para. 3.3.4.2).³⁴⁸ Today, the majority of Member States grant performers moral rights protection at least to some extent.³⁴⁹

³⁴⁴ S. Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986*, London [etc.]: Kluwer 1987, p. 309-310 [Ricketson 1987]; Ricketson/Ginsburg 2006, para. 8.112, p. 507-508.

³⁴⁵ Ricketson 1987, p. 308-309 and p. 868; Ricketson/Ginsburg 2006, para. 8.111, p. 506-507 and para. 19.03, p. 1207-1208.

³⁴⁶ Ricketson 1987, p. 310; Ricketson/Ginsburg 2006, para. 8.113, p. 508-509.

³⁴⁷ Ricketson 1987, p. 869-870; Ricketson/Ginsburg 2006, para. 19.04, p. 1208-1209.

³⁴⁸ H. Cohen Jehoram, 'The nature of neighbouring rights of performing artists, phonogram producers and broadcasting organizations', *Columbia - VLA Journal of Law and the Arts* 1990, vol. 15, no. 1, p. 75-91, p. 82-83 [Cohen Jehoram 1990].

³⁴⁹ See e.g. art. 34 Belgian Copyright Act; art. 70 Czech Copyright Act; art. 5 Dutch Neighbouring Rights Act; art. L 212-2 French Copyright Act; arts. 74-76 German Copyright Act; art. 75 Hungarian Copyright Act; arts. 81 and 83 Italian Copyright Act; arts. 309-319 Irish Copyright Act; art. 86 Polish Copyright Act; art. 113 Spanish Copyright Act. Even in the UK, where performers were declined statutory moral rights protection for a long time, they now enjoy moral rights protection since 1 February 2006, when *The Performances (Moral Rights, etc.) Regulations 2006* (Statutory Instrument 2006 no. 18) came into force. The aim of these regulations was to amend the UK Copyright Act with view to giving effect to art. 5 WPPT (providing moral rights of attribution and integrity for performers).

3.3.2.2 *Related rights in the EU*

Prior to 1992, several Member States already provided for protection of related rights. Nevertheless, the legal situation in the Member States showed considerable disparities, both as regards the scope and term of protection.³⁵⁰ Eventually a broad-ranging harmonisation of related rights was initiated with the Rental Right Directive of 1992.

The Rental Right Directive provides for the following exclusive rights: fixation right (for performers and broadcasting organisations; art. 6), reproduction right (for performers, phonogram producers, film producers and broadcasting organisations; art. 7), the right of broadcasting and communication to the public (for performers and broadcasting organisations; art. 8), the distribution right (for performers, phonogram producers, film producers and broadcasting organisations; art. 9) and the rental and lending right (for performers, phonogram producers and film producers; art. 2). In addition, the Rental Right Directive provides for a right to equitable remuneration for the broadcasting or communication to the public of commercial phonograms, also referred to as the secondary use of commercial phonograms (for performers and phonogram producers; art. 8(2)).

In 1993, the Term Directive also harmonised the terms of protection of related rights. Prior to the adoption of the Term Directive, the terms awarded by the Member States varied from country to country. The terms of protection of phonogram producers, for example, varied from 20 years in Luxembourg, to 25 years in Germany, to 40 years in Spain and 50 years in Denmark, France, Ireland, Portugal and the UK.³⁵¹ These differences raised barriers to the free movement of goods and the freedom to provide services. This was highlighted by the ECJ in its 1989 *Patricia* decision. In response, the Term Directive harmonised the term of protection of copyrights and related rights, and even provided for ‘upwards harmonisation’ by requiring all Member States to apply a 50 year term of protection for related rights.

Finally, in 2001, the Information Society Directive further harmonised the protection of related rights in order to foster the development of the information society in Europe. As is set out above in paragraph 2.3, the Information Society Directive provides for an exclusive reproduction right as well as a right of making available to the public (for performers, phonogram producers, film producers and broadcasting organisations; arts. 2 and 3). In addition, where the national legislation of a Member State contains a private copying exception –which is not mandatory– the Information Society Directive imposes upon that Member State the duty to provide for fair compensation (for performers, phonogram producers, film producers and broadcasting organisations; art. 5(2) sub b).

3.3.3 *Subject matter and scope of protection*

The differences between the concepts of copyright and related rights are not only to be explained from a historical perspective, there are also several distinctive features to be found in the subject matter and scope of protection.

The subject matter of copyright is the ‘work’ of authorship, the author’s intellectual product of creativity and originality (see also para. 2.3 above). The protection is focused on the immaterial intellectual creation, not on the medium in which the work is fixed.³⁵² In order to qualify for

³⁵⁰ Explanatory Memorandum to the Rental Right Directive, p. 18-21.

³⁵¹ S. von Lewinski, ‘EC Proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights’, *IIC* 1992, vol. 23, no. 6, p. 785-806 at p. 791-792 [Von Lewinski 1992].

³⁵² P.B. Hugenholtz, *Auteursrecht op informatie*, Deventer: Kluwer 1989, p. 20-25 [Hugenholtz 1989]. Note that some states make the protection of the work dependant on whether or not it has been fixed in a tangible medium. In the UK, ‘copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise’ (art. 3(2) UK Copyright Act).

protection, it is essential that the author's work consist of original elements, or a combination of original elements. Works that do not meet this originality requirement are not protected.³⁵³ One of the characteristics of copyright is that it protects the author for the various ways in which his work can be exploited: the protection granted is not limited to the original form of the work, but also covers the various modifications thereof, even if the author did not foresee the possibility of such modifications at the time of creation.³⁵⁴

The subject matter of related rights, on the other hand, is not the work of the mind, but the interpretation ('performance'), the sound recording ('phonogram'), the audiovisual recording ('film') and the transmission ('broadcast'). Although it can generally be said that these objects also exist in immaterial form, it must be understood that it is not the immaterial intellectual creation that is protected by related rights. Protection is granted for the specific object with a particular economical value. In order to qualify for protection under related rights, it is not required that an original and creative achievement is made.³⁵⁵ The simple fact that a particular performance is made, that sounds or moving images are fixed on a phonogram or film, or that a broadcast is transmitted, makes the said objects eligible for protection.

The scope of protection of related rights is unambiguously limited to the particular performances, phonograms, films and broadcasts made. The protection granted does not restrain others to make independently identical performances, sound recordings, audiovisual recordings or broadcast transmissions.

3.3.4 Objectives of protection

3.3.4.1 Introduction

Closely connected with the object and scope of protection are the objectives of protection, which are different again for copyright and related rights.

The objectives of copyright protection can be explained on the basis of four main principles. First, and foremost, there is the principle of natural justice, which finds most support in civil law ('*droit d'auteur*') countries. Since the author is the creator of the work, which is the expression of his personality, the author should be able to decide whether and how this work is to be exploited. Moreover, he should be able to prevent any damage or mutilation of his intellectual creation. According to the principle of natural justice, it is simply fair that the author is entitled to the fruits of his efforts. That justifies the author making a reasonable profit on his work. Second, there is the economic justification of copyright protection, which is put in the foreground in particular in common law ('copyright') countries. Since the creation of works requires considerable efforts in time and money, an exclusive right is necessary to enable the author (or whomever he assigns his rights to) to recoup the investment made. A third group of arguments that can be advanced in favour of copyright protection are social arguments. Since copyright guarantees that the author receives a share in the exploitation of his works, it is a means of securing an adequate income for the author and, therefore, of securing his social independence. A final reason to grant copyright protection is that by rewarding the author's creativity, copyright provides an incentive for the author to create new works. Copyright would therefore contribute substantially to the cultural and social development of society.³⁵⁶

³⁵³ Hugenholtz 1989, p. 26-27.

³⁵⁴ T.C.J.A. van Engelen, *Prestatiebescherming en ongeschreven intellectuele eigendomsrechten*, Zwolle: W.E.J. Tjeenk Willink 1994, p. 72-73 and p. 448 [Van Engelen 1994].

³⁵⁵ Van Engelen 1994, p. 126-127, p. 129, p. 132 and p. 448-449.

³⁵⁶ Stewart 1989, p. 3-4. See also F.W. Grosheide, *Auteursrecht op maat: beschouwingen over de grondslagen van het auteursrecht in een rechtspolitieke context*, Deventer: Kluwer 1986, p. 125-145 [Grosheide 1986].

Related rights, on the other hand, serve their own specific objectives. What the ultimate purpose of related rights protection is, shall be explained in the following sections. Since related rights do not serve a homogeneous interest, the objectives of protection differ between the right holders concerned. In general, a distinction can be made between on the one hand the objectives of protection of performers (para. 3.3.4.2) and the objectives of protection of phonogram producers, film producers and broadcasting organisations on the other hand (para. 3.3.4.3).

3.3.4.2 Performers

As previously explained, the need for the protection of performers was first perceived when, subsequent to the invention of the phonograph, the technological revolution made it possible to record performances and reproduce them on a large scale. The new techniques for recording and reproduction were perceived as a serious threat to performers, who feared that recordings would become a substitute for their live performances. Performers not only faced the risk of loss of employment resulting from the possibility of dispensing with their physical presence, the uses of the fixed performances also yielded profits in which performers had no share, contrary to the demands of equity.³⁵⁷ In response, to place performers in the position to decide upon and to discuss the economic conditions of the use of their performances, they were granted the right to prevent certain uses under the Rome Convention.³⁵⁸ In addition, they were granted a remuneration right in respect of the secondary uses of their fixed performances.³⁵⁹

Hence, the protection of performers in the Rome Convention was based from the outset on social objectives.³⁶⁰ These respond to the social problems of performers whose employment was jeopardised by the secondary use of their recorded performances. In addition, because of the artistic and creative efforts performers put in their performances, the principle of natural justice is also applicable to the protection of performers: there is little controversy that performers should be able to decide whether and how their (fixed) performances are to be exploited.³⁶¹ When harmonising the related rights of performers, the Commission also recognised that performers need an adequate legal protection in order to recompense them for their creative achievement and to secure that they receive an adequate income as a basis for further artistic work.³⁶² This has been highlighted by recital 7 of the Rental Right Directive:

‘Whereas the creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work [...]; whereas the possibility for securing that income [...] can only effectively be guaranteed through adequate legal protection of the right holders concerned.’

Because of the artistic efforts performers put in their performances, it has also been argued that it would be fair if the expression of the personality of performers in their performances would be protected. This would justify the recognition of prerogatives deriving from moral rights, such as the right to claim paternity of the performance, the right to oppose alteration to the performance, and the right to oppose distortion, mutilation or other impairment of the performance that could be prejudicial to the name, reputation or dignity of the performer.³⁶³ Neither the Rome

³⁵⁷ A. Kerever, ‘Should the Rome convention be revised and, if so, is this the right moment?’, [1991] *Copyright bulletin*, vol. 25, no. 4, p. 5-16 at p. 5 [Kerever 1991].

³⁵⁸ Art. 7 Rome Convention.

³⁵⁹ Art. 12 Rome Convention.

³⁶⁰ Report on the Implementation of the Rome Convention, p. 105.

³⁶¹ E. Ulmer, *Urheber- und Verlagsrecht*, Berlin [etc.]: Springer-Verlag 1980, p. 515 [Ulmer 1980].

³⁶² Explanatory Memorandum to the Rental Right Directive, p. 5-6 and p. 29. See also recital 7 of the Rental Right Directive and recital 10 of the Information Society Directive.

³⁶³ Kerever 1991, p. 6 and 10.

Convention, nor the EC Directives, however, protects the performers' moral rights. As a result, performers have to rely on national legislation to enjoy moral rights protection.

Applying these objectives to the terms of protection of performers, one could claim, as was the case in the consultation process, that in order to achieve these objectives it is necessary to fix a term of protection that covers at least the lifetime of the performer. In this respect, it has been argued that since life spans have increased, the term of 50 years as is currently provided for, is not satisfactory anymore. However, where the average life expectancy in the EU (25 countries) has only increased with 2.8 years (males) and 2.0 years (females) between 1993 and 2003,³⁶⁴ this argument in itself would not be sufficient to justify an extension of the terms of protection. On the other hand, since the life expectancy in 2003 is 75.1 years (males) and 81.2 years (females),³⁶⁵ one could indeed argue that the 50-year term of protection does not always cover the lifetime of a performer, at least in those cases where the performance at issue was made very early in the life of the performer, or when the performer lives longer than the average.

Therefore, proponents of a term extension argue, performers will see how their recordings fall into the public domain during their lifetimes, which would not only result in a loss of income, but also in a loss of control over how their recordings are going to be used. They are particularly concerned that their recordings are being altered and that they can be used in advertisements for products and causes of which they disapprove or in films whose subject matter they find distasteful.³⁶⁶ In other words, what performers want to achieve with a term extension is (1) that their income is ensured throughout their retirement years, and (2) that the deference of their personal contribution to their performances is safeguarded throughout their lives. This raises some fundamental questions.

First, it is questionable whether a term extension would really benefit the majority of performers or rather a specific group of bestselling artists. In paragraph 3.4.2.6, the question under which circumstances performers benefit from a term extension shall be dealt with more extensively. Moreover, it is uncertain whether revenues from related rights would provide performers with a certain source of future income or enable them to continue to earn an adequate income through their retirement years. At least, it is questionable whether these revenues would provide an adequate pension for most performers. If so, the question must be raised whether there would not be other, more sophisticated means to achieve this goal, rather than prolonging the terms of protection as an ultimate retirement policy for a small group of performers.

Second, one can wonder whether it would be adequate to realise the safeguarding of the performers' deference by means of an extension of the terms of protection of related rights. Of course, by granting a lifelong protection of their rights, performers would be able to prohibit the use of their recordings in films or advertisements that they disapprove at least throughout their lives. But the question is whether this would outweigh all the costs resulting from a term extension (see para. 3.4.1.3), especially considering that there are other less far reaching options to achieve the same objective. One could, for example, also grant performers lifelong moral rights protection. If performers would have the right to oppose the distortion, mutilation or other impairment of their performances that could be prejudicial to their name, reputation or dignity, they would also have the legal means to prevent their recordings to be used in dishonourable or distasteful productions, such as pornographic movies etc. There would appear no need to protect these 'moral' interests by way of an extension of the term of protection of the

³⁶⁴ Source: Eurostat - Life expectancy at birth,

<http://epp.eurostat.cec.eu.int/portal/page?_pageid=1996,39140985&_dad=portal&_schema=PORTAL&screen=detailref&language=en&product=Yearlies_new_population&root=Yearlies_new_population/C/C1/C14/cba10000>.

³⁶⁵ *Ibid.*

³⁶⁶ See in particular the response to the Staff Working Paper on Copyright Review by Sir Cliff Richard.

performers' *economic* rights. Moreover, moral rights are by their very nature personal and unwaivable rights. Consequently, in contrast to the economic rights, which are routinely assigned to phonogram producers by concluding a recording contract,³⁶⁷ the moral rights would provide more safeguards to the performers concerned.

3.3.4.3 *Phonogram producers, film producers and broadcasting organisations*

Phonogram producers and broadcasting organisations also felt the need for protection, when new techniques for recording and reproduction made it possible for anyone to use and exploit their phonograms and broadcasts beyond their control. As commercial and industrial firms, phonogram producers and broadcasting organisations spend considerable time, skill, effort and money on the production of their phonograms and broadcasts. Due to these high upfront investments, phonogram producers and broadcasting organisations could be seriously prejudiced by a situation where others could very easily, and without many additional costs, reproduce or rebroadcast their phonograms and broadcasts.³⁶⁸ This is why they demanded protection 'against piracy, unfair or parasitical competition and, in general, all acts whereby a third party derives undue commercial profit from their investments.'³⁶⁹ Phonogram producers and broadcasting organisations have found this protection in the Rome Convention.³⁷⁰ When, in Europe, the related rights of phonogram producers, broadcasting organisations and film producers were harmonised,³⁷¹ the Commission also emphasised that an adequate protection became necessary in order to cope with the increased piracy in the objects of related rights, in particular in phonograms and films.³⁷² This has been highlighted in recital 7 of the Rental Right Directive:

'Whereas [...] the investments required particularly for the production of phonograms and films are especially high and risky; whereas the possibility for [...] recouping that investment can only effectively be guaranteed through adequate legal protection of the right holders concerned.'

Although the legal history prior to the adoption of the Rome Convention also shows that phonogram producers and broadcasting organisations reasoned that next to the organisational and technical skills, artistic skills were involved in the process of making a phonogram or broadcast, at least where it concerned recordings and broadcasts of high quality,³⁷³ it must be emphasised that it is not the phonogram producer or broadcasting organisation that makes the artistic contribution to the recording or broadcast, but rather the person who operates the recording and broadcasting equipment, such as in the case of a phonogram, the person who

³⁶⁷ P.B. Hugenholtz and L.M.C.R. Guibault, 'Auteurscontractenrecht: naar een wettelijke regeling? – Onderzoek in opdracht van het WODC (Ministerie van Justitie)', Amsterdam: Instituut voor Informatierecht 2004, <<http://www.ivir.nl/publicaties/overig/auteurscontractenrecht.pdf>> [Hugenholtz/Guibault 2004], p. 24-25; see also L.M.C.R. Guibault and P.B. Hugenholtz, 'Study on the conditions applicable to contracts relating to intellectual property in the European Union', study commissioned by the European Commission (May 2002), <http://ec.europa.eu/internal_market/copyright/docs/studies/etd2000b53001e69_en.pdf>, p. 27 [Guibault/Hugenholtz 2002].

³⁶⁸ W. Mak, *Rights affecting the manufacture and use of gramophone records*, Den Haag: Nijhoff 1952, p. 144 [Mak 1952].

³⁶⁹ Kerever 1991, p. 8.

³⁷⁰ Arts. 10 and 12 (phonogram producers) and art. 13 (broadcasting organisations) Rome Convention. The Rome Convention does not provide for related rights protection on behalf of film producers.

³⁷¹ Next to phonogram producers and broadcasting organisations, film producers were granted related rights protection, because –in the view of the Commission– their achievements are comparable to those of phonogram producers and the presumptions of transfer of authors' rights in favour of film producers (see section 3.3.4.5) did not always provide sufficient protection. See Reinbothe/Von Lewinski 1993, p. 48-49.

³⁷² Reinbothe/Von Lewinski 1993, p. 4.

³⁷³ E. Ulmer, *Der Rechtsschutz der ausübenden Künstler, der Hersteller von Tonträgern und der Sendegesellschaften in internationaler und rechtsvergleichender Sicht*, München: Beck 1957, p. 11 [Ulmer 1957].

captures and electronically processes the sounds (the sound engineer or sound producer) or who actually compiles and edits the sounds (the sound editor).³⁷⁴ The claims of phonogram producers and broadcasting organisations, on the other hand, were not aimed at granting protection to their personnel, but were in essence aimed at protecting their business. What they actually wished for – and what they have been accorded by means of related rights – was protection of the investments they made to deploy the recording or broadcasting equipment and to employ their artistically and technically skilled personnel.³⁷⁵

The protection of phonogram producers, film producers and broadcasting organisations by means of related rights is therefore based on purely economic objectives, aimed at safeguarding the investments in the production of their phonograms, films and broadcasts (*‘Leistungsschutz’*). Phonogram producers, film producers and broadcasting organisations enjoy related rights in recognition of the technical and organisational skills and economic investments that the production of phonograms and films and the broadcasting of radio and television programmes require.³⁷⁶ But what kind of investment does this regime of related rights seek to protect? The EC Directives provide little guidance, except that it concerns ‘investments required particularly for the production of phonograms and films’.³⁷⁷

In legal writing, different opinions have been expressed on what exactly these investments consist of. On the one hand, it has been argued that they concern in particular the investments in the recording or broadcasting equipment as well as in the salaries of the personnel making the recording or broadcast.³⁷⁸ These are the investments directly related to the recording or broadcasting process (the ‘production costs’ in a narrow sense). On the other hand, as regards phonogram producers, it has been argued that the relevant investment would include the human and material (including organisational and technical) investments connected to the first technical sound fixation (recording and production costs, including studio fees, studio musicians, sound engineers etc.) as well as the time, effort and money spent to conclude the necessary contracts and to make the selection of the tracks (the ‘production costs’ in a broad sense).³⁷⁹

Arguably, since all these achievements are represented in the final product, the manufactured phonogram, which forms the subject matter of related rights protection (see para. 3.3.3),³⁸⁰ the purpose of related rights is not to protect phonogram producers for other expenditures, such as marketing and promotion costs, the costs involved in scouting and developing new talent (artist & repertoire, hereinafter: A&R), the costs of production of music video clips, public relations, tour support, etc. In fact, since returns on investment do not automatically occur, it is obvious that phonogram producers also have to invest in the development of their business (i.e. the scouting of new talent) and in marketing and promotion in order to sell their products. These costs would thus be part of the risk that every entrepreneur must take. An additional argument for this interpretation can be found in the next section (para. 3.3.4.4).

Whatever may be the precise nature of the investment that related rights granted to phonogram producers, film producers and broadcasting organisations seek to protect, these rights are clearly meant to serve as incentives to invest in record and film production and in broadcasting. Presumably, absent these exclusive rights, record producers, film producers or broadcasters would not be able to recoup their investments, and would therefore not undertake

³⁷⁴ Cohen Jehoram 1990, p. 88, Nimmer/Nimmer 2004, § 2.10[A][2][b].

³⁷⁵ Ulmer 1957, p. 11.

³⁷⁶ W. Nordemann, K. Vinck, P.W. Hertin and G. Meyer, *International copyright and neighbouring rights law: commentary with special emphasis on the European Community*, Weinheim [etc.]: VCH 1990, p. 340-341 [Nordemann et al. 1990].

³⁷⁷ See the above cited recital 7 of the Rental Right Directive.

³⁷⁸ Ulmer 1957, p. 11; Ulmer 1980, p. 515.

³⁷⁹ M. Vogel in: G. Schricker, *Urheberrecht: Kommentar*, München: Verlag C.H. Beck 1999, p. 1237-1293 at p. 1280 [Vogel 1999]. See also Nordemann et al. 1990, p. 362.

³⁸⁰ Vogel 1999, p. 1280.

these activities. Even though these rights may be subsequently transferred and licensed, and therefore have obvious economic value, as possibly reflected in companies' balance sheets where related rights are sometimes valued as 'intangible assets' (see para. 3.5.4), their rationale is clearly not to create economic value for the companies as such.

It follows that, in the case of phonogram producers, film producers and broadcasting organisations, an extension of the existing term can be justified only if it can be demonstrated that a term of 50 years is insufficient to recoup the investments made in the production of their phonograms, films or broadcasts. This question shall be dealt with in paragraph 3.4.2.1.

3.3.4.4 *Intellectual property rights with similar objectives*

Related rights of phonogram producers, film producers and broadcasting organisations are certainly not the only instances where intellectual property rights serve the objective of protecting investment. A more recent example of such a right is the *sui generis* database right, which was introduced by the Database Directive of 1996. Already in the 1988 Green Paper on Copyright and the Challenge of Technology, the Commission reasoned that in order to combat database piracy, it would be necessary to introduce a right for database operators to pursue unauthorised reproduction of databases, which would be similar to the producers' right in sound recordings:

'In cases where protection does not follow from the application of ordinary copyright law, [...] it would still seem desirable that protection against copying of the mode of compilation should be available to the database operator. It would give the producer a right similar to the right of the phonogram producer.'³⁸¹

The Database Directive follows a two-tier approach. Databases that reflect sufficient originality in the selection or arrangement of its contents are protected by copyright. Databases lacking originality are granted *sui generis* protection 'to protect investment in the creation of databases against parasitic behaviour by those who seek to misappropriate the results of the financial and professional investment made in obtaining and collection of data and information.'³⁸²

To enjoy this *sui generis* protection, the maker of the database must demonstrate that there has been qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents of the database (art. 7(1)). In this respect, the expression 'investment in [...] the obtaining, verification or presentation of the contents' of a database must be understood to refer to investment in the creation of that database as such.³⁸³ Hence, the investment must be directly related to the making of the database and not, for example, to the marketing or promotion thereof.³⁸⁴ As regards the nature of the investment, recital 7 of the Database Directive states that 'the making of databases requires the investment of considerable human, technical and financial resources'. These resources are comparable to the technical, organisational and economic achievements protected by related rights. The performances of the maker of a database are therefore comparable to those of phonogram producers, film producers and broadcasting organisations,³⁸⁵ which further supports the previous conclusion that marketing costs are not part of the investment protected under related rights (see para. 3.3.4.3).

³⁸¹ Green Paper on Copyright and the Challenge of Technology, p. 214.

³⁸² Report on the Database Directive, p. 9.

³⁸³ ECJ *British Horseracing Board*, para. 30.

³⁸⁴ See e.g. the case in Belgium: *Spot (cinebel.be) v Canal Numédia (allocine.be)*, District Court (Tribunal de première instance), Brussels, 18 January 2002, <http://www.droit-technologie.org/jurisprudences/civil_bruxelles_180102.pdf>. See also: E. Derclaye, 'Database *sui generis* right: What is a substantial investment? A tentative definition', IIC 2005, vol. 36, no. 1, p. 2-30, at p. 15-16 [Derclaye 2005].

³⁸⁵ M. Leistner, 'Verwandte Schutzrechte im europäischen Urheberrecht: Eine Untersuchung am Beispiel des Datenbankherstellerschutzes' in: P. Ganeva et al. 2001, p. 506-510 [Leistner 2001].

However, in contrast to related rights that exist regardless of any proof of investment, the *sui generis* regime sets a threshold requirement. Database producers are protected on condition that the investment in the database has been *substantial*. Moreover, the database right expires much earlier than related rights: the term of protection is a mere 15 years from the completion of the database (art. 10).³⁸⁶

Another intellectual property right that is primarily intended to safeguard investment is the right in topographies of semiconductor products. According to recital 2 of the Directive on the legal protection of topographies of semiconductor products,³⁸⁷ protection is needed because ‘the development of such topographies requires the investment of considerable resources, human, technical and financial, while topographies of such products can be copied at a fraction of the cost needed to develop them independently’. This demonstrates that the investment involved again relates to the ‘human, technical and financial resources’ directed at the ‘development’ of—in this case—topographies for semiconductor products. Moreover, it is obvious that the purpose of this right is to protect these products against piracy. On the other hand, the investments involved are arguably much higher than the investments of phonogram producers.³⁸⁸ Compared to related rights, the threshold requirement is higher as well; the topography must be the result of its creator’s own intellectual effort and may not be commonplace in the semiconductor industry. The term of protection, on the other hand, is again much shorter; the right expires after 10 years (art. 7(3)).

Other examples of intellectual property rights that are primarily based on an investment rationale are plant variety rights (term of protection: 25 to 30 years),³⁸⁹ medicinal and plant protection products (term of protection: max. 25 years),³⁹⁰ biotechnological inventions (term of protection: 20 years),³⁹¹ rights relating to industrial design (term of protection: max. 25 years),³⁹² and, possibly in the future, rights relating to utility models (term of protection: max. 10 years).³⁹³ Although the nature of these rights is not always directly comparable to the nature of related rights, it is striking that all of these rights have higher thresholds whereas the terms of protection are much shorter than those of related rights.

In conclusion, in comparison to other intellectual property rights with similar objectives, the existing terms of protection of related rights of phonogram producers, film producers and broadcasting organisations are already very long (50 years), especially when considering that no significant thresholds are set to obtain protection.

3.3.4.5 *The protection of film producers under copyright law*

In arguing for a longer term of protection phonogram producers regularly refer to film producers. Film producers in Europe benefit from a two-tier protection regime. Not only are

³⁸⁶ Although it can be argued that, in practice, the *sui generis* database right may endure perpetually, because any substantial change to the contents of a database qualifies this database for its own term of protection (art. 10.3), it must be emphasised that such a change must be the result of ‘a substantial new investment, evaluated qualitatively or quantitatively’, and that the protection granted therefore relates to the new investment involved.

³⁸⁷ Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, *OJ L* 24/36, 27.01.1987 [Semiconductor Directive].

³⁸⁸ P.B. Hugenholtz, ‘Juridische bescherming van chips’, *Bijblad bij de Industriële Eigendom* 1985, vol. 53, no. 5, p. 127-134, at p. 128 [Hugenholtz 1985]. L. Radomsky, ‘Sixteen years after the passage of the U.S. Semiconductor Chip Protection Act: Is international protection working?’, *Berkeley Technology Law Journal* 2000, vol. 15, no. 3, p. 1049-1094, p. 1051 [Radomsky 2000].

³⁸⁹ Art. 19 Community Plant Variety Regulation.

³⁹⁰ Art. 13 Regulation (EEC) No. 1768/92; art. 13 Regulation (EC) No. 1610/96.

³⁹¹ Biotechnological Inventions Directive.

³⁹² Art. 10 Designs Directive; art. 12 Community Designs Regulation.

³⁹³ Art. 19 Amended Proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by utility model, COM (1999) 309 final, Brussels, 28.06.1999.

film producers protected as holders of related rights in the first fixations of films, pursuant to the Rental Right Directive, but they also enjoy special status under the copyright laws of most Member States. The latter is to a large extent based upon article 14bis of the Berne Convention. In some countries (e.g. the UK and Ireland) film producers have been granted film copyright, and are regarded, together with the principal directors, as the co-owners of copyright in the film.³⁹⁴ Other countries (e.g. Austria and Italy) have established a system of statutory assignment of economic rights in films in favour of the film producer.³⁹⁵ Finally, there are countries in which film producers are deemed to have been assigned or licensed, by way of a statutory presumption, the economic rights that were originally vested in the authors of a cinematographic or audiovisual work (e.g. Belgium, France, Germany, Luxembourg, the Netherlands, and Spain).³⁹⁶ This implies that in all these countries film producers benefit from the much longer term of copyright protection, i.e. for the life of the original authors of the film plus 70 years.

The rationale behind the various legal means of concentrating copyright ownership in film producers is to avoid multiple claims of ownership in films and to circumvent the difficulties in tracing all the different authors of the film.³⁹⁷ The idea is that if the exclusive exploitation rights in the film are in the hands of only a single right holder, it will provide legal certainty to the distributors of the film with regard to the right holders' legitimation to sell the exploitation rights in the film. It would therefore be much easier to market and exploit the film commercially, which would benefit all the different stakeholders in the film. Where the exploitation rights in the film are presumed to have been acquired by the film producer, this assures that, even where the (many) natural persons creating the film are considered as authors, the film producer will still be able to control the rights to market and exploit the film commercially, without undue interference from the actual authors.³⁹⁸

Similar problems of rights management do not usually occur with regard to the commercial use of phonograms. Unlike in the case of films, where producers are sometimes confronted with hundreds or even thousands of authors and performers in a single motion picture, here contracting with the right holders concerned is a relatively simple and straightforward task, since normally only a handful of performers contribute to a single phonogram. Moreover, since it is common practice that performers, when entering into recording contracts with phonogram producers, assign part or most of their related rights to the phonogram producers, the economic rights often are already in the hands of the phonogram producer.³⁹⁹

In sum, even though the roles of phonogram producers and film producers may be somewhat comparable in an economic sense, there appears to be no reason to provide for similar treatment of both categories of producers under copyright law. Seen against this background, it is difficult to argue that there currently exists an unreasonable discrimination between the protection of phonogram producers and film producers.

³⁹⁴ Art. 9(2)(a-b) UK Copyright Act and art. 21(b) Irish Copyright Act. See also: P. Kamina, *Film copyright in the European Union*, Cambridge: Cambridge University Press 2002, p. 164-165 [Kamina 2002].

³⁹⁵ Arts. 38-40 Austrian Copyright Act and art. 45 Italian Copyright Act. See also: Kamina 2002, p. 166.

³⁹⁶ Art. 18 Belgian Copyright Act, art. L. 132-24 French Copyright Act, arts. 88-89 German Copyright Act, art. 24 Luxembourg Copyright Act, art. 45d Dutch Copyright Act and arts. 88-89 Spanish Copyright Act. See also Kamina 2002, p. 166.

³⁹⁷ Kamina 2002, p. 32-33 and p. 138.

³⁹⁸ M. Salokannel, *Ownership of rights in audiovisual productions: a comparative study*, Den Haag [etc.]: Kluwer Law International 1997, p. 102 [Salokannel 1997].

³⁹⁹ Hugenholtz/Guibault 2004, p. 24-25.

3.4 Economic arguments

3.4.1 Law and economics of term extension

European intellectual property law is to a considerable extent based on economic considerations, and often perceived as an instrument to develop and foster the European information economy. Works, phonograms, performances, and films are regarded as products and services for which markets have to be created.⁴⁰⁰ This is particularly obvious in the case of related rights of phonogram producers, a field that is dominated by economic reasoning rather than natural rights considerations, which still dominate the thinking in continental Europe about copyright (*droit d'auteur*). As was demonstrated in paragraph 3.3.4, the main objective of related rights protection is clearly to serve as economic incentive for investment. In the case of performers' rights, additional arguments apply, including arguments based in natural rights considerations (see para. 3.3.4.2).

A legal-economic analysis of the question of term extension for related rights involves balancing the different economic arguments in favour and against an extension, and assessing to what extent they promote the objectives behind the protection of related rights (for a description of the objectives behind the protection of related rights see extensively paragraph 3.3.4). From an economic perspective, the term of protection ideally reflects a balance between the incentives to invest in performances, phonograms or films, and the costs of such protection.⁴⁰¹ Stronger protection will not automatically lead to more creation, innovation and thriving markets; it can also impede the same. The economic analysis in this section will weight the benefits of a term extension against the costs for society, including competitors, consumers and public welfare in general.⁴⁰² After the following overview of the relevant law & economics literature and its arguments in favour of and against extending the term of protection, the economic analysis in paragraph 3.4.2 will examine the actual economic effects for phonogram producers and performers on the one hand and for users and consumers of sound recordings on the other hand. More generally, it will analyse the impacts on a competitive, innovative and diverse market for sound recordings.

Analysing the optimal term of protection meets comparable difficulties. Until today, the law & economics literature has not succeeded in proving that a specific term of protection has the desired effect of creating optimal incentives to produce, create and invest. Evaluating the impact of an extension on incentives is further complicated by the fact that in a dynamic and unpredictable sector such as the music sector is, it is extremely difficult to foretell which material will still sell after 50, 70 or 90 years. The lack of empirical data, one of the major problems of economic analysis in the area of intellectual property in general, and the inability of stakeholders arguing for a term extension to provide such data, add further to the difficulties of gaining concrete insights into the possible benefits and costs of an extension of the term of protection of related rights.

⁴⁰⁰ See Information Society Directive, recital 2: 'Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content'.

⁴⁰¹ N. Elkin-Koren and E. Salzberger, *Economic Analysis of Intellectual Property*, Draft November 2005 (forthcoming), p. 122 [Elkin-Koren/Salzberger 2005]; R. Bard and L. Kurlantzick, *Copyright Duration, Duration, Term Extension, The European Union and the Making of Copyright Policy*, San Francisco: Austin & Winfield 1999, p. 23 [Bard/Kurlantzick 1999]; W.M. Landes and R.A. Posner, 'Indefinitely renewable Copyright', [2002] Chicago: John M. Olin Law & Economics Working Paper no. 154, <http://www.law.uchicago.edu/Lawecon/WkngPprs_151-175/154.wml-rap.copyright.new.pdf>, p. 5 [Landes/Posner 2002]; R. Watt, *Copyright and economic theory: friends or foes?*, Cheltenham, UK: Edward Elgar Publishing Limited 2000, p. 13 [Watt 2000].

⁴⁰² Elkin-Koren/Salzberger 2005, p. 64; Bard/Kurlantzick 1999, p. 22; Landes/Posner 2002, p. 5.

3.4.1.1 *Term limitation and economic rationale*

In the law & economics literature, a number of economic factors explain the limited duration of related rights protection, all of which are related to reasons of efficiency and the incentive rationale (see para. 3.4.1.2). Landes and Posner, two leading writers on the economic aspects of the duration of intellectual property rights, summarise the question at hand as follows: ‘the optimal term of copyright protection is determined by balancing at the margin of the incentive effects of a longer term against both the administrative and access costs arising from the public goods aspect of intellectual property.’⁴⁰³

In order to fully understand the difficulties involved in the process of balancing the benefits and costs of extending the term of protection for phonograms, performances, broadcasts, etc. it is necessary to understand that in the law & economics discussion creative/information goods including sound recordings (as well as broadcasts and performances) are genuinely seen as quasi public goods. A good qualifies as a public good if it is non-rivalrous (once created, it can be used by everyone without depleting its quantity or quality) and non-exclusive (i.e. others cannot easily be excluded from consuming and/or copying it).⁴⁰⁴ While the aforementioned characteristics do not necessarily hold true for the carrier of a sound recording, e.g. a CD, they generally hold true for the sound recording itself. Producers of sound recordings, therefore, have to deal with the typical free-rider problem of public goods, i.e. copies cannot easily be prevented from copying and distributing sound recordings at low costs without embracing the cost of original production. The latter holds particularly true in a digitised world, where perfect copies can be made and distributed at almost zero marginal cost. This is where intellectual property comes into play: neighbouring rights grant temporarily exclusive rights to the right holder to use a phonogram (broadcast, performance) in a certain way, e.g. to make and distribute copies or to communicate or perform in public, and thereby removing some of the public good characteristics. An interesting question that, however, exceeds the scope of this study is what influence the introduction of Digital Rights Management technologies has on the public goods problem, and thereby, indirectly, on the economic justification of an extension of related rights protection.⁴⁰⁵ The difficulty in finding the optimal length of neighbouring rights protection is to identify the most efficient level between giving one party the right to exclude others from the use of a principally non-rivalrous and non-exclusive good, and the costs from restricting its use for society (or, in the words of Landes and Posner: the access costs).

Access costs in this context comprise the transaction costs for obtaining a licence from the original producer to use a protected phonogram, as well as the so-called deadweight losses⁴⁰⁶ from inefficient allocation. Exclusive rights in e.g. phonograms grant a temporary monopoly to phonogram producers. This allows phonogram producers to charge a price that is higher than under perfect competition. In absence of an exclusive right, the equilibrium price for e.g. a CD would equal marginal costs, i.e. the total costs that it would take to produce an additional copy of

⁴⁰³ Landes/Posner 2002, p. 5; E. Rappaport, *Copyright Term Extension: Estimating the Economic Values*, CRS Report for Congress, Washington: Congressional Research Service 1998, p. 1 [Rappaport 1998].

⁴⁰⁴ One example of a public good is non-commercial broadcasting. Everybody who owns a television set and is connected to a broadcasting network can watch it (non-exclusive) and an unlimited number of viewers can watch the programs without disadvantaging others (non-rivalrous).

⁴⁰⁵ See e.g. Elkin-Koren/Salzberger 2005, p. 130 *et seq.* (about the question whether DRM protected content is still a public good).

⁴⁰⁶ The term ‘deadweight loss’ typically refers to a situation where consumers will not purchase a good or service, because the price is deemed too high. The result is that consumers are denied the benefit of the product or service, whereas the provider of the good or services does not make any profit. The costs for society are called ‘deadweight losses’.

that CD.⁴⁰⁷ If a producer tried to sell a CD at a price higher than marginal costs, someone else could easily outdo him by offering copies at a lower price.

As opposed, in the presence of an exclusive reproduction right, the right holder can charge prices that are higher than the marginal costs. As a result, some consumers will not consume a CD, because the CD is not offered at a price they are willing to pay (i.e. a price somewhere between the price that the right holder charges and marginal costs; loss in consumer surplus)⁴⁰⁸. In a situation where the loss in consumer surplus is only partly captured by the holder of the exclusive right, while nobody else produces and offers CDs at a price these consumers are willing to pay, there is also a loss in producer surplus.⁴⁰⁹ This situation of inefficient allocation is also described as welfare loss or deadweight loss.

Extending the term of protection means prolonging a situation in which e.g. a producer of CDs can set a price at a level above marginal costs and thereby continue to raise transaction costs and deadweight loss. As explained above, this situation is only acceptable in terms of efficiency and social welfare benefits to the extent that it is necessary to realise the goals exclusive rights were granted for in the first place, namely to create the incentives necessary to invest in producing new phonograms.⁴¹⁰ Having said this, ultimately achieving a balance between benefits (incentives) and costs (access costs) will to some extent be always a political decision, too, depending on how the benefits and costs are valued.⁴¹¹

3.4.1.2 *The incentive paradigm*

The incentive paradigm is described as the ‘main contemporary law and economics framework for the analysis of intellectual property’.⁴¹² The underlying idea is the following: granting record and film producers or performers certain intellectual property rights will provide them with incentives to create and invest their time, effort and money in performances, phonograms, or films. Due to the aforementioned public good characteristics that also apply to sound recordings, phonogram producers are confronted with the problem that the initial investment to produce new sound recordings is high and potentially risky, while the marginal cost to reproduce them will be very low. Once a reproduction is made, further copies can easily be produced and distributed at low cost by anyone – particularly in the digital world. In a competitive market, where products are priced at or close to marginal cost, phonogram producers would be left with insufficient revenues to cover their initial investment.⁴¹³ The temporary monopoly granted by related rights enables phonogram producers to charge prices that are higher than in fully competitive markets. Having related rights allows them to recoup both the initial investment and the marginal production costs, and thereby creates incentives to invest and produce. Extending the term of protection, so the argument of the proponents of a term extension would increase the incentives to invest and produce in new phonograms, broadcasts or performances.

Another set of arguments brought in favour of a term extension calls upon the benefits of strong (and long-lasting) exclusive rights for the efficient management of protected subject

⁴⁰⁷ Presumably, in the digital environment marginal costs tend to zero because digitisation favours the making of cheap, good quality copies.

⁴⁰⁸ Consumer surplus is the difference between the price which a consumer would be willing to pay and the price he actually pays

⁴⁰⁹ Producer surplus refers to a situation where a producer receives more for a good than the least it would take to produce it.

⁴¹⁰ D.S. Karjala, ‘Comment of US Copyright Law Professors on the Copyright Office Term of Protection Study’, [EIPR 1994, vol. 16, no. 12, p. 531-537, at p. 533-534 [Karjala 1994]

⁴¹¹ Rappaport 1998, CRS-2.

⁴¹² Elkin-Koren/Salzberger 2005, p. 122; Bard/Kurlantzick 1999, p. 21; Landes/Posner 2002, p. 4.

⁴¹³ W.M. Landes and R.A. Posner, ‘An Economic Analysis of Copyright Law’, Journal of Legal Studies 1989, vol. 18, no. 2, p. 325-363, at p. 325 *et seq.* [Landes/Posner 1989].

matter (the so-called stewardship argument').⁴¹⁴ Effective management of protected subject matter can refer to a range of aspects, from optimal maintenance and distribution, to opposing low quality recordings flooding the market, the prevention of overuse up to the fight against offensive or deceptive uses. Having said this, it is already very questionable whether such aims as the prevention of overuse,⁴¹⁵ the protection of quality and of the consumer is still covered by the rationale behind granting neighbouring rights (see insofar para. 3.3.4). As far as the 'inferior product' argument is concerned, it also would seem that a functioning market place is best suited to take care of this problem.⁴¹⁶ Regarding the argument of deceptive or offensive uses it is already very questionable whether extending the term of protection is an adequate and proportional solution to the above mentioned problems.⁴¹⁷ More generally, the question of how an effective tool IP law, and here in particular the incentive function, is to stimulate a certain, allegedly socially and/or economically desirable behaviour is still far from decided, as the next paragraphs will explain.

Before continuing to the economic analysis of the impact of a term extension on the incentives for performers and producers in the second part of this section, some reservations are in order. It is important to be aware that, from an economic point of view, there is no real evidence yet whether, and if yes, to what extent intellectual property rights in general, and related rights specifically, actually provide the necessary incentives to promote innovate, create and invest.⁴¹⁸ It is not even clear whether granting or extending related rights protection is the optimal and proportional response to stimulate investment in production and distribution of e.g. phonograms.⁴¹⁹ This can be illustrated by the recent review of the Database Directive by the Commission. No hard evidence could be found that the introduction of the *sui generis* right for non-original databases indeed has led to an increase in the production and distribution of databases in the EU, or to an increase in competitiveness of the European database market. As a consequence, the Commission has seriously questioned whether the introduction of the *sui generis* rights has been successful in realising its original objectives.⁴²⁰

Another caveat concerns the situation of performing artists. Besides serving as an economic incentive, an important objective of granting related rights to performers is to enable them to earn a reasonable income from royalties and remuneration rights. For an economic analysis of the extent to which a term extension would further these objectives, it would be necessary to assess how much individual performers actually earn from their rights. This again would require extensive qualitative research that exceeds the scope of this study. Instead, the economic analysis in paragraph 3.4.2.6 examines more generally how performers can generate an income from

⁴¹⁴ See e.g. Liebowitz 2006, p. 20.

⁴¹⁵ Already denying that creative goods as public goods can be overused, M.A. Lemley, 'Ex ante versus ex post justification for intellectual property', *University of Chicago Law Review* 2004, vol. 71, p. 129-149, at p. 143 *et seq.* [Lemley 2004].

⁴¹⁶ In this sense also Bard/Kurlantzick 1999, p. 67.

⁴¹⁷ Critical himself, Liebowitz, p. 20. For an extensive discussion see also Bard/Kurlantzick 1999, p. 66-71.

⁴¹⁸ Bard/Kurlantzick 1999, p. 60; S.E. Sterk, 'Rhetoric and reality in copyright law', *Michigan Law Review* 1996, vol. 94, no. 5, p. 1197-1249, at p. 1213-15, p. 1220-1222, p. 1225-1226 [Sterk 1996]; Karjala 1994, p. 533; and extensively Elkin-Koren/Salzberger 2005, p. 89 *et seq.*

⁴¹⁹ Elkin-Koren/Salzberger 2005, p. 112 *et seq.* Positive: F.M. Scherer, 'The Innovation Lottery', in: C.R. Dreyfuss, D. Zimmerman and H. First (eds.), *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society*, Oxford: Oxford University Press 2001, p. 3-21, at p.15 *et seq.* [Scherer 2001]; critical: M.A. Lemley, 'Property, Intellectual Property, and Free Riding', *Texas Law Review* 2005, vol. 83, p. 1031-1075, at p. 1060-1062 [Lemley 2005]; C. Nguyen, 'Toward and Incentivized but Just Intellectual Property Practice: The Compensated IP Proposal', *Cornell Journal of Law and Public Policy* 2004, vol. 14, p. 113-143, at p. 113 *et seq.* [Nguyen 2004]. Apart from purely economical reasoning, another important aspect that in the end will have to weight in the analysis is, of course, whether the rationale behind related rights is to promote profit maximisation or reasonable recoupment of investment (see the discussion in para. 3.3.4.3 which argued in favour of the latter).

⁴²⁰ Report on the Database Directive, p. 24 *et seq.*

related rights protection, who would actually benefit from a term extension and the role that contractual arrangements play in this context. As to the latter aspect, it is important to realise that, in order to generate income from royalties and remuneration rights, performers typically rely on their cooperation with third parties, such as phonogram producers, broadcasters or collecting societies, to record and distribute their performances.⁴²¹ In other words, performers' incomes depend largely on the contractual arrangement between performers and phonogram producers, broadcasters or collecting societies.

The precise scope of such contractual agreements often reflects not only differences in negotiation power, but also a compromise between differing interests (see para. 3.4.2.6). For example, a phonogram producer will primarily be interested in maximising profits with the fixation; it is not in his interest to invest in promoting and marketing a fixation that is (no longer) economically profitable. By contrast, performers may be primarily interested in the widest possible dissemination of their performances (to gain reputation) and reliable, lasting revenue flows. As a result, and due to imbalances in negotiation power, the outcome of such negotiations is not always favourable to the interests of performers or their earnings. For example, Towse found in her study that despite high aggregate earnings in the music industry, the median individual payment for performers in the UK averaged a meagre GBP 75 per year.⁴²² She interpreted this also as a result of contractual practices: 'The large sums of royalty income that copyright law enables to be collected goes mainly to the publishers (music publishers and record companies) and to a small minority of high earning performers and writers. These are persons who can defend their own interests in the market place by virtue of their bargaining power and ability to hire advisers (managers, lawyers and accountants) to control their own affairs by contractual arrangements.'⁴²³ This is why paragraph 3.4.2.6 will pay particular attention to the effect of a term extension for performers' rights in the light of the contractual arrangements that are applied in practice.

It was not the task of this study to perform a qualitative analysis and gather further empirical data, nor was it within its terms of reference to analyse in greater depth the aforementioned more principal concerns about the adequacy of related rights protection as a tool to create incentives. The present economic analysis has to presume that the incentive paradigm is correct and will accordingly concentrate on the possible impact of a term extension on phonogram producers' ability to finance their activities and recoup their investment (para. 3.4.2.1), to invest in the development of new talent and repertoire (para. 3.4.2.2), and the ability of performing artists to generate an adequate income (para. 3.4.2.6), as well as the costs of such an extension. In so doing, it will concentrate on the term of protection for phonogram producers and performers, the only categories of right holders that have made, in the course of the EC consultation process, economic arguments in favour of an extension. A question that lies outside of the scope of this study is whether there are alternative, no less effective and more suitable forms of incentives than prolonging the term of related rights protection.

When analysing the incentive paradigm, a further differentiation must be made between (a) incentives to create or produce new material, and (b) incentives to improve, maintain and distribute already existing material. While the importance of the first aspect -incentives to create or produce- is generally accepted, the second argument is often overlooked in law & economics discussions. This aspect plays, however, a particularly important role when discussing retroactive

⁴²¹ Canadian Intellectual Property Policy Directorate, Assessing the Economic Impacts of Copyright Reform on Performers and Producers of Sound Recordings in Canada, Section 2.1, <<http://strategis.ic.gc.ca/epic/internet/inippd-dppi.nsf/en/ip01112e.html>>.

⁴²² R. Towse, *Creativity, incentive and reward: an economic analysis of copyright and culture in the information age*, Cheltenham: Edward Elgar Publishing Limited 2001 [Towse 2001], p. 124.

⁴²³ Towse 2001, p. 126.

extension, i.e. extending the term of protection for pre-existing subject matter.⁴²⁴ Extending the duration of protection for existing phonograms cannot as such provide incentives to produce new phonograms.⁴²⁵ Still, a term extension might -the argument is controversial- be able to create efficiencies by promoting better management, maintenance or distribution of existing catalogues (e.g. by digitising material, creating metadata, investing in multimedia products, digital archives and other derivatives, investing in distribution models and/or providing value added services).⁴²⁶ The crucial question in this context is whether the falling of a phonogram or performance into the public domain will either promote the further distribution of and investment in such material, or, to the contrary, discourage further dissemination because absent ownership rights in a phonogram or performance, no one will feel inclined to invest in its improvement, maintenance and further distribution. Put differently, this is the question of who is better positioned to improve, maintain and distribute (catalogues of) mature phonograms or fixations of performances that are older than 50 years: the original holders of related rights or third parties, such as archives, broadcasters or enterprises that specialise in restoring and distributing public domain content.

Of course, the mere fact that material is in the public domain is in itself no guarantee that it is actually widely accessible and available to users. What is still needed are parties that are willing to invest in public domain material and distribution models. The opportunities that arise from digitisation are one important parameter in this context, such as lower production, storage and distribution costs, interactivity, and decentralisation. Some economists posit that record companies that already hold the rights are the most promising candidates for efficient management of mature material.⁴²⁷

Others criticise this view as inherently anti-market, and argue that an extension of terms for such material would raise transaction costs for competitors.⁴²⁸ Moreover, there is no guarantee that phonogram producers as original right holders would actually be willing to licence that material to competitors. Consequently, a term extension would deprive consumers of the benefits of competition in terms of quality, price and value added services. It is also difficult to see why not extending the term of protection would prevent the original producer of a phonogram to continue exploiting the material, even after legal protection has expired. The producer is still the one who owns and controls the master copy. The property right in the master copy, which does not expire, gives the producer a 'natural' competitive advantage. Unauthorised copies made by competitors on the basis of commercially released vinyl recordings or CD's will never have the same quality (fidelity) as the master, particularly if it concerns an analogue recording.

Different questions may be asked in respect of recordings that are no longer popular (i.e. commercially profitable), but remain subject to exclusive phonogram rights. The likely consequence of a term extension would be that such material will remain dormant and

⁴²⁴ In this sense also S. Liebowitz and S. Margolis, 'Seventeen Famous Economists Weigh in on Copyright: The Role of Theory, Empirics, and Network Effects', [2003] AEI-Brookings Joint Centre for Regulatory Studies, SSRN: <<http://ssrn.com/abstract=488085>>, p. 4 [Liebowitz/Margolis 2003].

⁴²⁵ W.M. Landes and R.A. Posner, *The political economy of intellectual property law*, Washington, D.C.: AEI-Brookings Joint Center for Regulatory Studies 2004: 'The possibility of retroactive legislation is a candle to rent-seeking moths', p. 17 [Landes/Posner 2004]. Rent-seeking refers in this context to the process of using political processes (e.g. in the form of lobbying) to gain unilateral economic advantage.

⁴²⁶ Liebowitz/Margolis 2003, p. 4 *et seq.*; critical Elkin-Koren/Salzberger 2005, p. 109 *et seq.*, p. 113 *et seq.*, with further references.

⁴²⁷ Liebowitz 2006, p. 19-20.

⁴²⁸ E.g. Lemley 2004, p. 132 *et seq.*; Liebowitz/Margolis 2003, p. 3; Elkin-Koren/Salzberger 2005, p. 110 *et seq.*, p. 113 *et seq.* with an interesting reference to the complexity of human motivations and the trend to decentralised production.

unavailable to consumers.⁴²⁹ The overall question is closely related to the social costs of an extension, which is why the economic analysis takes place under the heading of access and cultural diversity in paragraph 3.4.2.3. Again, however, it should be kept in mind that economists do not yet have an answer to the question of what the impact of a term extension on the incentives to maintain and distribute older material really is.⁴³⁰ The analysis will point out relevant considerations; to know for certain, however, an empirical analysis will be necessary, which again falls outside the scope of this study.

3.4.1.3 Costs of a term extension

Delaying the moment from which works fall into the public domain can create costs: costs for competition and innovation, costs for consumers and costs for society.

Costs for competition and innovation

Costs for competition and innovation are the possible negative effects of an extension of the term of protection on how the original right holder can control prices, transaction costs, distribution channels and certain secondary uses. Transaction costs are the costs for third parties necessary to obtain permission to use or reproduce a phonogram. They include the costs of tracing the original right holder and to bargain with him, and the royalties and remunerations that must be paid.⁴³¹ If the expiration of related rights reduces or completely removes transaction costs, this could make it more attractive for competitors to invest in maintaining and distributing older material or to use such material in the context of own value-added products or services (for an extensive analysis, see para. 3.4.2.3).⁴³²

Costs of a diminished public domain

The public domain can be described as a ‘sphere in which contents are free from intellectual property rights’.⁴³³ The consequence is that everybody is free to use material in the public domain without being required to obtain prior authorisation or to pay royalties.⁴³⁴ The public domain serves as a valuable (re)source for researchers, educational institutions and authors, who are inspired by older material or use it in new creations (for example, samples of recordings used in remixes). Public domain material is also used as input to innovative content distribution models, both commercial and not-for-profit. Examples of models that draw heavily on public domain material include the Penguin Classics series, Project Gutenberg, Google Earth, the European Digital Library, Westlaw and LexisNexis, various archives for classical music and performances, sheet music, choral music, moving pictures, historical photographs, etc.⁴³⁵ The public domain

⁴²⁹ This is why Posner and Landes have argued in favour of introducing renewal and registration or ‘use it or lose it’ rules. The downside of renewal and registration solutions are, as Landes and Posner point out themselves, that only less valuable or popular content would enter the public domain, while rights in popular content could be indefinitely renewed. Landes/Posner 2002, p. 41.

⁴³⁰ Liebowitz/Margolis 2003, p. 6.

⁴³¹ Note, in case, other exclusive rights in the material exist, what is reduced is the need to negotiate with yet an additional party.

⁴³² Bard/Kurlantzick 1999, p. 59, with further references, and p. 64.

⁴³³ P. Samuelson, ‘Digital Information, Digital Networks, and The Public Domain’, [2001] draft paper, <<http://www.law.duke.edu/pd/papers/samuelson.pdf>>, p. 80-107 [Samuelson 2001], p. 82. See generally L. Guibault and P.B. Hugenholtz, *The Future of the Public Domain*, The Hague [etc.]: Kluwer Law International, 2006 [Guibault/Hughenoltz 2006].

⁴³⁴ Note that material, such as a phonogram, can be subject to a number of cumulative exclusive rights with different expiry dates. As long as the last exclusive right has not expired, the material is only partly in the public domain.

⁴³⁵ See e.g. Project Gutenberg: <<http://promo.net/pg/>>; Google earth: <<http://earth.google.com/>>; European Digital Library: <<http://www.theeuropeanlibrary.org/portal/>>; choral music:

thus is a valuable reservoir of diverse contents from a variety sources, and hence a driver of cultural, social and political diversity.⁴³⁶ It thus serves important cultural, social, democratic, academic, educational and economic functions.

The public domain is no static concept. It can grow or shrink, depending on how many new works and related rights are added or are prevented from falling into the public domain.⁴³⁷ Intellectual property protection, including the protection of related rights, has an important role to play in this context. It can cause the public domain to grow by creating incentives to produce new works, phonograms, films, etc. that eventually will fall into the public domain. To the contrary, it can also prevent the public domain from growing or even reduce it. Extending the scope or the length of protection, for example, cannot only have the effect that material falls into the public domain substantially later. Additional social costs are the unknown creations that have never materialised because of transaction costs or lack of access to materials enjoying prolonged protection. The argument, however, is not uncontested. Some scholars point out that the exceptions and limitations of intellectual property law would leave sufficient room for new innovative uses.⁴³⁸ However, considering the tendency in European copyright law to interpret limitations and exceptions narrowly, the argument is perhaps less convincing in Europe than it might be in the US.

It was mentioned earlier (para. 3.4.1.2), that the public domain status of creative material would in itself not constitute a guarantee that material will indeed be made accessible and available to the public. In the case that a term extension will result in a situation where less existing material will be made available than without an extension, because of higher transaction costs or because the original right holder refuses to licence the material to competitors, this would further diminish the public domain and constitute an additional cost of an extension. This is why some scholars are of the opinion that the fact that a particular phonogram enjoys lasting popularity is actually one more reason to release it into the public domain sooner rather than later, so that the public can make full and effective use of it.⁴³⁹

Costs for consumers

Related rights protection enables right holders to charge a price higher than would be possible in a fully competitive market. This results in higher costs for consumers and reduced access, compared to a competitive market situation without monopoly-like positions. Extending the term of protection means allowing excess pricing for an extended period of time.⁴⁴⁰ This can result in

<http://www.cpd.org/wiki/index.php/Main_Page>; sheet classical music: <<http://www.sheetmusicarchive.net/>>; clipart: <<http://www.openclipart.org/cgi-bin/navigate/buildings>>; photos: <http://www.trainingreference.co.uk/free_pictures/index.html>; moving pictures: <<http://www.archive.org/details/movies>>; classical music and performances: <<http://www.classicalarchives.com/beethoven.html>> and <http://www.infodigi.com/Public_Domain/music.html>.

⁴³⁶ See e.g. M.D. Birnhack, 'More or Better? Shaping the Public Domain', in: Guibault/Hugenholtz 2006, p. 59-86, p. 85 [Birnhack 2006]. Y. Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, paper submitted to the Conference on The Public Domain, 9-11 November 2001, Duke Law School, <<http://www.law.duke.edu/pd/papers/benkler.pdf>>, p. 203 [Benkler 2001].

⁴³⁷ Samuelson 2001, p. 81-82; Landes/Posner 2004, p. 3.

⁴³⁸ Critical Liebowitz/Margolis 2003, p. 10, pointing to the fact that e.g. fair use exceptions (or, to speak in terms of European intellectual property law: the exceptions to intellectual property law) would provide sufficient relief from the restrictions imposed by exclusive rights control.

⁴³⁹ Bard/Kurlantzick 1999, p. 60; Karjala 1994, p. 533.

⁴⁴⁰ G.A. Akerlof, K.J. Arrow, T.F. Bresnahan, J.M. Buchanan, R.H. Coase, L.R. Cohen, M. Friedman, J. R. Green, R.W. Hahn, T.W. Hazlett, C. S. Hemphill, R.E. Litan, R.G. Noll, R. Schmalensee, S. Shavell, H.R. Varian, and R.J. Zeckhauser, 'The Copyright Term Extension Act of 1998: An Economic Analysis', [2002] AEI-Brookings Joint Centre for Regulatory Studies, <<http://www.aei-brookings.org/admin/authorpdfs/page.php?id=16>>, p. 11 [Akerlof et al. 2002].

costs from underutilisation and inefficient allocation. In case individuals value the subject matter more than the costs of making a copy but less than the price at which it is offered,⁴⁴¹ they will surrender benefits (access) that exceed the costs of their use.⁴⁴² The economic analysis will examine the likely effect of a term extension on consumer prices in paragraph 3.4.2.5.

3.4.2 *Economic analysis*

Based on the framework of law and economics theory, the following section analyses in how far a term extension could actually help to achieve the objectives of related rights protection described above and what costs a term extension would be likely to bring about.

First, the effects of a term extension on phonogram producers' ability to finance their activities and recoup their investment is analysed, followed by an evaluation of the likely effects on their ability to invest in the development of new talent and repertoire. Second, the impacts of a term extension on access, cultural diversity as well as on competition and innovation are assessed with specific respect to the effects of digitisation. Third, an overview of the types of costs that a term extension would bring about is given. And, last but not least, the potential effects of a term extension on performing artists, in particular on their ability to receive an adequate income, are analysed.

The analysis was based on in-depth desk research, extensive dialogues with affected stakeholders and – as far as it was available and accessible – on data about the market for sound recordings. As in many cases no reliable data was available, estimates by stakeholders or experts were used to illustrate certain points.

3.4.2.1 *Phonogram producers' ability to finance their activities and recoup investment*

As we have seen in paragraph 3.3.4.3, the goal of related rights for phonogram producers is to enable them to recoup their investment and to protect them against piracy and unfair or parasitical competition. Against this backdrop, a term extension would be economically sensible if the current term of 50 years was not sufficient for phonogram producers to recoup their investment. Proponents of a term extension argue that '[p]roducers need a longer period of time to have a return on their creative work and investments.'⁴⁴³

To evaluate this need requires an assessment of

- the average investment necessary to produce (and market) a sound recording, and
- the time needed to recoup this investment.

'Average' investments in sound recordings

The amount necessary to produce a sound recording is difficult to define as production costs vary heavily e.g. between large and small productions or between different genres like classic music (requiring an entire philharmonic orchestra) or electronic dance music (that can be produced on a computer). Average numbers are therefore not very meaningful in this setting. What can be said, though, is that production costs have decreased over the past thirty years due to technological advances. While, for example, master tapes used to be recorded in intricate sound studios that charged several thousand euros per day, today, due to digital studio techniques even large productions can be produced for less than EUR 1000 per day.⁴⁴⁴ In addition, digital recording tools are available that enable semi-professional sound recordings in small 'home

⁴⁴¹ Bard/Kurlantzick 1999, p. 57.

⁴⁴² Differentiating Liebowitz/Margolis 2003, p. 14.

⁴⁴³ Responses to the Staff Working Paper on Copyright Review by AFYVE, UPFR, LaMPA.

⁴⁴⁴ A. Künne and A. Torkler, 'Managing Recording und Production', in: M. Clement, O.W. Schusser, *Ökonomie der Musikindustrie*, Wiesbaden: DUV-Verlag 2005, p. 113-130 [Künne/Torkler 2005].

studios' and simple sound recordings can even be produced with the help of specialised software on a desktop computer.

To nevertheless give a rough picture of the 'average' investment in a sound recording, table 3 shows exemplary estimates of the costs for a small production for illustrative purposes.

Table 3: Exemplary investment in a small production of a sound recording

Fixed costs		% of total cost
Studio production	€ 20.000	18%
Marketing and overhead	€ 40.000	37%
Video production for marketing	€ 15.000	14%
Variable costs per CD		
Production and shipment	€ 1,20	12%
Royalties authors & composers	€ 0,90	9%
Royalties artists	€ 1,00	10%
Total Costs for 11.000 CDs	€ 109.100	
Total revenue at PPD €10 per CD	€ 110.000	

As table 3 shows, phonogram producers do not only invest in the production, but also in the promotion and marketing of new phonograms. For most music labels (at least for the larger ones) this latter type of investment is typically a very important one. According to the OECD, 'marketing and promotion of a particular music piece make up for the greatest cost of music production.'⁴⁴⁵ Major labels often also simply acquire the rights to a readily produced master tape and only invest in the reproduction, distribution and marketing of the recording. If related rights are to protect the overall investment necessary to bring a new sound recording to the market, marketing costs would have to be considered as well. In paragraph 3.3.4.3, however, we have seen that the question whether promotion and marketing investments would be covered in the investment protected by related rights is rather controversial.

In the case of marketing costs, average numbers are even harder to estimate and have even less explanatory power than average production cost. On the one hand, major labels spend millions of euros in the promotion of new releases of hit artists; on the other hand, the Internet is ever more used e.g. by unknown artists to promote their works with hardly any marketing costs at all. The example in table 3 assumes marketing costs of EUR 40.000 and an additional EUR 15.000 for a music video production that serve marketing purposes as well. In this example, the phonogram producer would need to sell about 11.000 CDs to recoup its investment, assuming a PPD (price published to dealer) of EUR 10 per CD. This figure is broadly in line with assessments from stakeholders from the music industry, naming 20.000 sold CDs the threshold to make the production of an 'average' CD profitable. If marketing costs and video production costs were excluded, sales of only 3.000 CDs would be sufficient to recoup investment.

⁴⁴⁵ OECD, Working Party on the Information Economy, 'Digital Broadband Content: Music', 2005 <<http://www.oecd.org/dataoecd/13/2/34995041.pdf>>, p. 43 [OECD 2005].

Time needed to recoup investment

To evaluate whether 50 years are sufficient to recoup the investment in a sound recording, would then require an assessment of the ‘average’ time needed to sell 20.000 copies of a newly released record. Such an assessment is again difficult, due to the large variations between hits of a popular band and an unknown artist. While, for example, in March 2006 the average top 40 album sold about 100.000 copies worldwide per week,⁴⁴⁶ other records will never get anywhere close to this figure in years. However, what is known is that the life cycles of most sound recordings are very short and that the music markets are ever more fast moving, resulting in shorter life cycles. Strack (2005) estimates the average diffusion rate (diffusion of a product from introduction to the market to last sales) of long-play sound recordings to be 6 to 12 months.⁴⁴⁷ Significant differences exist, however, between different music genres. While some sound recordings have a short lifetime, tightly linked to fashions or news events, some others are regularly selling over a very long term.⁴⁴⁸ This is the case, for instance, for classical music or jazz. Other recordings experience a revival in interest many years after their first release, e.g. in a ‘retro wave’.

Nevertheless, the large majority of sound recordings probably either recoup their investment within the first years -if not months- after their release or never. Despite the lack of meaningful ‘hard’ data to prove this hypothesis, it seems save to assume that 50 years are more than enough time for phonogram producers to recoup their investment in a sound recording, even if marketing costs are included. If a recording has not recouped its investment after 50 years it is very questionable that it ever will.

3.4.2.2 Phonogram producers’ ability to invest in the development of new talent and repertoire

There are, however, sound recordings that still provide for considerable revenues to their right holders after 50 years. An important argument of the proponents of a term extension is that these revenues are crucial for the ability of phonogram producers to invest in the development of new artists and creativity. ‘Record companies use revenues generated by previous releases to invest in the development of new talent and new repertoire.’⁴⁴⁹ If related rights protection for these recordings expires, they argue, this will negatively affect phonogram producers’ revenues and their ability to invest in new works. ‘It’s [the music industry’s] ability to make the huge investments necessary to generate and market recordings with worldwide appeal depends to a significant extent on continuing revenues from sales of recordings of the classic artists of the 1950s and 1960s’.⁴⁵⁰

The following section therefore evaluates

- the significance of the repertoire affected by phonogram rights expiration in the next 5 to 10 years, and
- the impact that an expiration of these rights would have on revenues and investment in new talent and repertoire.

Significance of repertoire losing protection in the next 5 to 10 years

Statements on the significance of repertoire losing protection would require, first, figures on the share of repertoire that will lose protection, and, second, figures on the commercial value or market share of this repertoire. Unfortunately, stakeholders did not provide for data on these figures.

⁴⁴⁶ Source: <<http://www.mediatraffic.de/>>.

⁴⁴⁷ J. Strack, *Musikwirtschaft und Internet*, Osnabrück: epOs-music 2005 [Strack 2005].

⁴⁴⁸ See also the calculations by Liebowitz 2006, p. 12-17.

⁴⁴⁹ Response to the Staff Working Paper on Copyright Review by IFPI.

⁴⁵⁰ Response to the Staff Working Paper on Copyright Review by BPI (part 1).

One indication for the first figure, the share of repertoire that will lose protection, can be obtained from the Gramex (the collecting society for related rights in Denmark) recording database in Denmark where 0,43 per cent of all registered tracks will be unprotected in 2010. This share will increase to 11.9 per cent of registered repertoire in 2020.⁴⁵¹ Estimates of the share of repertoire that will lose protection are complicated by the fact that many phonogram producers do not have an exact overview of the size of their overall repertoire of protected recordings, because many of them are not published anymore. Some market participants estimate that more than 95 per cent of the music industry's back catalogue recordings remain unreleased.⁴⁵² This already indicates that a large majority of the protected repertoire currently does not have a commercial value. If this repertoire loses protection, the impact on the revenues of phonogram producers will be limited.

IFPI Germany estimates that sound recordings which will lose protection in the next 5 years have a market share of about 3 per cent overall.⁴⁵³ Again, significant differences exist between different genres. In pop music, where life cycles are usually shorter (see above) the share is estimated to be less than 3 per cent. In classical music, the market share of recordings from the 1950s might amount to 10 per cent of the classical music market (which has a market share of about 8 per cent of the overall music market).

In the next 10 to 20 years, the market share of commercially still valuable repertoire for which related rights protection expires can be expected to increase considerably, when popular repertoire from the 1960s and 1970s will lose protection.

Impact of expiration of rights on revenues and investment in new talent and repertoire

Accordingly, repertoire that will lose related rights protection over the next 5 to 10 years provides an important source of revenue to European phonogram producers. This income is mainly derived from three sources: Revenues from recorded music sales, royalties collected for broadcasting and public performances, and revenues from private copying levies.

Revenues from recorded music sales in Europe amounted to USD 12,375.2 million in 2004.⁴⁵⁴ The estimated market share of 3 per cent of commercially still valuable repertoire losing protection in the next 5 years would translate into USD 371 million of revenues. This is not to say that the recording industry would automatically forgo this amount of revenues, as they are still free to continue selling the phonograms affected. However, in a situation where phonogram rights expire these revenues might be negatively affected by competition, because recordings can be re-released by any competing phonogram producer, potentially at lower prices. The availability of low-price recordings can also affect the revenues from new phonograms, in particular in genres like classical music, where recent recordings often directly compete with older recordings of the same work.

Remuneration of phonogram producers for broadcasting and public performances collected by collecting societies amounted to USD 358 million in Europe in 2004.⁴⁵⁵ A share of 3 per cent would translate into USD 10.75 million that might not accrue to phonogram producers when related rights expire in the next 5 years. However, this would only be the case if collecting societies would adjust their collections and distributions to the actual share of repertoire that is still protected. This is currently not the case. A term extension of related rights would postpone potential negative effects on phonogram producers' revenues. In case of a term extension these

⁴⁵¹ These shares do not take into account new registered tracks in the respective periods.

⁴⁵² Response to the Staff Working Paper on Copyright Review by NAXOS.

⁴⁵³ Statements by IFPI Germany.

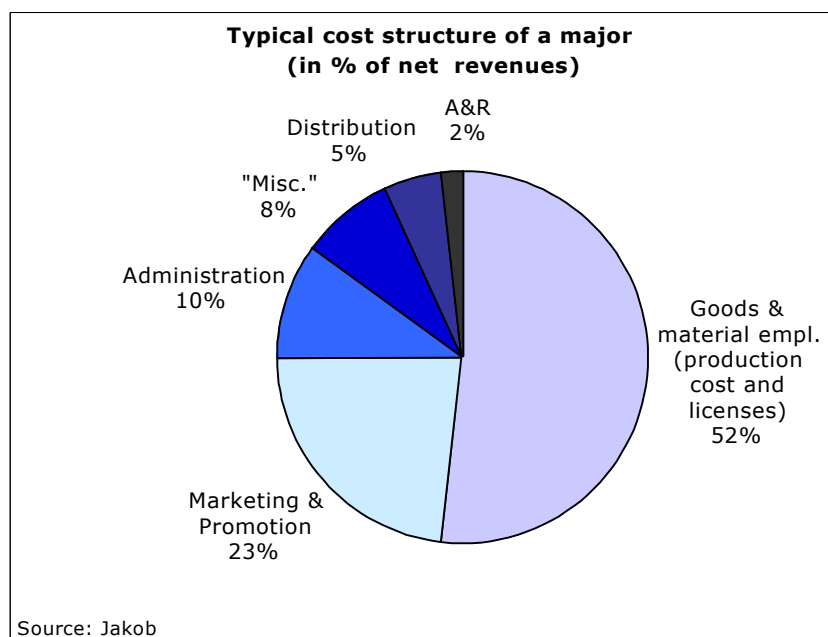
⁴⁵⁴ IFPI, 'The Recording Industry in Numbers 2005', August 2005, p. 27 [IFPI 2005].

⁴⁵⁵ *Ibid.* p. 20-21. These figures include collections from music videos. Excluded from these figures are the performing artists' share and private copying levy income.

additional revenues could indeed be used to invest in the development of talent and repertoire. However, according to Jakob (2005) only about 2 per cent of the net revenues of major music labels are spent on A&R, i.e. the costs involved in discovering and developing new artists and repertoire (see figure 1). This estimate seems to be at the low end, and A&R spending surely varies considerably e.g. between major and independent labels. The British Phonographic Industry estimates that the UK record industry reinvests about 17 per cent of its turnover in A&R to discover new talent.⁴⁵⁶ In any case, the overall effect of a term extension on investment in new talent and repertoire would only be limited, as the largest part of revenues primarily finances the running cost of phonogram producers (see figure 1).

Some opponents of term extension even argue ‘extending copyright protection for sound recordings will tend to cause the record industry, in general, to produce and release even fewer new recordings than is currently the case, particularly in the fields of classical music and jazz. This is because the industry increasingly tends to rely on the exploitation of its back catalogues for profits, instead of investing in commissioning new recordings.’⁴⁵⁷ Re-releases and compilations of old bestsellers are often more profitable and less risky than new recordings. They are frequently long-time ‘self-sellers’ without the need for large marketing investment. ‘In a typical year, approximately 43 per cent of our total revenues come from new album releases, although most of that is more predictable revenue from proven artists and less than 10 per cent is generally derived from artists without an established track record. [...] Relative to our new releases, we spend comparatively small amounts on marketing for catalogue sales.’⁴⁵⁸

Figure 1: Typical cost structure of a major label in % of net revenue⁴⁵⁹



⁴⁵⁶ BPI, 'Record industry reinvests 17% of turnover in new music', 19 April 2006, <http://www.bpi.co.uk/index.asp?Page=news/stats/news_content_file_989.shtml>.

⁴⁵⁷ Response to the Staff Working Paper on Copyright Review by NAXOS.

⁴⁵⁸ Warner Music Group, 2005 Annual Report, <http://library.corporate-ir.net/library/18/182/182480/items/181572/2005_AR.pdf>, p. 6-8.

⁴⁵⁹ H. Jakob, 'Wirtschaftlichkeit in der Musikindustrie', in: M. Clement, O.W. Schusser, *Ökonomie der Musikindustrie*, Wiesbaden: DUV-Verlag 2005, p.73-80, p. 74 [Jakob 2005].

3.4.2.3 *Impacts of extending the term of protection for phonograms on access, cultural diversity, and the effects of digitisation*

Access and cultural diversity

As indicated in paragraph 3.4.2.2, only a small share of sound recordings still continues to generate a commercial value for phonogram producers after 50 years. A term extension of related rights beyond 50 years would therefore only have a positive effect on the revenues from that small share of recordings that are still popular after this time. From the remaining part of the back catalogue repertoire, phonogram producers typically do not derive revenues anymore. Repertoire that does not sell well or that does not generate sufficient royalty payments and older niche productions are usually not disseminated after a certain time. These recordings will disappear from the market, leaving them inaccessible to the general public. ‘Many works do not stay in the commercial chain and a majority of sound recordings are locked in vaults.’⁴⁶⁰ A term extension would keep these recordings from being free to use by the public for an additional period of time.

From a public welfare perspective, this would have several negative implications. Many recordings that are not commercially valuable are still of economic or simply idealistic interest to special interest groups, smaller user groups, fan communities, collectors and/or the general public. Accordingly, usages that would be possible and would increase public welfare overall are not being realised. The focus on long-time bestsellers limits the accessibility of cultural heritage to a few recordings that might primarily derive their commercial value from large marketing efforts rather than superior quality. Recordings are kept from the public domain, which other artists can use to create new works, e.g. by means of sampling or remixing. Extending the term of protection for an additional 20 or 40 years would further aggravate this situation.⁴⁶¹

It has to be noted, however, that sound recordings that lose protection and fall into the public domain do not automatically become freely accessible to the public. As long as phonogram producers hold the master tapes of the recording, third parties do not have the possibility of producing perfect-quality copies of the recording, regardless of related rights protection.⁴⁶²

The effects of digitisation

The described problems of limited access and cultural diversity might however change in the coming years in the wake of digitisation. Digitisation in general and online music services in particular offer entirely new opportunities to remarket back catalogues of recordings that could not economically be exploited over analogue distribution channels due to limited retail space for physical distribution. Digital distribution channels allow content goods with low individual sales volumes to be marketed in sufficient quantities so that they can collectively make up a market

⁴⁶⁰ Response to the Staff Working Paper on Copyright Review by BEUC.

⁴⁶¹ These negative effects caused by a term extension have also been emphasised in the discussion in the framework of the European Commission ‘i2010: Digital Libraries’ initiative. ‘The digital environment has added a completely new dimension to the value of public domain material, since this material can be distributed through the Internet without any restrictions. Recently, the public domain has been under some pressure. The harmonisation of the term of copyright protection until 70 years after the death of the author has, for example, brought material which was out of copyright back under copyright protection.’ (Staff Working Paper on Digital Libraries, p. 11).

⁴⁶² Several stakeholders have proposed the introduction of a ‘use it or lose it’ rule as a solution to the problem of limited access, providing that a recording would fall into the public domain or rights would be reverted to the performing artists if they have not been exploited or made available for a certain period of time. See the responses to the Staff Working Paper on Copyright Review by EDRI, IMMF, UK Music Manager’s Forum, and VOSN. See discussion below at para. 3.4.2.6.

share that rivals or exceeds the relatively few bestsellers. This is often referred to as the ‘long tail’ effect of digital distribution.⁴⁶³

The term ‘long tail’ relates to a common statistical distribution that is characterised by a small high-frequency population (e.g. of bestselling hits), followed by a large low-frequency population which gradually ‘tails off’ (e.g. recordings with low sales volumes). For example, brick and mortar CD stores can only carry a limited number of recordings, usually those few that sell very well. Online music stores, to the contrary, can profitably offer very large catalogues of recordings – including niche productions – since they are not limited by physical retail space. Even if the majority of recordings sell in very low individual quantities (the long tail), they can add up to significant sales on an aggregated basis. This long-tail effect of digital distribution could not only have positive impacts on cultural diversity, it could also turn into a profitable business for the music industry – for the original producers of the phonograms as well as for secondary parties exploiting or distributing music recordings. ‘We’re stuck in a hit-driven mindset – we think that if something isn’t a hit it won’t make money... but misses usually make money, too. And because there are so many more of them, that money can add up quickly to a huge new market.’⁴⁶⁴

Proponents of a term extension argue that a term extension will ‘create an incentive for the creators of recordings, which own the original masters, to invest in remastering, digitising and remarketing older recordings in a new format and to new audiences.’⁴⁶⁵ From this perspective, a longer term of protection could serve as an incentive for phonogram producers to digitise older back catalogue recordings that would otherwise lose protection in the near future.

If large parts of the repertoire of the music labels were indeed digitised and archived, transaction costs for third parties related to finding and clearing the rights for secondary uses or exploitations could eventually be reduced, providing competitors are granted access to those data. Online distributors of digital music could increasingly make use of long tail effects, and make a large diversity of back-catalogue content available to consumers. Recommendation systems, social networks, legal P2P distribution and a whole wealth of other online distribution forms are currently evolving and often provide new opportunities for niche market content.

However, the development of a vibrant online market that also involves old and niche market content not only requires that phonogram producers really invest in digitising large parts of their back catalogues. It also requires that phonogram producers indeed support new distribution models by licensing their sound recordings to a diverse landscape of online services, even if these are still experimenting and not yet well established. This has not always been the case in the past.

It is questionable whether protection of sound recordings beyond 50 years would actually induce phonogram producers to better make use of the new business potential of digital distribution, and whether related rights protection is the adequate measure for creating incentives to exploit this potential in the first place.

As the following section will show, exclusive rights allow phonogram producers to control exploitation models for back catalogue repertoire, secondary uses (except the broadcasting right and the right of communication to the public, which both are remuneration rights), and new distribution models. A term extension would extend this control, leaving it in the hands of phonogram producers to decide which distribution models are supported or not.

3.4.2.4 *Impact on competition and innovation*

As described in paragraph 3.4.1.1 above, related rights provide phonogram producers and performing artists with a temporary monopoly on their sound recordings. This temporary monopoly enables phonogram producers to:

⁴⁶³ C. Anderson, ‘The Long Tail’, *Wired Magazine*, October 2004 [Anderson 2004].

⁴⁶⁴ *Ibid.*

⁴⁶⁵ Response to the Staff Working Paper on Copyright Review by BPI (part 1). See also Liebowitz 2006, p. 21.

- prevent competition from competing record companies by controlling the reproductions that competitors are allowed to make,
- control certain secondary uses of their phonograms, such as use in film, commercials, remixes, samples,
- control distribution of their phonograms.

This control is intended to achieve the goals of related rights described above. The following section will give an overview over the impacts a prolonged monopoly would have on competition and innovation.

If a sound recording loses protection after the current term of 50 years, competing record companies are enabled to release the same recording without the need for clearing the rights and paying licensing fees to the original producer of the sound recording. The resulting competition oftentimes leads to falling prices for these recordings. An extended protection would postpone this effect by allowing phonogram producers to keep charging monopoly prices for sound recordings.

But competition does not only take place on the price level. Competition also takes place on the basis of quality and service. The value of re-releases of older or more eccentric sound recordings often lies in discovering and locating interesting back catalogue repertoire, technically ‘brushing up’ old recordings, putting them in new context, providing information about the work and the performer, marketing it to special interest groups etc. The original holders of related rights are not necessarily the (only) ones that can best provide this specific value added. But as long as they hold the exclusive rights of reproduction, phonogram producers can control competitive releases of sound recordings by denying or assigning licences to secondary parties. This might also put a break on innovation by keeping record companies from more actively looking for new exploitation models for older and/or niche content. ‘The phonogram producers would prefer to sit on the recordings hoping that some windfall such as a film use or some revival of interest in that particular genre of music comes along. There is no obligation or incentive for the record producer to actively exploit the recordings.’⁴⁶⁶ This limit on competition would persist for a longer period of time in case of a term extension.

In addition, the exclusive right of making available and the exclusive right of distribution enable phonogram to control the physical as well as the online distribution channels over which their recordings are disseminated to the market. As a result, the term of protection has a direct impact on the availability of diverse content for certain secondary uses e.g. in new media and for new online distribution channels.

Currently, the European music market is dominated by four major music labels that have an overall market share of 81 per cent.⁴⁶⁷ Due to the exclusive rights they are granted and/or that have been assigned to them by performers (see more in para. 3.4.2.6 below), these companies have a significant control over exploitation, certain secondary uses, and distribution channels. A prolongation of related rights protection would extend this control.

3.4.2.5 Impact on licensing costs and consumer prices

The temporary monopoly granted by neighbouring rights has some other backsides. Monopolies typically not only result in lower volumes of products provided to the market (i.e. limited access) but also in higher prices for the products concerned. In economic theory, these negative effects are typically referred to as deadweight costs (para. 3.4.1.3). Deadweight costs can be acceptable if they help to achieve the goals related rights are aiming at: ‘Some deadweight losses serve a useful function if they are unavoidable consequences of an incentive system for which there is no better

⁴⁶⁶ Response to the Staff Working Paper on Copyright Review by the UK Music Manager’s Forum.

⁴⁶⁷ IFPI 2005, p. 7.

alternative.⁴⁶⁸ However, as we have seen in paragraph 3.4.2.1, the current term of 50 years is usually sufficient to achieve the main goal of related rights, i.e. to enable phonogram producers to recoup their investment.

A term extension beyond 50 years would involve deadweight costs that are not anymore necessary to fulfil the initial goals of related rights. These include higher licensing costs, respectively the obligation to pay remuneration for the use of sound recordings, potentially higher tracing costs, and higher prices for consumers and will be described in the following section. Ultimately, the revenues that phonogram producers and performing artists would reap from a term extension (see para. 3.4.2.1 and para. 3.4.2.6) would have to be paid by users and consumers of sound recordings.

Costs for the secondary use of sound recordings

The costs for secondary uses of phonograms that would increase with a term extension include:

- Equitable remuneration paid by broadcasters to the collecting societies for the broadcasting of phonograms. These are currently usually paid in lump sums, not differentiating between single recordings being protected or not. But the overall amount to be distributed by collecting societies to their members would have to rise with a term extension, due to an increasing volume of the overall protected repertoire.
- Licensing fees for on demand transmissions by broadcasters such as podcasts or webcasts.
- Equitable remuneration paid to collecting societies by bars, restaurants, discotheques etc. for the communication to the public.
- Levies on blank media collected in some Member States for private copying. ‘A change in the term of protection would undoubtedly be argued to impact the question of fair compensation (‘levies’) for private copying, which would serve to further exacerbate current problems with levies as applied in some (but not all) Member States.’⁴⁶⁹
- Licensing cost for other secondary uses of a sound recording, e.g. uses as a sound track in a film, for an advertisement or for the reproductions of the sound recording in a compilation or sampler.

High transaction costs might even prevent certain usage forms, further aggravating the problems of exclusive control described above (see para. 3.4.2.4), if they are prohibitively high and make certain secondary usage forms unprofitable. This can for example apply to the reproduction of older phonograms by third parties, which can involve considerable investments for technically brushing up and re-releasing old recordings to niche markets. Another example are tariffs for internet radio or podcasts charged by collecting societies that have been criticised of being prohibitively high for small or non-commercial providers.⁴⁷⁰

Tracing costs

Tracing costs are the costs associated with identifying and clearing the rights with the right holder. The effects of a term extension on tracing costs are not entirely clear. On the one hand, with the age of a phonogram also the difficulties in locating the right holder and clearing the rights increase. Usually tracing costs increase with the lifetime of a recording because it becomes increasingly difficult to determine and track the right holder. A lot of material is never archived or released to the public, which may result in the loss of many works that are unrestored and unarchived.⁴⁷¹ This is in particular true in Europe where no central database for protected sound

⁴⁶⁸ Liebowitz/Margolis 2003, p. 12.

⁴⁶⁹ Responses to the Staff Working Paper on Copyright Review by Intellect and Nokia.

⁴⁷⁰ See for example, ‘Deutliche Tarifierhöhungen und verschärfte Bedingungen für Webradios ab 2005’, <<http://www.radiosites.de/gvl.shtml>>.

⁴⁷¹ Response to the Staff Working Paper on Copyright Review by VOSN.

recordings or for public domain content exists. Moreover, as terms of protection become longer, transfers of rights (including transfers of entire catalogues) are more likely to occur, resulting in ever longer ‘chains of titles’, which in practice will become ever more difficult to prove.⁴⁷² In all likelihood, chains of titles will grow exponentially as terms of protection are extended. Tracing and transaction costs will rise accordingly.

On the other hand, documentation might improve for protected repertoire in the wake of digitisation due to the application of (digital) rights management systems by right holders and the growing sophistication of collecting societies. In the latter case, a term extension would not significantly affect tracing costs.

Price of sound recordings for consumers

As described above, when the exclusive reproduction right for phonograms expires, any competing record company can make use of it and release the same recording potentially at lower prices. An extended protection would prolong the temporary monopoly of the original phonogram producers, preventing the downward pressure of competition on prices. As a result, consumers would continue to pay higher prices for certain sound recordings for several years. This might also keep them from experimenting with and discovering more eccentric music, further aggravating the effects of limited access described above (see para. 3.4.2.3).

3.4.2.6 Performing artists’ ability to receive an adequate income

One major goal of related rights for performing artists is to enable them to receive an adequate income as a basis for further creative and artistic work (see para. 3.3.4.2).⁴⁷³ ‘A rigorous, effective system for the protection of [...] related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.’⁴⁷⁴

Proponents of a term extension argue that prolonged protection would enable performing artists to receive longer flow of revenues. This could act as an incentive to create new material for sound recordings and also enable them to stay in the business and secure income for their retirement, rather than turning to other careers that are economically more attractive.

Performing artists typically have two important types of income from the exploitation of their recorded performances:

- income from remuneration rights and
- income from exclusive rights.

Income from remuneration rights

In many countries, income from remuneration rights are royalties collected by collecting societies for the broadcasting of phonograms and the communication to the public of recordings, e.g. the playing in bars, restaurants, discos etc. (art. 8.2 Rental Right Directive; see para. 3.3.2.2). In many countries, a remuneration right also exists for private copying, e.g. levies on blank storage media and recording devices. These royalties collected by collecting societies are usually shared evenly (50/50) between performers and phonogram producers. According to A.E.P.O.-ARTIS, income from remuneration rights often forms the largest part of the overall revenues of performing

⁴⁷² See e.g. Court of Appeal of Amsterdam, 1 February 1996, AMI 1996, p. 112 (copyright ownership of ‘I wanna be loved by you’ not proven after records of multiple transfers between music publishers were lost).

⁴⁷³ Recital 7 Rental Right Directive.

⁴⁷⁴ Recital 11 Information Society Directive.

artists from their recordings. Rights to remuneration usually represent the main or sole guarantee of remuneration for performers for the multiple uses of their performances.⁴⁷⁵

As concerns income from remuneration rights, performing artists would indeed directly profit from a term extension if their recordings are still broadcasted or communicated to the public after 50 years. As we have seen above, however, this applies only to a limited share of the overall protected repertoire.

Income from exclusive rights

In addition, performing artists have certain exclusive rights, such as the right to authorise or prohibit the fixation, reproduction and distribution of their recordings (see para. 3.3.2.2). These exclusive rights are typically transferred to a phonogram producer on a contractual basis.

The degree to which the income of performing artists from exclusive rights would be affected by a term extension depends heavily on the contractual setting between performing artists and phonogram producers. In general, three different contractual settings can be distinguished.

First, there is a small but increasing number of contracts, where the right of reproduction of a readily produced master tape remains with the performing artists or his producer who has taken the risk of production. Exclusive distribution rights are assigned to a phonogram producer for a limited time, often 3 to 5 years. Because in this case most exclusive and remuneration rights remain with the performer, performing artists would directly benefit from a term extension - providing the fixation of their performance still sells after 50 years.

Second, there are contracts where all exclusive rights are transferred to the phonogram producer against a single fee ('buyout'), which is by definition not proportionate to future sales and independent of the duration of rights. Because no exclusive rights remain with the performer, an extension of the term of performers' rights would not benefit performing artists at all. In the light of these contractual practices, it can be argued that any proposals to extend the term of protection of performers' rights should be accompanied by statutory measures that offer protection to performers against such buyouts.⁴⁷⁶

In the most common third case, performing artists sign an exclusive contract with a record company and get paid on a royalty basis as a percentage of the sales of the recording and for secondary uses (the latter depending on the contract). The royalties performing artists receive vary considerably. Depending on the popularity and the negotiating power of the artist they usually range between 5 to 15 per cent. The exclusive rights are often, but not always, assigned for the whole duration of protection of the performers' rights.

In the latter case, the income of performing artists is dependent on whether their recordings are commercially exploited by the phonogram producer.

Exploitation of older recordings and availability to the public

If the phonogram producer decides to no longer publish the recording after a certain number of years, the performing artist concerned will not receive any royalties from sales. But at the same time, the assignment of all exclusive rights to the phonogram producer will keep him from developing alternatives for exploiting his own recordings or simply making them available to the general public. While performing artists can license or buy back their recordings from the record label, this is often denied,⁴⁷⁷ or they have to pay sometimes considerable amounts to obtain the rights to their own recordings. A term extension of performers rights would –depending on the applied contractual agreement– keep performing artists from exploiting their otherwise

⁴⁷⁵ A.E.P.O.-ARTIS in a statement on the effects of the term of protection on performers.

⁴⁷⁶ See Guibault/Hugenholtz 2002.

⁴⁷⁷ Response to the Staff Working Paper on Copyright Review by IMMF.

unpublished recordings and/or from making them available to the public for an extended period of time.

Some stakeholders therefore have proposed the introduction of a ‘use it or lose it’ rule that would provide that rights that have been assigned for commercial exploitation to a phonogram producer would revert to the performing artist if they were not exploited within a certain time span of, for instance, three to five years.⁴⁷⁸ These proposals remind of statutory rules in the field of copyright contract law already existing in several Member States that give authors, and in some instances performers, the right to reclaim assigned right after a period of ‘non usus’.⁴⁷⁹ Other stakeholders call for a harmonised rule of limitation of assignment, the length of time that a performer can assign rights in their fixed performances.⁴⁸⁰ Such rules might be better suited to strengthen the overall position of performing artists than extending the term of related rights protection.

Overall one can say that a term extension would indeed benefit those performing artists that are still popular after 50 years and still receive payments from collecting societies and/or participate in the revenues from the sales of their recordings - providing they have not signed away their rights against a single fee. Para. 3.4.2.2 above has shown, however, that the share of recordings that are still commercially valuable after 50 years makes up for only a small part of the overall repertoire. Benefits from a term extension would therefore only accrue to a limited share of performing artists. For the larger part of performers that do not derive substantial revenues after 50 years, a term extension could –depending on the contractual setting– prevent their recordings from either being commercially exploited by a secondary party or by themselves; or from becoming accessible to the general public.

3.5 Arguments concerning competition with non-EU market players

3.5.1 Introduction

The last line of arguments presented in support of a term extension relates to the competitive position of EU right holders in the global market. Proponents of a term extension argue that a shorter term of protection in the EU would negatively affect the competitive position of the European content industry and would be detrimental to an adequate protection of all categories of related right holders. Their arguments can be roughly distinguished into three categories.

One type of argument is that in a global market a term of protection that is shorter in the EU than in other major markets would make it more difficult for EU right holders (particularly phonogram producers and performers) to face foreign competition and to obtain adequate international protection, due to the application of the ‘comparison of terms’ rule in non-EU countries where protection is sought.⁴⁸¹ This argument will be examined in paragraph 3.5.2.

A second argument asserts that due to the shorter term in the EU, the European content industry would find less favourable conditions to market their products compared to, for example, their competitors in the US, with the result that the EU industry would become less profitable. Related is a third argument that suggests because of the more favourable conditions in the US (longer term of protection), European producers will tend to make recordings that are more appealing to the American audience, a situation that could have a negative impact on

⁴⁷⁸ See e.g. the responses to the Staff Working Paper on Copyright Review by EDRI, IMMF, UK Music Manager’s Forum, and VOSN.

⁴⁷⁹ Guibault/Hugenholtz 2002.

⁴⁸⁰ Response to the Staff Working Paper on Copyright Review by IMMF.

⁴⁸¹ Responses to the Staff Working Paper on Copyright Review by BPI (part 1) and the various national departments of IFPI.

European culture and diversity.⁴⁸² These arguments, which generally relate to the impact of a term extension on international competitiveness and trade, shall be dealt with in paragraph 3.5.3.

A fourth argument assumes that a longer term of protection would increase the value of 'intangible assets' in the balance sheets of European record companies. Granting a shorter term of protection to record companies in the EU than their competitors in the US already receive would arguably result in a comparatively lower valuation of assets of European companies.⁴⁸³ This argument will be looked at in para. 3.5.4.

3.5.2 *Competitive disadvantage due to comparison of terms*

The first type of argument concerning the competition of EU right holders with non-EU market players reads that a shorter term of protection in the EU will disadvantage EU right holders outside the EU due to a comparison of terms in those countries. This argument is examined extensively in the following sections (paras. 3.5.2.1 to 3.5.2.3).

3.5.2.1 *Comparison of terms*

As a rule, all international conventions on copyright and related rights require national treatment. National treatment means that once a right holder qualifies for protection under the eligibility criteria of that international convention, he shall be granted the same protection the contracting state in which he seeks protection accords to its own nationals.

An exception to the national treatment obligation can be found in the application of the so-called 'comparison of terms' rule. Comparison of terms means that a country where protection is sought grants to foreign right holders in its territory a term of protection that does not exceed the term granted by the country of origin of the work (copyright) or the country of which the right holder is a national (related rights).⁴⁸⁴ For example, if an EU right holder seeks protection in a non-EU country with a term of protection of 70 years, and that country applies a comparison of terms, an EU right holder would be granted protection in that country for 50 years only, which is equal to the term of protection he is granted in his own country. It has been argued that this would put EU right holders in a less favourable position than right holders from (non-EU) countries offering longer terms of protection, which might negatively affect the EU right holders' ability to compete in the global market.

Unlike the Berne Convention, where a comparison of terms is explicitly permitted (art. 7(8)), the international conventions on related rights do not specifically deal with the comparison of terms. This does not mean, however, that contracting states to these conventions are not allowed to apply such a rule. The reason is that the national treatment obligation is often very weak in the context of related rights protection. Only if an international treaty requires national treatment to its fullest extent, contracting states would be prevented from applying a comparison of terms. Therefore, we must first assess to what extent the international treaties actually require national treatment.

3.5.2.2 *National treatment obligation under the international treaties*

As regards the national treatment obligation under the Rome Convention, there is much debate in legal writing as to the scope of this obligation and, consequently, the degree of national treatment it provides for. On the one hand, it has been argued that the national treatment rule

⁴⁸² Liebowitz 2006, p. 18

⁴⁸³ Note that this argument has not been advanced by any of the stakeholders in the EC consultation process. It will be discussed here merely for the sake of completeness.

⁴⁸⁴ Explanatory Memorandum to the Term Directive, p. 30.

under the Rome Convention has a limited scope and that it is confined to the rights and terms specifically guaranteed in this convention. This would follow from article 2.2 Rome Convention, which states that the national treatment is subject to ‘the protection specifically guaranteed [...] in this Convention’. According to some legal writers this provision means that there is no obligation to grant national treatment beyond the minimum rights and minimum terms (20 years) enshrined in the Rome Convention.⁴⁸⁵

On the other hand, however, it has been argued that article 2(2) Rome Convention is not to be interpreted as limiting the scope of national treatment to the rights and terms specifically guaranteed in the convention, but that it makes clear that a contracting state must *at least* grant the minimum protection specifically provided by the convention, even if it does not grant such rights to its own nationals.⁴⁸⁶ That implies that in addition to the minimum rights and minimum terms of protection provided in the convention itself, the national treatment obligation in the Rome Convention is wide and would cover all rights and extended terms a contracting state grants to its own nationals.

Assuming that the Records of the Rome Convention seem to confirm that ‘the protection specifically guaranteed’ in article 2.2 Rome Convention refers to the ‘minimum protection [...] which the Contracting States undertake to grant [...] even if they do not grant it to domestic performances, phonograms, or broadcasts’,⁴⁸⁷ most legal writers are of the opinion that the Rome Convention indeed requires broad national treatment. In practice, that would mean that contracting states must grant the same treatment to foreign right holders as they grant to their own nationals. Consequently, when a contracting state grants an extended term of protection to its own nationals, it must also accord the extended term to qualified foreign right holders that claim protection. Adhering to this broad interpretation of the national treatment rule, contracting states are therefore not allowed to apply a comparison of terms under the Rome Convention.⁴⁸⁸

There is, however, one exception to this rule. As regards the right to remuneration for the secondary use of commercial phonograms, article 16(1)(a)(iv) Rome Convention provides that contracting states can declare that they will grant the remuneration right with respect to phonograms, the producer of which is a national of another contracting state, only to the same extent and for the same term as that state grants protection to phonograms first fixed by one of

⁴⁸⁵ See J. Reinbothe and S. von Lewinski, *The WIPO Treaties 1996*, London [etc.]: Butterworths 2002, p. 285 [Reinbothe/Von Lewinski 2002]. This opinion has also been expressed by the European Commission: Green Paper on Copyrights and Related Rights in the Information Society, p. 39.

⁴⁸⁶ See X. Desjeux, *La Convention de Rome (10 - 26 octobre 1961): Etude de la protection des artistes, interprètes ou exécutants, des producteurs de phonogrammes et des organismes de radiodiffusion*, Paris: Pichon et Durand-Auzias 1966, at p. 84-86 [Desjeux 1966]; C. Masouyé, *Guide to the Rome Convention and to the Phonograms Convention*, WIPO publication No. 617 (E), 1981, p. 19 [Masouyé 1981]; Stewart 1989, p. 227; M.M. Walter, ‘The relationship of, and comparison between, the Rome Convention, the WIPO Performances and Phonograms Treaty (WPPT) and the agreement on Trade-related Aspects of Intellectual Property rights (TRIPS Agreement); the evolution and possible improvement of the protection of the neighbouring rights recognized by the Rome Convention’, *Copyright Bulletin* 2000, vol. 34, no. 3, p. 4-43 [Walter 2000], p. 8; Brison 2001, p. 32-33; M. Ficsor, *The law of copyright and the internet: The 1996 WIPO Treaties, their interpretation and implementation*, Oxford: Oxford University Press 2001, para. PP4.08-PP4.12 [Ficsor 2001]; and P. Katzenberger, ‘Inländer-behandlung nach dem Rom-Abkommen’, in: P. Ganea et al. 2001, p. 481-491 [Katzenberger 2001].

⁴⁸⁷ Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome 10 to 26 October 1961, WIPO publication No. 326 (E), WIPO/BIRPI: Geneva 1968 (reprint 1995) [Records Diplomatic Conference Rome Convention 1961], p. 39 (Report of the Rapporteur-General).

⁴⁸⁸ See B. Knies, *Die Rechte der Tonträgerhersteller in internationaler und rechtsvergleichender Sicht*, München: Beck 1999, p. 17 [Knies 1999] and Walter 2001, p. 611.

their nationals.⁴⁸⁹ If a contracting state has made such a declaration, it can make a comparison of terms, but only as regards the right to remuneration that would accrue to phonogram producers and performers for the secondary use of commercial phonograms first fixed by the national of another contracting state to the Rome Convention.

On the other hand the Geneva Convention (art. 2), the TRIPS Agreement (art. 3(1)) and the WPPT (art. 4) require a very limited form of national treatment in respect of related rights. Under these international treaties, the national treatment obligation covers only the minimum level of protection specifically prescribed by these instruments.⁴⁹⁰ This means that a contracting party is required to grant the minimum rights and terms as provided for in these instruments to a right holder that claims protection under these treaties, but that it is not obliged to grant a foreign right holder an extended protection in case it does so to its own nationals. Accordingly, any contracting party to the Geneva Convention, the TRIPS Agreement and the WPPT is free to apply a comparison of terms in respect of foreign right holders claiming protection under these treaties.⁴⁹¹

3.5.2.3 *Application of a comparison of terms in non-EU countries*

In order to determine what terms of protection are accorded to EU right holders in non-EU countries, it is necessary to know whether the non-EU countries where protection is sought apply a comparison of terms in respect of foreign right holders. To that end, it must be distinguished between countries where EU right holders can qualify for protection under the eligibility criteria of the Rome Convention and countries where they can qualify for protection under one of the other international treaties only.

Contracting states to the Rome Convention

Because all EU Member States, except Cyprus and Malta, are party to the Rome Convention, EU right holders can easily claim protection under the eligibility criteria provided for in this convention. EU phonogram producers, for instance, generally qualify for protection in the contracting states to the Rome Convention, since they are a national of a contracting state.⁴⁹² In addition, where EU broadcasting organisations, as a rule, have their headquarters in one of the EU Member States and transmit the broadcasts from there as well, they also qualify for protection under the Rome Convention.⁴⁹³ Similarly, EU performers qualify for protection if their performances are embodied on a protected phonogram or incorporated in a protected broadcast.⁴⁹⁴

It follows from the assumption that the Rome Convention requires wide national treatment and does not allow contracting states to make a comparison of terms, that where EU right holders qualify for protection in a contracting state to the Rome Convention (e.g. Argentina, Australia, Brazil, Canada, Chile, Japan, Mexico, Russia and Turkey), they must be granted the same term of protection that that state accords to its own nationals. For example, were an EU phonogram producer to claim related rights protection in Brazil, he would be protected for 70 years, which is equal to the term Brazil accords to its own nationals.

⁴⁸⁹ Of the EU Member States that are party to the Rome Convention, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Italy, Netherlands, Poland, Slovakia, Spain, Sweden and the UK have made a declaration under art. 16(1)(a)(iv) Rome Convention. Such declaration has also been made by Bulgaria and Romania.

⁴⁹⁰ Walter 2000, p. 8; Ficsor 2001, para. PP4.13 - PP4.15; Reinbothe/Von Lewinski 2002, p. 285-286.

⁴⁹¹ Walter 2001, p. 612-613.

⁴⁹² Art. 5 Rome Convention (phonogram producers).

⁴⁹³ Art. 6 Rome Convention (broadcasting organisations).

⁴⁹⁴ Art. 4 Rome Convention (performers).

It must be emphasised, however, that there are contracting states to the Rome Convention which have made a declaration under article 16.1(a)(iv) of the Rome Convention, allowing them to make a comparison of terms as regards the right to remuneration for the secondary use of commercial phonograms. Of the states mentioned, Canada, Japan and Russia have made such a declaration. However, since Canada and Japan, for instance, apply an equal term of protection as is applied in the EU (i.e. 50 years), this provision is of no practical relevance to the protection of EU right holders.

States that are not a party to the Rome Convention

In principle, where an EU right holder does not qualify for protection under the Rome Convention, but may claim protection under one of the other international treaties (the Geneva Convention, TRIPS Agreement or the WPPT), the country where protection is sought could apply a comparison of terms in respect of this EU right holder. That is due to the fact that the Geneva Convention, the TRIPS Agreement and the WPPT require an only very limited national treatment in respect of related rights.

The US, for instance, is not a party to the Rome Convention, but it has adhered to the Geneva Convention, the TRIPS Agreement and the WPPT. As far as the protection of foreign sound recordings is concerned, the US Copyright Law is rather generous and provides that a sound recording that was first fixed in a treaty party is subject to protection under US Copyright Law, whereby a 'treaty party' is defined as a country that is party to an international agreement to which the US is party.⁴⁹⁵ Next to the Geneva Convention, the TRIPS Agreement, and the WPPT mentioned, the US is a party to the Berne Convention, the UCC and the WCT. As a result, because all EU Member States are party to at least one of these treaties, EU phonogram producers can generally qualify for protection in the US. In addition, if and to the extent that performers, broadcasting organisations and film producers can be considered to be authors of the sound recording, the broadcast or the film (see para. 3.2.3.7), they will also qualify for protection in the US. That is due to the fact that works are subject to protection under the US Copyright Act if (a) on the date of first publication, one or more of the authors of the work is a national or domiciliary of the US or of a 'treaty party', or (b) the work is first published in the US or in a foreign country that, on the date of first publication, is a 'treaty party'.⁴⁹⁶

The US Copyright Act is also liberal in respect of the duration of protection granted to foreign right holders. In the US, no comparison of terms is applied: under US copyright law, the term of protection applicable to sound recordings governs sound recordings of foreign origin no less than those of US origin.⁴⁹⁷ As a consequence, once EU right holder qualifies for protection in the US, this right holder is accorded the same term of protection as is granted to US right holders (95 years from publication or 120 years from creation).

3.5.3 Competitive disadvantage due to shorter term of protection in the EU

A second argument that has been brought forward by the proponents of a term extension is that a shorter term of protection in the EU is one reason why the European content industry is less competitive as compared to non-EU companies. These proponents argue that without an extension „creators of sound recordings in Europe will face a crucial disadvantage when

⁴⁹⁵ Art. 104(b) under (3) read in conjunction with art. 101 US Copyright Act.

⁴⁹⁶ Art. 104(b) under (1) and (2) read in conjunction with art. 101 US Copyright Act. If it concerns sound recordings, the provision of art. 104(b) under (3) read in conjunction with art. 101 US Copyright Act applies.

⁴⁹⁷ Nimmer/Nimmer 2004, § 9.12[A], at p. 9-160 to p. 9-162. Note that since the US protects sound recording under copyright law, art. 7.8 Berne Convention, which allows contracting states to apply a comparison of terms, is also applicable. The US, however, does not apply a comparison of terms.

competing against their counterparts in other territories, such as the USA, that will receive revenues from recordings that no longer enjoy copyright protection in the EU. This will have a very negative impact on the ability of European record companies to invest in developing and marketing European talent and to compete successfully in a global market.⁴⁹⁸

Para. 3.4.2.2 has shown that a term extension might indeed have a certain impact on individual phonogram producers' revenues from sound recordings.

However, it is very questionable whether extending the term of protection is likely to directly affect the international competitiveness of the European music industry to a large scale. First, competitiveness of phonogram producers is based on a variety of factors, intellectual property protection in general and the term of protection in particular being just one of them. More important for the future competitiveness of the European music industry should be, for example, the ability to make use of the considerable potential of new distribution channels and new usage forms of music (e.g. mobile music, ring tones, podcasts etc), and to realise necessary cost savings. The variety of factors that influence the competitiveness of the European content industry is also one reason why the third argument that a shorter term of protection in Europe (as compared to the US) will cause European record producers to aim their productions increasingly on the US market is little convincing.⁴⁹⁹ The duration of exclusive rights will never be the sole reason for businesses to change their focus towards the US market, as for the majority of productions, overall profitability is only marginally affected by the term of protection (see para.3.4.2). Another reason why such a shift in focus is not likely to be expected is that music as a cultural good is very perceptive to local influences, traditions, preferences and language. European productions and local music have a large and growing market share in Europe: for example, the share of domestic repertoire in Germany in 2004 was 49%, in Italy 47%, in France 63% and in the UK 51%.⁵⁰⁰ These figures also indicate that it is actually attractive for European businesses to produce domestic repertoire and thereby to contribute to Europe's cultural and creative production. Vice versa, in the US the market share of domestic repertoire of US recorded music sales in 2004 was 93%.⁵⁰¹ This clearly indicates a strong preference for domestic repertoire and little openness for non-US repertoire in the US, and is another argument against the hypothesis that differences in terms would cause a shift in focus among European producers.

Second, a term extension could also benefit right holders from non-EU countries that qualify for protection in Europe. According to article 7(2) Term Directive, the terms of protection of related rights also apply in the case of right holders who are not Community nationals, provided Member States grant them protection. Hence, if the terms of protection would be extended, right holders from third countries who qualify for protection in one of the EU Member States would also benefit from the extended terms, given that article 7(2) remains unaltered. It must be emphasised, however, that article 7(2) Term Directive is subject to a comparison of terms (see paragraph 3.5.2.1 on the comparison of terms). It provides that:

'The terms of protection laid down in Article 3 shall also apply in the case of right holders who are not Community nationals, provided Member States grant them protection. However, without prejudice to the international obligations of the Member States, the term of protection granted by Member States shall expire no later than the date of expiry of the protection granted in the country of which the right holder is a national and may not exceed the term laid down in Article 3.'

⁴⁹⁸ Response to the Staff Working Paper on Copyright Review by BPI (part 1).

⁴⁹⁹ But so Liebowitz 2006, p. 18

⁵⁰⁰ IFPI, 'The Recording Industry in Numbers 2005', August 2005 [IFPI 2005]; see also Impala, 'Profile of the European Music Sector', 2002, http://www.impalasite.org/docum/04-press/press_0302_1.pdf [Impala 2002].

⁵⁰¹ IFPI 2005.

It follows that the Term Directive does not harmonise relations between the Community and its Member States and third countries. In fact, none of the EC Directives mentioned requires Member States to grant protection to non-EU right holders.⁵⁰² Article 7(2) Term Directive leaves Member States free to determine the third countries to whose nationals they will grant protection.⁵⁰³ But if and insofar the law of a Member State grants protection to right holders from non-EU countries, it requires this Member State to accord the same term of protection as is harmonised in the Community to these non-EU right holders as well, however, subsequent to the application of a comparison of terms.⁵⁰⁴

As we have seen in paragraph 3.5.2.2, it is dependent on the scope of the national treatment obligation under the international treaties whether or not a contracting state may apply a comparison of terms. Article 7(2) Term Directive recognises this by stating that the comparison of terms is to be applied ‘without prejudice to the international obligations of the Member States’.⁵⁰⁵ In view of the different national treatment rules in the international treaties, it follows that only those non-EU right holders would have to be accorded the same harmonised term of protection (a) who qualify for protection in an EU Member State under the Rome Convention, assuming that this convention indeed requires broad national treatment, or (b) who qualify for protection in an EU Member State under the Geneva Convention, the TRIPS Agreement or the WPPT, provided that the term of protection in their national legislation is equal to or exceeds the extended term of protection provided for in Europe. Accordingly, it would also be these right holders that would profit from a term extension, given that article 7(2) Term Directive remains unaltered.

For instance, a Canadian phonogram producer would benefit from a term extension in those EU Member State that are party to the Rome Convention, because he would directly qualify for protection under that convention.⁵⁰⁶ A US phonogram producer could also benefit from a term extension, if and insofar he is granted protection in a EU Member State. For example, where a US phonogram producer qualifies for protection in an EU Member State under the Geneva Convention, the TRIPS Agreement or the WPPT,⁵⁰⁷ he is subject to the comparison of terms as provided for in article 7(2) Term Directive. That means that this Member State should grant him a term of protection expiring ‘no later than the date of expiry of the protection granted in the country of which the right holder is a national’. Because the protection of phonogram producers in the US Copyright Act expires 95 years from publication or 120 years from creation (para. 3.2.3.7), phonogram producers are to be protected in this Member State for an extended term as well, as long as it does not result in a protection that exceeds the 95 years from publication or 120 years from creation.

For those non-EU right holders who would indeed benefit, the term extension could also affect their revenues and potential competitiveness. Figure 2 shows, for example, that Europe is a net importer of records and recorded media from North America. About 50 per cent of the EU’s world imports of records and other recorded media come from the US and Canada.⁵⁰⁸ If and insofar EU Member States grant US and Canadian phonogram producers protection, they would

⁵⁰² See e.g. Reinbothe/Lewinski 1993, p. 199, in respect of the Rental Right Directive.

⁵⁰³ Explanatory Memorandum to the Term Directive, p. 38.

⁵⁰⁴ Walter 2001, p. 609.

⁵⁰⁵ Walter 2001, p. 610.

⁵⁰⁶ Art. 5 Rome Convention. Canadian phonogram producers qualify directly for protection, because they are a national of a contracting state to the Rome Convention.

⁵⁰⁷ US phonogram producers qualify directly for protection under the Geneva Convention, the TRIPS Agreement and the WPPT, because they are a national of a contracting state (art. 2 Geneva Convention; art. 1(3) TRIPS in conjunction with art. 5 Rome Convention; art. 3(2) WPPT in conjunction with art. 5 Rome Convention).

⁵⁰⁸ Source: OECD ITCS International Trade by Commodity database.

benefit from a term extension. This could limit the potential effects of a term extension on the relative competitiveness of EU right holders.

Moreover, if taking into account the question where the main international cash flow resulting from related rights protection would eventually end up, than it can be seen that a term extension would have many negative effects on the competitiveness of EU right holders indeed. That is attributable to the fact that US phonogram producers (as well as performing artists embodied on US phonograms) already benefit from a higher level of related rights protection provided for in many EU Member States. Unlike the US, most EU Member States are party to the Rome Convention,⁵⁰⁹ which grants the highest protection of all the main international treaties dealing with related rights.

The competitive disadvantage resulting from the Rome Convention lies in the fact that phonogram producers from non-contracting states (and performing artists embodied on phonograms from non-contracting states) can easily qualify for protection through the back door of the Rome Convention. If a phonogram first published in a non-contracting state has been ‘simultaneously’ published (i.e. published within thirty days) in a contracting state, than this phonogram also qualifies for protection under the Rome Convention and thus profits from the higher level of protection provided for in this convention.⁵¹⁰

As a consequence, it has always been, and still is, very lucrative for US phonogram producers to simultaneously publish their phonograms in one of the contracting states to the Rome Convention.⁵¹¹ By so doing, they benefit, *inter alia*, from the royalties collected in EU Member States in case their phonograms are played in public, for instance in restaurants, bars, shops, offices, or on radio or television. These royalties emanate from the right to an equitable remuneration for the broadcasting or communication to the public of a commercially published phonogram as provided for in article 12 Rome Convention (and art. 8(2) Rental Right Directive).⁵¹²

The US, by contrast, does not provide for such a remuneration right.⁵¹³ Instead, the US Copyright Act provides for a limited public performance right for certain *digitally transmitted* sound recordings.⁵¹⁴ Hence, EU phonogram producers cannot claim remuneration in the US when their phonograms are communicated to the public (i.e. played in restaurants, bars, shops or offices), or broadcasted by radio or television stations through analogue transmission. As a result, US right holders already benefit from a better protection of their sound recordings in many of the EU

⁵⁰⁹ See para. 3.2.1.1.

⁵¹⁰ Art. 5(1) under c in conjunction with art. 5(2) Rome Convention. Note, however, that any contracting state may declare not to apply the criterion of publication (art. 5(3) Rome Convention) or, under circumstances, to maintain fixation as the sole criterion (art. 17 Rome Convention). Of the EU Member States that are party to the Rome Convention, Belgium, Denmark, Estonia, France, Luxembourg, Poland, Slovenia and Spain have made a declaration of the first kind. Finland and Italy have made a declaration of the second kind.

⁵¹¹ See e.g. Stewart 1989, p. 229, who indicates that US phonograms, as a rule, are published simultaneously in the UK, which –as we have seen– is a contracting state to the Rome Convention.

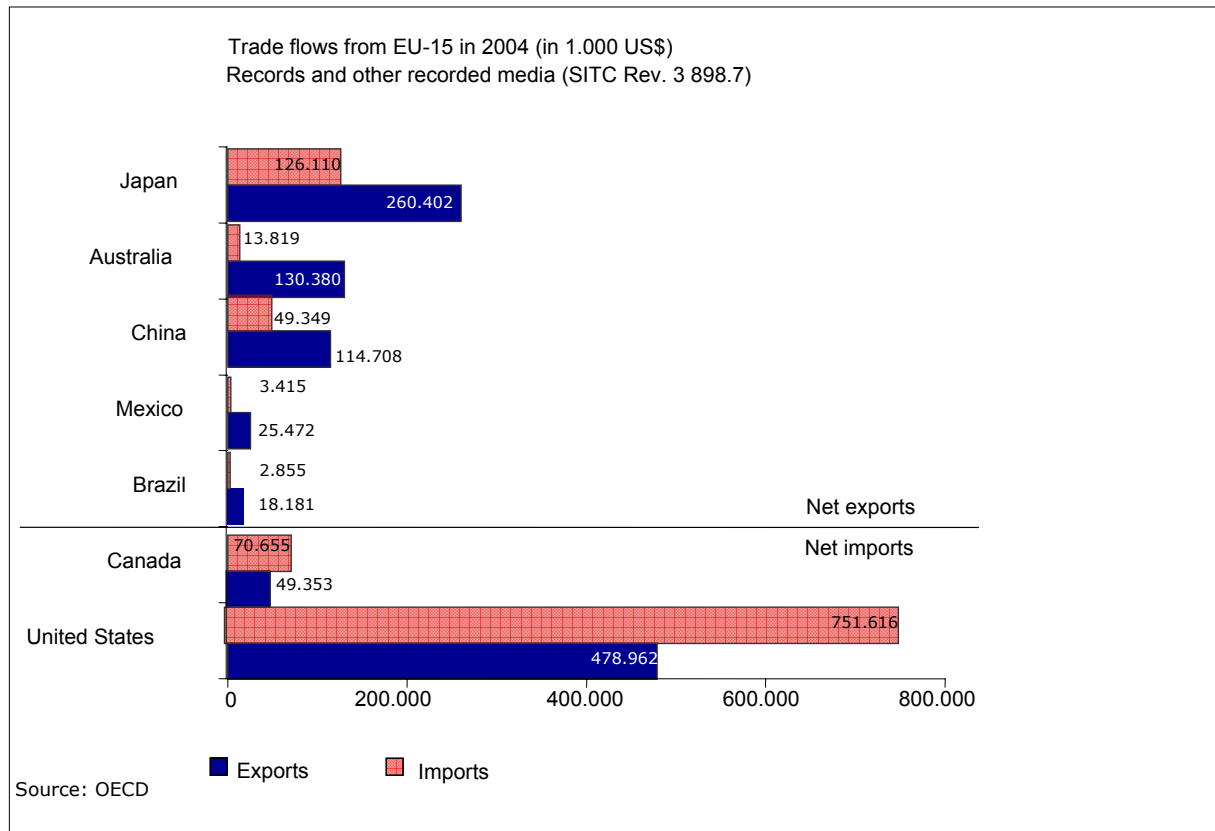
⁵¹² Note, however, that certain Member States have made a reservation under art. 16(1)(iii) Rome Convention, declaring that they do not apply the remuneration right of art. 12 Rome Convention to phonograms of which the producer is not a national of another contracting state. Such declaration has been made by Austria, Belgium, Czech Republic, France, Italy, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Spain and the UK. Bulgaria and Romania have also made a declaration of this kind.

⁵¹³ Although the US, in this respect, is bound by art. 15 WPPT, which provides for a similar rule as art. 12 Rome Convention, the US has made a declaration pursuant to art. 15(3) WPPT, that it will apply the provisions of art. 15(1) WPPT ‘only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under the United States law.’ See: <http://www.wipo.int/treaties/en/Remarks.jsp?cnty_id=1279C>.

⁵¹⁴ See arts. 106(6) and 114 US Copyright Act.

Member States. An extension of the term of protection of related rights in Europe would only aggravate this divide.⁵¹⁵

Figure 2: Trade flows in sound recordings from EU-15 to and from US, Canada, Mexico, China, Japan, Brazil (OECD)



Finally, the general argument that European countries have to compete with countries with a longer period of protection⁵¹⁶ is based on the view that countries directly compete with each other. This line of argument does not take into account that the music industry is an international industry that is dominated by multinational corporations. Of the worldwide music market 72 per cent⁵¹⁷ is controlled by just four multinational companies, the so-called majors. These companies have a large network of international affiliates and licensees in various countries. In these multinational companies revenues are often subject to intra-company flows that are not related to the shares of protected or unprotected recordings sold. It is therefore hardly possible to determine which of the potential positive effects of a term extension would directly benefit the EU music industry as compared to the music industry in other countries.

⁵¹⁵ Response to the Staff Working Paper on Copyright Review by NAXOS.

⁵¹⁶ Response to the Staff Working Paper on Copyright Review by BPI (part 1).

⁵¹⁷ IFPI 2005.

3.5.4 Valuation of assets

A fourth line of reasoning that has been brought forward in support of a term extension is that a shorter term of protection in the EU will result in a lower valuation of assets in the balance sheets of EU record companies compared to countries with longer terms of protection.

In accountancy terms, musical copyrights and related rights are part of the 'intangible assets' of a record company. In most large European corporations, International Accounting Standards (IAS) prescribe the accounting treatment in the balance sheets. IAS 38, which rules the treatment of intangible assets, and other national accounting rules (such as the HGB and DRS in Germany), distinguish between assets that have been produced by the company internally within its common business and intangible assets that have been acquired externally as part of a business transaction.

A company's own productions, i.e. sound recordings created within the business of a record company, are regularly not capitalised in the balance sheets. They are not recognised as intangible assets by record labels.⁵¹⁸ The costs for the production of the sound recordings are recorded as expenses when they are incurred, e.g. in the 'cost of revenues' section of the balance sheets.

One exception are royalty advances to artists on their future revenues, which are sometimes activated in the balance sheets. However, this is only the case if it can be expected that royalty advances against earnings are reasonably assured.⁵¹⁹ Otherwise, advances are expensed in the period in which they have been paid.

Intangible assets (including music catalogues) that have been acquired externally by a record company, either separately or as part of a business or financial transaction, are usually capitalised in the balance sheets as acquisition costs. Following initial recognition, these intangible assets are amortised on a systematic basis over their estimated useful lives. IAS 38.79 includes a rebuttable presumption that the useful life of an intangible asset will not exceed 20 years from the date when the asset is available for use. If there is persuasive evidence that the useful life of an intangible asset will exceed 20 years (cases should be rare), an enterprise should amortise the intangible asset over the best estimate of its useful life.⁵²⁰ In practice, useful lives for music catalogues usually do not exceed 20 years. For example, at EMI, intangible assets are amortised over periods of anything up to and including 20 years,⁵²¹ at Universal Music Group they are amortised 'over 15 years in selling, general and administrative expenses',⁵²² at Sony/BMG over a maximum of 20 years,⁵²³ and at Warner Music Group, estimated useful lives of ten years are assigned to a recorded music catalogue in the intangible assets.⁵²⁴

Since own productions are not capitalised in the balance sheets of music companies and acquired catalogues are amortised over a time span of a maximum of 20 years, it can be safely concluded that an extension of the term of protection beyond 50 years would have no effect on the value of assets in the balance sheets of European music companies. This assessment is in line with statements by various stakeholders.

⁵¹⁸ See e.g. Vivendi Universal 2005 Consolidated Financial Statements, p. 76; Bertelsmann Geschäftsbericht 2005, p. 84; EMI Annual Report 2005, p. 74.

⁵¹⁹ Vivendi Universal 2005 Consolidated Financial Statements, p. 75.

⁵²⁰ H.G. Bruns, M.G. Thuy and M. Zeimes, 'Die Bilanzierung von immateriellen Vermögenswerten des Anlagevermögens und Goodwill im Konzernabschluss', *Controlling – Zeitschrift für erfolgsorientierte Unternehmenssteuerung* 2003, vol. 15, no. 3/4, p. 137-142 [Bruns/Thuy/Zעים 2003]. See also: 'IAS-38 - Intangible Assets' at <http://www.accountancy.com.pk/reference_ias.asp?id=42>.

⁵²¹ EMI Annual Report 2005, p. 74.

⁵²² Vivendi Universal 2005 Consolidated Financial Statements, p. 75.

⁵²³ Bertelsmann Geschäftsbericht 2005, p. 84.

⁵²⁴ Warner Music Group 2005 Annual Report, p.109. Before 2004, estimated useful lives of 15 years were assigned to the recorded music catalogue and music publishing copyrights.

However, in case of a valuation of a company's assets for a business acquisition, the value of the music catalogue might be reflected in the goodwill of that company. The goodwill regularly includes intangible assets, such as the recorded music catalogue, that are not reported in the balance sheets of the acquired corporation. For the valuation of these intangible assets, the remaining term of protection might play a limited role if it affects the expected future cash flow. The valuation of the intangible assets within the goodwill also depends on the useful life of the assets, which is usually assumed to be no longer than 20 years, as is the case for intangible assets in the balance sheets. However, if it is expected that the assets will contribute to the expected future cash flow of the company beyond 20 years, it is possible that a longer economic life and resulting amortisation period is assigned. In a yearly impairment testing, the assets and their estimated economic lives have to be re-evaluated. In this case, the term of protection might have a certain impact on the valuation of the company's assets included in the goodwill. According to various statements of stakeholders, however, this effect is limited in practice.

3.6 Assessment and conclusions

In the previous sections we have introduced, and critically examined, a variety of arguments put forward by stakeholders in favour of a term extension of related (neighbouring) rights. We have concentrated our analysis on the rights of phonogram producers and performing artists, since only these right holders have expressly called for an extension on the occasion of the Commission's stakeholder consultation. In this final section we will assess the value of these arguments, both from a legal and economical perspective and in terms of international competition, and draw conclusions.

3.6.1 *Legal arguments*

In paragraph 3.2 we have described the existing international framework for the protection of related rights, as well as relevant national laws from the EU's main 'competitors'. From this description the following picture emerges. The term of protection currently laid down in the Term Directive (50 years from fixation or other triggering event) is well above the minimum standard of the Rome Convention (20 years), and substantially longer than the terms that previously existed in many Member States prior to the adoption of the Rental Right Directive in 1992. Note that in some Member States related rights were not protected at all prior to 1992. As regards phonograms and performances, the current European term is in conformity with the international 'acquis' as codified in the TRIPS Agreement and the WPPT. Countries such as Canada, Japan and China also provide for terms of 50 years, whereas longer terms (70-75 years) exist in Australia, Brazil and Mexico.

Stakeholders calling for a term extension have based their claim mainly on a comparison with the law of the United States. Indeed, in the U.S. sound recordings are protected for exceptionally long terms (life plus 70 years or, in case of works for hire, 95 years from publication or 120 years from creation). These American terms, however, do not truly reflect a judgment by the U.S. legislature on the need to protect sound recordings for extended periods of time. Rather, the very long terms in the U.S. are due to the fact that under American federal law, sound recordings are not subject to related rights, but protected under copyright law. The term of protection, therefore, follows the much longer terms applied in copyright law. From an international perspective, the American terms are anomalous, and cannot serve as a justification, from a legal perspective, for extending the terms of related rights in the EU. Moreover, the argument of disparities between the scope of protection is for another reason probably less strong for performers, broadcasters and film producers. Apart from the possible general protection under

US copyright law –if and to the extent that they made a creative contribution and can therefore be regarded as authors of the sound recordings, films or broadcasts– these categories of right holders do not benefit from protection in their own right, as is the case in Europe.

In paragraph 3.3 we have examined the nature of related rights, and queried whether this might support a claim for term extension. We have first looked at performers' rights and seen that, historically, performers were left without copyright protection because the development of phonographic technology, which triggered the need for protection, occurred well after the copyright paradigm had matured in the end of the 19th century. Although stakeholders and scholars have argued that the art (or artistry) of performers is not fundamentally different from the creativity of authors of derivative works (such as translations and arrangements) that do merit copyright protection, performers have never been recognised *de jure* as authors. Even so, the rationales underlying the legal protection of performers are basically the same as those underlying authors' rights: social justice, 'natural justice', cultural arguments, etc. Moreover, as has been rightly pointed out by stakeholders, in view of the average life expectancy of human beings in the EU, the existing 50-year term of protection will not always cover the lifetime of a performer. Clearly, if performers could be equated to 'true' authors, this would provide a powerful argument for extending the term of protection of performers, perhaps even to the current copyright term of life plus 70 years.

However, other arguments militate against such an equation. In the first place, important conceptual differences exist between copyright and related rights. Whereas works of authorship are protected by copyright on condition of originality (or creativity), no similar threshold requirement exists in the law of related rights. Moreover, if the main reason for a term extension would be to provide a measure of (additional) social security to performing artists, a term extension would be a very crude and imperfect measure. An extension would benefit only those performers whose recorded performances are still popular after 50 years (e.g. Sir Cliff Richard). Arguably, these (rare) artists are the least likely to be in dire straits. Arguably, a government policy promoting pension schemes for elderly artists would lead to more just and truly 'social' results.

Performing artists have also expressed concern that their older recorded performances could be abused or mutilated without their authorisation, once the term of 50 years has expired. These are understandable concerns, but they need not be remedied by extending the term of the *economic* rights. One could instead imagine extending the term of *moral* rights protection for performing artists. Note that in the law of copyright, the terms of economic rights and moral rights are not always identical.

In addition, certain practical difficulties may arise if the term of performers' rights were extended, while keeping the term of phonogram rights unchanged. For instance, article 8(2) of the Rental Right Directive requires equal sharing of the equitable remuneration for secondary use of commercial phonograms between performers and phonogram producers. It is unclear how such sharing should occur if the right of one of the two categories has expired.

Finally, in the light of existing contractual practices, it is unlikely that performers would actually (fully) profit from a term extension, since record companies routinely require a broad (or even full) assignment of the rights of the performing artists. In all likelihood, a term extension would primarily benefit the phonogram producers. Therefore, extending the term of protection of performing artists should be considered only in connection with statutory measures that protect the artists against overbroad transfers of rights.

As regards phonogram producers, film producers and broadcasting organisations we have seen that the existing regime of related rights is based on an entirely different rationale. These three categories of entrepreneurs have been awarded exclusive rights not as a reward for creativity or artistry, but to protect, and serve as incentives to, investment (*Leistungsschutz*). Ideally, the protection granted to a phonogram producer for a recording is just long enough for the producer to recoup the investment in producing the recording. Comparing the shorter term

of protection that is presently granted to phonogram producers with the much longer term provided under copyright law, misses the point that the rationales of both regimes are fundamentally different. Whereas copyright (authors' right) protects creative authorship, the rights of phonogram producers, film producers and broadcasting organisations are meant to protect the economic investment in producing recordings and films and broadcasting radio and television programs. Since the skills needed to produce a phonogram (or film or broadcast) were considered to be mainly mechanical and industrial, and do not constitute a literary or artistic creation, these three categories have traditionally remained outside the copyright paradigm.

But what then is the relevant 'investment' that justifies protection? As regards phonograms, the related right has been founded on the premise that producing sound recordings is a costly undertaking, while a phonogram once recorded can be easily reproduced at very low (marginal) cost. Therefore, account is to be taken of the human and material (including organisational and technical) investment in making the sound recording (e.g. recording and production costs, including studio fees, studio musicians, sound engineers etc.), since these are the achievements that are represented in the final product (the phonogram) that is the subject matter of protection. Surely, not all expenditures by the relevant right holders may be taken into account. As in the case of the database right, a direct relation between investment and ensuing production (phonogram, film or broadcast) must be demonstrated. This would exclude costs of marketing and after sales, and possibly also investment in A&R.

Indeed, the related rights of these three categories have perhaps more in common with certain rights of *industrial* property, such as design rights, semiconductor topography rights, plant variety rights and the *sui generis* database right. Interestingly, whereas all these rights share the same 'investment' rationale, their terms are considerably shorter, while setting higher threshold requirements. For example, whereas the *sui generis* database right requires 'substantial investment' in a database, the phonographic right requires no more than the making of a sound recording, be it a complex studio production or simply a matter of 'pushing a button'. Perceived through the lens of industrial property law, a good argument could in fact be made for shortening the term of related rights for these three categories.

But whatever may be the precise nature of the investment that related rights granted to phonogram producers, film producers and broadcasting organisations seek to promote and protect, the rationale of these related rights is not to create economic value for the companies as such. Ameliorating the balance sheets of record companies or film producers, is clearly not the objective of granting related rights.

Admittedly, film producers also benefit from copyright protection, due to the application in the national laws of the Member States of various statutory mechanisms aimed at concentrating the rights of film authors (e.g. screen writers, directors, etc.) in the producers. As a result, film producers who already enjoy related rights protection, also benefit from the much longer terms of copyright protection. Phonogram producers have argued that this amounts to unfair discrimination. However, this argument misses the point that the special rules for cinematographic works favouring film producers have not been developed to reward the work of film producers, but to facilitate the management of rights of all the (hundreds or even thousands of) contributors to a film. Similar problems of rights management do not normally occur when producing a phonogram.

3.6.2 *Economic arguments*

In paragraph 3.4 we have examined a variety of economic arguments and analysed relevant data. As to the latter, we were surprised to discover that stakeholders have presented very few quantitative (empirical) data to support their call for a term extension.

We have first examined the average costs of producing a sound recording. Whereas due to the advances in information technology the technical costs of owning and operating professional recording equipment has decreased, the costs of marketing recordings has gone up. These costs now make up the largest part of the total investment in producing a phonogram. However, as we have concluded earlier, it is doubtful whether these costs may be taken into account as investment justifying related rights protection. Insofar as marketing costs accrue in the goodwill of trademarks or trade names (increasingly, successful performers are indeed branded as such), phonogram producers or performing artists may derive *perpetual* protection therefore under the law of trademarks.

We have subsequently demonstrated that for the large majority of sound recordings the producers are likely to either recoup their investment within the first years, if not months, following their release, or never. If a recording has not recouped its investment after 50 years, it is very questionable that it ever will. On the basis of this finding it can be assumed that a term of protection of 50 years offers phonogram producers more than enough time to recoup their investment.

The temporary monopoly granted by related rights results in deadweight losses caused by lower volumes of sales due to higher licensing costs and consumer prices. Deadweight losses are acceptable if they help to achieve the goals related rights are aiming at. However, assuming that the current term of 50 years is indeed sufficient to achieve the main goal of related rights, i.e. to enable phonogram producers to recoup their investment and performing artists to receive an adequate income, then a term extension beyond 50 years would involve deadweight costs in excess of the costs necessary to fulfil the objective of related rights.

We have also seen that, as stakeholders have argued, recordings that will lose protection over the next 5 to 10 years indeed provide a substantial source of revenue to European phonogram producers. As the rights expire, these recordings will become subject to increasing competition and falling prices, leading to a loss of income from the licensing of sound recordings. Stakeholders argue that this will negatively affect future investment in A&R. However, it appears that only limited shares of phonogram producers' overall revenues are currently invested in A&R, so the predicted negative effect on investment in new talent is likely to be limited at worst.

Moreover, expiration of related rights does not necessarily imply that phonogram producers have completely lost their competitive advantage. Property rights in the master recordings that are indispensable to any high-fidelity reutilisation, will remain safely with the phonogram producers. Expiration of the related rights does not bring these 'masters' into the public domain. Most likely, these 'masters' will be treasured by the record companies for many more years to come. Not having direct access to the master recordings, competitors will have to content themselves with lower grade duplicates of phonograms previously published on vinyl or CD.

We have subsequently examined the 'long tail' argument put forward by stakeholders. It is argued that a longer term of protection could serve as an incentive to phonogram producers to digitise older back catalogue recordings that would otherwise lose protection in the near future. This argument, we have found, is not without merit. A term extension might indeed inspire phonogram producers to revitalise their back catalogues recordings, and make them available to a variety of (digital) distribution channels. This could, in turn, foster competition and innovation in new distribution models, also for niche content, and improve public access to sound recordings. On the other hand, a longer term of protection would prolong the exclusive rights of phonogram producers to control exploitation models for back catalogue repertoire, certain secondary uses, and new distribution models. The immense market potential of digital business models should already today have provided ample incentive to phonogram producers to exploit their back catalogue in new forms. The recent history of the internet, however, indicates that these opportunities have not always been seized by those stakeholders now asking for a term extension.

As regards performers, a term extension would certainly benefit those artists that are still popular after 50 years and still receive payments from collecting societies and/or phonogram producers. This however concerns only a small number of performing artists. For the majority of performers that do not derive substantial revenues from their recordings after 50 years, a term extension would only, depending on the contractual setting, result in their recordings not being commercially exploited and/or not being made available to the general public.

In the course of our economic analysis we have encountered various other factors that should be taken into account when considering a term extension. These, however, need not be repeated here.

3.6.3 *International competition*

Besides legal and economic arguments, stakeholders have also posited that not granting a term extension would distort competition between right holders based in the EU and their competitors based in non-EU countries where right holders may enjoy longer terms. We have examined this argument in paragraph 3.5.

In this context it has been argued that foreign countries would apply a ‘comparison of terms’ to the detriment of EU right holders. We have found this argument unconvincing, for various reasons. In the first place, the Rome Convention arguably requires full national treatment, which rules out a comparison of terms by those countries that are bound by the convention (incl. Argentina, Australia, Brazil, Canada, Chile, Japan, Mexico, Russia and Turkey). Moreover, many countries not party to the Rome Convention do not apply a comparison of terms. This is the case, for instance, for the EU’s main ‘competitor’ the United States. Right holders from the EU that qualify for protection in the US are accorded the same term of protection as is granted to US right holders.

Another argument advanced by stakeholders is that a failure to bring the term of protection in the EU in line with the US will negatively affect the competitiveness of the European music industry. However, the competitiveness of phonogram producers is based on a wide variety of factors, intellectual property protection in general and the term of protection in particular being just one of them. Moreover, the worldwide music market is dominated by only four multinational companies (the so-called ‘majors’), that can not be characterised as either ‘European’ or ‘American’. Revenues received by these companies are often subject to intra-company flows that are not related to the shares of protected or unprotected recordings sold. Juxtaposing the interests of the European and the American music industries, therefore, would be wholly artificial.

Even so, the market dominance of the ‘majors’ is an economic factor to be taken into consideration when contemplating any extension of the term of protection of related rights. Currently, the European music market is dominated by four major music labels that have an estimated overall market share of 81 per cent. Due to the exclusive rights they are granted and/or that have been assigned to them by performers, these companies have significant control over the exploitation, certain secondary uses, and distribution channels. A term extension would, in all likelihood, strengthen and prolong this market dominance to the detriment of free competition.

A final argument in favour of term extension comes from the world of accountancy. It assumes that a longer term of protection would increase the value of ‘intangible assets’ in the balance sheets of European record companies. Granting a shorter term of protection to record companies in the EU than their competitors in the US already receive, would arguably result in a comparatively lower valuation of assets of European companies. This argument, as we have seen, is largely without merit. The value of a record company’s own recordings is not regularly recognised as intangible assets by the record labels, and not capitalised in the balance sheets.

Acquired catalogues of recordings are usually capitalised, but routinely written off well before the existing terms of related rights protection expire. Term extension will perhaps play a minor role only in the valuation of the goodwill of a record company in the context of a merger or acquisition. Even then, its effect will be minimal at best.

In sum, the authors of this study are not convinced by the arguments made in favour of a term extension. The fact that some recordings still have economic value as rights therein expire, cannot in itself provide a justification for extending the term of protection. Related rights were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving 'value' in perpetuity. The term of related rights must reflect a balance between incentive and market freedom. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors. Without content that still triggers the public imagination a robust public domain cannot exist.

Finally, even though extending the term of related rights would be ill advised, it would be worth considering amending the Term Directive so that the terms of protection are calculated in the same way for performers and phonogram producers.

4 Calculation of the term of protection of co-written musical works

4.1 Introduction

One of the proposed areas for reform in the Commission Staff Working Paper on Copyright Review is inspired by the fact that the Term Directive has not resulted in identical terms of protection for all individual works of authorship throughout the European Union. A number of stakeholders in the music sector have stressed the negative financial and organisational effects of variations in the calculation of the term of protection of co-written music.

A prevailing characteristic of music is that it often consists of lyrics and composition, and that these have different (co-)authors. Certain Member States consider co-written musical works must be regarded as one work wherein joint authorship lies. Other countries choose to differentiate each author's contribution granting individual copyright ownership: the author of the text accompanying the melody is the owner of the copyright in the lyrics and the author of the melody⁵²⁵ is the owner of the copyright in the music. As a result, depending on which definition is followed, once the term of protection has expired (on this point no doubt subsists as it is 70 years *post mortem auctoris* throughout the EU), certain countries will see the music enter the public domain as a whole whereas in others there will be a situation where either the lyrics or the melody are free for all to use at different stages, namely 70 years after the death of the lyricist or the composer, whomever of the two comes to pass away before the other.⁵²⁶ Consequently, music publishers and the estates of authors can in some countries no longer control the part of the music in the public domain on the basis of copyright.

In theory at least, this diversity could affect the internal market because it may hamper the free flow of goods (music in tangible media) and services (stage performances, online music, etc.). It is however difficult to determine the scope of the problem due to a lack of industry data. Nonetheless, it has been suggested that a harmonised method of calculating the term of protection along the lines of the rule for film (art. 2 Term Directive) may solve the problems caused by the existing diversity.

Whether the introduction of such a rule –or alternative lines of action– does indeed cure (potential) distortions is analysed in four steps. First, the problem as perceived by stakeholders will be outlined. Second, a description is given of the various ways in which Member States calculate the statutory term of copyright protection for musical works. Third, a closer look is taken at the areas of the music and cultural industries where the effects of diverging terms of protection is mostly felt, and at how those involved deal with the issue in practice. Fourth and last, the expected effects, advantages and disadvantages of harmonisation and other policy options are analysed.

⁵²⁵ The term 'melody' is used here as including rhythmic sounds.

⁵²⁶ When we speak of 'split copyrights' it is this type of situation which we refer to. In music publishing the term split copyright is also used more generally to denote musical works in which a variety of (sub)publishers have rights (shares in ownership or royalty income).

4.2 Stakeholders views on diverging terms of protection

Consultations held by the European Commission have elicited a few reactions from stakeholders⁵²⁷ who have put forward a number of practical arguments which illustrate their discontent with the current situation. Representatives of music publishers⁵²⁸ complained this lack of harmonisation affects a voluminous list of songs and generates ‘substantial practical difficulties’ which have the effect of creating distortions in the internal market.

According to the music publishers, different terms of protection create barriers to the free flow of trade within the internal market: an instrumental version (or a version with new lyrics) could be marketed without the right holders’ consent in EU countries where the music has fallen into the public domain, but not in Member States where the original version is protected in its entirety. This would diminish the value of the music (or of the original lyrics) where the work is still protected and the sale of the instrumental version (or of a new lyrical version) in that member state is prohibited. Consequently, the different terms of protection, generate a situation where the principle of free flow of goods in the marketplace may be contrary to the legitimate exercise of the copyrights in the musical works in the states applying uniform term protection when the goods incorporate co-written copyright musical content such as CDs, DVDs, videos and other media products.

Another argument put forward by the music publishers is that diverging terms of protection impede the estates of music composers and text writers from effectively licensing their works throughout the European Union. When a work is protected in some Member States but certain of its elements are not in other Member States exploitation problems arise because it is more complicated to control those elements which remain protected in some Member States but not in others.⁵²⁹

It is also argued that collecting societies, representing the composers and authors and their music publishers, administer European works in their own territories through reciprocal representation agreements, and must ascertain for which territories, which parts of a musical work has fallen out of copyright. Cross-border use of works makes the latter a point to contend with often. As a consequence, there are limitations to the development of multi-territorial licences within the European Union when different terms of protection apply to the elements of co-written works. This situation, it is stressed by music publishers, does not facilitate the ability to license trans-border services within the Community (including broadcasting and other forms of communication to the public of sound and video images incorporating musical works, with the difficulties related to the broadcast via satellite, or to the simulcast or making available, of material which is unprotected in certain states into states where those rights are protected).

One of the recurring complaints pertains to administrative complications: the discrepancies in the definitions (i.e. the criteria to calculate the term of protection for musical works in the EU) make the administration of the rights in musical works (including technical difficulties in tracking the protected works) an arduous task. It also requires additional investment in IT systems of both

⁵²⁷ Consultation on the Staff Working Paper on Copyright Review. Stakeholders that have given more or less substantive replies on the issue are notably the International Confederation of Music Publishers, various UK organisations representing creators, music publishers and/or collecting societies (Creators’ Rights Alliance, British Music Rights), European Broadcasting Union, GESAC, PEARLE; see the list of contributions to this consultation: <http://forum.europa.eu.int/Public/irc/markt/markt_consultations>.

⁵²⁸ See the response to the Staff Working Paper on Copyright Review by the International Confederation of Music Publishers.

⁵²⁹ British Music Rights also pointed to the fact that split copyrights complicate licensing.

music publishers and collecting societies, who will have to deal with a growing stream of split copyrights.⁵³⁰

In addition, these differing applications of the term of protection are found to distort the flow of distributions to the creative community in music. Parts of a work can claim royalties in some countries but not in others resulting in different amounts of income. This, in turn, according to the International Confederation of Music Publishers has a negative impact on investment potential and decisions of that order will suffer due to the lack of legal clarity.

Not all stakeholders regard the differences in term calculation problematic, or favour an extension of the term of protection based on the life of the last surviving author.⁵³¹ It has been argued that the arguments put forward by the music publishers and collecting societies point to a lack of evidence of any practical problems arising from diverging applicable legal concepts and definitions, and thus the necessity for intervention at the EU level.⁵³² In practice there is no doubt as to the duration of copyright in music in EU Member States, nor as to the event that triggers the moment it will enter the public domain.

Summarised, it is primarily the music publishers who so far have voiced concerns, because the differences in terms of protection complicate the exploitation of works and results in less income. Those stakeholders who favour Community action advocate a solution in line with what the Term Directive has done for cinematographic works: it has designated the authors of the work as a whole for the purpose of calculating the term of protection of the economic rights, which is triggered by the death of the last surviving author and subsists for 70 years, after which, it expires.

4.3 Analysis of models used in Member States

Musical works are generally mentioned explicitly in Member States' copyright acts as eligible for protection. Quite a number of laws follow the distinction made in article 2(1) of the Berne Convention between musical compositions (with or without words) on the one hand and dramatico-musical works (e.g. opera) on the other hand.⁵³³ This distinction as such has no bearing on the issue of (joint) authorship or ownership in music to which more than one author has contributed creatively. Article 7 bis of the Berne Convention only stipulates in general terms that for works of joint authorship, the term of protection is to be calculated from the death of the last surviving author. The Term Directive specifies the same in article 1(2). The question *when* there is joint authorship is not addressed in either instrument, nor do they contain any further provisions relating to the term of protection for musical works specifically.

Recital 13 of the Term Directive poses that the question of authorship in the whole or part of a work is a question of fact to be decided by national courts. Consequently, for economic rights,⁵³⁴ the method of calculating the term of protection depends on how music is characterised under the law of individual Member States. Copyright laws do generally not address the status of co-written musical works in particular. Rather, musical works are treated the same as other

⁵³⁰ See response to the Staff Working Paper on Copyright Review by British Music Rights and the International Confederation of Music Publishers. GESAC has not raised these points in its response.

⁵³¹ See responses to the Staff Working Paper on Copyright Review made by EBU, PEARLE; the latter suggesting that if a standard term for co-written music could be based not on the life of the author, but calculated from date of first publication.

⁵³² See Response to the Staff Working Paper on Copyright Review by the EBU.

⁵³³ E.g. Denmark, Finland, France, The Netherlands, Poland, Portugal, Spain, Sweden, Czech Republic.

⁵³⁴ Moral rights are not addressed by the Term Directive. This is an area where disparities remain: in some Member States moral rights lapse when the economic rights do, in others the *droit moral* survives the economic rights indefinitely (e.g. Greece, France).

creations involving multiple contributors. The basic relevant concepts are the musical composition as unitary work (i.e. one single work), as two separate works (lyrics and music, i.e. multiple works), or as a collaborative work. These three concepts feature in two combinations in the laws of Member States (see also the graphic representation in para. 4.6).

On the one hand, there are Member States that classify music as either a *single* (unitary) work or as *multiple* works. The principal criterion used to distinguish between the two is either:

- a) whether the contributions are identifiable or have merged into an integrated whole (e.g. United Kingdom, the Netherlands), or
- b) whether the contributions have separate economic value, i.e. can be exploited separately (e.g. Germany, Hungary).

If there are no separable contributions (a), or no separately exploitable contributions (b), the work is classified as a joint work, in which joint authorship and ownership rests. A further relevant criterion is whether the co-contributors have worked creatively towards a common goal. Because lyrics and composition can typically be identified or exploited separately, as a rule the ‘unitary v. multiple’ Member States regard co-written music as two separate works (lyrics and composition).

On the other hand, there are Member States that classify music as either *multiple* works (separate) or a *collaborative* work (e.g. France, Belgium, Portugal, Spain). The principal criterion used in these legal systems is whether there has been creative collaboration towards a common goal or following a common plan. If there is such collaboration, the work is regarded as a joint work, in which joint authorship and ownership rests. Whether or not the individual contributions are separate entities is not a relevant criterion. On the contrary, if their contribution lends itself to separate exploitation, the authors as a rule retain the right to do so. The ‘multiple v. collaborative’ Member states tend to regard music as a collaborative work, but in some cases, such as where pre-existing poems or other texts are set to music, the situation is less clear.

The terms ‘joint work’ and ‘joint authors’ and ‘co-authored work’ and ‘co-authors’ are often used interchangeably. For clarity’s sake, we reserve the term ‘joint work’ and ‘joint authors’ to indicate situations where there is a unitary work (i.e. individual contributions can not be distinguished or exploited). The terms ‘co-authored works’ and ‘co-authors’ indicate situations where there has been a collaborative effort, but the individual contributions are still recognisable.

The three concepts –unitary, multiple, collaborative work– and the ramifications of their application to music will be analysed in more depth below. There are additional concepts that can fit certain music productions. For instance, some musical works could be characterised as a ‘collection’, i.e. a composite work which is original due to the selection and arrangement of its (copyrighted) contents (art. 2(5) Berne Convention, article 3(1) Database directive). On the same token, arrangements of music or translations of lyrics can attract copyright notwithstanding the copyright in the original composition or lyrics (art. 2(3) Berne Convention). For such derivative works, the same questions arise as to who qualifies as author: is it for instance, in case of a cover of a song in a foreign language, the original composer and the translator of the lyrics? Other ownership concepts, such as work for hire and ‘collective’⁵³⁵ works may also affect the issue of authorship or initial ownership –and therefore the term of protection– of music, but the use of these concepts is not at the heart of the problem that concerns us here.

A point that should be clarified is that the differences in terms of protection due to split copyrights with regard to the same music, only occur on the assumption that the law governing

⁵³⁵ A collective work or ‘oeuvre collective’ is (with slight variations among the laws of Member States who recognise the concept) a work created at the initiative of a natural or legal person who edits it, publishes it and discloses it under his direction and name. The personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created (e.g. art. L-113(2) French Copyright Act, art. 8 Spanish Copyright Act, art. 16 Portuguese Copyright Act.). See in more detail, chapter 5, para. 5.3.1.2.

the term of protection is that of the country for which copyright is claimed. In other words, from a conflict of laws perspective, the term of protection is governed by the *lex protectionis*, or law of the *Schutzland*.

The *lex protectionis* is quite widely accepted as the general conflict rule for copyright (and indeed all intellectual property).⁵³⁶ On that basis, a person may be regarded as either author, co-author or joint author (or not qualify as author at all) with respect to the same creation in different Member States, and the term of protection his or her successors in title enjoy is dependent on the local qualification of the kind of authorship/ownership. It is precisely in the area of authorship (initial ownership) that other conflict rules have been used in some Member States (and in the US)⁵³⁷ and have been propagated in legal doctrine.⁵³⁸

The most used alternative is application of some form of the *lex originis*, i.e. the law of the country of origin of a work.⁵³⁹ The advantage of this rule lies in the fact that one single law governs the question of authorship with respect to a particular creation. For a given co-written musical work this could mean that it will not be treated as a collaborative work (co-authorship) or as multiple works (separate authorship for each contribution) from one Member State to the next. The *lex originis* would thus indirectly affect the term of protection, since this in turn depends on the qualification of a work. This possibility is discussed in more detail below (para. 4.6.4).

4.3.1 Co-written music as unitary work

A number of Member States (e.g. Denmark, Finland, Sweden, the United Kingdom, the Netherlands) do not provide for collaborative works specifically. Consequently, in these systems a musical work is either a unitary work or multiple work. The distinction between musical works as single or multiple works is based primarily on the *indivisibility* of the contributions of the creative contributors.⁵⁴⁰

For a co-written musical work to qualify as one work, a number of copyright acts require that the end result constitutes an inseparable whole, i.e. in which the respective contributions of the authors are no longer recognisable as such. Their efforts should be directed at the production of an artistically integrated whole, in which their respective contributions have merged. If there is such a work, the authors are joint authors, owning the copyright jointly. Typically, each joint author can enforce the copyright individually. The term of protection is calculated from the time of death of the last surviving joint author. Under these systems, because the lyrics and the

⁵³⁶ For *infringement* of copyright, the Rome II proposal provides for application of the *lex protectionis*. Amended Proposal for a Regulation of the European Parliament and the Council on the Law applicable to non-contractual obligations ('Rome II'), Doc. COM (2006) 83 final 21 February 2006 [Proposed Rome II].

⁵³⁷ E.g. in French case law, in the Greek copyright act, in US case law; for an overview see M.M.M. van Eechoud, *Choice of Law in Copyright and Related Rights, Alternatives to the Lex Protectionis*, Information Law Series 12, London: Kluwer Law International 2003 [Van Eechoud 2003]. *ITAR Tass v. Russian Kurier* 153 F3d 82 (2nd Cir. 27 August 1998); Cass. 29 April 1970, *Lancio v. Editrice Fotoromanzi Internazionali*, [1971] Rev. crit. dr. int. priv.; CA Versailles 17 December 1993, *Sarl F2S v. Pravda*, 162 RIDA 448 (1994); CA Paris 6 July 1989, *Turner v. Huston*, 143 RIDA 329 (1990); CA Paris 1 February 1989, *Bragance v. Orban*, 142 RIDA 302 (1990); District Court and Court of Appeals in *Saab Scania v. Diesel Technic*, cited in Cass. 7 April 1998, (1999) Rev. crit. dr. int. priv. 1, 76.

⁵³⁸ See, for instance, J. Ginsburg, *The Private International Law of Copyright*, 273 *Receuil des Cours*, 1998, p. 356–357 [Ginsburg 1998]; Goldstein 2001, p. 103 *et seq.*; H. Schack, *Internationale Urheber-, Marken- und Wettbewerbsrechtverletzungen im Internet – Internationales Privatrecht*, MMR 2000, 64 [Schack 2000a]; P. Torremans, *The law applicable to copyright: Which rights are created and who owns them?*, RIDA 2001, no. 188 [Torremans 2001].

⁵³⁹ Another conflicts rule used for works made by employees is based on 'accessory allocation', whereby the law governing initial ownership in a work is the law that governs an employment contract.

⁵⁴⁰ A similar criterion is used in e.g. art. 10 Italian Copyright Act, Art. 11(1) Austrian Copyright Act ('untrennbare Einheit'), art. 2 Maltese Copyright Act, Art. 6 Danish Copyright Act, Art. 6 Finnish Copyright Act, Art. 6 Swedish Copyright Act, Art. 8 Slovenian Copyright Act.

musical composition can clearly be distinguished from each other, the two combined are not seen as one work, but two. As a result, if the creation of the music is a group effort, there will be two separate works (lyrics and composition), each of which is owned by the creators jointly.

Alternatively, the relevant criterion used to distinguish a unitary from multiple works is not factual indivisibility, but *economic* indivisibility, as is the case for instance under German, Czech and Hungarian copyright law. If parts are identifiable but are not suited for separate exploitation, the creative contributors who have worked towards a common goal, jointly own copyright in the work, and may not assign rights in their contribution.⁵⁴¹ In such cases also, the term of protection is based on the death of the last surviving author.

There are some forms of music where ‘lyrics’ and music do not appear to be separable, for example in the vocal technique known as ‘scat’ in jazz music, where words or sounds are sung, often as part of a call-and-response interaction with other musicians. Normally speaking however, co-written musical works will not easily meet the required *economical* indivisibility of lyrics and music, let alone the *factual* indivisibility. The British Copyright Act is very specific where it considers lyrics and music as separate works. Article 3 of the Copyright, Designs and Patents Act 1988 provides “musical work’ means a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.’ The Austrian Copyright Act also expresses –albeit indirectly– that music and words normally are separate, where it denies joint authorship in case works of diverse nature are joined (no joint authorship exist by mere ‘...Verbindung von Werken verschiedener Art - wie die eines Werkes der Tonkunst mit einem Sprachwerk’, art. 11 Austrian Copyright Act).

4.3.2 *Co-written music as multiple works*

In cases where co-written music can not be characterised as a unitary work or a collaborative work, lyricist and composer each are considered author and owner of their respective contributions.⁵⁴² This is the predominant view in for instance the United Kingdom, the Netherlands, Germany, Austria, Italy, Denmark, Finland and Sweden. Under these laws, both lyrics and music attract their own term of protection. Consequently, the lyrics and composition will typically fall out of copyright at varying times.

The time gap may be substantial, as is the case where one of the authors suffers an untimely death while the other lives a long life –the Gershwin brothers are an illustrative example, their deaths nearly 50 years apart, Lennon and McCartney could become another one. A large time gap may also exist where a pre-existing poem or other (literary) text is set to music. In many cases however, lyricist and composer are likely to be contemporaries and the time gap will be limited.

Exceptions to separate calculation of terms

In a few Member States, although lyrics and music each attract their own copyright, the calculation of the term of protection is based on whomever –lyricist or composer– survives last. This is the case in Italy for certain musical works. The detailed Italian rules on copyright contract law singles out dramatico-musical works (and other musical compositions with words) as being of a nature where literary and musical parts can be distinguished and do not constitute a joint work. Dramatico-musical works (e.g. opera) are however –like joint works– listed as works whose term of protection is to be calculated as expiring after the death of the last surviving author.⁵⁴³

⁵⁴¹ Art. 5(1) Hungarian Copyright Act, T. Dreier and G. Schulze, *Urheberrechtsgesetz; Urheberrechtswahrnehmungsgesetz; Kunsturhebergesetz; Kommentar*, München: Beck 2004 [Dreier/Schulze 2004].

⁵⁴² This does not mean that in the exercise of their copyright either author can ignore the legitimate interests of the other party, whether based on provisions within copyright acts, common torts, etc.

⁵⁴³ Art. 26 of the Italian Copyright Act.

The Italian legislator has expressly chosen to treat dramatico-musical works (opera) as a whole for the purposes of determining the term of protection.

Estonian copyright law also calculates the term of protection for copyrights in co-authored works the same as for copyright in joint works. Under article 30(3) of the Estonian Copyright Act, authors who jointly create a work in which the various contributions are recognisable as separate and can be exploited as such, each own the copyright in their contribution.⁵⁴⁴ They may not exercise their individual copyright to the detriment of the other co-authors with whom the work as a whole was created. The term of protection for these co-authored works is –like that for joint works– based on the last surviving co-author. This is a generic rule that applies to all genres of creations, including music.

A model in between collaborative works and multiple or separate works is the German concept of ‘associated works’.⁵⁴⁵ This concept is also recognised in e.g. Polish Copyright law.⁵⁴⁶ It applies where several authors have explicitly or implicitly agreed to ‘associate’ their individual works in view of joint exploitation. Under German law, the agreement to associate the works can either be for a determined period of time or extend to an open-ended venture (in doubt, the association of works will last until the death of the last surviving author). Typically, a libretto and the musical composition of an opera and the lyrics and music of a song are deemed to qualify as such works.

For the duration of the association agreement, all decisions pertaining to the exploitation of the ‘associated works’ must be taken jointly. In addition, independent exploitation of each contribution must not compete with or hinder the ‘association’. As a result, a poem which has been bound to a musical composition can be printed in an anthology. However, the author of the poem is prohibited from lending it to another musical composition as this would cause prejudice to the previously associated musical composition.

The different works comprised in the ‘association’ will each individually fall into the public domain seventy years after their respective authors pass away. This means that the heirs of the author of a work (comprised in the ‘association’) passing away first will cease to receive royalties attached to the ‘association’ after the term of protection’s expiration whereas the heirs of the last surviving author will continue to enjoy the fruits of the exploitation of the ‘association’ until seventy years *p.m.a.*

4.3.3 *Co-written music as collaborative work*

As has been said above, a co-written musical work is usually made up of two distinct parts and is consequently not regarded as a unitary work. Member States have however developed various concepts of collaborative works to establish authorship and its modalities where several authors are involved in a common project.

The French, Portuguese and Spanish laws share a similar concept of works of collaboration which is of particular relevance to co-written musical works.⁵⁴⁷ A work of collaboration is a work in the creation of which more than one natural person has participated. The authors must have worked together creatively towards a common goal. As has been said, unlike for unitary works, it is not a relevant factor that the respective contributions can be identified separately or have independent economic meaning. On the contrary, the rules for collaborative works assume that parts are suitable for independent exploitation.⁵⁴⁸ For music to qualify as a collaborative work,

⁵⁴⁴ If the contributions are inseparable, there is joint ownership (and by definition, no separate exploitation possible).

⁵⁴⁵ Art. 9 of the German Copyright Act.

⁵⁴⁶ Art. 10 Polish Copyright Act.

⁵⁴⁷ Art. 7 of the Spanish Copyright Act and art. 16 of the Portuguese Copyright Act.

⁵⁴⁸ Cf. Lucas/Lucas 2001, p. 160 *et seq.*

Portuguese law in addition demands that the musical work is presented as such, i.e. divulged or published under the name of (some of) the co-contributors.⁵⁴⁹

All three legislations provide for the same consequences where works of collaboration are concerned. The work becomes the joint property of its authors and is to be exploited collectively, but may be enforced individually. Each author may, unless otherwise agreed, separately exploit his own personal contribution without, however, causing prejudice to the exploitation of the common work. The qualification as collaborative work implies that the lyrics or music are not themselves each the object of a copyright, i.e. unlike is the case with composite works, there is not a copyright in the whole as well as in the separate parts.⁵⁵⁰ As is the case with joint works, the term of protection of collaborative works will be calculated from the calendar year of the death of the last surviving author.

French case law provides many examples of works of collaboration,⁵⁵¹ among which traditionally are co-written musical works.⁵⁵² Other collaborative works include, to name but a few, illustrations and dialogues for comic strips, photographs with comments, illustrations in scenario's, and cinematographic (or other audiovisual) works⁵⁵³. Such works are characterised by what French courts have labelled: 'a common inspiration'⁵⁵⁴ which results in the creation of a work regardless of whether the different skills applied are of the same nature or are on the contrary of different genres. Similarly, if the collaboration is not simultaneous, it does not necessarily preclude the work from being qualified as a work of collaboration.

French case law has recently given its interpretation of the application of article L 113-3 of the Code of Intellectual Property, which allows each co-author of a work of collaboration to exploit his contribution separately, in a case involving a song of which the composer had agreed to lend his music to a commercial advertisement⁵⁵⁵. It was ruled that the author of the lyrics could rightly invoke his moral rights to forbid such an exploitation as it robbed the song, a work of collaboration, of its 'oneness'. Indeed, adjoining different words, meant to increase sales of a product, amounted to causing prejudice to the song itself and thereby to the author of the original lyrics.

4.3.4 Conclusions

Typically, the copyright laws of Member States do not contain rules tailored specifically to musical works. Co-written musical works that are made up of music and lyrics are treated the same as other works of authorship. This means they are primarily categorised as multiple works

⁵⁴⁹ Art. 16(1) Portuguese Copyright Act. This criterion is primarily relevant to distinguish collaborative works from collective works.

⁵⁵⁰ See however art. 9 Polish Copyright Act, which states that in case of joint works, each creator may exercise the copyright in the part of the work created by him if the part has intrinsic value, without prejudice to the rights of the other joint creators. A similar provision is contained in art. 30(3) Estonian Copyright Act.

⁵⁵¹ French judges have been and still are entangled in the exact definition of works of collaboration and collective works. A plethora of court decisions points to the confusion the definitions, as formulated in the French Copyright Act, can lead to. The difficulty revolves around the notion of 'separate right' in the work.

⁵⁵² See for example Cour d'Appel – CA (Court of Appeal) Paris, 19 December 1878: DP 1880,2, p.62; Cour d'Appel – CA (Court of Appeal) Paris, 1ère ch., 11 May 1965: D. 1967, p. 555; Cour d'Appel – CA (Court of Appeal) Paris, 4ème ch. Cour d'Appel – CA (Court of Appeal) 29 April 1998: Juris-Data n. 022149.

⁵⁵³ These form an exception, as they are the only category to have been expressly designated as works of collaboration by law. They also obey a set of special rules.

⁵⁵⁴ This criterion of 'common inspiration' was first suggested by French doctrine and duly applied by French judges. See for example Cour d'Appel – CA (Court of Appeal) Paris, 1re ch., 11 December 1961: RTD com. 1962, p. 674; Cour d'Appel – CA (Court of Appeal) Paris, 7e ch., 8 June 1971: D. 1972,p. 383; Tribunal de Grande Instance - TGI Nanterre, 1re ch., 6 March 1991: Cah. dr. auteur, April 1991, p. 19.

⁵⁵⁵ Cour d'Appel – CA (Court of Appeal) Paris, 12 September 2001, reported at: <<http://www.nomosparis.com/fr/archives.php?idnews=2&mois=1&annee=2002>>.

or as collaborative works. The fact that lyrics or music constitute contributions eligible for separate exploitation, in many Member States means there is not one common copyright but only separate ones, each attracting its own term of protection of seventy years p.m.a. This approach is consistent within the legal systems concerned, since they do not recognise collaborative works but only joint works –where the individual contributions of authors have merged into one (economic) whole, which is protected for the life of the last surviving author plus seventy years.

The boundaries between various concepts are rather fluid, particularly where collaborative works are concerned. Some legislations seem to grant the co-author a separate copyright in his or her contribution, while the term of protection is dependent on the last surviving of all the co-authors. Others regard collaborative works as one, i.e. without separate copyrights for the individual co-contributors (although they generally are free to exploit their own contribution separately as long as it does not harm the work as a whole). In some Member States the concept of a joint work (inseparable whole) is incorporated in the concept of collaborative work, which may be a work with or without identifiable contributions. Other Member States explicitly distinguish joint works from co-authored works (collaborative works), while subjecting both to a term of protection based on the life of the last surviving author.

4.4 Problems with term calculation in practice

Above we have established that it is quite common for Member States' copyright laws to lay down individual terms of protection for lyrics and composition. In this section we will expand on the problems this causes stakeholders in the music industry, problems (or lack thereof) that have been put forward in the 2004 Consultation on the review of EU legislation on copyright and related rights and in subsequent interviews.⁵⁵⁶

In the EU split copyright only arises with regard to co-written works that are at the very least seventy years old, but given the average life expectancy of authors, the works in question are more likely to be a 100 to 120 years old. This is why split copyrights to date occur primarily in the classical ('serious') music repertoire, notably opera, and in popular music from the 1920s-1940's. The vast repertoire of popular songs created especially since the second world war will start falling partly out of copyright in about forty years time. The economic effects will then in all likelihood be felt more strongly, by whomever owns the rights (estates, music publishers, investment groups, etc.). It should be noted that the 'costs' properly attributed to the differential treatment of musical works, do not include any changes in licensing revenues which result from compositions or lyrics fall in the public domain at varying times. In other words, if a composition falls out of copyright before the lyrics, such 'costs' are in effect estimates on the extra income that music publishers and estates could generate if the term of protection for the composition were extended to match that of the lyrics.

It is difficult to ascertain the (future) size of the problem in terms of costs for right holders associated with the administration.⁵⁵⁷ These costs depend on various factors, such as the number

⁵⁵⁶ The following stakeholders were consulted for further information on the practical impact of split copyrights: International Confederation of Music Publishers, European Broadcasting Union, GESAC, British Academy of Composers and Songwriters, PEARLE. Correspondence is on file with the authors.

⁵⁵⁷ The ICMP has provided the authors an estimate of approx. 15 million Euro in additional costs per year for all EU music publishers combined, for the next ten years. The figure is extrapolated from estimates from two larger publishers and two smaller ones, and includes "a. One-time set-up costs (database, initial training of staff, etc.), Annual Staffing costs (primarily corresponding to headquarters' costs), Annual Additional Administrative ("AAA") costs (primarily corresponding to affiliates' costs), and Annual Provision for Litigation costs." The latter reservation is counted as actual costs. No specific breakdown of costs was given, nor information which allows an evaluation of the estimates of the sampled music publishers, and of whether they are representative for the music publishing industry. Paper from ICMP of 28 August 2006, on file with authors.

of actively exploited works involved and the measure in which existing information systems can deal with the necessary metadata. In the following the effects of diverging term calculation is analysed in more detail for both collectively and individually managed rights.

4.4.1 *Collectively licensed music*

The economic effects for music publishers, estates and collecting societies are essentially twofold. First, there is the potential loss of income as an increasing number of titles in back catalogues become less valuable, because copyright no longer provides a basis for exploitation of either the lyrics or music, whichever is no longer protected.⁵⁵⁸ Second, the administration and monitoring of a growing number of co-written works affected by split copyright requires investments, notably in databases.⁵⁵⁹ The general impression from information supplied by collecting societies⁵⁶⁰ is that where fixed costs are concerned, these are estimated to be insignificant, because the systems of collecting societies are already equipped to deal with split copyrights.

Currently music publishers and the authors they represent derive the bulk of their revenue from fees for collective licensing (especially as regards communication to the public). The authors will ultimately also bear the costs of administration made by collecting societies, which is why they have an interest in seeing these controlled.

Where collective licensing is concerned, the variations in the term of protection of musical works has (or in theory at least should have) both an effect on the fee calculated for blanket licences and on the redistribution of royalties to right holders.

The effect of split copyrights on the fees for blanket licences will in all likelihood be limited. Because each collecting society has its own method for calculating licensing fees it is however difficult to describe the exact effects of split copyright. Methods for calculating fees for various (commercial) uses are based on many different factors depending on the type of use and users. The ratio of music used in the public domain to music in copyright may be determined based on for instance complete cue lists or play lists, or on samples. Where an increasing part of the repertoire consists of titles that are partly in the public domain, this implies fees should decrease. But in relation to the size of the entire repertoire managed by collecting societies, with new music added and falling out of copyright daily, the proportion of the music in catalogue that is partly in copyright will remain small, and is unlikely to have a substantial effect on fees. Especially considering that licence fees are primarily calculated on the basis of capacity of a venue (e.g. for public performance in theatres, dancehalls, etc.), box office receipts, floor space (e.g. for use of music in background in stores), number of telephone lines (e.g. for use of music by call centres), size of audiences, etc.

On the distribution side of collective management, effects are potentially bigger. Once part of the musical work is in the public domain, the successors in title of the author of that part will no longer receive royalties. Typically, the monies calculated for distribution toward a given title will then accrue to all remaining right holders in the relevant revenue stream.⁵⁶¹ For the individual right holders (primarily music publishers and estates) of compositions or lyrics that are still popular today, the loss in income may be substantial, depending on how sensitive their back

⁵⁵⁸ Of the two, music is more easily exploited separately from the lyrics, so the effect of lyrics falling out of copyright would appear to be less than that of the composition entering the public domain.

⁵⁵⁹ Interestingly, this was not a point made by the collecting societies in the consultations on the Review of copyright (2004). GESAC did express concern over the loss of income due to split copyrights falling in the public domain.

⁵⁶⁰ Through GESAC, information was received from BUMA (Netherlands), PRS (United Kingdom), TEOSTO (Finland), SUISA (Switzerland), SPA (Portugal), STIM (Sweden), SGAE (Spain), SACEM (France), SOZA (The Slovak Republic), AKKA-LAA (Latvia), ARTISJUS (Hungary), ZAIKS (Poland).

⁵⁶¹ This is the case in the UK (PRS) and The Netherlands (BUMA), both countries where composition and lyrics are typically considered as two separate works with their individual term of protection.

catalogue is to split copyrights. Factors that determine this sensitivity are the age of titles, the occurrence of co-writing, the commercial viability of titles of approximately 100 years or more old.

Collecting societies that operate in countries that consider co-written music as multiple works of composer and lyricist, can be expected to have an administrative model that accommodates for split copyrights. However, where the distribution of royalties through sister societies is concerned, problems arise. The transfer may concern royalties specified to the level of individual works or interested parties (authors, composers, music publishers), but may also be transferred based on aggregates. If the receiving society does not have an information system that allows it to recognise which of its members (estates, music publishers) are not eligible for a share in the royalties because the lyrics or music in question are not in copyright in the country of use,⁵⁶² they may continue to receive royalties. This is of course disadvantageous to the right holders of music that is in copyright, because they share revenue with right holders for whom technically speaking no royalties were collected. The distribution of licence fees for foreign repertoire seems less problematic where the local collecting society transfers the royalties to sub-publishers that have registered with it.

The allocation of royalties across borders demands even more refined management systems when collecting societies licence repertoire for multi-territorial use, especially the Internet. On the other hand, advances in information technologies allow for the handling of complex metadata. Internationally standardised systems for the identification of works and composers, writers, arrangers, translators etc., are also becoming more sophisticated (e.g. WID, IPI, CIS-net, Fasttrac). Of particular importance is the IPI-system (interested parties information) with its unique identifier (IPI number) for all individuals and legal entities that hold music copyrights.⁵⁶³

The question is whether the additional administrative burden for music publishers and collecting societies that differences in term calculation will cause them in the coming years makes a difference large enough to justify the introduction of a harmonised rule. A point to consider in this respect is that the operations of collecting societies may undergo serious changes in the near future. Such changes may be caused by developments in information technologies and business models (e.g. increased use of DRM to individualise licences, cross border music services on the internet), but also by regulatory developments. The European Commission's Online Music Recommendation appears to mark a development towards collective management that is much less organised along territorial lines, giving right holders more leeway to choose different collecting societies to manage different rights for different territories. Such development could well require adjustments of the information systems of collecting societies that may dwarf those necessary to accommodate for the administration of split copyrights (e.g. multi-territorial licences).

4.4.2 *Individually licensed music*

As has been pointed out, a genre of music currently most affected by split copyrights is classical or serious music, notably opera as it by definition concerns a combination of composition and lyrics/text. In opera, the effect of separate copyrights for music and libretto is felt both where it concerns authorisation for stage performances and collective licensing. Because individual licensing of stage performances and other 'grand rights' are relatively more important in opera

⁵⁶² Most collecting societies report that they receive adequate information from their sister organisations to enable them to distribute the fees remitted. SPA Portugal reported that regardless of the status of the musical work in the (foreign) country of use, they redistribute monies received on the basis of the status the musical work under Portuguese law [email correspondence on file with authors].

⁵⁶³ The IPI system is managed by SUIISA (the Swiss authors rights society), and was designed to replace the CAE system (unique identifier for Compositeur, Auteur, Editeur).

than in popular music, the practical implications of split copyrights for individual licensing warrant closer scrutiny.

The exploitation of copyrights for staged opera takes place along territorial lines, not in the least because theatre companies or opera groups predominantly stage performances in the Member States where they are based. The licences for stage productions (including adaptations, e.g. translation of a libretto) are negotiated with local music publishers. For travelling productions, authorisation is obtained directly from the foreign right owners or music publishers or indirectly through the local music publisher.

For music publishers and the authors whose work they commercialise, split copyrights may complicate licence negotiations. The authors/music publisher have an interest in maintaining control over both music and lyrics/libretti, primarily for economic reasons but also because adaptations of the part that has fallen out of copyright may affect the integrity of the (author of the) work still in copyright.⁵⁶⁴ As was noted earlier, this economic concern of music publishers has been voiced during the Consultations on the review of EU legislation on copyright and related rights of 2004.

The stage performers on the other hand, expect that the fact that the composition or libretto is in the public domain is reflected in the licence agreement, notably in financial terms but also where it concerns freedom to stage adaptations or translations of the ‘free’ part of the work. To what extent the terms of use are actually revised due to the changed legal status of the opera in question, depends of course on the contracting parties’ relative bargaining power.⁵⁶⁵

Obviously, where it concerns the duration of copyright, right owners would benefit from a uniform rule which takes the death of the last surviving author as starting point. The same can not be said for stage performers and theatres (or other users, e.g. those seeking synchronisation licences). Most likely it only causes them to need permissions from music publishers/authors in Member States where they currently do not need them, or where they can negotiate reduced fees because part of the opera is in the public domain. As most opera’s are staged for local audiences by local groups/theatres, the introduction of a uniform European calculation rule –which as has been noted would artificially extend the term of protection for part of the musical work– potentially has a large impact for users in Member States that currently use separate terms.

4.5 Term calculation for audiovisual works

The European Commission and industry stakeholders (music publishers and collecting societies) have suggested that the calculation rule for audiovisual works as laid down in article 2 Term Directive could be suited to apply to co-written musical works. In this study, other policy options are also put forward. Before we analyse the possible approaches, a reminder of the source and objective of said film rule is given. This will help to ascertain whether film and music share the characteristics that call for application of a similar term calculation rule.

The question of authorship of cinematographic or audiovisual works in the Community was first raised in a Green Paper on Copyright and the Challenge of Technology. The disparities in national provisions establishing either the ownership of exclusive rights or a presumption of who was to exercise the economic rights on behalf of all the contributors were already then pointed out. It was the Directive on rental rights and lending right which marked the first Community harmonisation of who was to be considered the author of a cinematographic work. This came

⁵⁶⁴ An interesting question is –though not of practical importance for our purposes– to what extent moral rights of the composer can be invoked against adaptations of the lyrics of which he is not regarded author (and vice versa), whether or not the lyrics are in the public domain.

⁵⁶⁵ Model agreements, such as those developed by the *Deutscher Bühnenverein* (German national organisation of theatres and orchestras).

about through a legislative procedure wrought with amendments first looking to introduce the principal director as the author of a cinematographic work, then looking to undo this introduction.

The final solution ended up establishing at EU level that ‘for the purposes of this Directive the principal director of a cinematographic or audiovisual work shall be considered as its author or one of its authors. Member States may provide for others to be considered as its co-authors.’ The solution, though determining, was to be construed as concerning only the Directive’s realm as the words: ‘for the purposes of this Directive’ clearly indicate. This, however, was further expanded when article 1(5) of the Satellite and Cable Directive took over the very same definition. This had laid the foundations for the Term Directive to state for the first time that, in general, the principal director of a cinematographic or audiovisual work should be considered as its author or one of its authors without restricting the definition to ‘the purposes of this Directive’.

Article 2 of the Term Directive deals exclusively with cinematographic or audiovisual works, without establishing their exact nature (as unitary works, or works of collaboration, or collections of works). After establishing that the principal director of a cinematographic work is to be considered as its author or one of its authors, it goes on to exhaustively enumerate the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work as the four contributors whose life spans must be taken into account for the calculation of the term of protection’s expiration. The death of the last of these four contributors triggers the seventy year *post mortem auctoris*.

The European legislator has thus partly detached the calculation of the term of protection from the question of authorship. This was deemed necessary because of the sheer number of (creative) contributors to a film. Some Member States only regard certain contributors as authors, whereas others use open criteria, allowing everyone who creatively contributed to the work as author (e.g. persons designing sets, sound, costumes, lighting).⁵⁶⁶ A certain level of harmonisation of who qualifies as author was necessary to arrive at a uniform term of protection. In its report on authorship of cinematographic or audiovisual works of 2002, the Commission concludes that further harmonisation of the definition of authorship for film works is not necessary, as the existing differences do not seem to cause problems for the exploitation of the film or enforcement of copyright.⁵⁶⁷

4.6 Assessment and conclusions

Before we consider possible approaches to the issue of diverging terms of protection for co-written musical works, it is worth remembering the size and scope of the problem.

Varying terms of protection do not only occur with respect to music and lyrics that have been intentionally co-written. They will also occur in case of new arrangements by a later composer, or translations of a later lyricist, or where pre-existing poems are set to music. More importantly, the duration of moral rights has not been harmonised. Consequently, in some countries moral rights

⁵⁶⁶ French legislation, for example, presumes no less than five contributors to be the joint authors of an audiovisual work made in collaboration (art. L-113-7 French Copyright Act). These are, the authors of the script, of the adaptation, of the dialogue, of the musical compositions, with or without words, specially composed for the work and the director. In addition, ‘if an audiovisual work is adapted from a pre-existing work or script which is still protected, the authors of the original work shall be assimilated to the authors of the new work’.

⁵⁶⁷ Report of the European Commission to the Council, Parliament and Economic and Social Committee on authorship of cinematographic or audiovisual works, COM (2002) 691 Def., Brussels, 6.12.2002 [Report on authorship of cinematographic or audiovisual works].

lapse together with the economic rights, or lapse upon the death of the author unless he has appointed someone to exercise the *droit moral* after his death, whereas other Member States provide for eternal *droit moral*. In related rights as well, variation in terms of protection occurs: the performing artist does not necessarily enjoy the same term of protection for his performance recorded on a phonogram as the producer does who made the recording.

Split copyright terms only affect co-written music that is at least seventy years old, but given the average life expectancy of authors, more likely over a 100 to 120 years old. Especially in popular music, very few songs are still of economic interest after that time (see the previous chapter on term extension of related rights above). In various studies it is estimated that by the time musical works fall into the public domain, only 3-5 per cent is still commercially viable.⁵⁶⁸ This means that for the purpose of royalty redistribution, the status will have to be determined for a very limited number of works (i.e. those still exploited and having a separate composer and writer).

The size of the problem is modest today –it is notably present in opera– because the large volume of popular songs of the post war period will not start to fall (partly) out of copyright for another few decades. Also, since much music is co-written by authors of the same generation, the actual gap between the respective terms of protection will normally not be very substantial. Even if this gap were to be closed, it is doubtful whether –given the average life cycles of new titles⁵⁶⁹– it will in and of itself cause music publishers to invest more in new authors or in re-exploiting the existing catalogue, as has been claimed it would.⁵⁷⁰ It must also be reminded that a rise in the proportion of music that is co-written does not automatically imply a proportionate growth in the number of split copyrights and therefore administrative burden. Split copyright in terms of the problem addressed here does not arise where the creators have both contributed to music and lyrics (or are registered as such, e.g. Lennon/McCartney published songs under both their names, regardless of who composed them).

With these points in mind, four possible approaches can be distinguished.

4.6.1 *Maintenance of status quo*

There are a number of justifications for not actively addressing the term calculation issue at this time. The fact that Member States use different authorship models to characterise musical works, and thus may end up calculating a longer term of protection, is not of itself an unauthorised limitation of the free trade in goods within the meaning of the EC Treaty (*Patricia; Warner Brothers* cases). As the ECJ has elaborated in *Generalized Tariff Preferences*, a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms, are not sufficient to justify community action (on the basis of internal market competence, article 95 EC Treaty, see para. 1.2.2). The creation of a ‘level playing field’ is not a legitimate basis for community action as such.

More importantly, as has been set out above, in today’s music industry it is particularly in the area of opera that the effects of split copyrights are felt. In this genre the effects are also predominantly local, as there are relatively few staged opera performances that travel among Member States. From that perspective the effects on the free flow of services and goods in the internal market seems very limited.

⁵⁶⁸ Compare Rappaport 1998 and the studies on commercial viability of recorded music in para. 3.4.2.2.

⁵⁶⁹ Generally speaking, investment decisions are not taken on the basis of expected returns in 70-100 years time. See Rappaport 1998.

⁵⁷⁰ Submission by ICMP in the consultations on the Review of copyright (2004), ascertaining the split copyrights have a negative effect on investment decisions.

In popular music –a much larger section of the industry– it will be decades before a substantial part of the catalogue owned by the heirs of authors and music publishers consists of co-written works that are partly in the public domain. Repertoire conceived from the 1950's onward will only start to be affected by split copyright on average from 2050 onwards. And even when it is, the variations in terms of protection will then be felt only for the small share of musical works that are still commercially viable then.

Also, the split copyright problem appears to be primarily an administrative problem of collecting societies and music publishers. Advances in digital rights management systems should allow these problems to be handled, but will of course require some level of investment.

All in all, the impact on the internal market of varying terms of copyright in music seems limited, at least in the short and mid-term. This is not to say action may eventually not be called for, but it would have to be in accordance with the principles of subsidiarity and proportionality (see para. 1.2 and 4.6.3 below).

4.6.2 Contractual arrangements

In the consultations some parties have stressed the inequality that is supposedly caused between the successors in title of the co-authors when the contribution of one of them enters the public domain, while the other is still protected and thus can still draw income. This could be considered as an issue between co-creators, which could be addressed by them at the contractual level. Contractual provisions on the measure of control and share in royalties of co-authors based on the relative value of their contribution are common (such data can also be remitted to collecting societies which then calculate monies due to the individual parties accordingly). This type of arrangement can be extended to curb the effects of split copyright. If composer and lyricist desire to redistribute the risk of an untimely death and the chance of a long life, they can chose to let their successors in title share the royalty income between them (and the music publisher where necessary), even when either composition or lyrics is no longer copyrighted.

Another way for co-authors to rebalance their respective positions would be by agreeing not to have their successors in title exercise their copyright once the term of protection for the shortest living author has ended. The latter option in particular does not seem attractive for the authors, and would only benefit users of the musical work, as the contractual arrangement itself has no effect *erga omnes*.

4.6.3 Harmonisation of substantive law

If the practical impact of diverging terms of protection *is* to be qualified as a hindrance to the internal market which requires harmonisation, the question is what the measure should entail, considering especially the principle of proportionality as elaborated in the Protocol on subsidiarity and proportionality to the Amsterdam Treaty. The renewed commitment to this principle is also evident from the 2005 Strategy for Simplification of the Regulatory Environment (see para. 1.2.2).⁵⁷¹ The principle of proportionality requires inter alia that the EU legislate only to the extent necessary, and that care should be taken to respect the integrity of Member States' legal systems. As shall be elaborated below, it will be difficult to satisfy both criteria

⁵⁷¹ Communication on simplification of the regulatory environment, p. 5-9. See also: Communication on Better lawmaking, COM(2002) 275 final; Communication on the Action plan 'Simplifying and improving the regulatory environment', COM(2002) 278 final; the Communication on Updating and Simplifying the Community acquis [SEC (2003) 165], COM(2003) 71 final; Communication on Impact Assessment, COM(2002) 276 final; European Commission Impact Assessment Guidelines of 15 June 2005, SEC(2005) 971.

simultaneously with the introduction of a harmonised rule for the calculation of the term of protection.

The principal question to be answered when considering harmonisation of the term of protection for co-written musical works, is whether a rule such as has been introduced for film is suitable, and which shape it should have.

As was set out above, from the legislative history of the term calculation rule for film, it can be inferred that the differences between the laws of Member States were more about who qualifies as author,⁵⁷² than about how audiovisual works are to be characterised. The difficulty with determining the term of protection for co-written music however, depends not on who is (co)-author –essentially lyricists/translators and composers/arrangers– but on what type of work music with lyrics is. As was shown above, it can be a collaborative or unitary/single work (joint ownership), an associated work (separate ownership, common exploitation) or be regarded as multiple works (separate ownership).

Given the fact that national copyright laws do not treat musical works differently from other works which involve the contribution of more than one person, the question is why a special rule should be introduced solely for music. The problems that arise with determining the term of protection for co-written musical works also occur with other types of productions, e.g. multimedia, illustrated books, design, software. It can be questioned whether the harmonisation of the definition of a work for purposes of term calculation for one category of copyrighted subject matter is desirable in the light of the development of a consistent and clear European *acquis* for copyright and related rights.

A more consistent solution would be to harmonise the concept of works of authorship for all types of subject matter. In effect this entails defining a common notion of what constitutes a collaborative work, which must then be done in such a way as to include all intentionally co-written musical works. This in turn however raises another problem: variations in Member States laws also extend to other essential characteristics of the concept work of authorship, notably the originality criterion and the status of adaptations (see paragraph 2.2 on the *acquis communautaire* for works of authorship and related rights subject matter). Thus, to only harmonise the concept of joint authorship would not aid consistency of the *acquis*.

Even if harmonisation were limited to such a project, that would appear to run counter to the maxim that the EU shall legislate only to the extent necessary, given the size of the problem discussed here, i.e. varying terms of protection for musical works.

On the other hand, harmonisation limited to co-written musical works appears to run counter to the proportionality principle where it provides that care should be taken to respect the integrity of Member States' legal systems (see para. 2.2). A specific rule would have a negative effect on the internal consistency of copyright laws of those Member States that view music and lyrics as separate works, which therefore attract separate terms of protection. This is particularly so as copyright acts involved do not contain specific provisions for musical works, but these are treated the same as other protected subject matter, for which there is also no concept of collaborative work.

Another important point to consider is the effect a 'film rule' will have on various stakeholders and the public interest in general. Any harmonisation will in effect extend the term of protection for significant markets (e.g. UK, Germany, Nordic countries). Past experience has shown that it is not a realistic option politically to devise a 'downward' harmonised rule which would result in a uniform but shorter term of protection, i.e. based on the first author to die (see also para. 1.1-1.2). It is more likely that any harmonisation will result in a *de facto* extension of the term of protection. From the perspective of the internal market, intellectual property rights –

⁵⁷² Another question is how effective exploitation of a film can be guaranteed considering the large number of co-creators/authors involved. For the purposes of the term of protection as such this is not relevant however.

and by implication the extension of the term of protection— are in essence seen as limits to the free flow of goods and services, as is evident from article 36 EC Treaty (see para. 1.2).

Like the film rule approach a uniform rule (whether based on last or first of the composer or lyricist to die) would address the most important concern of music publishers and collecting societies, i.e. it would free them of the cost of administering split copyrights. It is difficult to ascertain what part of administration costs right holders could thus save. It may be a very modest sum considering that collecting societies as well as music publishers already need detailed information systems to properly administrate the multitude of right holders involved in musical works (composers, writers, translators, arrangers, publishers, sub-publishers and any estates, other owners or licensees).

On the more practical level, we have argued above that a uniform term of protection for co-written music will in all likelihood only have a minor effect on revenues from collective licensing for public performances, which is the principal source of income for right holders in (popular) music. These revenues will under a uniform term based on the life of the last contributor plus 70 years, be shared by a larger number of interested parties, resulting in a transfer of income from e.g. contemporary composers and lyricists to the estates (or other successors in title) of long deceased authors.

If harmonisation along the lines of the rule for audiovisual works takes place, provision would have to be made to distinguish musical works in which pre-existing lyrics or music are used from ‘true’ co-written works. Otherwise, the use of for instance a poem in the public domain could lead to a revival of the copyright in it when it is set to music (possibly also making the successors in title of the poet co-owners of the copyright in the newly created work). As a result, even if for intentionally co-written works a harmonised term of protection were introduced, one would still have to determine per musical work what its status is (e.g. true co-written or derivative) and how long its term of protection runs. Split copyright would still occur – although much less frequently– which means music publishers and collecting societies would still have to deal with them as they do today.

4.6.4 *Private international law rule*

The *lex protectionis* –or law of the country for which protection is claimed– is widely accepted as the conflict rule for copyright.⁵⁷³ The law of the *Schutzland* is generally held to govern the various aspects of existence, scope, duration, ownership, transferability, etc. As has been pointed out above, for our purposes, the implications are that the qualification of co-written music as a work (joint, collaborative, multiple), as well as the issue of authorship (and initial ownership) and consequently the term of protection for each contributor varies throughout the EU.

An alternative rule to the *lex protectionis* could have the benefit of a single law governing the term of protection of each individual co-written musical work, meaning it would no longer fall partly in the public domain in one Member State while being protected in full in the next Member State. As has been indicated above, for the issue of initial ownership, the *lex originis* (the law of the country of origin) is used as an alternative to the *lex protectionis*. Because the matter of term calculation in individual cases is closely related to how a work is characterised and more precisely who its joint or co-authors are, it is worth exploring whether the introduction of a conflict rule that designates the law of the country of origin of a work/author would truly solve the term problem encountered with split copyrights.

⁵⁷³ For infringement of intellectual property, the *lex protectionis* features in the Proposed Rome II.

An important aspect to be addressed is how to determine the country of origin. The criteria used in the Berne Convention (BC)⁵⁷⁴ are not really suitable. In the BC the place of first publication is the primary criterion used, but this place is notoriously difficult to determine in the digital environment. Also, because not all music is published, an alternative connecting factor would be required, the most likely candidate being the habitual residence of the author. However, the problem with author-oriented criteria is that they are ill-suited connecting factors where more than one author is involved, as these can have different habitual residences. Of course by their very nature co-written musical works have more than one author.

An alternative connecting factor could be the place of creation of a musical work, but then again, this may have little added value compared to the habitual residence – as the latter is the place where one would normally expect the creator(s) to work. Also, if the music is composed not in the country of residence of the creator but elsewhere, the question is what the quality of the connection between author and place of creation is (i.e. song writer on the road). In private international law the choice of connecting factors typically expresses a close connection between subject matter (e.g. determination of term of protection for an author) and designated law.

Even if a suitable connecting factor is determined, it is unlikely that the introduction of the *lex originis* would serve the interests of stakeholders. For one, because the *lex originis* can refer to a copyright law that treats music as separate works, split copyrights will still have to be contended with. Also, under the *lex originis*, music publishers and collecting societies have to deal with varying terms across their catalogue (some titles maybe subject to German law, others to Spanish law, etc.).

A more general drawback of this policy option is that interjecting a choice of law rule in a framework that is built on substantive law could be detrimental to the clarity and consistency of the *acquis*. Also, the introduction of a choice of law rule specifically for co-written musical works attracts the same problems as regards proportionality as the introduction of a rule of substantive law would.

Conclusion

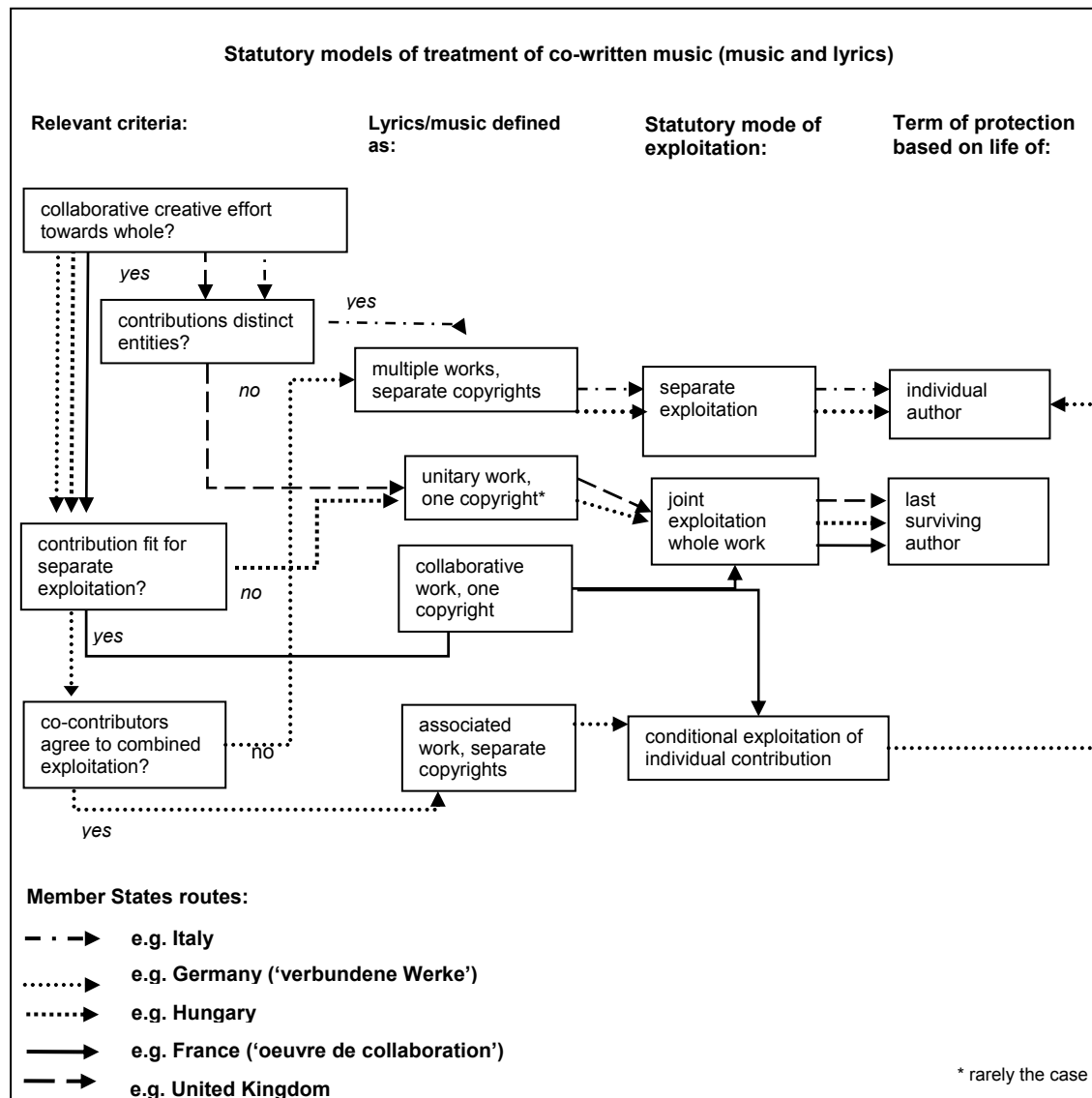
At first glance the variations in the term of protection for co-written musical works seem to stem from a simple dichotomy: music and lyrics are either considered to be one work, or two. Closer scrutiny of the position of co-written works in the copyright laws of individual Member States reveals a more nuanced legal framework, as is visualised in the graph on the next page.

The existence of diverging terms of protection for co-written musical works, in practice primarily complicates the administration of music publishers (and the estates they represent) and collecting societies. It is not perceived as a problem by professional users who are their clients.

Of the four policy options presented, fostering certain contractual arrangements or introducing a conflict of law rule seem the least attractive. On the whole, the introduction of a special conflict rule does not appear to have added value. The introduction of the *lex originis* (i.e. whereby one single national law would govern the term of protection for a work throughout the EU) would not end the occurrence of split copyrights, so the music publishers' concerns would not be addressed. Contractual arrangements between co-authors (and music publishers where necessary), i.e. self-regulation, would not make the administration of split copyrights less complicated for music publishers and collecting societies' alike.

⁵⁷⁴ Art. 4 BC, Paris Act. The concept of 'country of origin' within the framework of the BC is not conceived of as a conflict rule (designating the applicable law), but as a criterion used to determine whether a work or author is eligible for protection in (Berne) Union countries.

Figure 3: Statutory models of treatment of co-written music (music and lyrics)



The choice would thus appear to be between no (immediate) action and harmonisation of substantive law. Given the probably limited economic significance of the problem in the short and midterm, and the limited effect on the internal market, it would appear that immediate action is not called for.

If harmonisation is considered, it seems advisable to conduct further investigation into the feasibility of a general rule for term calculation for all situations in which contributions of various authors are combined into one product (e.g. music video, databases, comics, software games). In effect, what would have to be determined is whether there is reason to harmonise the definition of authorship. Horizontal harmonisation could have the advantage of contributing to a clear and consistent acquis. On the other hand, the divergence in Member States' laws on the subject of authorship may not necessarily cause real problems in practice (see also para. 2.2); the Commission has concluded as much where it concerns film.

The most important question to be answered is if, and in what form, harmonisation would meet the requirements of subsidiarity and proportionality. It may prove to be a challenge to meet two important demands that turn out to be contradictory: harmonisation limited strictly to co-written musical works appears to run counter to the proportionality principle where it provides that care should be taken to respect the integrity of Member States' legal systems. Member States who currently regard lyrics and music as separate works, do so because it follows from the general distinction made in their systems between joint works and separate works, based on the criterion of the (economic) divisibility of the contributions. A harmonised rule whereby the term of protection for co-written music is calculated on the basis of the last surviving contributor, would in effect introduce a term calculation rule devised to deal with collaborative works in national legal systems that do not recognise the concept of collaborative works.

On the other hand, harmonisation of the concept of joint and co-authorship for all types of subject matter, while contributing to the consistency and clarity of the copyright acquis, would appear to run counter to the maxim that the EU shall legislate only to the extent necessary. Another point to consider are the accrued costs involved in a (isolated) regulatory initiative to harmonise rules on co-written (musical) works, i.e. the administrative costs involved for the European institutions and national legislators, as well of course any social and economic costs for society at large, which results from the de facto extension of the term of protection a last surviving author rule would bring.

5 Rights clearance issues relevant to the reutilisation of existing works: multiple ownership and orphan works

5.1 Introduction

‘New technologies breathe new value into old content.’⁵⁷⁵ In today’s digital revolution, authors, producers, publishers, broadcasters and information services are discovering, as they did in ‘analogue’ times, that existing ‘content’ can be put to new, sometimes profitable secondary or derivative uses.⁵⁷⁶ Because of new technologies, existing works of authorship can easily be digitised and reused for all kinds of purposes. Classic films may be reissued on DVD; hits from long forgotten artists may be re-released on compilation CDs; archived television news items may serve as input to multimedia encyclopaedias; old photos may be incorporated into digital collages; film clips may become part of computer games or educational software; newspaper articles may be republished on internet websites; etc. In the online environment, where access to information can be provided against minimal distribution costs, providers of newly evolving services and business models are increasingly tapping the enormous potential of pre-existing content. Examples include the BBC Creative Archive that offers to the UK public full online access to old BBC television and radio programmes;⁵⁷⁷ and the proposal by several Member State leaders to establish a ‘European digital library’, to ensure that a full catalogue of European cultural and scientific literature is made available online.⁵⁷⁸

In general, different acts restricted by copyright or related rights are concerned when reutilizing existing content. Digitisation implies the making of a copy, which normally requires the consent of the right owners concerned, except when the subject matter is in the public domain or the act of reproduction is covered by an exception or limitation. An example of the latter is article 5(2)(c) of the Information Society Directive, which provides for an exception in favour of archives or publicly accessible libraries, educational institutions or museums, to make specific acts of reproduction for non-commercial purposes. This allows Member States to introduce a statutory limitation to allow these institutions to make reproductions for purposes of preservation or restoration of works available in their collections. In most Member States a provision of this kind has already been implemented.⁵⁷⁹ Hence, where it concerns mere preservation of culturally important materials stored in national libraries, museums or archives, rights clearance issues usually will not occur. Therefore, issues specifically relating to preservation will remain outside the scope of this chapter.

⁵⁷⁵ E. Atwood Gailey, ‘Who owns digital rights? Examining the scope of copyright protection for electronically distributed works’, [1996] *Communications and the Law*, vol. 18, no. 1, p. 3-28, p. 27 [Atwood Gailey 1996].

⁵⁷⁶ P.B. Hugenholtz and A.M.E. de Kroon, ‘The Electronic Rights War. Who owns the rights to new digital uses of existing works of authorship?’, [2000] *IRIS*, vol. 4, p. 16-20, p. 16 [Hugenholtz/De Kroon 2000].

⁵⁷⁷ BBC Creative Archive, <<http://creativearchive.bbc.co.uk/>>.

⁵⁷⁸ See: eGovernment News, ‘EU: European digital library proposed’, 4 May 2005, <<http://ec.europa.eu/idabc/en/document/4239/350>>.

⁵⁷⁹ See e.g. art. 42(7) Austrian Copyright Act; art. 22(1) 8° Belgium Copyright Act; art. 37(1) Czech Copyright Act; art. 16 and 33 Danish Copyright Act; art. 16n Dutch Copyright Act; art. L 122-5 8° French Copyright Act; arts. 53(2) 2° and 58(2) German Copyright Act; art. 37(1) Spanish Copyright Act; art. 42 UK Copyright Act.

In any case, permission is required if the digitised material is to be subsequently distributed, communicated or otherwise made available to the public, unless the material is in the public domain or the communication is covered by an exception or limitation. These permissions impose transaction costs, such as the costs of establishing the copyright status of the work, the costs of identifying, locating and contacting the right owner, and the costs of negotiating with the right owner to obtain a licence to reproduce or otherwise use the work. In some cases, these costs can be so high that they discourage prospective users to actually reutilise the work.⁵⁸⁰

In case the rights are owned by a plurality of right owners this incurs the risk that one of the right owners, by refusing permission, obstructs the prospective use of the entire work. Also it may prove to be difficult or even impossible to identify or locate the owners of rights in pre-existing works, making it impossible to legally reutilise the work.⁵⁸¹ This so-called ‘orphan works’ problem applies in principle to all types of works, but is especially problematic when it comes to works of multiple ownership.

In this chapter, the rights clearance issues associated with works of multiple ownership and orphan works are examined. To this end, the following section defines the problem and describes the underlying drivers (para. 5.2). Next, existing regulatory and practical solutions addressing certain aspects of the multiple ownership problem are examined (para. 5.3). Subsequently, a similar investigation is conducted with respect to the problems surrounding orphan works (para. 5.4). In the final section, the different models are evaluated and concrete policy recommendations are made (para. 5.5).

5.2 Definition of the problem

5.2.1 *Works of multiple ownership*

A single definition of what constitutes a work of multiple ownership⁵⁸² is difficult to provide. Multiple copyright ownership may arise from very different circumstances, and is therefore difficult to categorise. Multiple ownership will, in the first place, occur where a work has been created by a plurality of authors and the law has conferred a copyright in the work that is owned by the authors jointly. In the majority of Member States, this initial form of multiple ownership is regulated under either the concept of ‘joint works’ or that of ‘collaborative works’ (see also para. 4.3). A ‘joint work’ is a work that has been created in a collaboration between two or more authors and the parts created by each author are inseparable from the parts created by the others (e.g. Ireland, the UK and the Netherlands)⁵⁸³ or cannot be exploited separately (e.g. Hungary, Czech Republic and Germany).⁵⁸⁴ A ‘collaborative work’ is a work that is the unitary result of the creative collaboration of two or more authors (e.g. France, Portugal and Spain).⁵⁸⁵

⁵⁸⁰ Bard/Kurlantzick 1999, p. 58.

⁵⁸¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, ‘i2010: Digital Libraries’, COM (2005) 465 final, Brussels, 30.09.2005, p. 6-7 [Communication on Digital Libraries].

⁵⁸² Note that the multiple ownership issue is not limited to copyright protected works, but may also concern subject matter protected by related rights, such as performances and phonograms. For reasons of ease of terminology, the term ‘works of multiple ownership’, as used in this chapter, will be deemed to include subject matter protected by related rights.

⁵⁸³ Art. 22(1) Irish Copyright Act; art. 10(1) UK Copyright Act. In the Netherlands, there is no statutory definition of ‘joint works’, but the concept has been defined in jurisprudence: *La belle et la bête*, Hoge Raad, HR (Supreme Court), 25 March 1949, NJ 1950, 643.

⁵⁸⁴ Art. 5(1) Hungarian Copyright Act; art. 8(1) Czech Copyright Act; art. 8(1) German Copyright Act.

⁵⁸⁵ Art. L 113-2 French Copyright Act; art. 16(1)(a) Portuguese Copyright Act; art. 7(1) Spanish Copyright Act.

Apart from this initial form of multiple ownership, there are many other circumstances that may result in multiple ownership. An example would be a pre-existing work that is adapted, translated or transformed by a third person. The laws of most Member States determine that the copyright in such a work belongs to the adaptor, translator and transformer of the derivative work, without prejudice to the copyright of the author or copyright owners of the original work.⁵⁸⁶

A third category of works of multiple ownership are works the copyright of which has been passed by succession upon two or more heirs, or has been assigned to more than one person at the same time. Among the many intrinsic causes of multiple ownership in a work the (partial) transfer or inheritance of copyright is certainly an important one.

Because the copyright in a work of multiple ownership is owned by the right holders jointly, the consent of all of them is required to obtain a licence to use the work.⁵⁸⁷ Accordingly, if a single right holder withholds his consent, the use of the entire work will be obstructed. Moreover, since the copyright in a work of multiple ownership may be enforced by any of the right holders involved, each of the right holders is separately entitled to institute proceedings for an infringement of the copyright in the work.⁵⁸⁸ Each right holder thus has the power to prevent a potential user to actually use the work or, in case of an illegitimate use, to prohibit any further exploitation of the work. That may well impede the reutilisation of the entire work. This is sometimes referred to as the ‘tragedy of the anti-commons’,⁵⁸⁹ which forewarns that where multiple owners hold effective rights to authorise or prohibit the exploitation of a work, and each proposed user must secure permission from all rights owners, the work may not be used at all, despite its potential value.⁵⁹⁰

Multimedia works are the prime example of works of multiple ownership. They often combine and integrate completely different types of works and other protected subject matter into a single embodiment. Examples include entertainment products such as videogames, combining texts, graphics, images, sounds, animations and films into a single software application, and educational products such as electronic encyclopaedia, which combine texts, graphics, illustrations, photos and images, as well as music, animations and films into an electronic database running on a specifically designed computer program.⁵⁹¹ As a result, there will be numerous, in some cases even hundreds or thousands of creators involved in the creation of a particular multimedia work, which would typically give rise to the problems of multiple ownership that are examined in this chapter.

5.2.2 Orphan works

A second type of rights clearance issue that might arise in connection with the reutilisation of pre-existing content is the ‘orphan works’ problem. An ‘orphan work’ can be defined as a

⁵⁸⁶ See e.g. art. L 112-3 French Copyright Act; art. 10(2) Dutch Copyright Act; art. 23 German Copyright Act.

⁵⁸⁷ See e.g. art. 3(3) Irish Copyright Act and art. 173(2) UK Copyright Act, where this is explicitly provided for. See also F.J. Cabrera Blazquez, ‘In search of lost rightsholders: Clearing video-on-demand rights for European audiovisual works’, IRIS Plus 2002, vol. 8, p. 1-8, p. 2 [Cabrera Blazquez 2002].

⁵⁸⁸ See e.g. art. 11(2) Austrian Copyright Act; art. 26 Dutch Copyright Act and art. 8(2) German Copyright Act.

⁵⁸⁹ M.A. Heller, ‘The Tragedy of the Anticommons: Property in the Transition from Marx to Markets’, [1998] Harvard Law Review, vol. 111, p. 621-688 at p. 668 [Heller 1998]; J.M. Buchanan and Y.J. Yoon, ‘Symmetric tragedies: commons and anticommons’, [2000] Journal of Law and Economics, vol. 43, p. 1-13, p. 1 [Buchanan/Yoon 2000].

⁵⁹⁰ Buchanan/Yoon 2000, p. 4; A. Katz, ‘The potential demise of another natural monopoly: rethinking the collective administration of performing rights’, [2005] Journal of Competition Law & Economics, vol. 1, p. 541-593, p. 559-560 [Katz 2005].

⁵⁹¹ T. Tohyama, ‘Interactive digital entertainment and education products (multimedia)’, in: *WIPO guide on the licensing of copyright and related rights*, WIPO publication No. 897(E), Geneva: WIPO 2004, p. 71-88, p. 71 [Tohyama 2004].

copyright protected work⁵⁹² the copyright owner of which cannot be identified or located by someone who wants to make use of the work in a manner that requires the consent of the copyright owner.⁵⁹³ Where the copyright owner cannot be found, even after a reasonable search, the prospective user has no choice but to either reutilise the work and bear the risk of an infringement claim or to abandon his intention to use the work. In the latter case a potentially productive use of the work will be forestalled. That is clearly not in the public interest, in particular where the copyright owner if located would not have objected to the use of his work.⁵⁹⁴

In theory, every type of work can become ‘orphaned’. There might be orphaned manuscripts, orphaned books, orphaned photos, orphaned illustrations, orphaned songs, etc. A common cause of a work becoming orphaned is that the rights management information (metadata) indicating the author and current right owner(s) is unavailable or outdated due to a change of ownership (see para. 5.4.1). Untitled photos, antique postcards, old magazine advertisements and out-of-print novels are all examples of works that risk becoming orphaned.⁵⁹⁵

The orphan works problem will be exacerbated in case of works of multiple ownership. The need to obtain permission from each and every right owner in a work of multiple ownership implies that to successfully clear the rights in the work, a prospective user is required to identify and locate in advance all the different right owners concerned. Since there may be numerous right owners involved in a work of multiple ownership, this may well prove to be a difficult task.⁵⁹⁶ In practice, therefore, the likelihood that a work of multiple ownership may end up being partly ‘orphaned’, will be much higher than in case of a work that is owned by a single right holder.

Since paragraph 5.3 of this chapter already deals with the general clearance problems relevant to works of multiple ownership, the specific solutions to the orphan works issue will be examined largely abstract from the general problems of dealing with works of multiple ownership, in paragraph 5.4.

5.2.3 *The underlying drivers of the problems at issue*

At the outset it must be emphasised that neither the clearance problems associated with works of multiple ownership, nor the orphan works issue are truly ‘new’ problems. The history of the media provides many illustrations of pre-existing content being put to new secondary uses. The breakthrough of television broadcasting in the 1950’s and 1960’s, for instance, created huge secondary markets for existing cinematographic works. In addition, the proliferation of video recorders in the 1980’s gave new life to popular television programs, and further increased the commercial life span of movies, new and old.⁵⁹⁷ For all these secondary uses the rights had to be cleared, and users in those days were already facing the problems caused by the fact that they had to secure permission from a plurality of right owners, and that not all right owners concerned could easily be identified and located.⁵⁹⁸

⁵⁹² Note that the orphan work problem is not limited to copyright protected works, but may also apply to subject matter protected by related rights, such as phonograms. For reasons of ease of terminology, the term ‘orphan works’, as used in this chapter, will be deemed to include subject matter protected by related rights.

⁵⁹³ US Copyright Office, ‘Report on Orphan Works’, January 2006, <<http://www.copyright.gov/orphan/orphan-report-full.pdf>>, p. 15, [US Copyright Office Orphan Works Report 2006].

⁵⁹⁴ *Ibid.*, p. 15.

⁵⁹⁵ *Ibid.*, p. 9.

⁵⁹⁶ Commission Staff Working Document, Annex to the Communication from the Commission ‘i2010: Digital Libraries’, SEC (2005) 1194, Brussels, 30.09.2005, p. 12 [Staff Working Document on Digital Libraries].

⁵⁹⁷ Hugenholtz/De Kroon 2000, p. 16.

⁵⁹⁸ See, in this respect, also p. 71-72 of the Green Paper on Copyright and Related Rights in the Information Society, in which the Commission reacts on the rights clearance issues that arise where multimedia works are concerned.

There is, however, unmistakably a renewed interest in both issues, for a variety of reasons. The orphan works issue has become a particularly ‘hot topic’, both at the national and the international level. In the United States the Copyright Office has recently completed an official inquiry into the orphan works issue, the findings of which were published in a comprehensive report in January 2006.⁵⁹⁹ But the debate has also started within the European Union, where the question of orphan works, together with other rights clearance issues regarding multiple ownership, was addressed in the 2001 Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works,⁶⁰⁰ and more recently, in the context of the ‘i2010: Digital Libraries’ framework.⁶⁰¹ The latter has resulted in the adoption of a Recommendation on digitisation, online accessibility of cultural material and digital preservation in August 2006.⁶⁰² In this Recommendation the European Commission calls upon the Member States to create mechanisms to facilitate the use of orphan works and to promote the availability of lists of known orphan works and works in the public domain in order to improve the conditions for digitisation of, and online accessibility to, culturally important materials.⁶⁰³

5.2.3.1 *The external drivers of the multiple ownership and orphan works problems*

The renewed urgency of the problems at issue is first and foremost caused by the advent of new media and digital technologies that has fostered a rapidly growing market for secondary uses of existing works and subject matter. Digital networked technology offers the capability to reuse existing works at a large scale and at relatively small cost. Content that could not be economically re-exploited over analogue distribution channels can now be disseminated over digital distribution channels at modest cost. This allows even for productions with low individual sales to be reintroduced onto the market. This is the so-called ‘long tail effect’ of digital distribution (see also para. 3.4.2.3).⁶⁰⁴

The widespread digital dissemination of pre-existing works and other protected subject matter also inspires the creation of new works that are based largely or entirely on pre-existing works.⁶⁰⁵ Moreover, digital technology has allowed content to be created more easily in collaboration between potentially unlimited numbers of authors. Finally, in the online environment, the provision of content has become predominantly international in scope. Copyrighted material from all over the world can easily be accessed across Europe. Hence, where a user wishes to reuse such material, this may pose considerable obstacles where a copyright owner must be traced in a foreign territory or where rights need to be cleared in a work of multiple ownership,

⁵⁹⁹ US Copyright Office Orphan Works Report 2006.

⁶⁰⁰ Commission Staff Working Paper on certain legal aspects relating to cinematographic and other audiovisual works, SEC (2001) 619, Brussels, 11.04.2001 [Staff Working Paper on cinematographic and other audiovisual works]. The Staff Working Paper was followed by a public consultation, the outcomes of which were published in the Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works, COM (2001) 534 final, Brussels, 26.09.2001 [Communication on certain legal aspects relating to cinematographic and other audiovisual works].

⁶⁰¹ Commission Staff Working Document, Annex to the Communication from the Commission ‘i2010: Digital Libraries’, Questions for online consultation, SEC (2005) 1195, Brussels, 30.09.2005 [Questions for online consultation on Digital Libraries]. The different replies to this consultation can be found online at: <http://ec.europa.eu/information_society/activities/digital_libraries/cultural/actions_on/consultations/online_consultation/index_en.htm>, which also contains a link to: Results online consultation ‘i2010: Digital Libraries’.

⁶⁰² Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation, OJ L 236/28, 31.08.2006 [Recommendation on digitisation, online accessibility and digital preservation].

⁶⁰³ See art. 6 under a and c of the Recommendation on digitisation, online accessibility and digital preservation.

⁶⁰⁴ Anderson 2004.

⁶⁰⁵ O. Huang, ‘U.S. Copyright Office orphan works inquiry: Finding homes for the orphans’, [2006] Berkeley Technology Law Journal, vol. 21, no. 1, p. 265-288, p. 274 [Huang 2006].

the rights owners of which are nationals of, or living in, different countries. As a result, the number of instances where the clearance of copyright and related rights has become a problem has multiplied exponentially.

Concomitantly, at the political level there appears to be consensus that in order ‘to become the most competitive and dynamic knowledge based economy in the world’,⁶⁰⁶ European society should benefit fully from the opportunities the information society presents. In this respect, digitisation has been recognised as instrumental ‘if Europe is to exploit its rich cultural and scientific resources in today’s digital world and for keeping the past and the present alive for the future.’⁶⁰⁷ Digitisation of existing content may have a considerable impact on European economy, both directly, by allowing content to be reused for added value services and products, and indirectly, where the digital content is used for research, education, or other socially valuable activities which may positively affect the economy in the mid to long term.⁶⁰⁸

In addition, it has been acknowledged that digitisation of national cultural assets may very well contribute to the promotion of cultural diversity and the use of multilingual content in the online environment,⁶⁰⁹ both of which are among the founding principles of the European model.⁶¹⁰ The result of this political desire to enhance the access to and use of information is that the number of occasions where rights need to be secured has grown exponentially. This is one of the reasons that the already existing problems relevant to works of multiple ownership and orphan works have become more acute.

5.2.3.2 *The internal drivers of the multiple ownership and orphan works problems*

The other class of factors that determine the increased interest in issues of multiple ownership and orphan works are ingrained in the system of copyright and related rights itself. These factors are characterised by (1) the expansion of the traditional domain of copyright and related rights, (2) the ‘snowball-effect’ inherent to the creation of derivative works, (3) the transferability of copyright and related rights, and (4) the territorial nature of copyright and related rights protection.

In the first place, the problem of clearing rights in works of multiple ownership has been aggravated due to the *expansion of the traditional domain of copyright* and related rights in recent decennia. New categories of rights, introduced initially at the national level and later confirmed in the copyright ‘acquis’, have added new layers of protection to existing cultural productions, and have brought new categories of right holders into the realm of copyright and related rights. These include software producers, performers, producers of phonograms, broadcasters, film producers, and database producers. As a result, a single object now may be protected by various layers of overlapping copyrights and related rights, each of which will be held by a different right owner. This cumulation of rights has exacerbated the problems of rights clearance for re-users of pre-existing content.

⁶⁰⁶ Strategic goal for 2010 set for Europe at the Lisbon European Council. See: Presidency conclusions, 23 and 24 March 2000, <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm>.

⁶⁰⁷ Information Society Technologies, Directorate E-Content, DigiCULT: e-Europe digitization, <<http://cordis.europa.eu/ist/digicult/eeurope.htm>>.

⁶⁰⁸ Staff Working Document on Digital Libraries, p. 4-5.

⁶⁰⁹ Against this background, the call for the creation of a ‘European digital library’ can be explained. This proposal is considered to be a reaction to the Google Print Library Project, which has raised concerns regarding the increasing dominance of English language on the internet. eGovernment News, ‘EU: European digital library proposed’, 4 May 2005, <<http://ec.europa.eu/idabc/en/document/4239/350>>.

⁶¹⁰ See e.g. art. 151 EC Treaty and art. 22 Charter of Fundamental Rights of the European Union.

Furthermore, because the copyright term has been extended by an additional 20 years,⁶¹¹ the practical difficulties of locating right owners have increased considerably. This is due to several intrinsic factors. With the passage of time, ownership data may become outdated or even lost, for instance, because the copyright was assigned to an untraceable party, or because a corporate body owning the copyright has gone out of business. Term extension has also led to an exponential growth of the number of right holders in the later years of the term of protection, thereby resulting in an increased fragmentation of rights. This is particularly true in case of hereditary succession of rights upon the death of the author. As a consequence, users may find it even more difficult to identify and locate the right owners and to obtain their permission.⁶¹²

In the second place, it is inherent to the system of copyright that adaptations or transformations of a work in a modified form or in any other form in which a work is recast, transformed, or adapted are protected as separate works, without prejudice to the copyright in the original work.⁶¹³ According to the laws of certain countries, when an audiovisual work is adapted from a pre-existing work protected by copyright, the authors of the original work shall be assimilated to the authors of the new work.⁶¹⁴ In any event, with the creation of each new work based upon a pre-existing work, a new copyright is added to the already existing copyrights in the works used. This has the effect of an ever increasing *snowball* rolling from a hill. Following each adaptation, the total number of right owners in the derivative work is increased.

A third factor that complicates the clearance of rights in works of multiple ownership, is the *divisibility and transferability* of copyright and related rights. Each right in a component part of a work of multiple ownership can be separately assigned or exclusively licensed to a third party, either in whole or in part.⁶¹⁵ Such a transfer need not imply a total grant of rights, but may well be limited to a specific use or even a specified period of time. An additional complicating factor in this context is that some Member States provide for statutory limitations to the transferability or waiver of rights. In Austria and Germany, for example, copyrights are not assignable (except by testamentary disposition), which means that rights can only be transferred by means of an exclusive or non-exclusive licence.⁶¹⁶ In many other countries, the assignment or exclusive licence of copyrights is subjected to an array of statutory rules that are aimed at protecting authors against overbroad transfers. In such countries contractually assigning these rights in full will be difficult or even impossible. For instance, under the legislation of several countries, it is expressly prohibited to transfer rights relating to forms of exploitation that are not known or foreseeable at the time the copyright contract was concluded.⁶¹⁷

Consequently, on each occasion the legislator introduces a new layer of rights, the new rights accrue to the original right holder in the work, even where the existing rights belong to a third party because of a transfer of rights. Both the transferability of rights and the limitations set thereto in the laws of the Member States may thus constitute occasions for a separation of rights in a work among multiple right holders. This undeniably further complicates the problems of rights clearance in works of multiple ownership.

⁶¹¹ The 1993 Term Directive provided for 'upwards harmonisation' for almost all Member States, by setting the copyright term at 70 years *post mortem auctoris*.

⁶¹² Bard/Kurlantzick 1999, p. 59.

⁶¹³ See e.g. art. L 112-3 French Copyright Act; art. 10(2) Dutch Copyright Act; art. 23 German Copyright Act.

⁶¹⁴ See e.g. art. 14 Belgian Copyright Act and art. L 113-7 French Copyright Act. The legislation of the Nordic countries does not consider the authors of pre-existing works as co-authors of the film, but leaves this matter to contractual determination. See Salokannel 1997, p. 142.

⁶¹⁵ See, for the differences between assignments and licences, Guibault/Hugenholtz 2002, p. 28-29.

⁶¹⁶ See art. 23(3) Austrian Copyright Act and art. 29 German Copyright Act. In Austria, a similar rule applies to performers' rights, see arts. 67(2) and 74(2) Austrian Copyright Act.

⁶¹⁷ See e.g. art. 3(1) Belgian Copyright Act; art. 31(4) German Copyright Act; art. 13(5) Greek Copyright Act; art. 119 Italian Copyright Act; art. 43(5) Spanish Copyright Act.

Moreover, once the rights are assigned or exclusively licensed to another party, the initial right owner may no longer perform the acts covered by the rights transferred. This means that if someone wants to reutilise a work, the rights of which have been subject to an assignment or have been exclusively licensed, permission needs to be obtained from the assignee (i.e. the ‘new’ right owner) or a sublicense needs to be negotiated with the licensee, respectively. Over the years, however, rights may have been repeatedly transferred or assigned. It may even have occurred that the right owner has passed away, thus leaving his rights to his heirs. A prospective user is thus required to trace the chain of title of existing rights, in order to find out who currently owns the rights in a work that he intends to reutilise.⁶¹⁸ That may well prove to be a difficult task.

A final intrinsic factor adding complexity to the problems of clearing rights in works of multiple ownership, lies in the territorial nature of copyright and related rights protection. As was concluded in paragraph 2.1, although the seven directives approximating the laws of the Member States have removed many disparities between national laws, they have not done away with the territorial scope of copyright and related rights protection. Hence, where someone wants to reuse (derivative) works or other protected subject matter, whose right owners are nationals of different states or the underlying works of which originate from different countries, the rights may need to be secured for many different territories from a host of different right holders.

As a result, as long as the effect of copyright and related rights laws remains territorial in scope, it may prove to be very difficult to clear the rights in a single work, especially when taking into account that legislation regarding protected subject matter or copyright ownership may differ between the various Member States. This can be seen, for instance, in the existence of non-harmonised related rights in some Member States (e.g. the protection of typesetting⁶¹⁹ and of simple photographs⁶²⁰), and in the different rules of initial ownership,⁶²¹ the (re)allocation and transfer of rights. Furthermore, disparities between national rules on the law applicable to issues of authorship and ownership may further complicate rights clearance.

5.2.4 Practical importance of the problems at issue

Although digitisation and reutilisation of pre-existing content seem to provide ample opportunities to be explored to the benefit of the European society at large, the practical importance, in economic and social terms, of the problems discussed here, has yet to be assessed. With respect to the issue of multiple ownership, we shall see in the next paragraph that in the Member States there already exist a broad range of regulatory and practical arrangements that attend to many of the difficulties caused by the fact that copyright and related rights are owned by a plurality of right owners (para. 5.3). Therefore, the rights clearance issues in works of multiple ownership need not be exaggerated. Furthermore, even though there always will remain situations where cases of multiple ownership are not covered by any of the existing regulatory or practical arrangements, it needs to be borne in mind that clearing rights is inherent to the use or reuse of works or subject matter protected by copyright or related rights. It is completely normal and inevitable that transaction costs are involved in the process of clearing the rights in works and other protected subject matter, and that these costs will increase in proportion to the number

⁶¹⁸ See I.F. Koeningsberg, ‘An overview of the general business and legal principles involved in the licensing of copyrights and related rights’, in: *WIPO guide on the licensing of copyright and related rights*, WIPO publication No. 897(E), Geneva: WIPO 2004, p. 4-16, p. 5 [Koeningsberg 2004].

⁶¹⁹ See e.g. art. 51 Greek Copyright Act, where typesetting is protected as a related right on behalf of the publisher.

⁶²⁰ See e.g. arts. 87-92 Italian Copyright Act.

⁶²¹ In this respect, an illustrative example is provided for in chapter 4 of this study, where the problems relevant to the calculation of terms in musical works are described. These problems also rise due to diverging definitions of ownership in the various Member States.

of right holders involved.⁶²² Hence, the fact that a large number of right owners need to be traced and subsequently asked for a licence, does not by itself appear to be a valid justification for regulatory or legislative intervention.

As regards the problem of orphan works, the question as to the economic and social importance thereof has been addressed, *inter alia*, in the '2010: Digital Libraries' consultation.⁶²³ However, this consultation has not produced any firm quantitative data. The online consultation only revealed that the issue is perceived by several stakeholders, particularly by audiovisual and cultural institutions (mostly public broadcasters, libraries and archives), as a real and legitimate problem.⁶²⁴ No hard evidence was provided, however, on the degree to which orphan works present a problem for the actual use of these works or on the frequency with which orphan works impede creative efforts.⁶²⁵

In this respect, it must be emphasised that the question of finding a right holder is first and foremost a matter of conducting a thorough search. Although tracing right holders may sometimes be a laborious and costly task, a potential user is nevertheless obliged to spend sufficient hours and resources in seeking a licence. Legal solutions to the orphan works problem, therefore, should not be informed by the desires of certain stakeholders for whom a reasonable investment in rights clearance is not a priority. Besides, prospective users facing clearance problems may revert to alternative uses, e.g. by using another work which is already in the public domain, or a substitute work for a license can indeed be obtained.⁶²⁶ In addition, if not all the right owners of a particular work can be located and asked for permission after a reasonably conducted search, it is conceivable that users nonetheless decide to use the work, thereby taking the risk of an infringement claim.

Unlike the United States, where users face the risk of becoming liable for payment of massive damages,⁶²⁷ the situation in Europe is much less pressing. As a general rule, damages in Europe are based on the actual losses incurred by the infringement. The damages recoverable are compensatory and not punitive by nature.⁶²⁸ Therefore, if a user is eventually held liable for copyright infringement, he is generally obliged to pay no more than the actual damages suffered by the right owner, which is usually equal to the amount the user would have had to pay in case he had obtained a licence. In Europe, therefore, users of pre-existing content do not have the

⁶²² See Koeningsberg 2004, p. 5, describing the due diligence process in the clearance of rights.

⁶²³ Questions for online consultation on Digital Libraries, question no. 4. These questions have also been asked during the consultations held prior to the adoption of the US Copyright Office Orphan Works Report 2006.

⁶²⁴ See the Results online consultation '2010: Digital Libraries', p. 5, where it is indicated that several cultural institutions (libraries, archives and museums) stressed the economic importance and cultural and historical value of orphan works, whereas smaller institutions were not concerned with the problem at all. In the Communication on certain legal aspects relating to cinematographic and other audiovisual works, p. 14, it is shown that the importance of the issue was also raised by public service broadcasters and cinémathèques. Right holders and collective management societies are generally opposed to any legislative change.

⁶²⁵ Even in the US, where the Copyright Office did a large-scale inquiry, no detailed figures exist to quantify the problem relating to the exploitation of orphan works. See the US Copyright Office Orphan Works Report 2006, p. 92 and Huang 2006, p. 266-267. Nonetheless, an illustration of the practical problems relating to the clearance of rights can be found in: D. Troll Covey, *Acquiring Copyright Permission to Digitize and Provide Open Access to Books*, Washington, D.C.: Digital Library Federation 2005, <<http://www.clir.org/pubs/reports/pub134/pub134col.pdf>> [Troll Covey 2005].

⁶²⁶ See the US Copyright Office Orphan Works Report 2006, p. 52-59, for more alternatives.

⁶²⁷ In the US, a copyright owner may elect to recover either the actual damages plus profits attributable to the infringement or, if the work has been timely registered, statutory damages of up to \$150,000 and attorney's fees (for wilfully committed infringements). See arts. 504 and 505 US Copyright Act.

⁶²⁸ Not only is this the basic rule under civil law as applied in most continental European countries, it is also the general rule under common law as applied in the UK. See, for instance, Bently/Sherman 2004, p. 1101. Although in the UK, additional damages are available (art. 97(2) UK Copyright Act), their award is the exception rather than the rule. If they nevertheless are awarded, the damages have typically been modest. See: C. Michalos, 'Copyright and punishment: The nature of additional damages', EIPR 2000, p. 470-481, p. 473 [Michalos 2000].

‘Damocles sword’ of large monetary awards hanging over them, when deciding to market information products or services for which the rights have not been completely cleared. This allows them to reserve a certain amount of money to pay a right owner should he eventually come forward.

Nevertheless, it should be acknowledged that both the multiple ownership and the orphan works issues may cause problems for the clearance of rights in works and other protected subject matter. In particular the orphan works problem, although difficult to quantify, can indeed present a real problem to those who intend to reutilise pre-existing content.⁶²⁹ In the following two paragraphs, which separately deal with the issues of multiple ownership (para. 5.3) and orphan works (para. 5.4), various models shall be examined that address these problems. It is to be noted, however, that the solutions to both problems will sometimes overlap.

5.3 Solutions to the multiple ownership problem

In this section, the question is asked to what extent the multiple ownership issue has already been addressed in the various EU directives and the existing laws of the different Member States, and whether there is any need for legislative amendment with the intention of streamlining the exercise of rights in the digital age. To answer this question, it must be borne in mind that any legislative initiative on the issue of multiple ownership would directly impinge upon the issues of authorship and ownership of rights, the rules of which vary significantly from one Member State to the other. This essentially depends on the country’s conception of the underpinnings and objectives of the copyright regime, which to a great extent can be explained against the backdrop of the traditional dichotomy between the copyright and *droit d’auteur* (author’s right) systems.⁶³⁰

On the one hand are the common law countries, i.e. the United Kingdom and Ireland, whose copyright laws are rooted in the copyright tradition. In this tradition, copyright protection is said to follow utilitarian premises.⁶³¹ The result thereof is that the initial ownership of rights may be conferred, depending on the circumstances, either on the natural person who created the work or on the legal person who invested in its production, like an employer or a film producer. On the other hand are most countries of continental Europe, whose copyright laws follow the author’s right tradition, in which copyright is largely based on a philosophy of natural rights.⁶³² In these countries, only the natural person who created the work can be considered the author. As a result, following a principle known as the ‘creator doctrine’, it is the physical person of the author (the actual creator) on whom the initial ownership of the copyright is generally conferred.⁶³³

Because of the fundamental differences between the doctrines underlying the copyright and author’s right systems, it has proven to be extremely complicated hitherto to establish unified rules on authorship and ownership of rights at the international level. This can be seen in the Berne Convention, which hardly comprises any substantive rules on authorship and copyright ownership. The concept of ‘authorship’, for instance, is left completely undefined.⁶³⁴ Moreover, where it concerns the ownership of rights in cinematographic works, the Berne Convention

⁶²⁹ Commission Staff Working Document, Impact Assessment supporting the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, SEC (2006) 1075, Brussels, 24.08. 2006 [Impact Assessment on digitisation, online accessibility and digital preservation], p. 35. See also the US Copyright Office Orphan Works Report 2006, p. 92.

⁶³⁰ See e.g. A. Strowel, *Droit d’auteur et copyright - Divergences et convergences. Étude de droit comparé*, Paris: Bruylant 1993, for an extensive discussion on the dichotomy between copyright and *droit d’auteur* systems [Strowel 1993].

⁶³¹ Goldstein 2001, p. 3 and p. 5-8.

⁶³² *Ibid.*, p. 3-4 and p. 8-11.

⁶³³ J.M.B. Seignette, *Challenges to the creator doctrine: authorship, copyright ownership and the exploitation of creative works in the Netherlands, Germany and the United States*, Deventer [etc.]: Kluwer Law and Taxation Publishers 1994 [Seignette 1994].

⁶³⁴ Ricketson 1987, p. 158; Kamina 2002, p. 131; Ricketson/Ginsburg 2006, para. 7.02, p. 358.

provides that this is a matter for legislation in the country where protection is claimed (art. 14bis(2)(a) Berne Convention). As the results of the ill-fated Stockholm Conference (1967) demonstrate, it has been exceedingly difficult to reach any agreement at the international level on a uniform rule concerning the issue of multiple ownership in cinematographic works.

For similar reasons the European harmonisation efforts so far have not produced substantial approximation of rules concerning authorship and ownership of rights. Although generally all the directives refer to the ‘author’ as the right holder of a work,⁶³⁵ a definition of ‘authorship’ is nowhere provided for.⁶³⁶ Only in respect of audiovisual works has authorship been defined to a certain extent; article 2(2) Rental Right Directive provides that the principal director shall be considered as its author or one of its authors. Because the EC legislature did not wish to interfere unnecessarily with existing national concepts, however, it allowed Member States to provide for others (e.g. the film producer) to be considered as its co-authors.⁶³⁷ On the other hand, it has been recognised in several directives that the general rule for determining authorship in a work is that the author is the actual creator of the work.⁶³⁸

In a few other cases, but merely where it concerns ‘functional’ works such as computer software and databases, the EC legislature has accommodated for the interests of other persons than the physical author (e.g. employers and (film) producers) by laying down various legal presumptions. Under article 2(3) Computer Programs Directive, for instance, the employee is presumed to have transferred the economic rights in software made in the course of his duties to the employer. Member States are free, however, to designate legal persons as the initial owners of copyright in software or apply their rules on ‘oeuvres collectives’ to them (art. 2(1) Computer Programs Directive).⁶³⁹ The latter option is also laid down, with respect to copyrighted databases, in article 4 Database Directive. Here, however, no agreement could be reached on a presumption of transfer of the employee’s copyright as in the Computer Programs Directive.⁶⁴⁰ Finally, under the Rental Right Directive, a performer is presumed to have transferred his rental rights to the film producer (art. 2(5)), and Member States may opt for a similar presumption as regards the author’s rental right (art. 2(6)).

Except for these few examples, the question of authorship and ownership of rights has been left completely unharmonised. The strong roots that copyright legislations in most continental-European countries have in the author’s right tradition, which presupposes that the author of a work is a natural person⁶⁴¹ and requires recognition of the authorship of all those who have contributed to a work, have made it extremely difficult to achieve any consensus on these issues, except perhaps where mere functional works are concerned.⁶⁴² As a result, it may be very contentious for the EC legislature to tackle the multiple ownership issue by interfering with the

⁶³⁵ As well as to the ‘performer’, ‘phonogram producer’, ‘film producer’ and ‘broadcasting organisation’, where it concerns related rights protection.

⁶³⁶ See, however, the Explanatory Memorandum to the Rental Right Directive, p. 38, where the term ‘author’ is defined as ‘[t]he creator of the work within the meaning of article 2 BC.’ Since ‘authorship’ is not defined in the Berne Convention, however, the meaning of this definition is unclear. See Seignette 1994, p. 78.

⁶³⁷ See Reinbothe/Von Lewinski 1993, p. 47, explaining that the adoption of a single rule of ownership with respect to audiovisual works proved to be one of the most controversial issues of the Rental Right Directive.

⁶³⁸ See art. 2(1) Computer Programs Directive and art. 4(1) Database Directive. See Bently in Dreier/Hugenholtz 2006, p. 217-218 and Hugenholtz in Dreier/Hugenholtz 2006, p. 319-320.

⁶³⁹ See P. Katzenberger, ‘Inhaber des Urheberrechts’, in: G. Schricker, E.M. Bastian and A. Dietz, *Konturen eines Europäischen Urheberrechts*, Baden-Baden: Nomos Verlag 1996, p. 42-48, p. 44 [Katzenberger 1996].

⁶⁴⁰ See, in this respect also recital 29 of the Database Directive, which explicitly states that the arrangements applicable to databases created by employees are left to the discretion of the Member States.

⁶⁴¹ In France, for example, corporate ownership is allowed in certain limited circumstances only (see e.g. arts. L 113-5 and L 113-9 French Copyright Act). In Germany, the requirement that the author is the natural person who created the work is even more rigorous (see e.g. arts. 7-10 German Copyright Act). See Goldstein 2001, p. 205.

⁶⁴² Seignette 1994, p. 77.

rules on authorship and ownership of rights. Nevertheless, it is worth looking at what might be done to address the problem. To this end we shall first concentrate on solutions whereby rights are statutorily or contractually (re)allocated to a single right holder (para. 5.3.1) and subsequently look at some alternative approaches to address the multiple ownership issue (para 5.3.2).

5.3.1 *(Re)allocation of rights*

As we have seen in paragraph 5.2.1, the main problem relating to works of multiple ownership is that the consent of all right holders is required to obtain a licence to use the work, and that each of the right holders is separately entitled to exercise and enforce his rights. A possible way of addressing this problem would be to establish a legal provision requiring the copyright owners in a work of multiple ownership to jointly enforce their copyrights, or to appoint a representative for that purpose. Indeed this has once been the rule in some Member States.⁶⁴³ The main drawback of such a rule is, however, that it would enable a single right holder to obstruct an infringement claim to the disadvantage of the other right holders concerned.⁶⁴⁴

Instead of reverting to such ‘old’ practice, the lawmakers of some Member States have opted for another approach, whereby the economic rights in certain categories of works (or other subject matter) of multiple ownership are statutorily (re)allocated and conferred upon a single right holder. Examples include provisions on related rights in group performances (para. 5.3.1.1), on copyright in ‘œuvres collectives’ (para. 5.3.1.2), on copyright in works created in the course of employment (para. 5.3.1.3), and on copyright in films and other audiovisual productions (para. 5.3.1.4).

5.3.1.1 *Group performances*

A first model that has been adopted in the laws of certain Member States aims to streamline the exercise of the economic rights in group performances, such as performances by musical ensembles, choirs, orchestras ballet or theatre groups, by designating a representative responsible for the exploitation of these rights. Such a rule limiting the individual exercise of rights is allowed under the Rome Convention, which provides that contracting states may specify the manner in which performers will be represented in connection with the exercise of their rights if several of them participate in the same performance.⁶⁴⁵

In the Portuguese Copyright Act, for example, it is required that in the absence of an agreement, the related rights in group performances are to be exercised by the director of the company. In case there is no director of the company, the law provides that the actors are to be represented by the stage director, whereas the members of the orchestra and chorus are to be represented by their respective conductors or directors.⁶⁴⁶ The copyright acts of other Member States, such as the Netherlands and Spain, contain provisions stating that in the event of a group performance, the economic rights are to be exercised by a representative designated and elected by a majority of the performers participating in the performance.⁶⁴⁷ This representative may, for instance, be one of the performers in question (as in Spain) or a performer, director, conductor, choirmaster, choreographer, or any other person (as in the Netherlands).

It must be stressed, however, that this mandatory representation of rights does not extend to a soloist, director (of a stage performance) or conductor participating in the group performance.

⁶⁴³ For example, until 1973, such provision existed in the Netherlands (art. 26 (old) Dutch Copyright Act).

⁶⁴⁴ J.H. Spoor, D.W.F. Verkade and D.J.G. Visser, *Auteursrecht*, Deventer: Kluwer 2005, p. 481 [Spoor/Verkade/Visser 2005].

⁶⁴⁵ Art. 8 Rome Convention.

⁶⁴⁶ Art. 181 Portuguese Copyright Act.

⁶⁴⁷ Art. 13 Dutch Neighbouring Rights Act; art. 111 Spanish Copyright Act.

Because of their particular individual (creative) contribution to the group performance, these performing artists are given special status. Accordingly, the soloist, director and conductor may exercise their related rights on an individual basis. Moreover, this statutory ‘streamlining’ merely concerns the economic rights of the performers, thus leaving the moral rights of the many individual performers intact. Finally, it should be noted that these statutory rules concern the *exercise* of rights only. Unless otherwise agreed, therefore, the rights may be *enforced* by any of the performers participating in the performance.⁶⁴⁸ Consequently, even though the model here discussed does to a certain extent alleviate the rights management problems of users of productions in which group performances are incorporated, the problems of multiple ownership are not entirely solved.

5.3.1.2 ‘Oeuvres collectives’

Another legislative model can be found in the rules on ‘oeuvres collectives’, a concept which originates from French law. An ‘oeuvre collective’ can be defined as a work created at the initiative and under the direction of a natural or legal person who edits it, publishes it and discloses it under his name. The personal contributions of the authors that have participated in its production are integrated in the overall work for which they were envisaged, without it being possible to attribute to each author a separate right in the work as created.⁶⁴⁹ Examples of such works include magazines, periodicals, newspapers, dictionaries and encyclopaedia.⁶⁵⁰

The laws of several Member States (e.g. France, Spain and Portugal) provide that –subject to any agreement to the contrary– the copyright in an ‘oeuvre collective’ vests in the principal who publishes the work and discloses it under his name.⁶⁵¹ The rationale of this rule is to offer the principal –i.e. the main exploiter– a return on his investment by granting him the sole title of ownership, thus avoiding the difficulties in the clearance of rights that may otherwise arise where a work is the collaborative contribution of multiple creators.⁶⁵²

The rules on ‘oeuvres collectives’ are very complex.⁶⁵³ This becomes evident when examining the French law and corresponding case law.⁶⁵⁴ If the individual contributions to an ‘oeuvre collective’ can be separately exploited, as is usually the case with newspaper articles or contributions in periodicals, the law determines that the original authors maintain the right to reproduce or exploit their contributions in any form whatsoever, on condition that this does not compete with the exploitation of the newspaper or periodical concerned.⁶⁵⁵ Moreover, the French courts are generally reluctant to establish that the principal who published the work, and thus owns the copyright in the work, may single-handedly decide on the exploitation of the ‘oeuvre collective’ in a derivative form or on the exploitation of the ‘oeuvre collective’ on new media

⁶⁴⁸ This is explicitly stated in art. 13 Dutch Neighbouring Rights Act.

⁶⁴⁹ See the definition in art. L 113-2 French Copyright Act. For a similar definition, see art. 8 Spanish Copyright Act.

⁶⁵⁰ Note that other types of works with similar characteristics are so easily qualified as ‘oeuvres collectives’. See e.g. C. Caron, ‘Le festival confronté à la qualification d’oeuvre collective’, RIDA 2001, no. 188, p. 2-35 [Caron 2001], who provides for a rather peculiar example.

⁶⁵¹ See e.g. art. L 113-5 French Copyright Act; art. 8 Spanish Copyright Act and art. 19 Portuguese Copyright Act. A similar provision can be found in and art. 38 in conjunction with art. 3 Italian Copyright Act.

⁶⁵² P. Sirinelli, B. Warusfel, S. Durande, G. Bonet and J. Daleau, *Code de la propriété intellectuelle Commenté - édition 2006*, Paris: Dalloz 2006 [Sirinelli et al. 2006], p. 72.

⁶⁵³ See e.g. B. Edelman, ‘L’oeuvre collective: une définition introuvable’, Dalloz 1998, no. 13, Chronique, p. 141 [Edelman 1998] and E. Dérieux, ‘Le droit d’auteur des journalistes à l’épreuve d’internet’, Panorama de Presse juridique 2000, no. 109, April 2000 [Dérieux 2000].

⁶⁵⁴ See e.g. Sirinelli et al. 2006, p. 71-74.

⁶⁵⁵ Art. L 121-8 French Copyright Act. Note that journalists also enjoy certain additional rights pursuant to the French Labour Act (e.g. art. L 761-9 French Labour Act), which may complicate the situation even further.

platforms such as the internet.⁶⁵⁶ On several occasions French courts have even opposed secondary uses of ‘œuvres collectives’ without the consent of its authors,⁶⁵⁷ which could lead to the conclusion that the legal effects of the rules on ‘œuvres collectives’ are exhausted after the first publication of the work.⁶⁵⁸ According to Sirinelli et al., there are several reasons for the judicial reserve to apply the rules on ‘œuvres collectives.’ First, it is a legal concept closer to the copyright system than to the author’s rights system. Second, the French concept of ‘œuvres collectives’ has hardly been followed by foreign legislations. And third, the concept is extraordinarily complex.⁶⁵⁹

The very constricted judicial reading of the rules on ‘œuvres collectives’, and the many legal uncertainties surrounding it, should make the principal who publishes the work very cautious. If he desires greater legal protection, he will need to enter into contractual agreements with the various contributors to the work and arrange that they transfer or assign him their rights, including all their future rights.⁶⁶⁰ Accordingly, even though the law promises the principal the exclusive right to exploit the ‘œuvre collective’, he still may need to revert to additional contractual arrangements in order to guarantee that he can also exercise the rights in the work for secondary and future forms of exploitation.

Notwithstanding these difficulties, however, the French *Conseil supérieur de la propriété littéraire et artistique* (CSPLA)⁶⁶¹ has recently proposed to introduce a new statutory category of works, the so-called ‘œuvres multimédias’.⁶⁶² The rules on ‘œuvres multimédias’ are to be classified somewhere in between the rules on ‘œuvres collectives’ and those on ‘œuvres audiovisuelles’ (see para. 5.3.1.4). In its proposal, the CSPLA expressed the intention to establish a presumption of transfer of the economic rights of the authors contributing in the multimedia work to the person who takes the initiative and responsibility for the creation of a multimedia work (e.g. a studio or editor). Excluded from the presumption rule are authors of musical works specifically created for the multimedia work, as musical rights are usually managed collectively. Similar to the rules on ‘œuvres collectives’, this presumption of transfer rule does not prevent these authors from separately exploiting their particular contributions, provided that this does not compete with the exploitation of the work as a whole.

The aim of the CSPLA’s proposal is to address the problems that occur due to the multiplicity of creative processes and difficulties in contractual practices involved in the exploitation of a multimedia work.⁶⁶³ In the light of the many shortcomings of the rules on ‘œuvres collectives’, however, it remains to be seen whether the introduction of these rules on multimedia works could indeed address these concerns. Similar to the rules on ‘œuvres collectives’, the rules on ‘œuvres multimédias’ seem very complex. This already starts with the definition of a ‘multimedia

⁶⁵⁶ Sirinelli et al. 2006, p. 72. See e.g. *Plurimédia*, Tribunal de grande instance Strasbourg, TGI Strasbourg (First instance court Strasbourg), 3 February 1998, *Légipresse* no. 149-I, p. 19 and no. 149-III, p. 22; Cour d’appel de Colmar, 1ère civ. (Court of Appeals Colmar), 15 September 1998, *Légipresse* no. 157-I, p. 148 and no. 157-III, p. 172 and *Le Progrès*, Tribunal de grand instance Lyon, TGI Lyon (First instance court Lyon), 21 July 1999, *Légipresse* no. 166-I, p. 132 and no. 166-III, p. 156; Cour d’appel de Lyon (Court of Appeals Lyon), 9 December 1999, *Légipresse* no. 168-I, p. 9 and no. 168-III, p. 7. See Hugenholtz/De Kroon 2000, p. 16-17.

⁶⁵⁷ See e.g. Cour de Paris (district court), 8 September 2000, *Juris-Data* no. 2000-121728, where it has been determined that the contract of employment between a journalist and a press body implies a transfer of rights for a first publication only, thereby allowing journalists to republish their works, for instance, in special series. This follows from the combination of art. L 121-8 French Copyright Act and art. L 761-9 French Labour Act.

⁶⁵⁸ Sirinelli et al. 2006, p. 72.

⁶⁵⁹ *Ibid.*, p. 62.

⁶⁶⁰ *Ibid.*, p. 72.

⁶⁶¹ CSPLA: <<http://www.culture.gouv.fr/culture/cspla/index-cspla.htm>>.

⁶⁶² ‘Avis du CSPLA relatif aux aspects juridiques des œuvres multimédias’, *Légipresse* 2006, no. 228, p. 1-6 [CSPLA 2006].

⁶⁶³ *Ibid.*

work'. The range of works that fall under the term 'multimedia' is very broad and includes not only productions such as videogames, CD-ROMs, websites and educational or entertainment programmes, but might also extend to a simple picture book, integrating textual works and images into an 'interactive' medium.⁶⁶⁴ As a result, the interpretation of what constitutes an 'oeuvre multimédia' may cause great difficulties.⁶⁶⁵

5.3.1.3 *Works created in the course of employment*

The provisions that exist in certain Member States concerning works made in the course of employment certainly facilitate the rights clearance in works that are the result of a collaborative effort by multiple employees. After all, where they confer the copyright in those works upon the employer, these provisions tend to avert multiplicity of ownership arising from the creation of works. It must be emphasised, however, that the rationale behind these rules is primarily informed by notions of labour law, and does not primarily concern the reallocation of rights for the benefit of efficient rights management. Although the attribution of the initial ownership of rights to the employer implies that the latter can exercise full control over the exploitation of that work, the main idea is that since the author already receives compensation for his intellectual creation in the form of a salary or any other form of agreed remuneration, he does not necessarily merit additional compensation in the form of an exclusive economic right on the work. As it is the employer who takes the major financial, organisational, and associative risks involved in the creation and publication of the work,⁶⁶⁶ the rights of the employee are therefore presumed to be transferred to the employer.

The rules on employers' copyright in those Member States that have such provisions vary greatly. In some Member States the law provides that where a work is made in the course of employment, the employer shall be deemed the author thereof, unless otherwise agreed between the parties (e.g. the Netherlands and the UK).⁶⁶⁷ Hence, if the employee has not been able to agree with the employer on retaining his copyright, the latter automatically is regarded as the author. That makes the employer entitled to the rights that are normally granted to the author. However, whether this means that the employer is also entitled to moral rights protection is uncertain, at least in the Netherlands.⁶⁶⁸ In the UK, it is laid down in statute that the employee retains his moral rights in the work.⁶⁶⁹ This is subject, however, to a number of limitations.⁶⁷⁰ In other Member States (e.g. Hungary), the controversy concerning moral rights has been dispelled by providing for an implied transfer of economic rights upon the employer (as successor in title), as opposed to an implied authorship of the employer.⁶⁷¹

In many Member States, however, allocating initial authorship or ownership to employers (often legal persons, such as private companies or public sector bodies) is controversial, at least in terms of legal theory, because it is a concept that does not fit well within *droit d'auteur* systems given their focus on the individual creative person. For this reason these countries have adopted less far-reaching provisions on employers' copyright. The Belgian Copyright Act, for example,

⁶⁶⁴ Tohyama 2004, p. 71.

⁶⁶⁵ The CSPLA acknowledges that the term 'multimedia works' applies to a broad variety of works. Nevertheless, the CSPLA proposes to define a multimedia work according to five cumulative criteria. A multimedia work (1) combines elements of different kind of works; (2) is indifferent to the communication mode; (3) presupposes interactivity with users; (4) forms a whole, and is different from the elements, or the simple sum of the elements, of which it is made up; and (5) the construction of and access to the multimedia work are governed by a technological programme.

⁶⁶⁶ Seignette 1994, p. 115.

⁶⁶⁷ Art. 7 Dutch Copyright Act; art. 11(2) UK Copyright Act.

⁶⁶⁸ Dutch scholars do not agree on this particular issue. See Spoor/Verkade/Visser 2005, p. 418.

⁶⁶⁹ Art. 82 UK Copyright Act. See also Bently/Sherman 2004, p. 123.

⁶⁷⁰ Arts. 79(3) and 81 UK Copyright Act. See also Bently/Sherman 2004, p. 238 and 248-249.

⁶⁷¹ Art. 30 Hungarian Copyright Act.

provides that when works are created by an author pursuant to an employment contract or a statute, the economic rights in the work can be transferred to the employer, but only in so far as (a) the transfer of rights is explicitly provided for, and (b) the creation of the work took place within the scope of the contract or the statute.⁶⁷² Accordingly, if the employer desires to have the economic rights in the works of his employees, he is required to contractually arrange this in advance, i.e. at the time of concluding the employment contract.

In other Member States, the economic rights in a work are conferred upon the employer only with regard to functional works. In Italy, for instance, employers' copyright exists only with respect to computer programs and databases, works of industrial design and photographs.⁶⁷³ In France and Germany, on the other hand, the grant of copyright to the employer is limited to the protection of computer software only.⁶⁷⁴ This is, to a large extent, the result of the harmonisation efforts of the EU in the area of copyright law. As seen in the introduction of this paragraph, article 2(3) of the Computer Programs Directive requires that where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer is presumed to be the first owner of all economic rights in the work.

Finally, in countries where the creator doctrine is applied very strictly, like for example in Austria, it is held that a legal person may never be deemed to be the initial owner of the copyright on a work.⁶⁷⁵ As a result, in case of computer programs, instead of the presumption of initial ownership the employer has been granted an unrestricted licence to exploit the work.⁶⁷⁶

In sum, there is hardly any equivalence in the national legislation of the Member States with respect to the attribution of initial ownership of rights to the employer. Although the ownership of rights by a legal entity may correspond to utilitarian premises of certain European countries rooted in the copyright tradition, it will certainly collide with the natural rights principles that are at the heart of a number of continental European author's rights regimes. As a result, the legislators in several of these countries have limited themselves to the implementation of the mandatory provision pursuant to the Computer Programs Directive and otherwise abstained from granting the employer the initial ownership in other works made in the course of employment.

5.3.1.4 *Films and other audiovisual productions*

Yet another solution that is based on a statutory reallocation of rights can be found in the rules on copyright in films and other audiovisual productions. In most Member States legislative measures exist that, in a variety of ways, concentrate the copyright ownership in films in their producers. This enables them to control the rights to market and exploit a film commercially, without undue interference from the actual authors involved.⁶⁷⁷ The underlying idea is that if the economic rights in the film are in the hands of the producer, it will be much easier to market and exploit the film commercially, which would presumably benefit all the different stakeholders in the film. Hence, these measures are generally designed to avoid multiple claims of ownership in films and to circumvent the logistic difficulties in dealing with the many authors of the film.⁶⁷⁸

The rules provided for in the laws of most Member States originate from article 14bis of the Berne Convention. As stated, this provision has been the result of a hard-won compromise between the author's rights countries, which traditionally grant authorship to the actual creators

⁶⁷² Art. 3(3) Belgian Copyright Act.

⁶⁷³ Art. 11bis, art. 11ter and art. 88 Italian Copyright Act.

⁶⁷⁴ Art. L 113-9 French Copyright Act; art. 69b German Copyright Act.

⁶⁷⁵ This is of settled jurisprudence. See, for instance, Oberste Gerichtshof, OGH (Supreme Court), 18 February 1992, no. 4Ob127/91 and Oberste Gerichtshof, OGH (Supreme Court), 24 November 1998, no. 4Ob292/98i.

⁶⁷⁶ Art. 40b Austrian Copyright Act. See also art. 40f(3) Austrian Copyright Act with respect to databases.

⁶⁷⁷ Salokannel 1997, p. 102.

⁶⁷⁸ Kamina 2002, p. 32-33 and p. 138.

of the audiovisual work, and the copyright countries (e.g. the UK and Ireland) that vest the copyright of the audiovisual work in the film producer. This divide can still be seen in the different national copyright acts.

In the laws of the UK and Ireland, the authorship of the film is conferred upon the film producer and the principle director jointly.⁶⁷⁹ Therefore, since the rights in the film are owned by the film producer and principle director only, there is no need to (re)allocate the rights for the benefit of an efficient administration of rights. In contrast, in the author's rights countries, where in principle each creative contributor to the film qualifies as a co-author, this need is apparent. For this reason, the laws of many of these countries provide for a (re)allocation of rights in favour of the film producer. There is much variation, however, in the means by which this is realised. Some countries have established a system of *cessio legis* (legal assignment) of the economic rights in audiovisual works in favour of the film producer (e.g. Austria and Italy).⁶⁸⁰ In most countries, film producers are deemed to have been assigned, by way of a rebuttable presumption rule, the economic rights that originally belonged to the authors of a cinematographic or audiovisual work (e.g. Belgium, France, Germany, Luxembourg, the Netherlands, and Spain).⁶⁸¹ A similar presumption of transfer to the producer of an audiovisual work is established with respect to the performers' exploitation rights.⁶⁸²

The various legislative models include numerous exceptions to the presumption of transfer or legal assignment. In many countries the rights of certain categories of authors or in certain uses have been expressly excluded from the presumption. This concerns in particular the authors of musical work and the authors of pre-existing works incorporated in the work, such as novels and screenplay. In addition, certain uses are often excluded from the scope of the presumption. For instance, in the Netherlands, the presumption does not apply to the right to adapt the work (apart from subtitling and synchronisation). Most differences exist, however, with respect to the application of the presumption to the author's rental and lending rights. In some countries, authors retain their exclusive right to authorise the rental and lending of their works (e.g. Luxembourg and Germany), in others they are covered by the presumption of transfer (e.g. the Netherlands).⁶⁸³ Finally, the laws of many countries provide that regardless of the presumption of transfer of rights to the producer, and absent provisions to the contrary, the authors of an audiovisual work may exploit their contributions individually as long as these are separable and this does not prejudice the normal exploitation of the audiovisual work.⁶⁸⁴

Overall, these exceptions to the presumption of transfer of rights are inspired by the wish to protect the original authors of the audiovisual work, i.e. those who have made an original contribution to the work.

⁶⁷⁹ Art. 9(2)(ab) UK Copyright Act; art. 21(b) Irish Copyright Act. Originally, these countries only recognised the film producer as the author of the film, but with the implementation of art. 2(2) Rental Right Directive, they also needed to designate the principle director as one of the authors of the film.

⁶⁸⁰ Arts. 38-40 Austrian Copyright Act; art. 45 Italian Copyright Act. For the assignment of the rights of performers, see arts. 69(1) Austrian Copyright Act and art. 84(1) Italian Copyright Act.

⁶⁸¹ Art. 18 Belgian Copyright Act; art. L 132-24 French Copyright Act; arts. 88-89 German Copyright Act; art. 24 Luxembourg Copyright Act; art. 45d Dutch Copyright Act; arts. 88-89 Spanish Copyright Act.

⁶⁸² Art. 36(1) Belgian Copyright Act; art. L 212-4 French Copyright Act; art. 92(1) German Copyright Act; art. 51 Luxembourg Copyright Act; art. 4 Dutch Neighbouring Rights Act; art. 109 Spanish Copyright Act.

⁶⁸³ This is due to the fact that arts. 2(5) and (6) Rental Right Directive grant Member States the *possibility* to establish a presumption of transfer of rights from the authors and performers to the producer of the audiovisual work.

⁶⁸⁴ See e.g. art. 45g Dutch Copyright Act; art. L 132-29 French Copyright Act; and art. 88(2) Spanish Copyright Act.

5.3.2 *Alternative solutions*

If there is one thing that can be concluded from paragraph 5.3.1, it is that it would indeed be very difficult, if not impossible, to establish uniformity in the different national copyright regimes through a legislative initiative at the European level, aimed at a general (re)allocation of rights in works of multiple ownership. However, there may be alternative solutions to address the problems related to the reutilisation of works of multiple ownership that do not interfere with the authorship or ownership of rights. These solutions include the collective management of rights (para. 5.3.2.1), the application of the doctrine on abuse or misuse of rights (para. 5.3.2.2) and contractual arrangements (para. 5.3.2.3).

5.3.2.1 *Creating ‘one-stop shops’ by means of collective rights management*

Clearly, many of the clearance problems associated with works of multiple ownership can be alleviated by resorting to collective management of rights. In this respect, it needs to be noted that there exist different systems of collective rights management. These include voluntary, extended and mandatory collective rights management. In paragraph 5.4.2, the distinctive features of the systems are explored in more detail.

By lowering transaction costs, an adequate system of collective rights management may significantly contribute to creating efficiency and transparency in the clearance of rights. All by itself, however, collective rights management cannot provide a complete solution to all the clearance problems concerning works of multiple ownership. Such works may be covered by numerous layers of rights, all of which will belong to different right owners. Therefore, even if all these rights were collectively administered by a management society, the very number of societies a user would need to contact could still pose considerable obstacles, as collective management societies are usually organised around a particular category of right.⁶⁸⁵

To alleviate some of the problems that arise with respect to the accumulation of rights in a single work, rights clearance centres have been set up in various Member States.⁶⁸⁶ These centres function as ‘one-stop shops’ where users can obtain a single licence covering multiple rights. This greatly facilitates the rights clearance of multimedia works. Therefore, if a solution were to be sought along the lines of collective rights management, it would be sensible for the European Commission to further promote the establishment of copyright clearance centres. In this respect, experience can be gained from the many pilot projects on multimedia rights clearance systems that were funded by the Commission in the past.⁶⁸⁷

5.3.2.2 *The doctrine of abuse or misuse of rights*

Another alternative solution would be to subject the exercise of the rights in works of multiple ownership to the doctrine on abuse or misuse of rights. According to this doctrine a refusal to license by an individual right owner that would obstruct the reutilisation of an entire multimedia work could be qualified as abusive, particularly if such behaviour runs afoul of public policy or of the social function of copyright.⁶⁸⁸ A court or another competent public authority might then order an appropriate measure to redress the abuse.⁶⁸⁹

⁶⁸⁵ D. Gervais, ‘The changing role of copyright collectives’, in: D. Gervais (ed.), *Collective management of copyright and related rights*, The Hague: Kluwer Law International 2006, p. 3-36, p. 12 [Gervais 2006].

⁶⁸⁶ Examples of rights clearance centres include CEDAR: <<http://www.cedar.nl>>; CMMV: <<http://www.cmmv.de>>; COPYSWEDE: <<http://www.copyswede.se>>; KOPIOSTO: <<http://www.kopiosto.fi>>; SESAM: <<http://www.sesam.org>>; and SIAE: <<http://www.siae.it>>.

⁶⁸⁷ Different pilot projects are described by M. Schippan, ‘Purchase and licensing of digital rights: The VERDI project and the clearing of multimedia rights in Europe’, EIPR 2000, p. 24-29 [Schippan 2000].

⁶⁸⁸ Grosheide 1986, p. 125-145.

⁶⁸⁹ Guibault 2002, p. 184-194.

Interestingly, the French Copyright Act comprises a specific provision that provides that in the event of manifest abuse in the exercise or non-exercise of the exploitation rights by the representatives of a deceased author, the Tribunal de grande instance may order any appropriate measure. The same applies in the event of a dispute between such representatives, if there is no known successor in title, no heir or no spouse entitled to inherit.⁶⁹⁰ The main advantage of this provision is that it allows the court to order ‘any appropriate measure’. This may even go as far as imposing an author to sign a license permitting the use of a work.⁶⁹¹ On the other hand, the court is not allowed to appoint a person for the exploitation of a work or to replace the parties in specifying the terms of the agreement.⁶⁹²

Rules on abuse or misuse of rights mostly exist as general norms of private law⁶⁹³ or competition law, and are usually not incorporated in a country’s copyright law. However, in exceptional cases such rules can be inferred from statutory provisions on collaborative works, as for instance article 8(2) of the German Copyright Act, which provides that a joint author may not unreasonably refuse his consent to the publication, exploitation or alteration of the work. However, considering that under German civil law no specific doctrine of abuse or misuse of rights has been developed,⁶⁹⁴ this provision needs to be examined in the light of the general civil law principle of *Treu und Glauben* (good faith) as enshrined in article 242 of the German Civil Code.⁶⁹⁵

Notwithstanding the possible advantages of the concept, the unclarity of the notion of abuse or misuse of rights, combined with the fact that in certain Member States no such doctrine has been developed, would make it difficult to propose any harmonised rule at the EU level.

5.3.2.3 Contractual arrangements

A final approach to the problems of multiple ownership would be to simply leave it to the market to arrive at contractual agreements with right holders concerning the reutilisation of existing works of multiple ownership. This, of course, is nothing out of the ordinary. In everyday practice, there are numerous examples where users enter into negotiations with right holders to conclude agreements regarding the reutilisation of a work, even if this requires obtaining permission from a multiplicity of right owners.

In many Member States, for example, newspaper publishers were obliged to renegotiate with the many original authors of old ‘analogue’ press articles (i.e. the journalists) to gain permission to reutilise these articles electronically (e.g. in CD-ROM compilations, in digital databases or on the internet). This need usually arose as a result of courts having interpreted existing transfers of rights in a restrictive manner and finding that the publishers had acquired the rights for the reproduction and commercial distribution of the works in printed form only,⁶⁹⁶ which left the publishers with no other choice than to re-enter into negotiations in order to obtain permissions

⁶⁹⁰ Art. L 122-9 French Copyright Act. An identical provision is in place with respect to the manifest abuse in the exercise or non-exercise of the (moral) right of disclosure by the deceased author’s representatives. See art. L 121-3 French Copyright Act.

⁶⁹¹ P.Y. Gautier, ‘Le cédant malgré lui: étude du contrat forcé dans les propriétés intellectuelles’, *Dalloz Affaires* 1995, no. 6, p. 123-126 [Gautier 1995].

⁶⁹² Lucas/Lucas 2001, p. 384-385.

⁶⁹³ See e.g. art. 3:13 Dutch Civil Code (*Burgerlijk Wetboek*). Another example is art. 544 French Civil Code, which can be called upon in court if the *lex specialis* provisions in the French Copyright Act find no application. See, for an overview of the application of the doctrine of abuse or misuse on the (non)exercise of copyright: Guibault 2002, p. 277-289.

⁶⁹⁴ Guibault 2002, p. 189-190 and p. 278.

⁶⁹⁵ In fact, art. 8(2) German Copyright Act refers explicitly to the principle of *Treu und Glauben*.

⁶⁹⁶ Guibault/Hugenholtz 2002, p. 149.

to reutilise these works.⁶⁹⁷ In many cases the ensuing negotiations have resulted in agreements, usually involving the payment of supplementary fees or royalties to the authors concerned.

Another example of contractual solutions can be found in the variety of licensing agreements entered into by producers of multimedia products (e.g. videogames and educational entertainment products) with owners of rights in pre-existing works. Such licensing arrangements have become particularly customary with respect to the use of certain very popular motion pictures that are well suited for exploitation in videogames (e.g. ‘Star Wars’, ‘Harry Potter’ and ‘Lord of the Rings’).⁶⁹⁸

5.4 Solutions to the orphan works problem

In contrast to the multiple ownership problem discussed in the preceding paragraph, the orphan works problem is merely concerned with the traceability of right holders. The orphan works problem arises if the right owners of a work remain unidentified or cannot be located after a reasonable search has been conducted by a prospective user of the work (see para. 5.2.2). Here some form of legislative redress does seem to be in order. Failure to address the orphan works problem would lead to underutilisation of potentially valuable content, or would invite potential users to simply exploit orphan works without the consent of the right owners. This would devalue their rights and undermine the system of copyright and related rights as such.⁶⁹⁹ Accordingly, a legal solution should address both the public interest in having works available to the fullest extent, as well as the interests of right holders in having their works exploited in situations where this would otherwise be impossible. In order to maintain the balance between the different interests involved, it is necessary to find a solution that provides legal certainty to bona fide users who want to reutilise existing works of authorship (and to these bona fide users only), but that at the same time protects the legitimate interests of the authors and copyright owners concerned.

In addressing the issue of orphan works, a variety of alternative solutions can be considered. In general, these alternatives can be grouped into six categories. First, it might be possible to ameliorate the orphan works problem by adopting a model in which right holders are stimulated to make copyright ownership or rights management information publicly accessible (para. 5.4.1). A second solution could be found in a system of collective rights management, whereby rights management organisations are entitled to grant licences that include even those works the right owners of which cannot be traced by reasonable means (para. 5.4.2). Alternatively, a mechanism could be proposed whereby a user who cannot locate a right owner after having conducted a reasonable search, may apply to a representative private organisation to obtain an indemnity or security (para. 5.4.3). For the same reason, it could be feasible to allow a user to apply to a competent public authority to obtain a nonexclusive licence (para. 5.4.4). Fifth, an exception or limitation could be introduced permitting the reutilisation of orphan works under certain conditions (para. 5.4.5). Finally, a liability rule could be established that would allow bona fide reutilisation by users who have taken reasonable steps to track and identify, but who have been unsuccessful in locating, a copyright owner (para. 5.4.6).

⁶⁹⁷ See Hugenholtz/De Kroon 2000, presenting a comprehensive overview of case law in several EU Member States concerning disputes that arose over the questions of transfer and ownership of ‘electronic’ rights.

⁶⁹⁸ See Tohyama 2004, p. 81.

⁶⁹⁹ See also, in this respect, the response to the Communication ‘2010: Digital Libraries’ by AIDAA.

5.4.1 *Copyright ownership and rights management information*

Because the unsociability of copyright owners is caused, to a large extent, by certain intrinsic factors, which include the fact that (i) not all works carry a statement indicating the authorship or copyright ownership of the work (which is particularly true for graphical works, such as photos, and audiovisual works),⁷⁰⁰ (ii) the copyright ownership information on the work may be outdated due to a change of ownership, and (iii) there is a general lack of adequate copyright registers or other publicly accessible records,⁷⁰¹ it would be feasible to attend to the orphan works issue by providing mechanisms that encourage the supply of copyright ownership information or rights management information (metadata) to the public.⁷⁰² If adequate rights management information is made publicly accessible, this could lower the transaction costs that are involved in identifying right holders, thus facilitating the rights clearance of works.

Obliging the author or copyright owner to provide information on copyright ownership, however, would be at odds with article 5(2) of the Berne Convention, if this would make the existence or exercise of copyright contingent upon formal requirements. Except for purely national situations, it is illicit under the Berne Convention to establish mandatory registration systems or to require the affixation of a copyright notice, including information on the identity and whereabouts of a copyright owner and the date of copyright, on each copy of the work. On the other hand, it is not prohibited to establish measures which stimulate right owners to voluntarily provide the necessary information concerning copyright ownership and licensing conditions.⁷⁰³

A first possibility would therefore be to simply encourage authors and copyright owners to provide adequate copyright information or, for digital works, to incorporate inclusive rights management information.⁷⁰⁴ In this respect, an important role could be played by DRM systems. Since DRM systems may include large databases of rights management information to support the process of authorizing and monitoring the online use of copyrighted works, they can contribute to a significant extent to efficient rights clearance in the online environment.

If supported by additional legislative measures, the advantages of using DRM could even be strengthened. It would be possible, for instance to alter the provision of article 7 of the Information Society Directive in such a way that the protection of rights management information is made conditional upon the requirement to provide, as a minimum, information regarding the current copyright owner (at present, it is left open to the right owner to choose whatever combination of information listed in article 7(2) is included).⁷⁰⁵ Additionally, it would be feasible to provide that the protection of rights management information under article 7 Information Society Directive is only granted in case this information has been deposited in a

⁷⁰⁰ See Huang 2006, p. 267-268. Huang analyses variations in the extent of the orphan works problem for different types of copyrighted works (music, books and graphical works).

⁷⁰¹ In this respect, a comparison can be made with other IPRs, where rights management information is generally supplied to the public. In trademark law, for instance, public registers fulfil an important function of making rights management information accessible to the public. As trademark holders are also required to register any assignment of their rights, the information available in these registries remains adequate and up-to-date.

⁷⁰² Rights management information is broader than copyright ownership information, in the sense that it covers not only information identifying the work, the author and the copyright owner, but also information indicating the terms and conditions of use of a particular work, and any numbers or codes that represent such information. See art. 7(2) Information Society Directive.

⁷⁰³ The US Copyright Act, for example, relies on voluntary formalities. For works of US origin, registration is a prerequisite to initiate an infringement action. Moreover, the recovery of statutory damages and attorney's fees is limited to instances of infringement occurring after registration. See arts. 411 and 412 US Copyright Act.

⁷⁰⁴ 'The widespread use of digital metadata and digital watermarking can permanently attach author information to copyrighted works, ameliorating the orphaned works problem.' See the response to the Communication 'i2010: Digital Libraries' by ADOBE.

⁷⁰⁵ Ginsburg/Ricketson 2006, para. 15.39, p. 991.

publicly accessible database. To this end, databases should first be established at the national, or ideally, at the European level. If the deposit of rights management information would become a prerequisite to the legal protection of metadata, this may offer a significant incentive to right holders to make the required information available. In other words, a provision of this kind has the potential to provide the necessary stimulus to supply information, thus enhancing the efficiency in the right clearance of works.

Since article 7 Information Society Directive is based directly upon article 12 WCT, however, the question arises whether an alteration of this kind would be compatible with the international obligations of the Community and the Member States under the WCT. According to the second part of the agreed statement concerning article 12 WCT, 'Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.' This agreed statement reminds contracting parties not to 'rely' on article 11 as a basis or justification to institute formalities as prohibited under article 5(2) of the Berne Convention (as incorporated by reference into the WCT).⁷⁰⁶ In other words, contracting parties may not go as far as requiring right owners to provide rights management information as a condition to enjoy copyright protection.⁷⁰⁷

However, since the protection provided for in article 7 Information Society Directive does not concern the protection of *copyright*, but merely the protection of rights management information against removal or tampering, a mandatory deposit of rights management information would not interfere with the prohibition of formalities. Moreover, as the other elements of the agreed statement are concerned, it is quite unclear how a rights management system (as opposed to a technological protection measure) would prohibit the free movement of goods or impede the enjoyment of rights under this Treaty.⁷⁰⁸

In any event the protection of rights management information under article 12 WCT does not establish any new right of authors in their works, but merely looks like a traditional enforcement provision.⁷⁰⁹ Accordingly, since the non-compliance with the mandatory deposit would result in a loss of protection of rights management information and not in the protection of any of the exclusive rights and rights of remuneration as protected under the WCT (and the Berne Convention),⁷¹⁰ this does not seem to be at odds with the agreed statement concerning article 12 WCT. Therefore, there does not appear to be any violation of the Community's and the Member States' international obligations under the WCT.

In addition, it would be feasible to stimulate authors or right owners to avail themselves of Creative Commons (CC) licences or similar licences,⁷¹¹ which provide a direct link between a work and its licence. If authors or right owners decide *a priori* under what conditions they would allow the reutilisation of their works and which rights they thereby would want to reserve, and subsequently attach these licensing conditions to copies of the work, this would create transparency and facilitate the licensing process considerably. After all, where the terms and

⁷⁰⁶ Art. 1(4) WCT.

⁷⁰⁷ Ricketson/Ginsburg 2006, para. 15.39, p. 991.

⁷⁰⁸ *Ibid.*, para. 15.40, p. 992.

⁷⁰⁹ Reinbothe/Von Lewinski 2002, p. 152-153.

⁷¹⁰ See the first part of the agreed statement concerning art. 12 WCT: 'It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration.'

⁷¹¹ Alternative licences include the Click-Use Licence (as used in the UK for the re-use of Crown copyright information, public sector information or parliamentary copyright information) <<http://www.opsi.gov.uk/click-use/index.htm>>; and the Creative Archive Licence (as used by the BBC to license the content from the BBC Creative Archive) <http://creativearchive.bbc.co.uk/licence/nc_sa_by_ne/uk/prov/>.

conditions to use a work are already indicated on the work itself, a prospective user would be provided legal certainty to use the work without the need to locate the copyright owner to ask for permission.⁷¹² This has also been acknowledged by the Commission in the framework of the '2010: Digital Libraries' initiative.⁷¹³

A disadvantage for right owners seeking revenue for their works, however, is that CC licences do not allow for direct remuneration.⁷¹⁴ To accommodate this drawback, it would be possible to introduce a commercial variant of such licences (e.g. a licence that permits reutilisation under the condition that a certain fee is paid), or to provide accompanying pass through mechanisms that would connect a user e.g. to the right owner's website or to a collective management society to arrange the payment for the use made under the relevant licence.⁷¹⁵

Finally, it is conceivable to provide certain facilities to authors and right holders to record ownership of copyright in databases established and maintained for the purpose of providing information regarding the copyright status of works. Such initiative could consist of facilitating either the creation of rights management information databases by public or private entities,⁷¹⁶ or the establishment of voluntary registration systems under national copyright law.⁷¹⁷ By encouraging the recording of rights management information in databases or registers, established at the national or European level, users may be supplied with an important source of information concerning a work, its author and its present copyright owner.⁷¹⁸ This will facilitate the reutilisation of copyrighted works to a significant extent, provided of course that the information is kept up-to-date. In this respect, an important role could be reserved for collective management societies to open up their databases, as they already hold large databases of rights management information relating to their repertoire. In addition, information brokers might play a part in assisting users to search the databases or registers to clarify copyright ownership, and perhaps even to clear the rights in copyrighted works.

Although all these initiatives may significantly contribute to alleviate the problems of rights clearance of copyrighted works, especially those works whose right owners would otherwise be difficult to identify and locate, it must be stressed that the supply of information alone would not provide a complete solution to the orphan works problem, as for many 'old' works the required information is simply unavailable. Nevertheless, since the core of the orphan works problem lies in the absence of adequate copyright ownership information, every effort to enhance the supply of information in the future should be an important part of a solution.

5.4.2 *Collective rights management*

A second alternative would be to stimulate the collective management of rights in subject matter that is most suitable to digital reutilisation. This would have the advantage that, because of the concentration of right holders in a collective management society, prospective users would face

⁷¹² Note, however, that the extent to which legal certainty is provided for fully depends on the validity of the CC licence. It is conceivable, for instance, that a particular licensor was not entitled to issue a licence because he did not hold all the relevant rights. This matter, however, exceeds the scope of our current debate.

⁷¹³ Staff Working Document on Digital Libraries, p. 13.

⁷¹⁴ ALAI, Memorandum on Creative Commons Licenses, January 2006, p. 2 [ALAI 2006]. This memorandum generally aims to make authors and right owners aware of both the advantages and shortcomings of CC licences.

⁷¹⁵ ALAI 2006, p. 5.

⁷¹⁶ An example is 'Cannes market', an online database on rights in films, supported by the MEDIA Plus programme of the European Union: <<http://cannesmarket.com>>. Another interesting initiative can be found in the Japanese 'Copymart' project: <<http://www.copymart.jp>>.

⁷¹⁷ For an overview of the different national legislations, see the Survey of national legislation on voluntary registration systems for copyright and related rights, WIPO document (SCCR/13/2), 9 November 2005.

⁷¹⁸ Illustrative is the International Register of Audiovisual Works, as provided for by the WIPO Treaty on the International Registration of Audiovisual Works [Film Register Treaty], adopted at Geneva on 18 April 1989.

fewer difficulties in finding the copyright owner whose work they intend to use. Where a collective management society has been established, and this society represents a significant part of the right holders in a given field, there is a reasonable chance that the society also represents the particular copyright owner the user is looking for. Nonetheless, if the particular copyright owner is not represented by this collective management society, a user may still face considerable uncertainties. In the systems of collective rights management discussed below, different attempts are made to deal with these uncertainties.

5.4.2.1 *Voluntary collective rights management ('opt in')*

A system of voluntary collective licensing is characterised by the freedom of the copyright owner to decide whether or not to authorise a collective management society to represent and exercise his rights. In other words, any copyright owner may 'opt in' to the system, but he is not required to do so. As a result, even where the voluntary collective management of rights is reasonably developed, and supported by a comprehensive network of bilateral agreements, the catalogue of copyrighted works in respect of which a collective management society has been mandated will most likely not cover the entire world repertoire.⁷¹⁹ Hence, a prospective user will not always be able to obtain a licence from this society for the works he wants to use. Moreover, if the user obtains a blanket licence, there is no guarantee that this would prevent right owners whose repertoire the collective management society not represents, to come forward and to invoke their exclusive rights.

An important example in this respect, is the general agreement concluded between the French *Institut National de l'Audiovisuel* (INA) and five French collective management societies (SACEM, SACD, SCAM, SDRM and SESAM), authorizing INA to use the collective management societies' audiovisual and sound catalogue, to the extent that it is available in its archive, for any mode of exploitation (including internet and mobile telephony). Although this agreement greatly facilitates and simplifies the exploitation of INA's archives, it does not cover the repertoire of right holders who are not members of any of the contracting societies. Consequently, the obstacle remains that INA still needs to identify and locate these, perhaps unknown, right holders to clear the rights of the works not covered by the agreement.⁷²⁰

Rights management societies often attempt to overcome these problems by granting users a blanket licence that includes an indemnity for the use of those works the rights of which the society has not acquired. This particularly occurs where a collective management society already represents a comprehensive repertoire of works. An indemnity, however, does not always provide for the necessary legal safeguards for users (see para. 5.4.3).

Moreover, if a solution to the orphan works problem would solely depend on a system of voluntary collective rights management, the risk exists that not all right holders in a given field are willing to cooperate and, perhaps, that in certain fields no collective management societies are established at all. Especially if it comes to exploitation of digital content, right holders are often reluctant to allow the reutilisation of their works under 'collectivised' terms, because such exploitation might be harmful to their economic interests in the long term.⁷²¹ Other groups of right holders, such as photographers and film producers, have traditionally been cautious to allow collective management of their rights, as they consider the exploitation of their works a matter

⁷¹⁹ M. Ficsor, 'Collective management of copyright and related rights in the digital, networked environment: Voluntary, presumption-based, extended, mandatory, possible, inevitable?', in: D. Gervais (ed.), *Collective management of copyright and related rights*, The Hague: Kluwer Law International 2006, p. 37-83, p. 47 [Ficsor 2006].

⁷²⁰ J.-F. Debarnot, 'Les droits des auteurs des programmes du fonds de l'INA exploités sur son site internet', *Legipresse* 2006, no. 232, p. 93-94 [Debarnot 2006].

⁷²¹ TNO Strategie, *Technologie en Beleid*, 'Cultuurpolitiek, auteursrecht en digitalisering', report commissioned by the Ministry of Education, Culture and Sciences, 5 September 2003, <http://www.minocw.nl/documenten/digitaalomroep-doc-stb_03_26_auteursrecht.pdf>, p 70 [TNO report 2003].

that they can manage best on an individual basis. Hence, voluntary collective management of rights will not provide a complete solution to the orphan works problem. Moreover, even in those areas where voluntary collective management could be effective, it would provide a solution for future works only. Accordingly, the system would not solve the problem for already existing orphan works.

5.4.2.2 *Extended collective licensing ('opt out')*

An alternative to voluntary collective rights management would be the introduction of a system of extended collective licensing, such as is applied in the Nordic countries (i.e. Denmark, Finland, Norway, Sweden and Iceland) in various sectors.⁷²² This system is distinguished by the combination of a voluntary transfer of rights from right holders to a collective management society with a legal extension of the repertoire of the society to encompass those right holders that are not members of the society.⁷²³ Statutory provisions thereby give an extended effect to the clauses in a collective licensing contract, which is concluded between a representative organisation of right owners and a certain group of users (or individual users). A precondition is that a 'substantial' number of right holders in a given category are represented by the contracting organisation.⁷²⁴

The extended collective licence automatically applies to all right holders in the given field, whether they are domestic or foreign. It also applies to deceased right holders, in particular where estates have yet to be arranged,⁷²⁵ and to unknown or untraceable right holders. This greatly facilitates the clearance of rights, since a user may obtain a licence to use all works covered by the licence without the risk of infringing the rights of right owners who otherwise would not be represented. In fact, the rationale of the system of extended collective licensing has always been to facilitate the licensing in case of massive uses, for which it would be impossible for users to clear all the necessary rights.⁷²⁶

To protect the interests of right owners who are not members of the collective management society and who do not wish to participate in the collective licensing scheme, the extended collective licensing system should provide right owners with the option to either claim individual remuneration or to 'opt out' from the system altogether.⁷²⁷ That would correspond to the legitimate concerns of those right holders who want to retain control of their works and their basic business operations.⁷²⁸ By offering the possibility of opting out the system, the extended collective licence system is less far reaching than the mechanism of mandatory collective exercise of rights that will be discussed below. To ensure its compatibility with international copyright conventions, however, the procedure of opting out should be relatively simple and straightforward, to prevent it from being deemed a *de facto* formality prohibited by article 5(2) Berne Convention.⁷²⁹

⁷²² T. Koskinen-Olsson, 'Collective management in the Nordic countries', in: D. Gervais (ed.), *Collective management of copyright and related rights*, The Hague: Kluwer Law International 2006, p. 257-282 [Koskinen-Olsson 2006].

⁷²³ Gervais 2006, p. 28.

⁷²⁴ For more details, see: H. Olsson, 'The Extended Collective License as Applied in the Nordic Countries', [2005] Kopinor 25th anniversary international symposium, 20 May 2005, <http://www.kopinor.org/hva_er_kopinor/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries>, para. 6.2 [Olsson 2005].

⁷²⁵ Gervais 2006, p. 28.

⁷²⁶ Olsson 2005, para. 3.

⁷²⁷ Ficsor 2006, p. 48. See also Olsson 2005, para. 6.4; Koskinen-Olsson 2006, p. 268-270.

⁷²⁸ Response to the Communication '2010: Digital Libraries' by the Federation of the Finnish Media Industry.

⁷²⁹ Ficsor 2006, p. 48. See Gervais, p. 29-35, for a full elaboration of the question whether the extended collective licensing system may constitute a prohibited formality. Following the drafting history of art. 5(2) BC, Gervais concludes that the system is not a prohibited formality under the Berne Convention.

Although the system of extended collective licensing has the potential to provide a valuable solution to the orphan works issue, at least for certain specific cases, it must be stressed that its success is fully dependent on the conclusion of contracts between collective management societies and users.⁷³⁰ This implies that collective management societies already must operate in those fields where the orphan works problem is most pressing, which is currently not the case in all Member States. As stated before, in particular in the photographic and audiovisual field, collective rights management is still rather underdeveloped. As we have seen, right owners in those fields are reluctant to have their rights administrated collectively, as they generally prefer to manage their rights individually. Besides, even if collective management societies have been established, it may still occur that negotiations with users fail, or that no agreement can be reached on specific terms or conditions. In that respect, it would be conceivable that the extended collective licensing scheme is supplemented by legal arrangements, such as mediation or arbitration.⁷³¹

5.4.2.3 *Mandatory collective rights management*

A second alternative solution to the orphan works problem could be the establishment of a system of mandatory collective rights management. Under this system, it is provided by law that right owners can only exercise their rights through collective rights management, without any possibility for individual claims or prohibitions. Such a system exists in the European Union in the area of cable retransmission rights, pursuant to the Satellite and Cable Directive.⁷³² Where mandatory collective rights management applies, the repertoire of all right holders in a given field is represented by one, or by several competing, collective management societies. Although, in the situation where several societies compete, uncertainty may exist as to which of these societies would represent the untraceable copyright owner, this uncertainty may be removed, for instance, by a statutory provision indicating that the untraceable copyright owner is presumed to be represented by a particular society or by any of the societies involved. For prospective users, the system of mandatory collective rights management could therefore provide considerable legal safeguards. Nevertheless, since the mandatory collective rights management by its very nature excludes the possibility of individual exercise of rights, even for those right holders who would have the means to manage their rights individually,⁷³³ it is to be exercised with vast reserve.⁷³⁴

5.4.3 *Indemnity or security granted by a representative private organisation*

Another (partial) solution would be to allow a representative private organisation to grant an indemnity or security to a prospective user who, after a reasonable search, has not been able to identify and locate a copyright owner. In some Member States, there already exist voluntary arrangements of this kind. In the Netherlands, for example, a system is in place whereby a prospective user of a photograph can request *Foto Anoniem*,⁷³⁵ a foundation which is allied to Burafo, the organisation for professional photographers, to be of service to find the copyright owner of a photographic work. To that end, *Foto Anoniem* has at its disposal a vast directory of photographers. In the majority of cases, *Foto Anoniem* is indeed able to trace the name and

⁷³⁰ Olsson 2005, para. 7.

⁷³¹ Koskinen-Olsson 2006, p. 270.

⁷³² Art. 9(1) Satellite and Cable Directive.

⁷³³ Note that under the Satellite and Cable Directive broadcasting organisations have been exempted from the rule of mandatory collective rights management. See art. 10 Satellite and Cable Directive.

⁷³⁴ Questions have been raised as to the compliance of mandatory collective rights management with the norms of the international copyright conventions and the *acquis communautaire*. See Ficsor 2006, p. 43 and 46.

⁷³⁵ Stichting Foto Anoniem, <<http://www.fotoanoniem.nl/>>.

address, and to bring the user in contact with the photographer. Nonetheless, if the photographer cannot be found, *Foto Anoniem* will grant the user legal protection by means of an indemnity. In the indemnity clause, *Foto Anoniem* commits itself to protect the user against liability for copyright infringement. To obtain indemnity, a user must pay *Foto Anoniem* a fair compensation, which generally relates to the usual licence fee for publication of a photograph. The compensation is reserved to disburse right owners in case they are retrieved. In Belgium, a similar model is employed by SOFAM, the collective management society for visual arts.⁷³⁶

It appears that SGDL,⁷³⁷ the French Authors Association, is currently examining whether it can also develop a similar solution to provide access to literary works the right owners of which cannot be identified.⁷³⁸ It would consist of setting up a system in which a publisher who faces difficulties to find a right holder could apply to SGDL to obtain a security. By paying a certain fee, the publisher would enable SGDL to undertake an investigation to the ownership of the work and to deposit money into a security fund of which the right owner can be remunerated in case he would be found. By this system, SGDL could officially endorse that the publisher has acted in good faith, should that ever be necessary, for instance, in a lawsuit.

Although the grant of an indemnity or security provides a measure of legal certainty to the user, it is apparent that these alternatives do not fully safeguard the user's position, at least where the indemnity or security, as in the above mentioned cases, is not supported by statutory provisions in the law. First, an indemnity or security does not prevent the copyright owner to invoke his exclusive rights should he ever come forward. Therefore, even where the indemnity or security would protect the user against financial liability, it does not guarantee to the user that the orphan work may be actually used. Moreover, because an indemnity or security only eliminates financial liability under civil law, the user may still be held responsible for copyright infringement under criminal law.⁷³⁹ As a result, if a solution to the orphan works issue would be sought in indemnity clauses or security funds, it should ideally be supported by legal measures addressing both matters, in order to provide legal certainty to the prospective user. At the same time, such legal measures should take account of the legitimate interests of right owners, by strictly defining the conditions under which the use of an orphan work is permissible.

5.4.4 *Licence issued by a competent public authority*

Another way to provide legal certainty would be to allow a user to apply to an administrative body to obtain a compulsory licence to use a particular work, in those cases where the identity or whereabouts of the copyright owner cannot be ascertained by reasonable inquiry. Such a system has been established, *inter alia*, in Canada and Japan.⁷⁴⁰ In the UK, a similar procedure exists with respect to the right to make a copy of a recording of a performance.⁷⁴¹ Under the licence schemes provided for, the competent public authority (i.e. the Canadian Copyright Board, the Commissioner of the Japanese Agency for Cultural Affairs, and the UK Copyright Tribunal) must be satisfied that the applicant has made 'reasonable efforts' to find the copyright owner,

⁷³⁶ SOFAM, <<http://www.sofam.be/main-nl.php?ID=104&titel=Borgstelling>>.

⁷³⁷ La Société des Gens de Lettres (SGDL), <<http://www.sgdl.org>>.

⁷³⁸ See e.g. the responses to the Communication '2010: Digital Libraries' by Bibliothèque Nationale de France (annex), EDITIS and the Federation of European Publishers.

⁷³⁹ Koskinen-Olsson 2006, p. 267.

⁷⁴⁰ Art. 77 Canadian Copyright Act; art. 67 Japanese Copyright Act.

⁷⁴¹ Art. 190 UK Copyright Act.

before a licence may be issued. The purpose for which the applicant requests the licence (e.g. commercial, educational or religious) is irrelevant.⁷⁴²

As a general rule, it is not required that ‘every effort’ has been made to trace the right holder, but an applicant must prove to have conducted a ‘thorough search’.⁷⁴³ In Canada, for example, the Copyright Board recommends the applicant to contact different collective management societies and publishing houses; to consult indexes of national libraries, universities and museums; to check registration systems of copyright offices; to investigate inheritance records; and to simply search the internet.⁷⁴⁴ In Japan, similar recommendations are made to a user who wants to apply for a licence at the Agency for Cultural Affairs. There, the user is also encouraged to announce in newspapers or on a website that the particular copyright owner is sought.⁷⁴⁵ As a general rule, a user may request, by a single application, a licence for multiple orphan works.

Once the administrative body is convinced that the applicant, despite reasonable efforts, cannot locate the copyright owner, it may grant a licence, irrespective of whether the work is of domestic or foreign origin.⁷⁴⁶ A licence cannot be granted, however, for works which are unpublished or works of which the publication status cannot be confirmed.⁷⁴⁷ Although this may be seen as a shortcoming of the system, because it may not always be easy to resolve whether an old work (e.g. a photograph) has ever been published,⁷⁴⁸ it must be emphasised that this provision respects the moral right of the author to decide whether or not to make his work available to the public (*droit de divulgation*). It would be possible, however, to alleviate this drawback by allowing the administrative body to presume previous publication if conclusive evidence is hard to provide, but the circumstances may indicate the likeliness of publication. In fact, the Canadian Copyright Board has, from time to time, relied on indicia that would not meet the civil burden of proof in cases where there was at least some evidence allowing it to conclude that a work had previously been published.⁷⁴⁹

The licence granted permits the applicant to use the copyrighted material without the explicit consent of the copyright owner. The licence is nonexclusive and limited to the domestic territory in which the licence has been issued. The grant of the licence is usually subject to specific terms and conditions, such as the type of use which is authorised,⁷⁵⁰ the restrictions to this use, the date of expiration of the licence, etc. In any event, the licence stipulates a royalty fee, which should

⁷⁴² See, with respect to the Canadian system, L. Carrière, ‘Unlocatable copyright owners: some comments on the licensing scheme of section 77 of the Canadian Copyright Act’ 1998, <<http://www.robic.com/publications/Pdf/103-LC.pdf>>, p. 9, [Carrière 1998].

⁷⁴³ Copyright Board of Canada, ‘Unlocatable Copyright Owners Brochure’, updated: July 2001, <<http://www.cb-cda.gc.ca/unlocatable/brochure-e.html>> [Copyright Board of Canada 2001].

⁷⁴⁴ Copyright Board of Canada 2001.

⁷⁴⁵ See the website of the Agency for cultural affairs of Japan: <http://www.bunka.go.jp/1tyosaku/c-1/content_02.html>; in Japanese (many thanks to Professor Y. Inoue for translation).

⁷⁴⁶ See e.g. *National Film Board of Canada (Re)*, Copyright Board of Canada, 13 September 2005, 2005-UO/TI-34, <<http://www.cb-cda.gc.ca/unlocatable/other/5-b.pdf>> (application denied).

⁷⁴⁷ Art. 70(4) Japanese Copyright Act also states that no licence shall be issued if it is evident that the author has the intention to halt forever the publication or other exploitation of his work.

⁷⁴⁸ See e.g. Peter B. Hirtle, ‘Unpublished Materials, New Technologies, and Copyright: Facilitating Scholarly Uses’, [2001] *Journal of the Copyright Society of the U.S.A.*, vol. 49, p. 259-275 [Hirtle 2001] and J. Brito and B. Dooling, ‘An orphan works affirmative defense to copyright infringement actions’, [2005] *Michigan Telecommunications and Technology Law Review*, vol. 12, p. 75-113, p. 106 [Brito/Dooling 2005].

⁷⁴⁹ See e.g. *Canadian centre for architecture (Re)*, Copyright Board of Canada, 17 January 2005, 2004-UO/TI-32, <<http://www.cb-cda.gc.ca/unlocatable/other/3-b.pdf>> (application denied) and *The office of the Lieutenant Governor of Québec (Re)*, Copyright Board of Canada, 3 March 2005, 2004-UO/TI-37, <<http://www.cb-cda.gc.ca/unlocatable/other/4-b.pdf>> (application denied).

⁷⁵⁰ In Canada, the licence can only be issued for uses specified in arts. 3, 15, 18 and 21 Canadian Copyright Act. This covers most, but not all, cases. See Carrière 1998, p. 7. In Japan, a user may request a licence for any kind of use. In the UK, the licence can only be obtained for the reproduction of a recording of a performance.

generally correspond to an ordinary royalty rate as would have been made in consideration of consent being given.⁷⁵¹

The royalty fee is usually ordered to be made directly to a collective management society that would normally represent the untraceable copyright owner, but users may also be required to deposit the fee into an escrow account. If the copyright owner resurfaces, he may collect the royalties fixed in the licence or, in default of their payment, commence an action to recover them in a court of competent jurisdiction. In Canada, a statutory cut-off date to recover the royalties is provided for.⁷⁵² If no copyright owner has come forward within five years after the expiration of the licence, the collected royalty fee may be used for means other than those relating to the use in question. The Copyright Board may, for instance, allow a collective management society to which the fees are paid to dispose of the royalties as it sees fit for the general benefit of its members.⁷⁵³

An often claimed disadvantage of the pre-clearance of orphan works by an administrative body is that it is an expensive and time consuming process.⁷⁵⁴ The Canadian Copyright Board, however, indicates that once it has received all the required information, a decision can usually be issued within 30 to 45 days.⁷⁵⁵ The opponents of a system of licensing by a public authority also maintain that the inefficiency of the system is exposed by the small number of applications filed before the Canadian Copyright Board.⁷⁵⁶ However, this need not be true as the relatively small number of applications might also simply point to the relatively limited size of the orphan works problem.

Notwithstanding these possible drawbacks, a system which allows for a public authority to issue a licence to use an orphan work has the potential to provide a practical and valuable solution to the problem. As indicated, the main advantage is that this system adequately provides the user with legal certainty to use an orphan work. Where a user is granted a licence, he is authorised to use an orphan work, without the risk of an infringement claim should the right owner come forward. At the same time, the legitimate interests of the right owners concerned are not unnecessarily prejudiced. First, the verification of the good faith of a user is performed by an independent public body, which can take due account of keeping the legitimate interests of right owners and users in equilibrium. Second, it is determined on a case-to-case basis whether a licence is issued and thus an exception to the exclusive right of the right owner is made. Third, the licence issued is not all-inclusive, but granted to a particular user for a specific kind of use only. Finally, the system does not result in a loss of income for right holders. If a right holder resurfaces, he is reimbursed for the use made under the licence that has been issued. The system whereby a licence is issued by a competent public authority thus provides a well-balanced solution to the problem of orphan works.⁷⁵⁷

5.4.5 *Exceptions and limitations*

Yet another possibility would be to introduce a statutory exception or limitation under which the reutilisation of orphan works would be allowed under certain strict conditions. For instance, a

⁷⁵¹ Art. 67(1) Japanese Copyright Act; art. 190(6) UK Copyright Act; Carrière 1998, p. 9-10.

⁷⁵² Art. 77(3) Canadian Copyright Act.

⁷⁵³ Copyright Board of Canada 2001.

⁷⁵⁴ Brito/Dooling 2005, p. 106-107; D.W.K. Khong, 'Orphan Works, Abandonware and the Missing Market for Copyrighted Goods', [2006] International Journal of Law and Information Technology, <<http://ijlit.oxfordjournals.org/cgi/rapidpdf/eai032v1.pdf>>, p. 22 [Khong 2006].

⁷⁵⁵ Copyright Board of Canada 2001.

⁷⁵⁶ Since 1990, when the system became effective in Canada, only 190 applications were filed and 184 licences were issued. By contrast, in Japan, only 29 licences were issued since the system entered into operation in 1970.

⁷⁵⁷ The system is also compatible with the substantive minima under the international treaties (e.g. with the prohibition of formalities under art. 5(2) BC). See Ricketson/Ginsburg 2006, para. 6.108, p. 329.

limitation might stipulate that certain specific users (e.g. public broadcasters, museums, libraries, or educational institutions) would be allowed to make available works in their archives, or works that are otherwise at their disposal, for certain specific purposes (e.g. public broadcasting, public exhibition, private studying, teaching or scientific research), upon the condition that they have not been able to reasonably ascertain the identity or whereabouts of the copyright owners of those works. That would have the benefit that once a copyrighted work would qualify under the exception as being ‘orphaned’, a user could make unauthorised use of this work.

If a general exception to the exclusive right of copyright owners would be introduced, this should be compatible with the three-step test of article 5(5) of the Information Society. This test prescribes that an exception is only permitted (1) in certain special cases, (2) which do not conflict with a normal exploitation of the work, and (3) do not unreasonably prejudice the legitimate interests of the right holder. In this respect, the first step of the test could be easily met, if the exception were strictly limited to certain specific cases for certain specific purposes. The second step would be surmountable as well, since the exception would concern orphan works only, for which a normal exploitation is excluded by definition. The third step, however, might be more difficult. Only if the exception would be supported by measures to protect the legitimate interest of the right holder (e.g. payment in escrow of reasonable compensation to the benefit of right owners that might resurface), the exception could pass the third step. Even then, the question remains whether there are no other, equally effective means, which could achieve the same objective while at the same time providing more legal safeguards to protect the interests of right owners.⁷⁵⁸

5.4.6 *Liability rule*

A last alternative would be to introduce a rule that would limit the liability of those users who use an orphan work after an unsuccessful but reasonable search for the copyright owner has been conducted. This solution has been proposed in the US Copyright Office’s orphan works report of 2006,⁷⁵⁹ and has subsequently been introduced, with some minor amendments, as a bill –the ‘Orphan Works Act of 2006’– in the US House of Representatives.⁷⁶⁰

In general, the liability rule permits bona fide users, who have been unable to identify and locate a copyright owner, to make use of the work, subject to a limitation on remedies that the right owner could obtain against the user if he would subsequently come forward and file a claim. To qualify for this limitation, the user is required to prove that he has performed a ‘reasonably diligent search’ and, if possible and reasonably appropriate under the circumstances, to provide attribution to the author and copyright owner of the work.⁷⁶¹

The term ‘reasonably diligent search’ is not defined in the proposal. It is a general standard which incorporates some minimum requirements of good faith, and which is to be applied on a case-by-case basis, taking account of all the circumstances of the particular use.⁷⁶² The orphan works report of the US Copyright Office nevertheless describes a number of factors that may be regarded as relevant to the reasonableness of a search. These factors include the amount of identifying information on the copy of the work, the availability of publicly accessible records containing information about the work and the copyright owner, the transfer of copyright, death

⁷⁵⁸ See also Senftleben 2004, p. 236.

⁷⁵⁹ US Copyright Office Orphan Works Report 2006

⁷⁶⁰ Orphan Works Act of 2006, H.R.5439, Introduced in the House of Representatives, 109th Congress, 2nd Session, 22 May 2006, <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5439ih.txt.pdf>.

⁷⁶¹ The idea is that it should be unambiguously clear to the public that the true author and copyright owner are another than the user in question. See US Copyright Office Orphan Works Report 2006, p. 110-112.

⁷⁶² US Copyright Office Orphan Works Report 2006, p. 98.

certificates of authors, records concerning the closedown of corporate copyright owners, etc. Other factors include the question whether the work has ever been made available to the public, the age of the work and, finally, the nature of the use (e.g. whether it is commercial or non-commercial) and the extent of the use (e.g. how prominently the work figures into the activity of the user).⁷⁶³ In any event, it is to the court to decide whether a search has been reasonably diligent in the given circumstances.

If a user meets the burden of proof that he conducted a reasonably diligent search and has provided reasonable attribution to the true author and copyright owner, there is a closed set of remedies available in case the right owner should resurface and there would be litigation over the use of the work. First, monetary relief is limited to ‘reasonable compensation’ for the use made. In general, this reasonable compensation should equal a reasonable licence fee as would have been established in negotiations between the user and the right owner before the infringing use commenced. Where the use was non-commercial and the user expeditiously ceases the infringement upon a notice by the copyright owner, however, no monetary relief is due at all.⁷⁶⁴

In addition, the proposal provides for a limitation on injunctive relief. Where the orphan work has been transformed or incorporated into a derivative work (e.g. a motion picture, a documentary film or a book), the copyright owner cannot obtain full injunctive relief to prevent the exploitation of the derivative work, provided that the user pays the copyright owner a reasonable compensation. Full injunctive relief is available, however, where an orphan work has simply been republished or posted on the Internet without any transformation of its content. Nevertheless, in these cases, courts are instructed to account for and accommodate any reliance interest of the user that may be harmed by the injunction.⁷⁶⁵

The main advantage of the liability rule is that it would provide for an inclusive provision to address the orphan works issue, thus not categorically excluding any type of work (e.g. unpublished or foreign works) from its scope.⁷⁶⁶ Moreover, the liability rule would not affect any existing rights, limitations or defences to copyright infringement.⁷⁶⁷ In addition, since users do not have to recompense right owners in advance, but only in case they reappear and file a claim, the liability rule is claimed to be much more cost efficient than, for instance, the *ex ante* clearance of orphan works as in the Canadian or Japanese system whereby a licence may be issued by a competent public authority.⁷⁶⁸

Although reactions to the proposed liability rule in the US have been overwhelmingly positive,⁷⁶⁹ certain groups of right holders remain strongly opposed. Concerns were expressed in particular by individual right holders such as photographers, illustrators and graphic artists. They fear that potential users would not always conduct a sufficiently diligent search to find a right owner, thereby inaccurately labelling many works as orphan works. For that reason, right holders are concerned that users may unjustly regard the liability rule as a permit to use their works. In particular where, under the liability rule, right owners bear the burden of seeking judicial relief in the event of a dispute, and litigation to enforce their copyrights is often prohibitively expensive, they are afraid that many of their works are eventually used without consent or disbursement for

⁷⁶³ *Ibid.*, p. 99-108.

⁷⁶⁴ *Ibid.*, p. 115-119.

⁷⁶⁵ *Ibid.*, p. 119-121.

⁷⁶⁶ *Ibid.*, p. 100 and 121.

⁷⁶⁷ *Ibid.*, p. 121.

⁷⁶⁸ *Ibid.*, p. 114.

⁷⁶⁹ J.L. Sigall, Statement before the Subcommittee on Intellectual Property of the Senate Committee on the Judiciary on “Orphan Works: Proposals for a Legislative Solution”, 6 April 2006, <http://judiciary.senate.gov/testimony.cfm?id=1847&wit_id=5219> [Sigall 2006].

the use of their works.⁷⁷⁰ This would frustrate the initial aim of the proposal to create a balance between the interests of right holders and those of users who intend to undertake to use an orphan work.⁷⁷¹

Another question is whether a liability rule would actually provide the legal certainty the users require. Although the limitation on remedies aims to give a user more certainty that the good faith efforts he has made in reliance of the orphan works designation would not result in significant monetary damage or an injunction,⁷⁷² there is no guarantee that this certainty would also be provided for if it would come to convincing a court *ex post* of the reasonableness of a search. Especially where the search was conducted a long time ago, a user may face considerable difficulties to provide evidence on the efforts made to find the copyright owner. As a consequence, to be able of providing sufficient evidence in court, users would need to keep records of each and every search they have made, often for an indefinite period of time. This may impose inappropriate burdens especially on smaller users.

Moreover, by taking into account the total costs that a liability rule would impose on a user (i.e. the costs of keeping search records, the costs of assessing the likeliness of possible future claims, the litigation costs and, finally, the costs of paying reasonable compensation after a successful litigation by a right owner that reappears), the question remains whether the liability rule would truly be more cost efficient than, for example, the Canadian or Japanese system which allows a licence to be issued by a competent public authority.

Finally, it is highly questionable whether a liability rule similar to the one now proposed in the US would really improve the situation in the European Union as regards the use of orphan works. As we have seen in paragraph 5.2.4, when it comes to the financial damages that a user may incur, the (civil) law in the Member States is much more benevolent to the user than in the US. A liability rule, therefore, would not alleviate the situation for users as such. It would, at the most, encourage more users to use orphan works. Only to the extent that the liability rule would also limit injunctive relief, as in the US proposal, would it improve the legal certainty for users who incorporate an orphan work into a derivative work.

5.5 Assessment and conclusions

In this chapter we have examined possible solutions to the rights clearance issues relating to works of multiple ownership and orphan works. The multiple ownership problem is characterised by the fact that the consent of all right holders is required to obtain a licence to use the work, and that each of right holders is separately entitled to enforce the copyright in the work. The orphan works problem occurs if one or more right owners of a work remain unidentifiable or untraceable after a reasonable search has been conducted by a prospective user of the work. Although by no means new, both these issues, particularly that of orphan works, are attracting an increasing interest at the national and international levels. This increased interest can be explained by both external and internal factors that seem to have aggravated these problems. Nevertheless, although these problems are perceived by certain stakeholders as a real and

⁷⁷⁰ V. Perlman, Executive summary and prepared statement before the Subcommittee on Intellectual Property of the Senate Committee on the Judiciary on “Orphan Works: Proposals for a Legislative Solution”, 6 April 2006, <http://judiciary.senate.gov/testimony.cfm?id=1847&wit_id=5220> [Perlman 2006].

⁷⁷¹ US Copyright Office Orphan Works Report 2006, p. 94.

⁷⁷² *Ibid.*, p. 95-96. The Copyright Office’s response to these concerns is that this problem goes beyond the orphan works issue, as right owners bear the burden of seeking judicial relief in ordinary settings as well. See: US Copyright Office Orphan Works Report 2006, p. 114. The point is, however, that where the liability rule does provide legal certainty to the user, it does not provide for any safeguards for individual right owners.

legitimate problem, there is still a lack of empirical data as regards their actual economical and social importance and practical relevance.

Multiple ownership

In paragraph 5.3 we have examined possible solutions to the problems of multiple ownership. First, we have seen that provisions on multiple ownership are only scarcely addressed in the ‘acquis’. The absence of harmonised rules is largely due to the fact that this issue is closely linked to issues of authorship and initial ownership, and may be difficult to regulate separately. If a general concept of what constitutes a work of authorship were to be harmonised along the lines of a ‘person’s own intellectual creation’, such definition would bring to the fore the link between the natural person’s creative production, i.e. authorship, and the intuitive designation of such person as initial owner of the copyright. Where it concerns works of multiple ownership, it would be particularly onerous to establish such a link, as the rules on authorship and initial ownership of rights vary significantly among the Member States.

Whereas in the copyright system, the initial ownership of rights may be conferred on either the natural person creating the work or the legal person investing in its production, the countries in the author’s rights system only regard the natural person who has created the work to be the author and initial copyright owner of the work. Accordingly, if the European legislator were to harmonise rules on works of multiple ownership, difficulties would arise as to the designation of who would qualify as the authors of this work, and moreover, as to whom to confer the initial ownership of rights. As was observed above, both at the international and the European levels, it has proven to be very complicated hitherto to bridge the gap between the copyright and author’s rights traditions and to establish unified rules on these aspects.

At the Member State level, on the other hand, there already exist various kinds of measures addressing the adverse effects of the multiple ownership issue. A first category of measures concentrates on the statutory or contractual (re)allocation of rights from the multiple authors or right owners in a work to a single (legal) person. Examples of statutory provisions (re)allocating or concentrating the rights in works or other protected subject matter of multiple ownership include provisions on group performances, ‘oeuvres collectives’, works created in the course of employment and films and other audiovisual productions. In general, these rules have in common that they confer the rights of the original authors and performers (as defined according to the so-called ‘creator doctrine’) upon the employer, producer or other ‘main exploiter’ bearing the financial risk in the production of these works. This explains why these models have not found general application in all Member States. Given the strength of the ‘creator doctrine’, legislators in several countries of the EU have shown restraint in adopting measures that have the effect of reallocating the rights of the original contributors in a work. Moreover, if harmonisation measures would nevertheless be taken, it may turn out that in jurisdictions anchored in author’s rights doctrine, national courts are not willing to set aside the creator doctrine, which may result in a general non-application of these measures. This can be illustrated by the fact that French courts on numerous occasions have been reluctant to interpret the rules on ‘oeuvres collectives’ in more than a very strict sense.

But there are other, more practical, reasons not to recommend any legislative action. Except for certain specific works initially created by multiple contributors (such as ‘oeuvres collectives’ or films) and works created in specific circumstances (e.g. in the course of employment), it is often very difficult to appoint a single person who can be regarded as the principal right holder to whom the rights may be consigned. For several categories of works, there simply is no key figure (‘spider-in-the web’) who takes the organisational and financial responsibility for the creation and exploitation of a work (e.g. a producer or employer) and who, for that reason, would be the most appropriate person to reallocate the rights to. Therefore, a statutory reallocation of rights would

certainly not be a proper remedy for each and every category of works. Moreover, a statutory (re)allocation of rights can only solve part of the problem. There will always remain situations that require exceptions to the (re)allocation of rights. It is generally accepted, for example, that certain groups of right holders deserve special treatment (e.g. the soloists in group performances, the authors of underlying musical works in a film, and the authors of pre-existing works incorporated in a derivative work). With each exception made, however, there remains multiple ownership in the work. In addition, there are circumstances in which it simply cannot be avoided that a work has multiple owners. This is the case, for instance, where ‘new’ right owners come about as a result of the introduction of new layers of rights, or of the transfer or inheritance of rights. Apart from the expected resistance in various Member States that are strongly rooted in the author’s rights tradition, therefore, any legislative initiative to address the multiple ownership issue through a (re)allocation of rights would probably not achieve all the intended results.

As far as it concerns any of the alternative solutions to address the multiple ownership issue, a legislative initiative would not be commendable either. First, it would be practically impossible to provide an inclusive answer to the problem at issue by means of a single legislative approach in the field of collective rights management. Given the many different layers of rights that may exist in a work of multiple ownership, the rights clearance problems could only be solved if collective rights management were established at the level of each of the rights contained in the work. A legislative initiative covering each and every right, however, would go far beyond the aim of the proposition (i.e. to streamline the exercise of rights in the digital age). Moreover, it would fit best in the system of exclusive rights to leave it to the right holders to voluntarily establish –individual or collective– arrangements to manage their rights. As regards the application of the doctrine on abuse or misuse of rights, on the other hand, this doctrine was seen not to exist in the laws of all Member States, making it extremely difficult to adopt any specific rule harmonising this concept at the EU level.

In sum, there is good to reason to be extremely cautious when considering a legislative solution of the perceived problems of multiple ownership at the European level. As has been demonstrated, the work of multiple ownership is a many-faceted phenomenon that is unsuitable for a ‘one-size-fits-all’ solution. Multiplicity of ownership may be the result of a great variety of causes, varying from acts of collaborative creation to multiple rights transfers. Furthermore, because of the fundamental differences in the rules on authorship and ownership of rights that currently exist among the Member States and that can be explained against the backdrop of the traditional dichotomy between copyright and author’s rights systems, it would be unwise, both from a legal and political point of view, to tackle the multiple ownership issue by adopting a legislative initiative aiming at some form of (re)allocation of rights. Indeed, any such initiative would almost inevitably need to be preceded by, or combined with, a full harmonisation of the rules of authorship and ownership, which would make such an undertaking even more ambitious and prone to failure.

Orphan works

In paragraph 5.4, we have examined possible solutions to the orphan works problem. Currently, this problem is largely unaddressed in the national legislation of the Member States. Although private initiatives have been developed to attend to the issue, for instance, by organisations granting an indemnity or security to those who wish to use an orphan work, these initiatives are not supported by legislative means and are therefore unable to provide complete legal certainty to prospective users of orphan works. The only Member State where legislation is in order that partially addresses the problems relevant to orphan works is the UK, where the Copyright Tribunal has the power to grant consent on behalf of the right owners in a performance in a case where a user wishes to make a reproduction of a recording of the performance and the identity

and the whereabouts of the right owners cannot be ascertained by reasonable inquiry. Whereas the scope of this provision is extremely narrow, however, it does not provide an absolute solution to the orphan works problem.

Nevertheless, although the size of the orphan works problem is difficult to quantify, this is a clear case of structural market failure that does seem to justify some form of legislative intervention. Rules addressing the issue should ideally reflect an equilibrium between safeguarding the interests of right holders and giving legal certainty to bona fide prospective users. Accordingly, while providing legal certainty to prospective users of works the right owner or right owner of which cannot be traced by reasonable means, a legislative measure should at the same time guarantee that the legitimate interests of copyright holders are not unnecessarily prejudiced.

In the light of our findings, it appears that neither a general exception or limitation, nor a specific liability rule would be the appropriate means to achieve these objectives. Providing legal certainty to users by introducing a general exception to the exclusive right of a copyright owner may be too rigorous a measure for the purpose of addressing the orphan works problem, particularly since the magnitude of the problem is still unknown. A liability rule, on the other hand, will not always provide legal certainty to bona fide prospective users, as it may be difficult for users to convince a court *ex post* of the reasonableness of a search, in particular where the search was conducted a long time ago. Moreover, since bona fide users in Europe are generally not exposed to large monetary awards from infringements claims, the question is whether a liability rule would really contribute to accommodating the orphan works problem in the Member States. Finally, a liability rule does not provide any legal safeguards for right owners who, under the liability rule, bear the burden of seeking judicial relief in the event of a dispute. This may be particularly onerous for small individual right owners, for whom litigation to enforce their copyrights may be prohibitively expensive.

A system that allows for a competent public authority to issue a licence to use an orphan work, on the other hand, would provide for adequate legal certainty for users. When a user is granted such licence, he is authorised to use the orphan work for the purposes as specified in this licence, without bearing the risk of an infringement claim should the copyright owner come forward. At the same time, the grant of the licence would not unnecessarily prejudice the legitimate interests of the right holders concerned. First, the licence is issued by an independent public institution, which can take due account of the interests of both right owners and users. Second, it is determined on a case-to-case basis whether a licence is issued and thus an exception to the exclusive right of the right owner is made. Third, the licence is not all-inclusive, but granted to a designated user for a specific use only. Finally, if the right owner re-appears, he may collect the royalties fixed in the licence (e.g. from an escrow account, a collective management society, or wherever the royalties have been deposited), which will compensate him for the usage that has been made under the licence issued. Therefore, this system may well keep the legitimate interests of right owners and users in equilibrium.

It would be, therefore, an important step to address the orphan works problem if the Member States were to introduce a system whereby a prospective user, after a reasonably conducted inquiry, may apply to a public authority to obtain a licence to use an orphan work. In this respect, the systems that are currently in place in Canada, Japan and, to a limited extent, in the UK may serve as valuable examples to be built upon.

On the other hand, it appears to be premature for any legislative initiative to be developed at the EU level. So far, it has not been demonstrated that the orphan works problem has a noticeable impact on the internal market. In fact, the exact scale of the orphan works problem remains largely unknown, as quantitative data on the degree to which orphan works actually present a problem for the reutilisation of these works or on the frequency with which orphan works impede creative efforts have not yet been presented. Therefore, it is advised to conduct

further research into the practical importance, in economic and social terms, of the orphan works issue, before any legislative initiative at EU level were to be considered.

Nevertheless, a recommendation by the European Commission of limited scope that would partially address the issue might be in order here. If in each of the Member States a system would be introduced whereby a licence could be obtained to use orphan works, potential obstacles to the intra-Community trade in copyright works might arise. Since the scope of a licence granted by a national public authority would be necessarily limited to the domestic territory in which it has been issued, a prospective user intending to use an orphan work in multiple countries within the EU, or perhaps even in the whole territory of the EU, would have to apply to the national authorities of all these Member States to obtain the licences required for the use he wants to make. This may not only impose considerable burdens upon the user, it would also create legal complications if national authorities would rule differently on similar applications. It would thus be desirable if a user intending to use an orphan work in different Member States, could apply to a national public authority to obtain a licence covering multiple Member States, or perhaps even the entire EU. Accordingly, if a system as proposed here would be introduced at Member State level, it would be commendable if this system would be complemented by appropriate measures at EU level that attend to the licensing difficulties that may occur in case of a cross-border exploitation of orphan works.

Alternatively, Member States might consider addressing the orphan works problem by means of the mechanism of extended collective licensing. Since this would provide a more structural, but also more radical solution, such a measure should only be applied in cases where there is a clear public interest at stake. Examples include the exploitation of past archive productions of public broadcasting organisations for on demand services; or the exploitation of copyrighted works included in the collection of archives, museums, libraries or educational institutions for specific purposes such as public exhibition, private studying, teaching or scientific research. The advantage of a system of extended collective licensing for users is that because of its ‘extended’ effect the collective licence automatically applies to all right holders in the given field, thus providing for the legal certainty that re-users of existing works require. Moreover, if it were restricted to exceptional cases and accompanied by an easy and simple ‘opt-out’ possibility for right holders who do not wish to participate in the collective licensing scheme, a system of extended collective licensing would not be detrimental to the interests of right holders.

However, difficulties may arise as to the practical implementation of an extended collective licensing regime. First, where it concerns works which include different layers of rights (such as the productions of public broadcasting organisations), the extended collective licensing would need to apply to the various levels of the rights concerned. This may require cooperation of multiple collective management societies. In this respect, the voluntary agreement concluded between INA and five French collective management societies concerning the exploitation of materials stored in the archive of INA might serve as an example. Moreover, in those areas where collective rights management is still rather underdeveloped (e.g. in the photographic and audiovisual field), the extended collective licensing may not have the intended effects. Finally, because of the current territorial based structure of collective rights management, additional measures may also need to be taken to address the licensing difficulties that arise in the case of cross-border exploitation of works. This is particularly relevant in the case of online exploitation.

Admittedly, both the granting of licences by a public authority and the extended collective licensing scheme may result in an accumulation of royalties that cannot be distributed to the rightful copyright owners as long as they remain untraceable. However, such disadvantage is the unintended result of a solution to a general market failure and therefore may need to be taken for granted. Perhaps the non-distributable royalties can be used for cultural aims, or for the creation of databases of rights management information that will prevent future works from becoming ‘orphaned’. While this may imply that users end up paying royalties for means other than those

relating to the use in question, it may be regarded as the price that needs to be paid to obtain legal certainty to use an orphan work for which it would otherwise be impossible to obtain authorisation to proceed with the prospective use.

Finally, it would be commendable if supportive measures were taken to stimulate the supply of copyright ownership information or rights management information to the public. If adequate records on the identity and whereabouts of right owners were made publicly available, this would significantly facilitate the search for copyright owners, thus alleviating the orphan works issue. In this respect, it is worthwhile to consider the establishment, either at the national or the European level, of a register or database of rights management information. To this end, a project could be launched aiming to set up a register of metadata or, at least, to provide the required financial, technological and organisational infrastructure for that purpose.

As a possible legal flanking measure, which would require intervention by the Community legislator, one might consider amending article 7 of the Information Society Directive in such a way that the legal protection of rights management information is only granted in case this information has been deposited in a publicly accessible database. An adjustment of this kind could provide a considerable boost to the volume and fidelity of rights management information available to the public.

6 Consumer awareness and acceptance of copyright

[Note: This chapter is based on research conducted by dr. Carsten Orwat and Knud Böhle of the Institute for Technology Assessment and Systems Analysis (ITAS), Research Centre Karlsruhe.]

6.1 Introduction

In the past decade, consumers have embraced peer-to-peer communications technology which allows them to ‘share’, largely illegally, vast amounts of copyrighted content (music, video, software, images and even books). It is especially the scale and pervasiveness of these unauthorised uses, combined with consumer criticism of new business models proposed by ‘big media’, that has caused many within the copyright community to believe that the general public has lost its faith in the traditional copyright system. This chapter centres on the validity of the prevailing belief that copyright is losing its moral imperative among consumers. It aims to answer the question whether there is a lack of consumer awareness and acceptance of copyright and, if yes, how to improve the public image of copyright law.

For the purpose of this study ‘copyright awareness’ is understood as knowledge about copyright and related matters, such as licences. Copyright awareness does not necessarily mean that consumers accept the copyright legislation as is, or that they accept how content providers exercise copyright in their business models and practices. While ‘awareness’ refers to *knowledge*, ‘acceptance’ implies *acknowledgement*. It refers to an individual’s attitude and behaviour expressing that something is accepted, which does not necessarily mean wholeheartedly or without reservations. For analytical purposes one may distinguish three facets of copyright awareness and acceptance: (1) with respect to the basic ideas, i.e. the values enshrined in copyright,⁷⁷³ (2) with respect to copyright legislation, and (3) with respect to copyright business practices.⁷⁷⁴

Taking stock of available empirical studies, it turns out that awareness and acceptance of copyright legislation have not directly been studied. Assuming that consumer behaviour is shaped first of all by experiences and influences in the everyday life of citizens, this is no surprise. Conscious acceptance or non-acceptance of copyright legislation is just a minor factor among many others influencing individual behaviour. It is safe to assume that the social relation ‘consumer-to-business’ is most important for the acceptance of copyright on the one hand, and that on the other hand the influence of groups, communities, and organisations that people belong to (peer group, family, school, work, club, church, etc.) are most important for their value orientation.

There are two main types of empirical studies that can be taken into account.⁷⁷⁵ From studies investigating either the success of legal paid content offerings or the dimension of unauthorised p2p file sharing, rough indications about the acceptance of copyright can be derived. Research about actual factors underlying ‘piracy’ or unauthorised use is the other major source. The latter can be further split into two types: One type of research focuses on the underlying economic or rational calculus of consumers when deciding whether to opt for legal paid content or for free

⁷⁷³ Copyright is understood as an institution which reconciles private exploitation interests and the interest of the public in the accessibility and availability of knowledge for all. This includes acknowledging exemptions from copyright as well as a return on investment for private investments in creative works.

⁷⁷⁴ Copyright business practices determine how digital media products can be accessed and used. Business practices include terms of contracts, the application of DRM systems as well as communication strategies (e.g. ‘copyright information campaigns’).

⁷⁷⁵ We concentrate on surveys and studies related to the application fields music and software. These fields are most prominent in the public debate and relevant scientific literature.

illegal content. It reflects the individual justifications and rationalisations for unauthorised uses of copyrighted content, and gives indications of the acceptance of copyright. The other type centres on non-utilitarian ethical attitudes and behaviour with respect to the (unauthorised) use of digital goods. Most studies of this type have been performed on ‘software piracy’, but more recent studies also cover music.

6.2 Copyright awareness is growing

Lack of copyright awareness cannot be advanced any longer as an explanation for (large scale) infringement by end users. With the rise of online stores offering literature, music and film, and the introduction of Digital Rights Management (DRM) systems taking place with a considerably broad participation,⁷⁷⁶ consumers have become familiar with copyright business practices as a matter of course. Stakeholder campaigns and consumer input in legislative processes have ensured awareness with regard to copyright legislations, and to the values underlying them as well. This will be explicated in the next two paragraphs.

6.2.1 Stakeholder Campaigns

Information campaigns by content industry organisations attempt to confront and familiarise consumers with copyright issues related to digital media, especially copyrighted material that can be found in p2p file sharing networks. A good example is the cross-sector Pro-music campaign by musicians, performing artists, companies and retailers.⁷⁷⁷ Its website contains information about and links to legitimate online music suppliers. The International Federation of the Phonographic Industry (IFPI), which represents the recording industry on a global level, is bolstering awareness in several ways.⁷⁷⁸ It carries on information campaigns, conducts and publishes market surveys, and initiates highly publicised legal proceedings against pirates in various countries.⁷⁷⁹ In contrast, certain factions within the content industry also run campaigns against the use of copyright protection measures and DRM, such as the ‘Respect the music’ campaign by the German association of independent music labels.⁷⁸⁰

Awareness campaigns by consumer organisations and advocacy groups attempt to inform consumers and citizens about their rights in contractual relations on digital products, effects of DRM applications, and about changes in access and usage rights by copyright revisions. A distinction can be made between organisations that serve consumer interests in general on the one hand, and organisations and projects set up for the specific purpose of increasing awareness among consumers and citizens on the other. The European Consumers’ Organization (BEUC) ‘Consumers Digital Rights’ project, which aims to inform consumers and citizens about their legal status, is an example of the former.⁷⁸¹ The French consumer organisation Union Fédérale des Consommateurs (UFC) *Que Choisir* is also very active in strengthening awareness among consumers of their rights and obligations vis-à-vis copyright holders – not merely by means of

⁷⁷⁶ Cf. pol-di.net e.V. / politik-digital.de, ‘Copyright und Urheberrecht Formen und Strukturen des netzbasierten Diskurses. Studie im Rahmen des TA-Projekts “Analyse netzbasierter Kommunikation unter kulturellen Aspekten”’, Berlin 2004 [Pol-di 2004].

⁷⁷⁷ <http://www.pro-music.org>.

⁷⁷⁸ <http://www.ifpi.org>.

⁷⁷⁹ See IFPI Recording Industry 2006 Piracy Report, *Protecting Creativity in Music*, available online at: <<http://www.ifpi.org/site-content/library/piracy-report2006.pdf>>.

⁷⁸⁰ Verband unabhängiger Tonträgerunternehmen, Musikverlage und Musikproduzenten, VUT. See www.vut-online.de.

⁷⁸¹ See <http://www.consumersdigitalrights.org/cms/index_en.php>.

informing consumers, but also through a number of lawsuits against content providers who employ restrictive DRM systems.⁷⁸² The German iRights.info initiative, partially funded by the German Federal Ministry of Food, Agriculture and Consumer Protection, is an example of an organisation falling in the latter category. It offers a website with information on users' rights and obligations and on legislative developments.⁷⁸³

6.2.2 Consumer input in the legislative process

The intensive public debates in the EU and in various Member States on the recent revisions of national copyright laws constitute a general indicator for 'copyright awareness'. In this context, several activities are shaping copyright awareness.

Specialised non-governmental organisations (NGOs) and advocacy groups have been participating actively in the decision-making process preceding copyright revisions and DRM regulation at the Member State level. Some of those have already been mentioned in the previous paragraph. *Que Choisir*, for instance, campaigning for interoperability obligations and preservation of a private copying exemption in the French Copyright Code, has appealed repeatedly to national decision makers.

In France, civil society, including citizens' and consumer organisations, has made the debate surrounding the adoption of the *DADVSI* (loi no. 1206 relatif aux Droits d'Auteur et Droits Voisins dans la Société de l'Information) extremely lively.⁷⁸⁴ Likewise, in the UK the Open Rights Group (ORG) not only provides information to the media and co-ordinates grassroots campaigns, but has also actively engaged in the legislative process in that country. ORG has made submissions to the All Party Parliamentary Internet Group (APIG) inquiry into DRM in late 2005 and to the 'Gowers Review' of intellectual property.⁷⁸⁵ As for Germany, the Privatkopie.net initiative, which as its name indicates aims at the preservation of the German private copying exception in the digital environment, deserves mentioning.⁷⁸⁶

On a European and international level, citizens' interests are looked after by the European Digital Rights (EDRI) association,⁷⁸⁷ and its US based counterparts the Electronic Frontier Foundation (EFF)⁷⁸⁸ and PublicKnowledge.⁷⁸⁹ The EDRI is comprised of NGOs from fourteen European countries, that stand up for civil rights in the information society. It speaks out in participatory and consultations procedures set up by the Community legislature, inter alia in respect of copyright issues. The Consumer Project on Technology (CPTech) operates on a transatlantic level. This US based organisation co-operates with NGOs throughout Europe on copyright issues ('access to knowledge'), and lobbies the European institutions.⁷⁹⁰ The INDICARE project (Informed dialogue about consumer acceptability of DRM solutions in Europe), finally, intends to contribute to the development of a European vision on user issues related to DRM applications.⁷⁹¹ Concerns voiced by these organisations concern the 'criminalisation' of consumers by copyright law, the negative effects of DRM applications and an alleged lack of consumer rights implemented in copyright legislation.

⁷⁸² <<http://www.quechoisir.org>>.

⁷⁸³ <<http://www.iriights.info>>.

⁷⁸⁴ The fact that a petition 'NON au projet de loi DADVSI' has been signed by almost 175,000 individuals and over 1,000 interested organizations serves to illustrate this point. See <http://eucd.info>.

⁷⁸⁵ <http://www.openrightsgroup.org>.

⁷⁸⁶ <http://privatkopie.net>.

⁷⁸⁷ <http://edri.org>.

⁷⁸⁸ <http://eff.org>.

⁷⁸⁹ <http://publicknowledge.org>.

⁷⁹⁰ <http://www.cptech.org>.

⁷⁹¹ <http://www.INDICARE.org>.

6.2.3 *Other indicators for growth of copyright awareness*

Apart from the above-described activities of civil societies, two more catalysts of public awareness of copyright awareness deserve attention. In the first place, it is noted that the frequent reporting in the specialised press and mass media, especially in online media (journals, newsletters, blogs, newsgroups etc.) has made a significant contribution to the further recognition of copyright questions by the public.⁷⁹²

Secondly, the increasing role of consumers as amateur or semi-amateur content producers and providers – ‘amateurisation’ – is mentioned as an indicator of a rise of copyright awareness. It is in the self-interest of these citizens becoming creative users to be aware of and have some knowledge about copyright. This can be illustrated by a small example referring to ‘blogging’: ‘... bloggers are somewhat more likely than non-bloggers to say that they care whether or not the music they download is copyrighted. Perhaps in keeping with their status as creators of their own content, more than half (52 per cent) of bloggers say they do care about copyright, while 37 per cent of non-bloggers report concern over the copyright status of the music files they download.’⁷⁹³ Of course when publishing content on private or organisational websites or in blogs, (semi-)amateurs have to deal with licences and copyright, and other intellectual property rights. In this context the well publicised Creative Commons licences⁷⁹⁴ and, to a lesser extent, the GNU licences for open source software, have certainly helped to raise copyright awareness.

6.3 Consumer acceptance of copyright

Discussions on copyright acceptance have come up particularly in the peer-to-peer (p2p) arena, which should not come as a surprise given the magnitude of (unauthorised) file sharing. Empirical research of public attitudes towards copyright also tends to focus on software and music and their exchange over file sharing networks. For these reasons file sharing of music and software will be relied upon hereinafter as an indicator by proxy of consumers’ (non-)acceptance of the copyright system.

6.3.1 *Empirical data on unauthorised use*

The actual size and the real impact of file sharing over p2p networks is a crucial issue in public debates and political decision making. Even after several court judgments were passed against the providers of p2p systems, file sharing is still occurring on a massive scale, although the exact volume is difficult to ascertain. Several methodological problems hinder accurate measurement of the dimensions of file sharing. File sharing activities are difficult to observe due to their private and decentralised nature and to lacking user registration. On the one hand there are studies stating that p2p file sharing has significantly dropped in recent years, in particular after the legal measures taken by representatives of the music industry against p2p technology providers and

⁷⁹² cf. C. Orwat, ‘Konsultationsverfahren als Mittel der politischen Gestaltung des digitalen Rechtemanagements – notwendig, aber nicht hinreichend’, *Technikfolgenabschätzung - Theorie und Praxis* Vol. 15, No. 2, August 2006, <<http://www.its.fzk.de/tatup/062/tatup062.pdf>> [Orwat 2006].

⁷⁹³ A. Lenhart and M. Madden, ‘Teen Content Creators and Consumers, Pew Internet and American Life Project’, Washington D.C. 2005, <http://www.pewinternet.org/PPF/r/166/report_display.asp> [Lenhart/Madden 2005], p. 10.

⁷⁹⁴ An indicator for the dimension of creative users’ awareness of copyright might be the number of Creative Commons licences. In June 2006 140 million web pages were CC-licensed (<http://creativecommons.org/weblog/entry/5936>).

individual p2p network users.⁷⁹⁵ On the other hand, since p2p network technologies are rapidly changing, other measurement methodologies come to the result that p2p traffic has not decreased and is instead still increasing.⁷⁹⁶ In this context it must be taken into account that Internet users tend to respond more and more cautiously in surveys. Therefore surveys with self-declarations, especially on activities that can have legal consequences, have to be interpreted carefully.⁷⁹⁷ For these reasons the supposition that unauthorised file sharing is still occurring on a large scale appears to be in place. This hints at a paucity of copyright acceptance among consumers.

However, the phenomenon of file sharing should not be regarded in isolation. Taking the source of digital music and videos as indicators of consumer habits and, thus, of the acceptance of copyright business practices, INDICARE⁷⁹⁸ has come to the result that p2p networks are one

⁷⁹⁵ See L. Rainie, M. Madden, D. Hess, G. Mudd, 'The impact of recording industry suits against music file swappers', Pew Internet and American Life Project and comScore Media Metrix, Washinton D.C. 2004, <http://www.pewinternet.org/PPF/r/109/report_display.asp> [Rainie et al. 2004]; Business Software Alliance (BSA), 'Youth and Downloading', Study conducted by Harris Interactive, Washington D.C.: BSA 2006, <<http://www.bsa.org/usa/research/>> [BSA 2006]. An online survey among 1,644 young people (8 to 18 years of age) came to the result that the amount of downloading without payment has significantly dropped from 53 per cent who reported downloading music in 2004 to 32 per cent in 2006, and for downloading movies from 17 per cent in 2004 to 10 per cent in 2006 (BSA 2006). A Pew/Internet study shows that the share of downloaders had fallen to 14 per cent of all internet users in January 2004 from 29 per cent in March/May 2003 (Rainie et al. 2004). The study attributes this effect to the law suits by the Recording Industry Association of America (RIAA) against those suspected of copyright infringement. However, the concomitant web traffic measurement has analysed only four p2p networks and has not taken into account other networks, especially BitTorrent, which represent a large share of all p2p traffic.

⁷⁹⁶ T. Karagiannis, A. Broido, N. Brownlee, K.C. Claffy, M. Faloutsos, 'Is P2P dying or just hiding?', University of California at Riverside et al 2004, <<http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf>>. [Karagiannis et al. 2004]; see also IFPI – International Federation of the Phonographic Industry, 'Digital Music Report', London: IFPI 2006, <<http://www.ifpi.org/site-content/library/digital-music-report-2006.pdf>>, plus press release 'Digital formats continue to drive the global music market - World Sales 2005', London: IFPI 2006, <<http://www.ifpi.org/site-content/press/20060331a.html>> [IFPI 2006], p. 21; BigChampagne statistics reported in Digital Music News 2006. IFPI (2006, p. 21) estimates that the number of simultaneously available unauthorised and copyright-protected music files in January 2006 was around 885 million, with 775 million from p2p networks and 110 million from websites. Since 2002 these numbers fluctuate from ca. 800 million to ca. 1,100 million. The p2p monitoring company Big-Champagne reports an increase in the number of global average simultaneous p2p users, from ca. 5.6 million in December 2003, through ca. 7.6 million in December 2004, up to 9.6 million in December 2005 (BigChampagne statistics reported in Digital Music News 2006). Figures of average simultaneous users are regarded as more accurate than the amount of files on p2p networks, since the latter also contain spoofs and bogus downloads (i.e. faked files) (Digital Music News 2006). However, measurement problems hinder the provision of accurate figures on total numbers of distinct users of p2p networks: S. Wunsch-Vincent and G. Vickery, 'Digital Broadband Content: Music, A Report by the Organization for Economic Co-operation and Development (OECD), Directorate for Science, Technology and Industry (DSTI), Committee for Information, Computer and Communications Policy (ICCP), Working Party on the Information Economy', DSTI/ICCP/IE(2004)12/FINAL, 13 December 2005, Paris: OECD 2005, <<http://www.oecd.org/dataoecd/13/2/34995041.pdf>> [Wunsch-Vincent/Vickery 2006], p. 74. For a critical examination of the reliability of industry figures, see inter alia R. Towse, 'Economics and copyright reform: aspects of the EC Directive', *Telematics and Informatics* 22 (2005) 1-2, p. 11-24 [Towse 2005], p. 20 *et seq.* on CD sales, A. Lange, 'The Impact of piracy on the Audiovisual Industry. Sources of Economic and statistical information on physical piracy and file-sharing', Working document for the conference 'New technologies and piracy: a challenge to the audiovisual industries' Paris 18 June 2004, European Audiovisual Observatory, <http://www.obs.coe.int/online_publication/expert/impactpiratage.pdf.en> [Lange 2004], p. 8 *et seq.* on the lack of transparency).

⁷⁹⁷ *cf.* Lange 2004, p. 13.

⁷⁹⁸ N. Dufft, A. Stiehler, D. Vogeley, Th. Wichmann, 'Digital Music Usage and DRM, Results from an European Consumer Survey', Report of the INDICARE Project 2005, <http://www.INDICARE.org/tiki-download_file.php?fileId=110> [Dufft et al. 2005]; N. Dufft, P. Bohn, A. Stiehler, Th. Wichmann, 'Digital Video Usage and DRM, Results from an European Consumer Survey', Report of the INDICARE Project 2006, <http://www.INDICARE.org/tiki-download_file.php?fileId=170> [Dufft et al. 2006].

source of digital music and videos, but that the legitimate copying and ripping of CDs is a more important one.

For digital music, 51 per cent of digital music users report that p2p networks are a source.⁷⁹⁹ The share can be broken down into 12 per cent who use this source weekly, 15 per cent using this source several times per month, and 24 per cent who use it less often. In comparison, own CDs are for 77 per cent of digital music users the preferred source and CDs from family and friends for 71 per cent. For video content, the most important sources are commercial company websites (previews and ads). 42 per cent of digital video users use this source to consume digital videos at their computer or portable device, compared to 39 per cent who use ripped DVDs from family and friends and 37 per cent who use own ripped DVDs. Only 36 per cent use p2p networks as a source, among them 14 per cent who use them frequently and 22 per cent who use them not often. Similarly, a Pew/Internet consumer survey shows that file sharing activities are being shifted more and more from p2p networks to email and instant messaging exchange, or swapping between portable players.⁸⁰⁰ This could signify a tendency in file sharing away from the unauthorised mass exchange over anonymous p2p networks, towards the more traditional dimensions of sharing among friends and family members, acts which may be exempt by provisions for 'private copying' or 'fair dealing' or compensation by levies.

In addition, it has to be noted that as of 2003 sales of commercial digital online services are rapidly growing, especially since the decision of major record labels to license their songs to online music services and since the emergence of online vendors with broad repertoires, such as Apple's iTunes or the (commercial) Napster.⁸⁰¹ IFPI reported that the worldwide record companies' sales in digital delivery channels ('digital sales') have grown rapidly, by 181.91 per cent from 397 million US\$ in 2004 up to 1,143 million US\$ in 2005.⁸⁰² The revenue stream from digital sales is said to have reached a 5.5 per cent share of the global revenues of the recording industry and comes close to the dimension of DVD sales (7.41 per cent share of formats). For the European market the number of single track downloads is reported to have increased even by 355 per cent from 14 million downloads in 2004 up to 62 million in 2005.⁸⁰³

Thus, it has to be recognised that copyright-based business models are actually accepted by consumers to a considerable extent. Claims that file sharing activities are the death of commercial services thus seem no longer justifiable. It is however conceivable that overly protective DRM systems are a letdown for users who have been willing at the outset to consume in accordance with the copyright system.

6.3.2 *Empirical data on behaviour influencing factors*

The activity of p2p file sharing is not without any social norms. Empirical research into p2p file sharing speaks of a 'culture of piracy' or a 'gift economy'.⁸⁰⁴ Although p2p networks are

⁷⁹⁹ Digital music users are internet users who frequently use either the computer or a portable device to listen to digital music (Dufft et al. 2005, p. 21).

⁸⁰⁰ M. Madden and L. Rainie, 'Music and video downloading moves beyond P2P', Pew Internet and American Life Project, Washington D.C. 2005, <http://www.pewinternet.org/PPF/r/153/report_display.asp> [Madden/Rainie 2005]; it is not clear in this study if the considered "downloading" includes also commercial downloading activities.

⁸⁰¹ cf. Wunsch-Vincent/Vickery 2006, p. 29 *et seq.*

⁸⁰² It has to be noted that the total trade revenues would have declined by 3.13 per cent from 21,468 million US\$ in 2004 to 20,795 in 2005. The sales of CDs would have fell by 6.02 per cent in value and 3.4 per cent in units which also indicates reductions in prices for CDs.

⁸⁰³ IFPI 2006, p. 5.

⁸⁰⁴ I. Condry, 'Cultures of music piracy. An ethnographic comparison of the US and Japan', *International Journal of Cultural Studies* 7 (2004) 3, p. 343–363, <<http://web.mit.edu/condry/www/pubs/Condry-CultMusPiracy5-04.pdf>> [Condry 2004]; M. Giesler, 'Consumer Gift System: Netnographic Insights from Napster', *Journal of Consumer Research*, forthcoming, <<http://www.mymacexperience.com/GieslerJCR1.pdf>> [Giesler 2006].

mechanisms to obtain music for free from the wealth of the ‘celestial jukebox’, economic calculus cannot explain why file sharing networks do not break down. As free riding, i.e. unilateral downloading from p2p networks without sharing would be an individual’s rational choice, p2p networks could be expected to break down sooner or later. The main explanation appears to be that sharing can be viewed as ethical behaviour ‘based on the social solidarity of its users, a solidarity that is reflected in the norm of reciprocity’.⁸⁰⁵ Interestingly, this norm is even operative in a network of anonymous persons. To be more precise, despite a large share of free riders, there is a sufficient number of individuals whose ethical behaviour keeps file sharing going. To a certain extent, p2p networks are perceived by those who use them as ‘virtual communities’ similar to networks of friends with common interests.⁸⁰⁶ Music is to users not just a commodity, but a shared social activity: ‘Whereas the marketplace is about exchanging music as a commodity with outsiders, Napster is about sharing music as a gift with insiders’.⁸⁰⁷ The same idea is put forward by Condry: ‘Music is about the relation to the artist as fan, and about the relations with others of the same taste with recommending, and sharing, and communicating about it as social act. The common ground for fans and artists [...] is the sense of participation in a shared community supporting music that people care about’.⁸⁰⁸

Copyright acceptance and social norms

Explications for individual behaviour are often related to social norms. Normative orientations are commandments like ‘don’t damage’, ‘don’t harm’, or more abstract principles such as responsibility, solidarity, reciprocity,⁸⁰⁹ and formal democratic values like ‘conforming to law’. Social norms are internalised and maintained by social relations and communication with important persons (authorities, educators, idols, best friend etc.) that give advice, educate and serve as role models, and by informing public opinion in a broad sense through the mass media, alternative information channels, educating or deterrent campaigns, and promotional messages from industries.

Examining the literature we find that piracy –in the sense of unauthorised use and consumer distribution– is the *de facto* social norm for more or less 50 per cent of the considered populations. This can be illustrated by the following quote: ‘If you live in a college dorm, for example, the question is not why you don’t respect copyright law. The question is how could you not share music?’.⁸¹⁰ Gopal et al. found that the behavioural dynamics for software piracy are the same as for audio piracy and that the same model of ethical behaviour can be used for different types of digital goods alike.⁸¹¹ This allows us to draw also on studies about software piracy.

With respect to software, Hinduja comes to the following conclusion: ‘In fact, most inquiries have found a prevailing social consensus with regard to the acceptability of intellectual property theft among university students, likely due to peer norms and the lack of a threat of disciplinary repercussions’.⁸¹² It is also important to see that this attitude is not likely to change soon.

⁸⁰⁵ Giesler 2006, p. 16.

⁸⁰⁶ cf. the empirical study of S. Haug and K. Weber, ‘Konfrontation oder Kompromiss? Empirische Befunde und ethische Überlegungen zu Urheberrechtskonflikten’, *Ethica*, 11 (2003) 2, p. 163-184 [Haug/Weber 2003].

⁸⁰⁷ Giesler 2006, p. 11.

⁸⁰⁸ Condry 2004, p. 23.

⁸⁰⁹ A.W. Gouldner, ‘The Norm of Reciprocity: A Preliminary Statement’, *American Sociological Review* 25(1960), p. 161-178, <<http://www2.pfeiffer.edu/~lridener/courses/NORMRECP.HTML>> [Gouldner 1960].

⁸¹⁰ Condry 2004, p. 7.

⁸¹¹ R.D. Gopal, G.L. Sanders, S. Bhattacharjee, M.K. Agrawal and S.C. Wagner, ‘A Behavioural Model of Digital Music Piracy’, *Journal of Organizational Computing and Electronic Commerce*, forthcoming at SSRN, <<http://ssrn.com/abstract=527344>> [Gopal et al. 2002].

⁸¹² S. Hinduja, ‘Trends and patterns among online software pirates’, *Ethics and Information Technology* 5(2003)1, p. 49-61 [Hinduja 2003], p. 52.

Siegfried, replicating a study by Cohen and Cornwell on students' attitude towards software piracy, found 'that there has been few if any changes in student opinions regarding the unauthorised duplication of copyrighted materials'.⁸¹³

Further results from empirical studies confirm the '50 per cent rule of thumb', i.e. that 'piracy' is the social norm for around 50 per cent of surveyed people. The empirical study of Hinduja revealed that 49.6 per cent of all respondents would not feel guilty about pirating software and 51.3 per cent of all respondents did not regard piracy as improper or intrinsically wrong.⁸¹⁴ Particular studies however may come up with higher or lower ratios. In a survey by Siegfried of 224 students in entry-level courses even 82 per cent thought it is okay for them to download music from the Internet. To the contrary, a more recent study found that 60 per cent of respondents say that downloading music without paying is always wrong.⁸¹⁵ This study also identified a trend that the rate of copyright infringement is decreasing. While in 2004 53 per cent of persons aged 8 to 18 said to have downloaded music without paying; in 2006 only 32 per cent said so. However if we concentrate on the 16-18 year old ones the share is still high at 52 per cent.

The INDICARE consumer survey already quoted found that 43 per cent of online music users care if the music downloaded from the Internet is copyrighted, while another 43 per cent agree to the statement 'This isn't something I care much about'. 14 per cent don't know exactly what copyright means. The attitude seems to be fairly divided among respondents. However the result depends a lot on age and country. In Hungary and Sweden only 34 per cent and 35 per cent said to care about copyright, and in the age group 10 to 19 years only 29 per cent said they cared while 47 per cent said they do not care. In the age group 40 years and older, 54 per cent care and only 37 per cent do not care.⁸¹⁶

Lenhart and Madden also found fairly divided responses when offering the following statement: 'It is never really okay to download music or share copyrighted files online without paying for them or getting permission'. Of teens aged 12 to 17 years, 52 per cent agreed, while 47 per cent disagreed. Opinion and actual behaviour differ to a certain extent. Among teen downloaders 55 per cent said they do not care much whether the songs they download are copyrighted. Interestingly the share of adults who don't care is even higher with 58 per cent.⁸¹⁷

While it must be assumed that many have no moral problems with piracy, the other side of the coin should also be acknowledged. Around 25 per cent conform consciously to the legal norm. As Gopal et al.⁸¹⁸ found out, a high general 'ethical index' correlates to a lower propensity to pirate music. According to a study of German download users in 2006, 24 per cent of downloaders use exclusively paid content services and the most prominent reason to do so, is to behave conforming to the law.⁸¹⁹ Dolderer and Wöbken⁸²⁰ found that 25 per cent don't use illegal copies themselves. Thus, we may add to the '50 per cent rule of thumb' a '25 per cent rule of

⁸¹³ R.M. Siegfried, 'Student Attitudes on Software Piracy and Related Issues of Computer Ethics', *Ethics and Information Technology* 6(2004)4, p. 215-222 [Siegfried 2004]; E. Cohen and L. Cornwell, 'College Students Believe Piracy is Acceptable', *CIS Educator Forum: A Quarterly Journal* 1(1989)3, p. 2-5 [Cohen/Cornwell 1989] p. 215.

⁸¹⁴ Hinduja 2003, p. 54.

⁸¹⁵ BSA 2006, p. 2.

⁸¹⁶ Dufft et al. 2005.

⁸¹⁷ Lenhart/Madden 2005, p. 13, 14.

⁸¹⁸ R.D. Gopal, S. Bhattacharjee and G.L. Sanders, 'Do Artists Benefit From Online Music Sharing?', *Journal of Business* 79(2006)3, <<http://ssrn.com/abstract=527324>> [Gopal et al. 2006].

⁸¹⁹ GfK/BPW, 'Brenner Studie 2006, Study on behalf of the Bundesverbandes der phonographischen Wirtschaft e.V. (BPW)', Berlin: BPW/IFPI, <<http://www.ifpi.de/wirtschaft/brennerstudie2006.pdf>> [GfK/BPW 2006], p. 53.

⁸²⁰ M. Dolderer, H. Wöbken, 'Digitale Mentalität', Institut für Strategieentwicklung in co-operation with University of Witten/Herdecke, Witten 2004, <http://www.ifse.de/studien/digitale_mentalitaet_-_Studie_des_Instituts_fuer_Strategieentwicklung.pdf> [Dolderer/Wöbken 2004], p. 16.

thumb' for the share of people adverse to copyright infringements and consciously conforming to copyright law.

Despite the high share of people that do not care about copyright or follow the social norms in their peer groups, it can also be shown that the basic ideas of copyright, i.e. the values related to copyright, are generally respected. There seems to be consensus that authors who have to live by commercially exploiting their creative work need some kind of remuneration, and that risky investments in creative productions deserve a return on investments. There is also consensus that *commercial piracy* is not ethically acceptable.

In the survey by Dolderer and Wöbken⁸²¹ 95 per cent of respondents stated that protection of investment for software producers is needed; 95 per cent also stated that the use of illegal copies in companies is wrong and should be prosecuted; and 86 per cent stated that making illegal copies for commercial purposes is bad and deserves prosecution. Condry asked students 'Is there music you would always pay for?', and most students said yes hinting to independent artists, artists from their hometown, certain genres of music like jazz and classic because they were 'not adequately supported by major record companies'.⁸²² An INDICARE consumer survey revealed a considerable acceptance among European digital video users of DRM: 62 per cent are in favour of technical protection matters if they are used 'to protect valuable content from illegal distribution', and even 65 per cent if the purpose is 'to reward the creative work of artists'.⁸²³

Discussing the causes of the empirically tested ineffectiveness of 'anti piracy' arguments, D'Astous et al. pinpoint a 'message inconsistency': 'However, the most important [cause] may be the inconsistency of the entire spectrum of messages that are sent to the consumers. While many organisations mobilise to stop music piracy, other organisations [...] try to convince consumers of the benefits of music online. Although these organisations promote the downloading of music in a legal fashion, the message may appear ambivalent, especially among young people'.⁸²⁴

While the content and software industries tend to criminalise unauthorised uses, network providers and device manufacturers have other interests. As Strangelove has pointed out, although there are monopolistic and oligopolistic tendencies in media industries, it is also an area of intense competition, and 'various sectors of the economy stand to gain from open architectures'.⁸²⁵ Among the examples he gives is Apple's 'Rip, Mix and Burn' advertising campaign of 2001, and the story of MP3 players, in which device manufacturers did not comply with recording industry's demand for more protection with the result that 'digital piracy is now advertised as a product feature'.⁸²⁶

Copyright acceptance and economic norms

Apart from social norms, a variety of economic-rational considerations influence the choices consumers make with respect to acquiring digital content from commercial services or from file sharing. Consumers take into account more or less comprehensively the advantages and disadvantages of each option. In the following, it is described how a range of factors can influence and provide orientation in consumers' decisions among copyright respecting and copyright ignoring behaviour.

⁸²¹ Dolderer/Wöbken 2004, p. 32, 13.

⁸²² Condry 2004, p. 23.

⁸²³ Dufft et al. 2006, p. 39.

⁸²⁴ A. D'Astous, F. Colbert, D. Montpetit, 'Music Piracy on the Web – How Effective Are Anti-Piracy Arguments? Evidence From the Theory of Planned Behaviour', *Journal of Consumer Policy* 28(2005)3, p. 289–310 [D'Astous et al. 2005], p. 307 *et seq.*

⁸²⁵ M. Strangelove, *The Empire of Mind. Digital Piracy and the anti-capitalist movement*, Toronto: University of Toronto Press 2005, p. 65 [Strangelove 2005].

⁸²⁶ Strangelove 2005, p. 66.

Fetscherin defines the implicit trade-off emphasizing two main variables: first, the availability of copies from p2p networks in terms of quantity and quality⁸²⁷ and, second, the risk associated with copying from p2p networks with the probability of being caught and the underlying penalty. He comes to the result that in the movie sector the probability of getting high quality movie copies from p2p networks is low and the importance of p2p networks as source of digital movies is therefore low. Large fractions of the downloaded files were obvious fakes, not downloadable, not playable, others than supposed to be, or of a bad quality. Additionally, comparisons of paid download services and p2p networks lead to the result that commercial services compete with p2p file sharing but that both channels can not be simply regarded as substitutes. The enormous number of files available at p2p networks can also be a burden of search for the right file and version. Some p2p services have security problems (spy ware, viruses etc.) and usability problems. Commercial services normally provide some features that p2p networks do not have such as preview function, album art, streaming audio, exclusive tracks or celebrity play lists, and normally enable more reliable and faster downloads.⁸²⁸

The INDICARE consumer survey on digital music reveals that many users of p2p networks face problems with the quality of tracks (84 per cent of p2p network users), with the availability of songs (82 per cent) or the accessibility of the services (75 per cent).⁸²⁹ However, the survey also reveals that consumers have experienced similar problems although to a lower degree at commercial music download stores regarding the availability of songs (70 per cent of users of digital music stores), the accessibility of the service (57 per cent), or the quality of tracks (55 per cent).⁸³⁰

Commercial download services normally come with usage restrictions enforced by DRM that may frustrate consumers and make them opt for unauthorised uses.⁸³¹ Consumer surveys have shown that consumers especially dislike that paid files have a lack of portability to other devices.⁸³² They also dislike encryption and requirements for specific software and/or hardware to use the digital content, nor do like restrictions on playability.⁸³³ In particular, the INDICARE consumer surveys reveal that commercial download services may collide with consumer expectations since in many cases they prohibit or restrict portability and sharing of the purchased files. For the majority of digital music users the transfer of files between devices is important (for

⁸²⁷ The availability is estimated by setting the fraction of high quality copies available on p2p networks in relation to the total numbers of copies available. The availability is influenced by the network character (centralised or decentralised), the number of network users and files, as well as the sharing behaviour of the users: M. Fetscherin, 'Movie piracy on peer-to-peer networks - the case of KaZaA', *Telematics and Informatics* 22 (2005) 1-2, p. 57-70, p. 60 [Fetscherin 2005b].

⁸²⁸ P. Bakker, 'File-sharing-fight, ignore or compete. Paid download services vs. P2P-networks', *Telematics and Informatics* 22(2005)1-2, p. 41-55 [Bakker 2005]; M. Peitz and P. Waelbroeck, 'An Economist's Guide to Digital Music', *CESifo Economic Studies* 51(2005)2-3, p. 359-428, <<http://cesifo.oxfordjournals.org/cgi/reprint/51/2-3/359>>, p. 370 *et seq.* [Peitz/Waelbroeck 2005].

⁸²⁹ Dufft et al. 2005, p. 30.

⁸³⁰ Dufft et al. 2005, p. 31.

⁸³¹ M. Fetscherin, 'Evaluating consumer acceptance for protection technologies', in: D. Günnewig, E. Becker, W. Buhse and N. Rump (Eds.), *Digital Rights Management - Technological, Economic, Legal and Political Aspects*, Berlin, Heidelberg, New York: Springer 2003, p. 315 [Fetscherin 2003].

⁸³² *cf.* also M. Maclachlan, 'Music Downloads and Consumer Perception: Hype, Skepticism, and the Generation Gap', *IDC* 2000, p. 14 [Maclachlan 2000].

⁸³³ M. Fetscherin, 'Consumer acceptance of digital rights management systems', *INDICARE Monitor* 2 (2005) 3, 30 May 2005, <http://www.INDICARE.org/tiki-read_article.php?articleId=105> [Fetscherin 2005a].

84 per cent) as well as to share music with friends and family (75 per cent).⁸³⁴ Also McGuire and Slater (2005) emphasise that online music users have a desire to share their favourite music.⁸³⁵

One can conclude that purchases at legitimate download services can not be explained alone as an expression of a wish to behave legally, but also as a rational choice when the value proposition is convincing. The weighing up of different advantages and disadvantages however can also lead to preferring p2p networks as a source of unrestricted MP3 files.

The non-acceptance of business models or practices, which are perceived as unfair, can also explain copyright infringing behaviour. This behaviour can in some cases be understood as 'protest' against applied controversial business practices. Pointing to such practices serves for the justification as well as for the rationalisation of copyright infringing behaviour.

Software industry and software research on unauthorised use shows that software pirates often use justifications such as blaming the industry for high prices or profiteering motives, and denying that financial losses are caused by their behaviour. The intangible and remote characteristics of software companies make it also difficult to render real 'victims'.⁸³⁶

In the music and video sector, some authors point to the public perception of high CD prices and industry's revenue sharing models as important factors for consumers' acceptance of business practices. It has been argued that especially the revenue sharing models often give users the impression that the original creators of the content, such as the composers or musicians, do not participate adequately in revenue sharing.⁸³⁷ Other factors are brought forward by consumer representatives –among others in the public copyright and DRM consultations organised by the European Commission⁸³⁸– that include the exaggerating 'deterrent' campaigns to 'educate' consumers, the 'criminalisation' of all internet users and the litigation against individual file sharers which is perceived as overdone, the potential to hamper competition using DRM systems to disable compatible uses on different devices, security and privacy threats imposed to consumers' computer systems with the introduction of DRM systems,⁸³⁹ or contracts that are not in accordance with consumer protection laws.⁸⁴⁰ Controversial business practices have led to information campaigns by consumer organisations and advocacy groups, and public demonstrations by concerned citizens (e.g. in France). Also negative market reactions can be observed.⁸⁴¹

⁸³⁴ Dufft et al. 2005, p. 23 *et seq.*

⁸³⁵ M. McGuire and D. Slater, 'Consumer Taste Sharing Is Driving the Online Music Business and Democratizing Culture', Cambridge MA: Berkman Center for Internet and Society and Gartner, Inc., <<http://cyber.law.harvard.edu/home/uploads/511/11-ConsumerTasteSharing.pdf>> [McGuire/Slater 2005].

⁸³⁶ see e.g., Hinduja 2003, p. 51; S. Goode and S. Cruise, 'What Motivates Software Crackers?', *Journal of Business Ethics* 65 (2006) 2, p. 173-201, p. 176 *et seq.* [Goode/Cruise 2006].

⁸³⁷ see e.g., S.M. Lantagne, 'The Morality of MP3s: The Failure of the Recording Industry's Plan of Attack', *Harvard Journal of Law and Technology* 18(2004)1, <<http://jolt.law.harvard.edu/articles/pdf/v18/18HarvJLTech269.pdf>>, p. 279 *et seq.* [Lantagne 2004].

⁸³⁸ See also INDICARE, authored by N. Helberger (ed.), N. Dufft, S. van Gompel, K. Kerényi, B. Krings, R. Lambers, C. Orwat and U. Riehm, 'State-of-the-Art Report. Digital Rights Management and Consumer Acceptability. A Multi-Disciplinary Discussion of Consumer Concerns and Expectations', December 2004, <http://www.INDICARE.org/tiki-download_file.php?fileId=60>, p. 19 *et seq.* [INDICARE 2004].

⁸³⁹ E.g. the 'Sony BMG rootkit' scandal, see e.g. N. Helberger, 'The Sony BMG rootkit scandal. Consumers in the US finally wake up. And march to courts...', *INDICARE Monitor* 2 (2006) 11, 27 January 2006, <http://www.INDICARE.org/tiki-read_article.php?articleId=165> [Helberger 2006].

⁸⁴⁰ see e.g. L. Grøndal, 'DRM and Contract Terms', *INDICARE Monitor* 2(2006)12, 24 February 2006, <http://www.INDICARE.org/tiki-read_article.php?articleId=177> [Grøndal 2006].

⁸⁴¹ Colbert, Tomiuk, Hwang, and Ménard found that the closing of (the former) Napster led to negative emotions among Napster's users and a lower intention to buy CDs (quoted in D'Astous et al. 2005, p. 290).

6.4 Assessment and conclusions

In canvassing the public image of copyright, an important distinction must be made between consumer awareness and consumer acceptance of copyright. The former refers to *knowledge* and the latter to *acknowledgement* of copyright principles and values, existing copyright legislation, and current copyright business practices.

Consumer awareness of copyright

Various developments have contributed to a growing knowledge about (the existence of) copyright and related rights among the public. The growth of online stores offering copyright and DRM protected content has confronted consumers with copyright business practices as a matter of course. There is increased public debate about the position of the consumer in copyright law, as is illustrated by the implementation process of the Information Society Directive in France, the participation of user oriented interest groups in the UK's Gowers review on copyright, etc. Also, publicity campaigns by content industry associations, consumer organisations and advocacy groups familiarise the public with copyright principles and end users' rights and obligations. As a result, it appears no longer plausible to explain large-scale copyright infringement by consumers in terms of a lack of copyright awareness. Although well designed informational or educational activities by the Community institutions may help spread further copyright awareness, the question is whether such initiatives are called for, considering the existing level of awareness existing and the ongoing activities by stakeholders.

Consumer acceptance of copyright

Acceptance by the consumer of legal norms is a function of many variables. Apart from social norms, technical factors and rational/economic factors influence consumer behaviour.

For the purpose of appreciating consumer acceptance of copyright, empirical data on p2p file sharing and software sharing was analysed as an 'indicator by proxy'. Notwithstanding the fact that extensive empirical research into the size and impact of p2p file sharing has been carried out in recent years, unequivocal conclusions as regards copyright acceptance are hard to draw. Studies into the magnitude of unauthorised file sharing have produced contradictory results. Relying on studies that take into account the unsettled nature of file sharing methodologies and indicate at an increase in p2p traffic, and considering the fact that internet users are responding more cautiously in surveys, the assumption is justified that p2p file sharing is still occurring on a large scale. That does not necessarily mean that the public does not accept copyright. Rather it would appear that the two most important drivers for file sharing are social norms (from peer groups especially) and dissatisfaction with what consumers perceive as restrictive business models. The rapid growth in recent years of commercial digital online services, however, suggests that new business models and practices have gained a substantial degree of acceptance by consumers.

Empirical data on ethical norms make clear that in such circles as student communities as well as the 'virtual communities' that are p2p networks, the norm is not so much one of complying with the copyright system, but rather one of sharing with one another. It was further found that consumer behaviour also results from a weighing of the advantages and disadvantages of file sharing versus purchasing copies (in terms of availability, quality, portability, usability). These factors are interwoven with business models. If a commercial content provider offers the consumer a 'bad bargain' in terms of high prices or restrictive use conditions, then the consumer is not likely to find it unethical to opt for p2p file sharing in order to obtain the music or video he or she is looking for.

Surveys make clear that unauthorised use and distribution is the norm for approximately 50 per cent of the populations concerned. However, a much larger share of the European public recognises the equitability of and the need for copyright protection. That gap between behaviour and norm might be explained not only by economic considerations on the part of the consumer, but also by an alleged ambivalence of messages about downloading music and film.

The conclusion that copyright (non)conforming behaviour acceptance is largely influenced by social norms and rational/economic considerations, begs the question what realistic options are available to the European institutions to help compliance to copyright law. Obviously, consistently seeking the input from stakeholders that represent consumers in the policy making process, may contribute to a balanced end result which in turn can lead to a better acceptance of and adherence to copyright norms. But it would appear that considering the drivers, stakeholders themselves –industry and consumers alike– are best positioned to influence acceptance, for instance through the development of more consumer friendly business models and informative campaigns (including initiatives like standardised labelling of product features on playability). The European Commission could continue to play a facilitating role, especially by supporting the dialogue between industry and consumers.

7 Conclusions & recommendations

As its title illustrates, this study on the ‘recasting of copyright for the knowledge economy’ seeks to cover extensive ground, as does the call for tender by the European Commission that inspired it.⁸⁴² Since the topics treated in this study are heterogeneous and each chapter carries its own set of conclusions, these need not be repeated in this final chapter.⁸⁴³ Instead, we will concentrate our final analysis on the basic questions that have inspired this study. Should the process of harmonisation of copyright and related rights, which has resulted in seven directives, continue in the years to come? Is there a need for rectifying existing inconsistencies in the *acquis*? And if so, what legal instruments are appropriate to achieve this? In the final paragraph of this final chapter, our focus will very tentatively shift to the long-term future of European copyright lawmaking.

7.1 15 years of harmonisation: an evaluation

At first impression, fifteen years of harmonisation of copyright and related rights (from 1991 to the present) have been remarkably productive. Despite initial scepticism about the European Union’s legislative competence in the realm of copyright among Member States, stakeholders and scholars, the EU legislature has carried out an ambitious and broad ranging agenda of harmonisation that has touched upon many of the most important issues in the field of copyright and related rights. From the early directives dealing primarily with specific subject matter or rights to the later broad Information Society Directive, the harmonisation process has produced a sizeable body of European law on the subject matter, scope, limitations, term and enforcement of copyright and related rights.

Although many inconsistencies –some of which will be summarised below– remain, the harmonisation machinery has undeniably produced a certain ‘*acquis communautaire*’. While far from complete it has normative effect not only in the Member States that are obliged to transpose the directives, but also at the international level. Where the directives have provided precise instructions, leaving the Member States little discretion for deviation, such as in the case of the Computer Programs Directive, the harmonisation process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency and predictability of norms in these distinct sectors.

But these results have come at considerable expense, in terms of time, public finance and other social costs, to the organs of the European Community and its Member States. Due to the complexity of the European law-making procedure, even a relatively non-controversial directive takes several years to complete, from its first proposal to its final adoption, including translation into the 20 (soon 21) official languages of the Community. Upon adoption of a directive, another round of lawmaking will commence at the level of the Member States. Twenty-five governments will consult local stakeholders, draft twenty-five different implementation bills, and discuss with twenty-five different parliaments, often ignorant of the fact that the directives leave limited discretion to national legislatures. The step-by-step approach towards harmonisation that the EC legislature has followed, has placed an enormous burden on the legislative apparatus of the

⁸⁴² Call for tender MARKT/2005/08/D, Study on the recasting of the copyright for the knowledge economy, Notice of contract 2005/S131-129165 of 09.07.2005.

⁸⁴³ See the appended *Executive Summary* for a complete summary of the present report.

Member States. For national legislatures, the harmonisation agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights.

In all, the time span between the first proposal of a directive and its final implementation can easily exceed ten years. Despite the Community's 'Better Regulation' agenda, which includes proposals to speed up, simplify and make more transparent the Community legislative process and its various end products, it is not to be expected that the duration and costs of this entire process will be significantly reduced. Even if 'Better Regulation' will lead to a speeding-up of lawmaking at the Community level, this will not affect the transposition process at the national level which may take up over five years from adoption of a directive.⁸⁴⁴ On the contrary, given the rapid expansion of the EU with new Member States having limited experience with the transposition process, it can be expected that a new harmonisation initiative will require even more time to complete.

Clearly, the instrument of a harmonisation directive is not well suited to quickly respond to the challenges of a constantly evolving, dynamic information market. But even a relatively unambitious consolidation exercise (a 'recasting' of the *acquis*)⁸⁴⁵ would take several years to complete and then transpose, assuming that Member States and stakeholders could exercise enough self-restraint to refrain from adding new policy options to the agenda.

Another structural deficiency of the harmonisation process is the asymmetric normative effect of harmonisation by directive. As this study has illuminated, the harmonised norms of copyright and related rights in the seven directives in many cases well exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered. More often than not the norms also exceed average levels of protection that existed in the Member States prior to implementation, as exemplified by the Term Directive that has harmonised the duration of copyright at a level well above the normal European term of 50 years post mortem auctoris. Surely, this trend of 'upwards' harmonisation is driven, in part, by the desire of the EC legislature to seek 'a high level of protection of intellectual property', which would lead to 'growth and competitiveness of European industry'⁸⁴⁶ – a proposition that has yet to be proven.⁸⁴⁷ But some up-scaling of protection is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

A related problem is the 'ratcheting-up' effect a harmonisation directive inevitably has on national levels of protection, even in the rare case that a directive would later be repealed. Repealing a directive does not automatically lead to the undoing of implementation legislation at the national level, unless a national legislature has provided for a sunset clause. This makes harmonisation by directive essentially a one-way street, from which there is no turning back.

The phenomenon of 'upwards' approximation is inherent to the process of harmonisation by directive, and a reason for serious concern. The effectiveness, in economic and social terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary 'delicate balance' between the interests of right holders in maximising protection and the interests of users (i.e the public at large), in having access to products of creativity and knowledge. Moreover, a constant expansion of rights of intellectual property due to 'upwards' harmonisation is likely to create new obstacles to the establishment of an Internal Market, rather than remove them, as long as exclusive rights remain largely territorial and can be

⁸⁴⁴ For example, at the time of writing of this report implementation of the Information Society Directive, which was adopted on 22 May 2001, was still ongoing in at least one Member State.

⁸⁴⁵ Communication 'Updating And Simplifying The Community Acquis', COM (2003) 71 Final, Brussels, 11.2.2003.

⁸⁴⁶ Recital 4 of the Information Society Directive.

⁸⁴⁷ See Report on the Database Directive (arguing that positive effect of the introduction of the *sui generis* right on the EU information economy cannot be proven).

exercised along national borders. This, it is submitted, is not what the EC legislature had in mind when embarking, more than 20 years ago, on its ambitious legislative journey.

Another weakness of the harmonisation process lies in its short-term negative effect on legal certainty in the Member States, especially where a directive introduces new rights or novel terminology. Harmonisation by directive creates additional layers of legal rules, that require interpretation first at the national level of the local courts, and eventually by the European Court of Justice. This extra legislative layer is the cause of great legal uncertainty, as long as the ECJ had not pronounced its final ‘verdict’ on the most contentious issues. As we have learned from recent experience with the EC Trademark Directive, which was adopted in 1989, it may take more than 15 years for such issues to be finally decided by the ECJ. In the area of copyright and related rights the Database Directive, that introduced the *sui generis* database right, and the Information Society Directive, that codified the (related) right of making available, are a cause of widespread legal uncertainty. As our consultation with stakeholders has revealed,⁸⁴⁸ the introduction of these new concepts, while possibly enhancing legal security in the long run, has forced right holders and users –and eventually national courts and even the ECJ– to reinterpret or redraft existing licenses and rights transfers, which has caused unrest and uncertainties in practice.⁸⁴⁹ These side effects, too, should be factored in when contemplating further harmonisation efforts.

Yet another structural draw-back of the instrument of harmonisation is its limited potential to provide true unification. Harmonisation directives usually leave a broad measure of discretion to the Member States, and not just when the wording of its provisions are relatively vague as a result of political compromise. It is common for directives to provide minimum standards of protection, or optional provisions. In some cases, the norms in a directive leave national legislatures so much leeway that their actual harmonising effect must seriously be called into doubt. An example here is article 5(2) and (3) of the Information Society Directive, that allows Member States to ‘pick and mix’ limitations from a smorgasbord of some 21 broadly worded categories of exemptions. This kind of ‘faux’ harmonisation merely creates havoc among Member States and interested parties, and does not bring the internal market much closer.

But even ‘perfect’ harmonisation will never lead to truly uniform norms at the national level, as long as national legal systems with diverging histories and traditions are left intact. National legislatures and courts will inevitably interpret the norms of a directive, however well-crafted they may be, in the light of their own laws and legal terminology, and (wishfully interpreting) read into the European norms the legal concepts they are most familiar with. The flexibility of implementation that comes with legislating by directive (rather than by regulation) enables Member States to mould the European standard in their existing framework, which will often result in differing national standards. An example, here, would be the Database Directive that has sought to establish a uniform standard of originality for copyright protection – somewhere in between continental ‘creativity’ and common law ‘not copied’. One would have expected the Member States on both sides of the Channel to adjust their notions of originality, but this has not happened. Instead, most national legislatures, courts and commentators have contented themselves with interpreting the harmonised standard (the ‘author’s own intellectual creation’) as compliant with pre-existing notions of originality for databases. This is the ‘homing tendency’ of harmonisation by directive, a structural weakness that no directive can overcome.

Indeed, when one compares the current copyright laws of the 25 Member States –an exercise well outside the terms of reference of the present study– one immediately perceives enormous differences in wording, terminology and legislative style (not to mention language), even for areas squarely within the *acquis*. Despite seven harmonisation directives, the look and feel of the

⁸⁴⁸ IViR ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’ (forthcoming).

⁸⁴⁹ See Commission review of Database Directive, p. 12.

copyright statutes of the Member States remains predominantly ‘national’. The enhanced transparency that harmonisation initiatives often promise, is in practice rarely achieved. An uninformed outside observer would probably never guess that the copyright laws of the 25 Member States reflect 15 years of sweeping harmonisation. Although the EC legislature is to be lauded for its current agenda aimed at increasing transparency of EC law, the sad truth is that even after 15 years of harmonisation producers, providers and users of copyright protected content still cannot sail upon the compass of a European copyright law. Instead, national law remains the rule, meaning that providers of copyright goods and services across the EU will have to acquaint themselves with the copyright laws of not one, but 25 different jurisdictions.

Yet another criticism concerns the lack of transparency of the legislative process. Law-making by directive involves a highly complex interplay between all three legislative powers of the Community. Almost inevitably this complexity reduces the transparency of the legislative process, and invites lobbying, rent-seeking and overregulation. More often than not, harmonisation initiatives are driven by hidden political agenda’s. Indeed, the stated aim of a directive (‘removing national disparities’) rarely tells the full story, and in some cases appears to be wholly far-fetched. As we have suggested in par. 1.2 of this study, steering closer to the principles of proportionality and subsidiarity might substantially reduce this kind of unnecessary harmonisation.

A final critique, coming from an admittedly biased source, concerns the quality of the legislative product. Here again, the ‘Better Regulation’ initiative deserves applause, albeit that the main cause of this problem is, once again, directly related to the harmonisation process, and is therefore structural. The complex legislative procedure leading to a harmonisation directive, involving input from three EC institutions and 25 Member States, simply can not produce norms of the quality that the EU – the largest market in the world – requires. To make matters worse, pressure from powerful lobby groups and from the EU’s main trading partners (especially the US), does not allow enough time for the reflection needed to produce good-quality regulation. At the national level, to avoid the risk of rushing into immature or unnecessary legislative initiatives, legislatures often seek advice from (committees of) academic advisors. Similarly, academic experts could play an important role as ‘quality controllers’ at the European level.

On balance, the process of harmonisation in the field of copyright and related rights has produced mixed results at great expense, and its beneficial effects on the Internal Market are limited at best, and remain largely unproven. Fifteen years of ongoing harmonisation of copyright law have not produced a solid, balanced and transparent legal framework in which the knowledge economy in the European Union can truly prosper. Even worse, the harmonisation agenda has largely failed to live up to its promise of creating uniform norms of copyright across the European Union. This sobering conclusion calls for caution and restraint when considering future initiatives of harmonisation by directive, even it were only a modest ‘recasting’ exercise. In the light of the renewed interest in the EC’s legislative competence, which is not given by the mere existence of disparities at the national level, and in view of the growing importance of the principles of subsidiarity and proportionality, which were discussed in Chapter 1, the authors of this study respectfully advise the EC legislature not to undertake any new initiatives at harmonisation, except where a clear need for amendment of the existing *acquis* can be demonstrated.⁸⁵⁰ Instead, various other legislative instruments appear to be more suitable and effective to further the goal of an internal market for content-related goods and services. In the short run, instruments of ‘soft law’, such as recommendations, interpretative notices or communications, would appear to be the legislative tools of choice. Soft law is particularly suitable for dealing with the dynamics of an information market that is in constant flux and

⁸⁵⁰ Such an exception might well concern the Byzantine rules on technological protection measures in art. 6 of the Information Society Directive, a topic that has remained outside the scope of the present study. See forthcoming IVIR Study on the Information Society Directive, note 848.

regularly requires ad hoc legislative adjustment. Moreover, solutions laid down in soft law might serve as test-beds for more permanent legislative solutions. In the long term, other more ambitious approaches towards unification might merit consideration. In the final part of this chapter we will entertain the option of a truly European Copyright Law.

7.2 Inconsistencies in the *acquis*

As Chapter 2 has revealed, the current *acquis* in the field of copyright and related rights, while generally coherent, suffers from a number of inconsistencies and un-clarities that might merit some form of legislative redress.⁸⁵¹ As we have seen, one of the principal causes of these inconsistencies lies in the sequential and cumulative build-up of the *acquis*. Later directives are usually declared ‘without prejudice’ to earlier directives, a legislative technique that, by leaving most of the existing *acquis* intact, almost inevitably leads to inconsistencies. An example among many would be the limitation on transient copying that was introduced by the Information Society Directive, but does not apply to computer programs and databases, both of which are governed by earlier directives.

This problem is exacerbated by the ongoing process of convergence of content formats, transmission media and platforms that is another major cause of inconsistencies in the *acquis*. This convergence has made the ‘vertical’, content or media specific approach towards harmonisation that typifies, in particular, the earlier directives, difficult to maintain. As a result, similar providers or users of content-related services are now subjected to diverging rules, which distorts competition and undermines legal certainty. A prime example here would be the rules on compulsory collective management of retransmission rights that apply to cable operators but not to similar content aggregators, such as providers of satellite re-broadcasting services or internet-based simulcasting (IPTV).

Yet another structural cause for inconsistencies and disparities is the inconsistent application in the directives of full (‘maximum’) harmonisation, which basically pre-empts the competence of Member States to maintain national norms in the harmonised field, and ‘minimum’ harmonisation, which leaves Member States discretion to preserve (or even introduce) additional norms provided these do not conflict with the *acquis*. An example of full harmonisation would be the Database Directive’s rule on originality, which expressly forbids Member States from applying other tests (‘No other criteria shall be applied to determine their eligibility for that protection’).⁸⁵² A typical example of ‘minimum’ harmonisation in the *acquis* is article 13 of the same Directive that allows a variety of concurring legal regimes, including unfair competition remedies, to survive at the national level. Other examples would be those provisions that leave Member States room to extend exclusive rights to other groups of right holders (e.g. art. 2 of the Information Society Directive) or provide for more or broader exclusive rights (e.g. art. 8 of the Rental Right Directive). Needless to say, the positive effects on the internal market of such minimum harmonisation are comparatively limited.

Chapter 2 of this study has identified the main inconsistencies in the *acquis* for the main areas of research: (1) subject matter, (2) exclusive rights, (3) limitations, (4) collective rights management, and first and foremost (5) territoriality. These will be summarised hereunder, together with proposed solutions:

⁸⁵¹ Note that the conclusions here presented are subject to change depending on the outcome of the IViR Study on the Information Society Directive.

⁸⁵² Art. 3(1) Database Directive.

Subject matter

As regards the subject matter of copyright only a limited *acquis* can be reported. The directives appear to take the ‘quasi-*acquis*’ of article 2 of the Berne Convention for granted, and provide harmonised rules only with respect to new or controversial subject matter, such as computer software, databases and photographs. Interestingly, while software and databases are subjected to an identical test (‘the author’s own intellectual creation’), the test for photographs is somewhat stricter, and stays closer to the *droit d’auteur* conception of the work of authorship.

The absence of a general *acquis* implies that fundamental differences between continental and common law systems will remain, although a ‘*rapprochement*’ is noticeable, particularly at the level of infringement analysis. The question arises whether an extension of the *acquis* to all copyright works would be beneficial to completing the Internal Market. The practical effect of any such harmonisation may be limited if the dynamic application of a harmonised criterion by national lawmakers and courts (the ‘homing tendency’) persists. On the other hand, national variations may be so slight as not to cause any noticeable problem from an Internal Market perspective.

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

In sum, no clear advantage of aligning the *acquis* with regard to protected subject matter seems to exist.

Economic rights

As regards exclusive rights, only minor inconsistencies appear in the *acquis*. One concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction, which although it is described more broadly in the Information Society Directive, does not seem to have a different meaning from the definitions used in either Computer Programs or Database Directive. Both inconsistencies might be clarified by the Commission in an interpretative communication, without the need of treading on any new ground.

A more serious inconsistency relates, once again, to broadcasting. The advent of online dissemination models that share the characteristics of broadcasting and on demand delivery, cause uncertainty whether they come under the broadcasting or making available right. However, precisely because particularly in the area of broadcasting the transition to new forms of transmission, distribution and business models is in full swing, it might be advisable to opt here for the most flexible solution, i.e. to leave the interpretation to the courts of Member States and ultimately to the European Court of Justice. Alternatively, an attempt at delineating broadcasting and making available could be included in an interpretative communication.

Surely, the most problematic inconsistency in the area of economic rights concerns the overlap in the digital environment of the reproduction right, which includes acts of temporary copying, and the right of communication to the public, which includes a right of making available online, both of which are defined in a very broad manner in the Information Society Directive. Arguably, these rights cannot co-exist in the way they are presently –too broadly– defined. Given that the right of making available was especially tailored to serve as the primary economic right

involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years. Consultations with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue and unjustifiable claims for ‘double payment’ by different right holders for unitary acts of exploitation, resulting in market distortions. This problem will be addressed in the IViR Study on the Information Society Directive.

Limitations

As regards limitations, it is important to reiterate that the conclusions here presented may be subject to amendment and supplement pending the finalisation of the IViR Study on the Information Society Directive.⁸⁵³ Our provisional recommendations are as follows: (1) the issue of transient and incidental acts of reproduction should be reassessed, and a consistent legal solution applied to all categories of works capable of being transmitted; (2) the limitations on related rights permitted by the directives should be aligned with the permitted limitations on copyright; (3) the EC legislature should strive to establish a more flexible and forward looking regime of limitations on copyright and related rights. A non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise, undoubtedly, in the dynamic information market. Such an open-ended regime would best reflect the principles of subsidiarity and proportionality that require lawmaking at the level best fit for its purpose.

For the short term, recommendations (1) and (2) could largely be achieved in the form of an interpretative communication. Such an instrument could explain, for instance, that the concept of ‘lawful user’ has similar meaning across different directives, and clarify the relationship between the limitations to related rights permitted under the Rental Right Directive and those listed in the Information Society Directive. Recommendation (3) is obviously less suitable for a short-term solution in ‘soft law’, although arguably an interpretative communication might be helpful to ‘interpret’ Recital 32 of the Information Society Directive so as to clarify that the list of optional limitations in the Directive does allow Member States some flexibility, within the confines of the three-step test.

Collective rights management

Finally, as regards collective rights management, in the absence of a general directive no true ‘acquis’ can be reported here. Nevertheless, the harmonisation directives do contain a number of rules relating to the issue, the most important of which are found in the Satellite and Cable Directive’s chapter on cable retransmission. The Directive gives rise to a number of questions that are best answered by the Commission in the form of an interpretative communication. In the first place, there is a need for clarification of the term ‘transfer’ used in article 10 of the Directive. This should include exclusive licenses, but not encompass non-inclusive grants. Second, a communication could shed more light on the mediation system that the Directive imposes upon the Member States, for instance by setting mandatory negotiation deadlines. Third, a communication might delineate the notion of ‘cable retransmission’, and clarify whether it covers simulcasting via the Internet.

No need for further legislative ‘repair’ of the Directive seems necessary. The collapse of its satellite broadcasting rules, which is described in paragraph 2.1 of this study, will soon be followed by the gradual extinction of its rules on cable retransmission. In the future, terrestrial

⁸⁵³ See note 848.

primary broadcasting will probably cease to exist, and having becoming primary distributors cable operators will have little left to retransmit.

Territoriality

The Achilles' heel of the *acquis* remains the rule of territoriality. The seven directives have smoothed out some of the main disparities between the laws of the Member States, but largely ignored the single-most important obstacle to the creation of an internal market in products of creativity: the territorial nature of the economic rights. This allows for the compartmentalisation of the internal market along national geographic boundaries. As a consequence, even in 2006 content providers aiming at European consumers need to clear rights covering some 25 Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States.

While EC (case) law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Community exhaustion incorporating intellectual property, policies in respect of Internet-based services, as reflected in the Information Society Directive, have left the territorial nature of rights of communication intact. While the Commission's more recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such.

As long as this territorial nature is left intact, harmonisation can achieve relatively little. By approximating the laws of the Member States harmonisation can perhaps make these laws more consistent and transparent to (foreign) providers of cross-border goods or services, but removing the disparities does not do away with the territorial effect that constitutes a much more serious obstacle to the establishment of a single market.

A more structural solution would be to extend the 'country of origin' rule that was introduced by the Satellite and Cable Directive for satellite broadcasting, to the right of communication in general. This 'satellite model', however, has several technical draw-backs, which have been identified in paragraph 2.1 of this study. Unless accompanied by a harmonised adequate (minimum) level of protection, the application of the country of origin approach to the online environment would also entail the risk that Member States offering lower levels of copyright protection or enforcement become 'copyright havens' for service providers wishing to offer pan-European services at the expense of right holders.

Nevertheless, in the long run the Community must confront the problem of territoriality in a fundamental way. A truly structural and consistent solution, which would immediately remove the disparity in treatment of goods and services in the realm of copyright, would be the introduction of a Community copyright along the lines of the Community Trademark and Design Regulations that have been adopted in the past. This possible long-term solution will be further, and rather tentatively, explored in the final of this chapter.

7.3 Towards a European Copyright Law?

Having critically assessed the structural weaknesses of the instrument of harmonisation by directive (para. 7.1), and concluded that the existing *acquis* does not call for urgent, large-scale legislative repair (par. 7.2), we can finally look ahead at what the more distant future might bring for copyright law in the European Union. Needless to say, what follows is entirely speculative and tentative, and not the outline of any immediate legislative agenda.

Assuming *arguendo* that the growth of the knowledge economy in the EU is best promoted by a truly unified legal framework, and having discarded harmonisation by directive as the legislative

instrument of choice, the alternative of unification by regulation inevitably comes to the fore. Interestingly, article III-176 of the draft European Constitution expressly invites the European legislature to adopt ‘uniform IPR protection throughout the Union’, either through the establishment of ‘European laws’ (i.e. regulations) or ‘framework laws’ (i.e. directives). Long considered taboo in copyright circles, the idea of a Community copyright modelled after the Community rights that already exist in the realm of industrial property, is gradually receiving the attention it deserves, both in political circles⁸⁵⁴ and in scholarly debate.⁸⁵⁵ At first blush, the potential advantages of a Community copyright are undeniable. A Community Copyright Regulation (or ‘European Copyright Law’) would immediately establish a truly unified legal framework. A Community copyright would have instant Community-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction costs.⁸⁵⁶ Unification by regulation could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely *permits* limitations. A regulation would give rights and limitations equal status, and could restore the necessary ‘delicate balance’, provided it were the product of a transparent legislative process wherein all interests concerned are fairly represented.

To give full effect to a Community Copyright Regulation, it would be necessary that the rights and limitations provided therein pre-empt similar rights and limitations at the national level. In this respect a Copyright Regulation would go a step further than the existing regulations in the area of trademarks and industrial designs. There, Community rights have been superimposed upon existing structures of national rights. Whereas Community trademarks and design rights can co-exist with national titles, because the granting of such rights requires an affirmative act of deposit and subsequent registration (for a fee), a similar co-existence would be hard to imagine for the domain of copyright. As regards trademarks and designs, companies are offered a choice between relative cheap protection in distinct national markets or more expensive, but extensive Community-wide coverage. When opting for the latter, owners of Community titles will have little or no incentive to register the same trademarks or designs at the national level.⁸⁵⁷ Copyright and related rights, by contrast, are granted *ex lege*. Absent pre-emption each creation of a work would automatically trigger the vesting of a national and a Community right in the same subject matter. Co-existence of these rights would, in other words, be wholly impracticable. Moreover, superimposing a Community copyright would do little to solve the problem of territoriality. Right holders would still be able to partition copyright along national borders.

A Community copyright would therefore need to pre-empt national titles.⁸⁵⁸ Would the EC Treaty allow this, particularly in the light of article 295? As discussed in par. 1.2 of this study, it could indeed be argued that where the rights introduced by a Community title are substantially

⁸⁵⁴ According to EC Commissioner V. Reding, ‘we have to start calling into question the territoriality of copyright protection in Europe’; speech held at IDATE conference, Montpellier, 21 November 2005.

⁸⁵⁵ Schack 2000, p. 800; Bornkamm 2000, p. 20; Hilty 2004, p. 760; see also various contributions in ZUM, 2006 no. 1. In 2002-2003 a group of prominent European copyright scholars formed the ‘Wittem Group’, that regularly convenes with the aim of drafting a ‘European Copyright Code’ by 2008.

⁸⁵⁶ Peifer 2006, p. 3-4.

⁸⁵⁷ This development is already visible in trademark law. For instance, the French Institut National de la Propriété Industrielle reports in its annual reports 2003 through 2005 that the number of foreign applications for French trademarks has dropped significantly since the introduction of the Community trademark; similar developments are reported in the Benelux Trademark Bureau annual reports and those of the Deutsches Patent- und Markenamt. For economic actors whose activity is purely local (no internal market dimension) national titles obviously will continue to serve their purpose.

⁸⁵⁸ Note that in federal states, such as Germany, Switzerland, Belgium and the United States, the legislative competence in the field of intellectual property invariably is attributed to the federal state, and that (local) state titles are thereby pre-empted.

similar to pre-existing national rights, article 295 (or its equivalent, art. III-425 of the draft Constitution) is not violated.⁸⁵⁹ Note that a Community copyright would in no way diminish the scope of protection or total economic value of (the bundle of) economic rights that right holders enjoy under the current system. More likely, its value would substantially increase because of the reduction of transaction costs that comes with the removal of its territorial limitation.

Perceived through the lens of ‘Better regulation’, replacing the rules of seven directives and 25 national laws on copyright and related rights by a single regulatory instrument comprising provisions that require no transposition and are directly binding upon the citizens of the EU, has obvious advantages in terms of enhanced transparency, consistency and legal certainty. Although questions of interpretation will undoubtedly remain, they need not be channelled through the national courts to the ECJ, but could be answered directly by specialised Community Copyright Courts that have exclusive jurisdiction.⁸⁶⁰ In sum, replacing the seven directives by a single regulation would effectively amount to substantive *deregulation*.

All this is not to suggest that a Community Copyright Regulation should completely replace the laws of copyright and related rights of the Member States. In the light of the principles of subsidiarity and proportionality, a regulation should only regulate those aspects of the law that cannot be left to the Member States to achieve its goals, i.e. to create a well-functioning Internal Market for copyright goods and services. Consequently, a Regulation should not deal with issues that have little impact on the Internal Market, or are intrinsically linked to the cultural and social policies of the Member States. Such issues might include moral rights, copyright contract law and the governance of collective rights management societies. In this context, distinguishing genuine national cultural interests from considerations of national economic self-interest will pose a challenge.

What a Community Copyright Regulation should certainly deal with are the basic economic rights and limitations that shape the right of intellectual property. Its economic rights could be easily reproduced from the ‘acquis’, adding perhaps a right of adaptation and translation. As regards its limitations, one might consider a two-tiered approach, which would take into account the need for regulatory flexibility, following the principles of subsidiarity and proportionality. In the first place, a Regulation should comprise a list of basic limitations. These limitations, no longer optional as under the Information Society Directive, should reflect the fundamental rights and freedoms that are enshrined in the European Convention on Human Rights and are part of Community law. Limitations of this kind include rights of quotation and criticism, the right of news reporting, the right of parody, and basic academic and educational freedoms. In addition, a Regulation might include limitations that have a noticeable impact on the Internal Market or concern the rights of European consumers, such as the right of private copying and the right to make transient copies (assuming this would not be converted into a carve-out of the economic rights, as proposed above). The second tier could be an open-ended norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on condition that these freedoms not have a noticeable impact on the Internal Market.

Surely, for collecting societies, the prospect of introducing a Community copyright and abolishing ‘national’ rights is unattractive, to say the least. Territorial rights are the bread and butter of most existing collecting societies. This would call for a comfort solution, to avoid implosion of especially the smaller societies that would suffer the most from abolishing territoriality. One possibility, which would comply with the Commission’s current policy of creating a Community-wide market for online rights, would be to create a distinction between

⁸⁵⁹ Note that Regulation 2081/92, providing for Community protection of geographical indications, has pre-empted competing national systems (art. 17(3) Regulation 2081/92).

⁸⁶⁰ One might even consider attributing certain administrative or regulatory tasks (e.g. setting uniform levy rates) to existing Community bodies, such as the Office for the Harmonisation of the Internal Market (OHIM).

traditional rights of public performance and broadcasting that might remain territorial, taking into account the necessity for societies to maintain a 'local presence' in order to effectively manage and monitor performance rights, and rights of making available online that need not be managed locally and would become Community-wide. Note however that the distinction between traditional broadcasting and making available online might be difficult to make in practice, as we have argued elsewhere in this report.

Clearly, the idea of introducing a Community Copyright Regulation raises many more difficult and controversial questions, including the issue of legislative competence that has been discussed at some length in para. 1.2. of this study. Absent a specific legal basis for intellectual property titles, existing Community rights are based on the residual competence of article 308 of the EC Treaty, not on article 95 that forms the legal basis of the directives. Assuming that the introduction of a Community copyright is indeed necessary to ensure the proper functioning of the Internal Market, a Regulation might also be based on article 95. Considering the territorial nature of copyright and related rights and the fact that these rights exist *ex lege* as opposed to requiring registration, a Community Copyright would replace rather than co-exist with national titles. It would then harmonise rather than supplement existing national copyright and related rights, bringing it within the scope of article 95. Consequently, a qualified majority in the Council would suffice for its enactment, which would make a Community Copyright Regulation a politically viable option, even in an ever-expanding European Union. A similar result would be achieved if the draft Constitution were adopted. The Community Copyright could then be based on article III-176, which would replace the present article 308 (and art. 95), requiring only a qualified majority vote.

It goes without saying that a Community Copyright Regulation, being directly binding upon the citizens of the Union, would have to meet even higher standards of coherence, consistency, transparency and quality than the existing directives. Apart from all the political hurdles that undoubtedly lie in the way of such a regulation, this should make it a project of the very long term, allowing sufficient reflection and continuous input from academic experts. In this respect, the slow but certain development of a body of European contract law in an institutionalised cooperation between the Commission and a group of qualified academic experts can serve as an example.⁸⁶¹ Ideally, such an 'unhurried' drafting process could produce the technologically neutral norms that make up a transparent, consistent and stable legal framework for many years to come. Perhaps, incorporating the norms of a *European Copyright Code*, such as is currently being drafted by the 'Wittem Group',⁸⁶² into a recommendation by the Commission or the Council, could constitute a first step in this direction.⁸⁶³

Having thus painted a fairly rosy picture of a future Community Copyright Regulation, several serious caveats are in order. Some of the drawbacks of harmonisation by directive mentioned in paragraph 7.1, may equally apply to unification by regulation. Although regulations do not require transposition by the Member States, the legislative process leading up to a regulation may still take a considerable length of time, particularly if it were based on article 308 requiring a unanimous decision by the Council. Although technically less complicated than legislation by directive, the legislative process may still lack transparency and be equally prone to rent-seeking. Like harmonisation by directive, unification by regulation will favour standards of protection at the high end of the European average, especially if unanimity among Member States were required. Like directives, a regulation will be difficult to amend, and thus cannot provide rapid

⁸⁶¹ Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the *Acquis*: The Way Forward, COM (2004) 651 final, Brussels, 11.10.2004.

⁸⁶² See note 855.

⁸⁶³ F. Gotzen, 'Mécanismes juridiques permettant de faire valoir la norme internationale de droit d'auteur en droit interne', *Auteurs & Media* 2006, no. 2, p. 136-146 [Gotzen 2006].

solutions to the most pressing problems of a dynamically evolving market. As stated earlier, this would call for a measure of built-in flexibility, allowing the Member States to provide ad hoc regulatory first-aid. In addition, a Community regulation should be subjected to a process of constant regulatory review, which would allow for regular feed-back from interested circles and possible adjustment of legal norms on an ongoing basis.

But before even sketching the contours of a future regulation, the European legislature should first develop a consistent and integrated vision of the role and function of copyright and related rights in the European Union. Does the EU subscribe to the author's rights tradition rooted in natural justice, that –although waning– remains dominant on the European continent? Or should the EU embrace the more industry-oriented, 'copyright approach', wherein copyright is perceived as an instrument of economic policy, promoting growth, creating markets and fostering innovation? And how do the interests of users and consumers fit into the picture? Are they potential 'pirates' whose freedoms to use works or other subject matter without authorisation should be curtailed as much as possible, or should they be treated on a par with authors and rights holders? Unfortunately, such a consistent vision has been hard to interpolate from the seven directives of the *acquis*.

Even more importantly, before embarking on any such ambitious journey, we first need a clear perspective on the future of the European Union. Obviously, the Union's recent failure to agree on a Constitution that would, for the first time, create an express mandate for the EU to legislate in the field of intellectual property, has not fostered a political climate that is favourable to such an undertaking. Surely, musing on a future Community Copyright in the current climate is 'music of the future'. But the future of music, and of the other cultural industries in Europe, has begun today.

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WIPO Performances and Phonograms Treaty

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THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY

Annexes



THE RECASTING OF COPYRIGHT & RELATED RIGHTS FOR THE KNOWLEDGE ECONOMY

Annex 1 – Transition of certain traditional business models to online forms of distribution and marketing

by Nicole Dufft & Philipp Bohn (Berlecon Research)

This inventory will give a preliminary overview of the transition from traditional to new distribution and business models in the areas of broadcasting, software distribution, database services and rental and lending services. It will also show which new players have entered the respective markets and what roles they are taking. The overview is complemented by examples of new services and new players that illustrate how the boundaries between traditionally separated forms of distributing content, data and software become more and more blurred.

It is important to note, though, that we are currently in the midst or maybe only at the start of a development that will bring about changes that cannot yet entirely be foreseen. Any regulatory framework must be open to such changes. The examples given below are therefore also intended to hint to new trends and developments that are currently evolving; their future importance, however, needs to be abided.

1.1 Broadcasting

For the purpose of this section, broadcasting is defined as the distribution of audio and/or video content to a large number of recipients (one-to-many). The following section gives a brief overview over new transmission channels and new forms of distribution over which audio and video content is brought to recipients. It also brings examples of new players and offerings that compete with traditional forms of broadcasting content. A focus will be on IP-based content offerings, i.e. services that are accessible over the internet or mobile networks.

Figure 1: Broadcasting: Transmission, distribution and business models

Transmission	Distribution models	Business models
Terrestrial	One-to-many, scheduled	Advertisement/sponsoring
Cable	On-demand streaming	Subscription/membership
Satellite	On-demand downloading	Gov. funded / licenses
Internet	P2P	Non-commercial
Mobile Networks		Pay-per-view
		Pay-per-download
		Rental

Traditional
 New

New transmission channels

Over the last 20 years, broadcasting programs have been transmitted over terrestrial, cable and satellite networks. These traditional channels are now changing due to the transition from analogue to digital technologies and allow for interactive forms of broadcasting. This is, for example, the case for interactive cable TV. In addition, two new, namely the internet and mobile networks, have been added in recent years to bring video and audio content to consumers – either to large groups as in the case of traditional broadcasting or to small groups or single users as is the case in new distribution models.

These new channels are fundamentally changing the traditional broadcasting landscape. They enable new distribution models, they enable new business models (see figure 1), and they bring a wide range of new players to the market of audio and video content distribution (see figure 2).

New forms of distribution

Traditional broadcasting was a one-to-many model, where scheduled programs were distributed to a broad audience at fixed times. Over IP-based channels (internet and mobile networks), audio and video content, including traditional TV and radio content, can additionally be delivered to users on demand. This can be the case over any IP-enabled device such as a PC, an IP-enabled TV set, a set-top-box connected to a TV or even a mobile device. On-demand services include models where content is streamed to users' devices (e.g. webcasts), and models that offer the download of content (e.g. podcasts, downloads of TV shows). Traditional broadcasters such as the British BBC or German ARD, for example, increasingly take advantage of these possibilities and offer (live) streams or on-demand downloads directly to their customers. In the case of on-demand services, content that was originally produced to be broadcasted to a large number of recipients is distributed in a one-to-few model (e.g. a special interest radio program that can be downloaded from a broadcaster's website) or in a one-to-one model (e.g. downloads of a podcast). The latter make the distinction to other online content services blurred or meaningless. Other online download services like iTunes⁸⁶⁴, for example, now offer traditional broadcasting content like TV shows or radio programmes for (paid) download. This development is often referred to as convergence of broadcasting and other content services.

In addition to one-to-many, one-to-few, and one-to-one models, peer-to-peer networks are increasingly used for content distribution. P2P technologies offer a very economical way to distribute large quantities of data and information and are therefore well suited for large content files like movies. Traditional media companies have lately started to experiment with technologies for the legal distribution of their content. Bertelsmann's subsidiary arvato, for example, has partnered with Time Warner to introduce a P2P-based download-to-own platform called In2Movies.⁸⁶⁵ The P2P delivery system is called GNAB and is also licensed as a white label service to other media distributors.

New business models

Looking at the list of traditional and new business models in figure 1 reveals that at first sight the degree of change is comparatively limited. Most business models that exist today have existed before the evolution of the internet and mobile networks as content distribution channels. Entirely new are only pay-per-download and rental models of digital content files

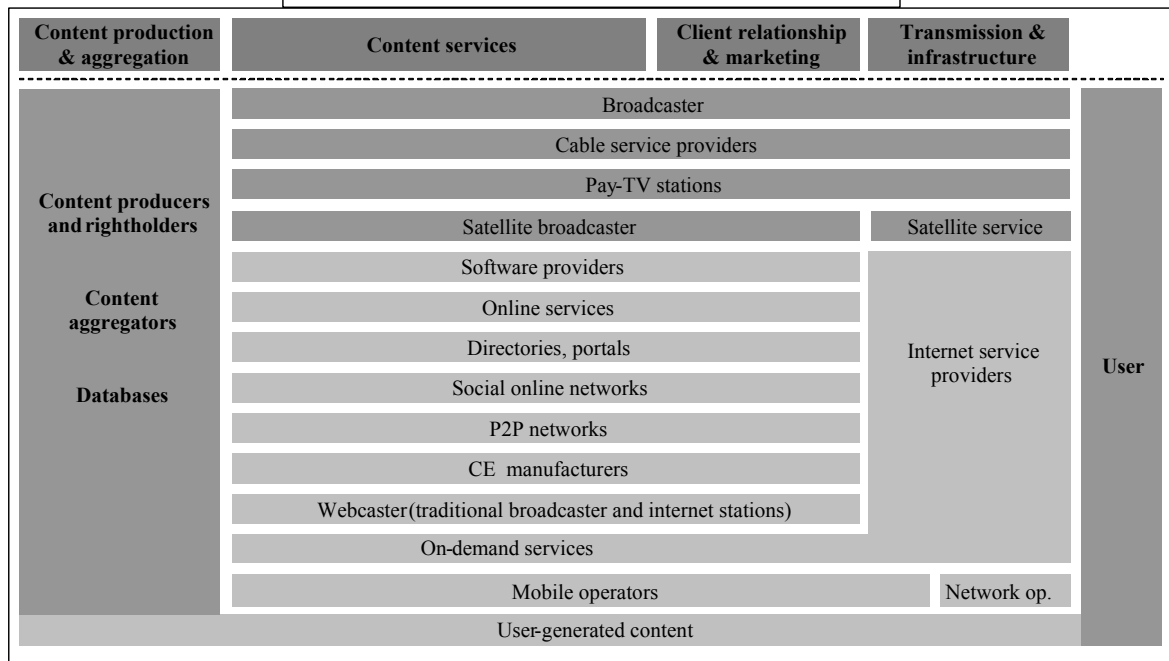
⁸⁶⁴ <<http://www.apple.com/itunes/>> .

⁸⁶⁵ <<http://www.in2movies.de>>.

that have been enabled through the combination of IP-based transmission with Digital Rights Management (DRM) systems. The latter allow, for example, that files expire after a fixed time period for which the user has paid a rental fee.

However, the combination of the various traditional and new business models, with traditional and new distribution models and transmission channels has resulted in a very diverse landscape of content offerings that are based on a large variety of different business models as the examples of new players below will show.

Figure 2. Content distribution: players



New players

Figure 2 illustrates that the most far-reaching changes to the landscape of broadcasting and content distribution has taken place on the side of market participants. This is partly due to the increasingly difficult distinction between broadcasting and other forms of content distribution. Services by various media and technology providers now compete directly with services provided by broadcasters.

But it is also due to new players that have become active in the distribution of audio and video content that were formerly not involved in any type of content distribution at all. The latter have taken sometimes very important roles in areas that have traditionally been occupied by broadcasters. These new players come from areas that are fundamentally different from broadcasting, e.g. consumer electronics (CE) manufacturing, software providing, or mobile network operating. They typically do not produce their own content but license content from other rightholders or content aggregators. For these new players content distribution often only forms part of their business and content is often distributed in 'bundles' with other services - e.g. internet and telecommunication services - or with hard- and software. This bundling often makes it difficult to determine exactly which type of business model is underlying the content offering. Can e.g. the content services offered by a mobile operator be

considered as a marketing tool to attract new and keep old customers, as a tool to increase network usage, as a stand-alone source of revenue, or as all of the before mentioned?

In particular the providers of the infrastructure today are also heavily engaged in providing content directly to users. This is true for 'traditional' cable and satellite providers as well as for new players such as internet service providers and mobile operators. Therefore, the distinction between infrastructure & technology providers and content providers becomes blurred and sometimes meaningless as well.

The following examples of new players and their diverse offerings are intended to illustrate how the traditional landscape of content distribution, part of which was formerly defined as broadcasting, is changing due to the diverse offerings of new players (see figure 2):

- In their drive to leverage technology and marketing access to the end-user, Internet service providers (ISPs) increasingly push into so-called Triple Play strategies, i.e. they sell internet access, telephony and content to the consumer. Examples for on-demand content services offered by subsidiaries of ISPs are German T-Online's T-Vision, or United Internet's maxdome service⁸⁶⁶, which is offered under the 1&1 brand in cooperation with media company ProSiebenSat.1. Lately, players even become engaged in so-called Quadruple Play strategies that combine Triple Play with wireless services. In the UK, for example the recent merger of NTL and Virgin Mobile will result in a company offering a quadruple play of Cable Television, Broadband Internet, Home Telephone and Mobile Telephones.
- Similar to the ISPs, cable providers want to leverage their market access to sell data and information services to end-users. Examples are Belgian Telenet⁸⁶⁷, German Kabel Deutschland⁸⁶⁸, and British NTL⁸⁶⁹, which offer cable internet or DSL access and content services.
- Pay-TV stations originally were based on subscription models over cable and satellite. Recently digital terrestrial offerings are gaining importance as well as additional types of business models. In case of German Premiere⁸⁷⁰ or British Sky⁸⁷¹, viewers can be subscribers, pay per view or use on-demand offerings.
- Also software providers, in particular providers of player software such as Apple (iTunes) or RealNetworks⁸⁷² (RealPlayer) directly offer content to users. Besides pay-per-download offerings, they also offer streaming services. While iTunes has several radio stations pre-programmed and grouped according to genre, RealPlayer allows the user to customise by offering a web-based directory of radio stations. All players can tune in to web-radio as well as traditional radio stations that offer their content online. Additionally, social networking features are often integrated into the offerings by providers of player software. LastFM⁸⁷³, for example, is a player software with a social networking element. It can be listened to via a plug-in for a traditional music player or via an own player provided by the service. Based on interactive features, the program calculates the musical taste and subsequently plays music according to the specific taste. The software also allows the creation and sharing of individual playlists and the formation of user groups.

⁸⁶⁶ <<http://www.maxdome.de>>.

⁸⁶⁷ <<http://www.telenet.be>>.

⁸⁶⁸ <<http://www.kabeldeutschland.de>>.

⁸⁶⁹ <<http://www.ntl.com>>.

⁸⁷⁰ <<http://www.premiere.de>>.

⁸⁷¹ <<http://www.sky.com>>.

⁸⁷² <<http://www.real.com/international/>>.

⁸⁷³ <<http://www.last.fm>>.

- A broad variety of other online services rely on a mix of business models. They combine pay-per-download models with on-demand streaming, one-to-many streaming (Webradio), user-generated podcast directories, subscriptions, rental models etc.
- The same is true for directories and portals. Portals like Yahoo!⁸⁷⁴ offer online streaming services, subscriptions, downloads of music and music videos etc.
- Social networks are a relatively new content services. Among the most important features of social networks are the opportunities to build an online profile, link to other users and comment on content offered by the users. One popular offering is YouTube,⁸⁷⁵ a site dedicated to the distribution of online video content. Although its main purpose is to let users share their own videos, several broadcasters (such as MTV or E! Entertainment) use the platform to distribute original content. YouTube has become one of the most popular video sites in 11 months, serving 30 million videos a day with 9.1 million people in February 2006. Another prominent example is MySpace,⁸⁷⁶ a social network focusing on music, which has recently been acquired by News Corp. Music labels, individual artists and music channels use the platform to distribute (via streaming) music, music videos or entertainment shows.
- Commercial P2P services such as In2Movies⁸⁷⁷ rely on P2P technologies for the download of content. In contrast to illegal P2P networks, content is protected by DRM technologies and can be purchased to be owned by users.
- A relatively new content channel came into existence with networked consumer electronics (CE) devices offered by CE manufacturers, such as Microsoft's Xbox 360, Sony's PlayStation 3 (due in November 2006) or networked DVD players offered by Danish manufacturer KiSS Networked Entertainment.⁸⁷⁸ Part of the devices' functionality is the possibility to download and stream digital content, i.e. games, music, video and also broadcasts.
- Also mobile operators have become important distributors of content. They offer audio as well as video content to their users in various business models. Mobile music services, offered for example by Orange, Vodafone, O2 or T-Mobile, allow the download of songs to mobile devices and Pcs. Visual Radio⁸⁷⁹ is an add-on functionality for mobile phones with FM receiver. Radio stations supporting the application can be received over the ordinary FM waves. The service is complemented by an interactive channel, which transmits data and information on the program over the mobile phone network. Via the channel the user may buy and download songs that are broadcasted. The radio service is currently free of charge, the interactive channel is billed according to the mobile operator's charges. In addition, mobile operators start offering a variety of video content, either paid downloads or streams that can be free or paid services. The market for mobile TV is still in an early phase of development. Mobile operator O2 in cooperation with NTL has, for example, engaged in a trial in the UK where users have access to channels like Sky News, CNN, Chart Show TV, Sky Sports News, Cartoon Network, Discovery on their mobile phones.⁸⁸⁰
- Last but not least users have lately become very active in creating and distributing content themselves in blogs, podcast, video podcasts, etc. This kind of user-generated content

⁸⁷⁴ < <http://music.yahoo.com> > .

⁸⁷⁵ <<http://www.youtube.com/>>.

⁸⁷⁶ <<http://www.myspace.com>> .

⁸⁷⁷ <<http://www.in2movies.de>> .

⁸⁷⁸ <<http://www.kiss-technology.com>>.

⁸⁷⁹ <<http://www.visualradio.com/>>.

⁸⁸⁰ Wireless Week, O2, NTL Reveal Channels for Mobile TV Trial, <<http://www.wirelessweek.com/article/CA601020.html>>.

increasingly competes directly with content provided by traditional broadcasters. It can be accessed directly over dedicated websites, over specific directories and portals or over online stores like iTunes.

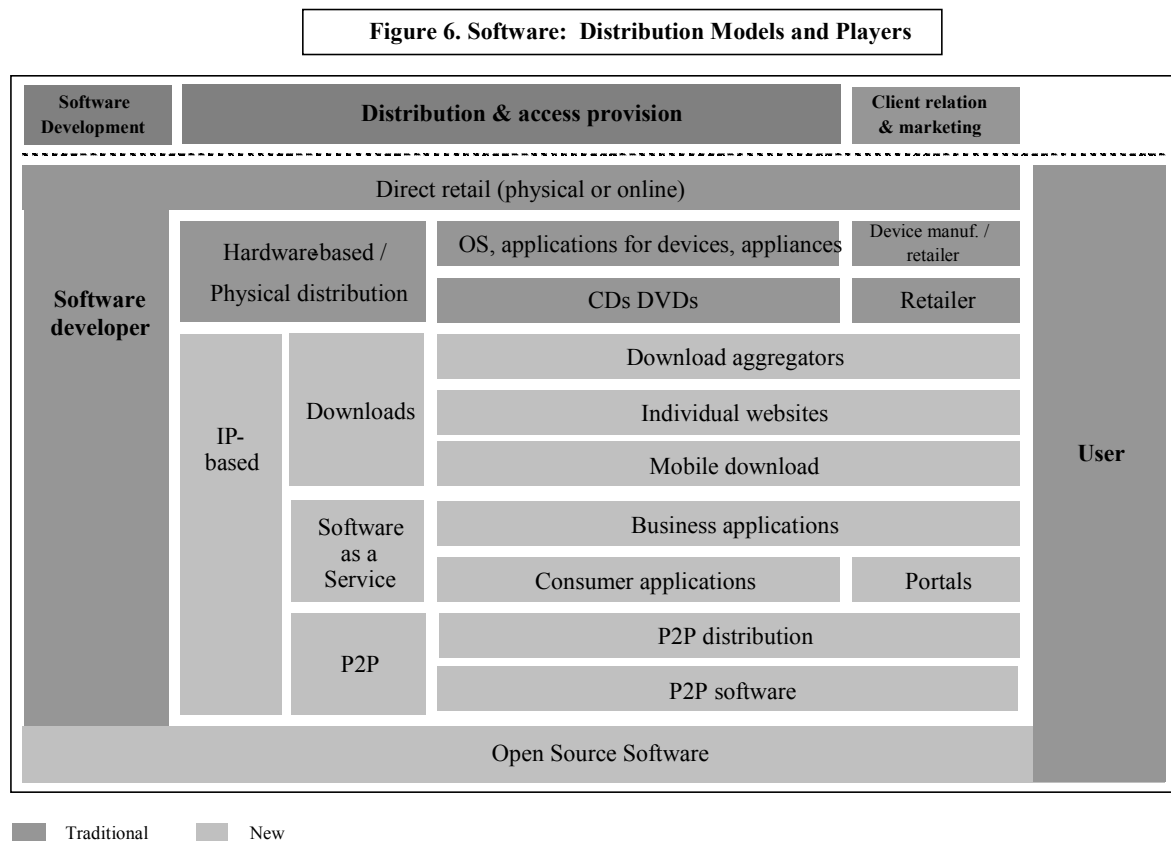
1.2 Computer programs

As is the case in the distribution of media content, the evolution of IP-based distribution channels has changed the landscape of software distribution and business models. Figure 3 gives an overview over current software distribution models and players - 'traditional' as well as new ones.

Physical Distribution

Computer programs have traditionally been and still are distributed on physical storage media (floppies, CDs, DVDs) predominantly over retail channels. Software regularly also comes integrated or bundled with hardware, e.g. as operating systems software, as application software for devices, or as a programs embedded in appliances. In the case of hardware-based software, the device manufacturers and/or their retailers are marketing and distributing the software to the end-user. Alternatively, the software developer can distribute software on physical media directly to users, which has been significantly simplified over online commerce channels.

Figure 3: Software: Distribution Models and Players



Downloads

Software distribution over IP-based channels is a phenomenon that has evolved since the late 1990s and has enabled software developers to also distribute their software online for download directly to users. The downloading of software over the internet has become very common and takes place over individual websites of software providers and their partners or over download aggregators and online retailers. The software distributed online is not only offered for paid download, a significant share of software is also offered online for free. Portals like e.g. Download.com⁸⁸¹, which is operated by media company CNET, aggregates download links for Open Source Software, freeware, shareware and first-try titles (as well as music and video content). In addition, users can comment and rate the software. There is no charge for accessing the site or for down- and uploading software. Download.com offers more than 100,000 programs. Other platforms such as the open-source community platform SourceForge⁸⁸² have additional functionalities and support not only downloading but also the administration process of software development within a specific open source community.

In addition to software downloads over fixed internet, software is also offered for download from mobile networks. The availability of affordable high-speed mobile network access has enabled mobile operators, service providers and device manufacturers to offer mobile software and updates for download over the air. This also gives the opportunity to add functionality to hardware that is already on the market. Slingbox⁸⁸³, for example, is a CE device, which works in tandem with hard drive VCRs like TiVo. With the hardware, viewers can record content and stream it to any place where they have broadband internet access (place shift). The company extended these services to mobile phones, which they increasingly expect to be used for mobile TV consumption. Users can download the player software over the mobile network.

Software as a Service

In addition to software downloads, software is also provided as a browser-based service over the internet. Clients buy or get free access to the hosted software, which is accessed through a web browser. The applications are not downloaded and operated on the user's hardware. Rather, the software is run on the supplier's server. Commands and input can be generated by the user's interface, but are processed by a server hosted by the provider. The concept is also called on-demand software or Application Service Providing (ASP). The concept is sometimes also described as software rental, since the software is not owned but used and paid for fixed time periods. However, the Software as a Service (SaaS) model does not only involve the provision of the software for a fee. In addition, it involves a whole range of related services such as hosting, operating, maintaining, and updating the software.

Software is offered as a service to businesses as well as to consumers. In the case of business applications, the provider is responsible for customer services and support. Two examples of business applications in the SaaS model are Salesforce.com,⁸⁸⁴ a CRM (Customer Relationship Management) software and Onventis,⁸⁸⁵ an on-demand e-procurement and SRM (supplier relationship management) software.

⁸⁸¹ <<http://www.download.com>>.

⁸⁸² <<http://sourceforge.net>>.

⁸⁸³ <<http://www.slingmedia.com>>.

⁸⁸⁴ <<http://www.salesforce.com>>.

⁸⁸⁵ <<http://www.onventis.com>>.

Prominent examples for consumer applications offered as browser-based services are all web-based email applications offered by portals, such as Google's Gmail, Yahoo! Mail or Microsoft's Hotmail offerings. For a long time, functionality of web-based applications was rather limited. More recently, applications are made available that have capabilities of standard productivity software. For example, Writeley⁸⁸⁶ (which has been acquired by Google) is a web-based word processing software which allows for collaborative working and sharing of text. The service is currently offered free of charge. iRows, NumSum are examples for web-based spreadsheet software, 30 Boxes and CalendarHub are examples for web-based calendar software.

While the importance of SaaS is still limited for larger business applications, the importance of web-based applications for consumers and smaller businesses can be expected to further grow over the coming years, because an increasing number of Ajax-based applications coming to the market. Ajax is a web development technology for creating interactive web applications.

P2P

P2P networks are an economical way to distribute large quantities of data. No central server provides download capacity, rather, content is loaded from the peers' hard drives and shared within the P2P community. As a result, P2P technology is well suited also for the efficient distribution of software. Especially the Linux community uses P2P services such as BitTorrent to distribute new releases of their operating system to any interested party. There are also commercial services entering the market for P2P software distribution. One example is Bertelsmann's GNAB⁸⁸⁷, which can be used to distribute game software, among other types of content such as music and videos. However, software distribution over P2P networks is not very widespread yet.

P2P technology can also form the basis of the software itself. Skype⁸⁸⁸, for example, is a software client that allows for free internet telephony, chatting, sending files and conferencing. Because it is based on P2P technology, there is no centralised infrastructure or directories, which allows the software to utilise the processing and networking power of the end-users' machines.

Open Source Software

As is the case in content distribution, the role of users in the landscape of software development and distribution has changed over the past years as well. In case of open source software (OSS), users can also modify and redistribute software. In the original concept of open source software the distinction between user and developer is blurred. However, over the past years, a broad variety of software and services providers have evolved that offer commercial, customised software and services on the basis of open source software. This has resulted in significant complexities related to the licenses for OSS usage.

1.3 Database services

Figure 4 provides an overview over traditional and new forms of database distribution models and players. Database services were traditionally and still are offered as stand-alone products

⁸⁸⁶ <<http://www2.writely.com>>.

⁸⁸⁷ <<http://www.arvato-mobile.de/digital-media-distribution.html>>.

⁸⁸⁸ <<http://www.skype.com>>.

or services in form of printed catalogues or on CD-ROMs that are distributed to users over retail or similar channels.

Figure 4. Databases: Distribution Models and Players

Aggregation & hosting	Distribution & access provision		Client relationship & marketing	
Publishers scientific & public institutions libraries information providers	Stand-alone	Catalogues, CEROM	Retailer	Users
	Browser (Terminal) based	User generated	Web-based portals, directories, and online services	
		Commercial		
	Software bundled	Application functionality	Software distributors	
	Hardware bundled	Device functionality	CE manufacturers	
	Services and application based	Contentbound metadata	Content & media distributors	
		Service data	Application & service provider	
	User-generated databases			

TraditionalNew

Browser-based

In addition, terminal-based database-services have existed before the widespread use of online database services. The concept of giving users 'life' access to a database over remote channels as was the case in terminal-based services has largely remained the same when these services have been moved to the internet and users were enabled to access a database over a Web-browser. Examples of stand-alone online database services range from simple consumer services such as online 'yellow pages' to complex scientific, statistical, or patents databases with online access. The internet has significantly enhanced the possibility for e.g. statistics offices and providers of scientific databases to make their services available online directly to users either for free or against a usage or license fee. Many web-based portals for online databases exist that help users find and access databases.

A relatively new phenomenon that has significantly been enhanced by the internet are user-generated databases. They include databases generated by scientific communities, by consumers or by a mix of both (e.g. Wikipedia⁸⁸⁹). A popular, partly user-generated database is the Internet Movie Database IMDb,⁸⁹⁰ a database of movies, TV shows and games: release dates, cast, background information, etc. In a basic version it is free of charge, in a professional, subscription-based version users are offered premium information and services, such as business and contact information as well as industry news.

⁸⁸⁹ <<http://www.wikipedia.org>>.

⁸⁹⁰ <<http://www.imdb.com>>.

Software-bundled

Databases also come bundled with software and often form an integral part of the software itself, as is e.g. the case with navigation software that makes use of geodata information from geodatabases. In this case the database information is integrated into the software and client relationship, marketing is taken over by the respective software distributor. Data can either be integrated and used by the software offline or, in newer models, the software can use an online connection to get up-to-date access to a database.

Hardware-bundled

Databases are today also bundled or integrated in hardware. Devices in which databases form the basis for the device functionality and database updates are provided for over a network connection are a relatively new phenomenon. Some CE manufacturers provide, for example, access to databases via their products by connecting to the internet. Based on the database information, CE entertainment devices like digital video recorders offer programming guides and organise the content offered e.g. for TV and video on demand services. Examples are the networked HD media players offered by Danish company KiSS Networked Entertainment⁸⁹¹ or the popular TiVo⁸⁹² devices and services in the US. In addition to the electronic program guide KiSS also offers access to weather and stock information retrieved from respective databases. While hardware-bundled database access is still a niche phenomenon in Europe, their relevance can be expected to increase.

Services- and application-based

As opposed to hardware-bundled database access, online services and applications that are based on databases have become very widespread. Databases today play an important role as part of many online services and applications. They are either content-bound, i.e. they provide metadata information about the content offered, or they form the basis of a service or application. Metadata information obtained from databases today form an integral part of almost all online content services. All Media Guide (AMG), for example, offers metadatabases for music, games and movies. The information is used for in-store information systems and for player software such as Windows Media Player or Musicmatch Jukebox. In addition, the database can be directly accessed by users and AMG sells print compilations of its information.

A small but increasing part of metadatabases is also user-generated. MusikBrainz⁸⁹³, for example is a user-generated metadatabase in the public domain providing information about music recordings. It includes information about artists, albums, track length, etc. Users can also access the database online via a software to tag their MP3 or Ogg files. A similar database is provided by the FreeDB project.⁸⁹⁴

In addition, a large variety of online services and applications are based on the information provided by databases today, such as weather, address, or financial services etc. In these cases the division between the service provided and the database access is often difficult or insignificant.

⁸⁹¹ <<http://www.kiss-technology.com>>.

⁸⁹² <<http://www.tivo.com>>.

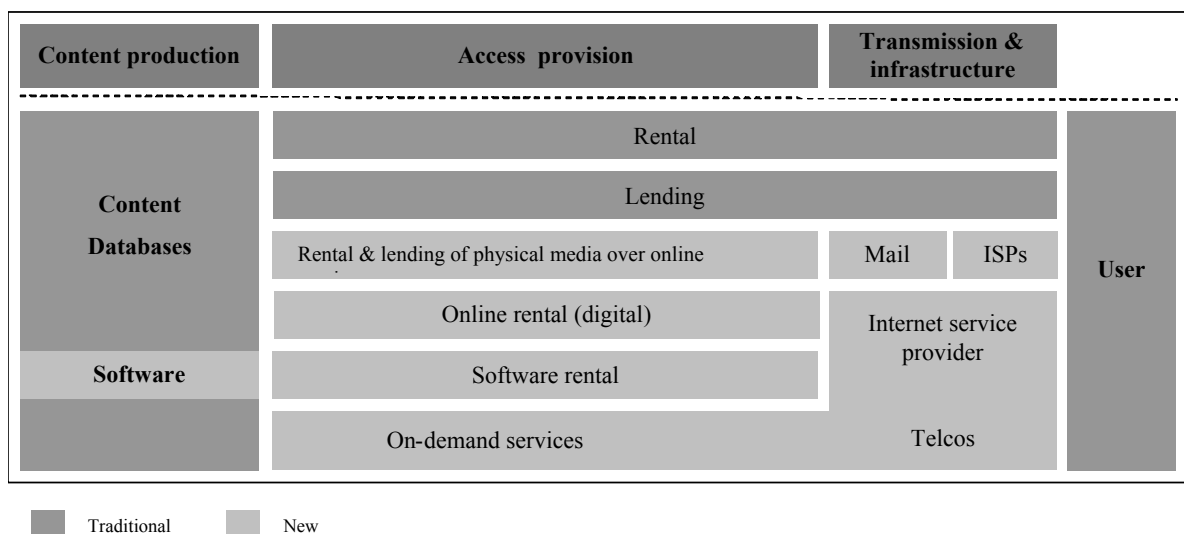
⁸⁹³ <<http://www.musicbrainz.org>>.

⁸⁹⁴ <<http://www.freedb.org>>.

1.4 Rental and Lending

The possibility to distribute content in digital form over the internet has also provided for entirely new forms of digital rental and lending services (see figure 5). However, traditional rental and lending models cannot easily be transferred to online distribution forms due to rights problems. What has kept new rental and lending models from further evolving (e.g. as compared to new forms of broadcasting services) are the entirely new issues of copy protection that come along with the rental and lending of digital files.

Figure 5. Rental & Lending: Models and Players



Rental and lending of physical media over online services

In a first new model, the rental and lending of physical carrier media has been transferred to online channels, which can significantly enhance the searching and ordering process. Online lending services of libraries, where catalogues can be searched and books can be ordered online but are delivered physically are one example. Online processing possibilities have also enabled new forms of lending as shows the example of mybookyourbook⁸⁹⁵, a collaborative library in the UK. Members contribute some of their own books and can borrow books online, which are shipped via mail for the price of a self-stamped and self-addressed envelope. Up to 5 books per month can be requested from the library.

Prominent examples of online rental services of physical media are DVD rental services, which are offered by e.g. Netflix in the USA or by Amazon also in Europe. Users pay a monthly fee and can then order a predefined number of DVDs online, which are delivered and returned via mail. Netflix⁸⁹⁶ currently has 5 million subscribers that can choose from a collection of 60,000 titles. At Amazon Germany⁸⁹⁷ users can choose from a library of 10,000

⁸⁹⁵ <<http://www.mybookyourbook.co.uk>>.

⁸⁹⁶ <<http://www.netflix.com>>.

⁸⁹⁷ <<http://www.amazon.de/dvdverleih>>.

titles for a monthly subscription fee. A similar model is offered for games in the US by GameFly.⁸⁹⁸

Online rental of digitised content

Recently, Digital Rights Management (DRM) technologies have enabled the complete transfer of rental and lending models to online channels including the distribution of the content. In the case of online rental models, digital products such as movies or games are made available for a fixed period of time to users. DRM systems ensure that the digital files become unusable to the user after the fixed renting or subscription time has expired. As the transmission of large files such as digitised movies requires broadband access, infrastructure provider like ISPs or telecommunication companies have included video-on-demand services in their offerings. On the video-on-demand service of T-Online⁸⁹⁹, for example, users can download or stream movies after paying a one-time rental fee. Users have access to the rented movie for 24 hours. Online lending models are only starting to evolve. If libraries act as distributors of digital material, DRM systems are needed that enable the management of allowed usages and also the management of the limits of use, the obligations required to exercise the permissions, as well as the exceptions that disable the permissions.⁹⁰⁰ The British Library⁹⁰¹, for example, now offers secure electronic delivery (SED) of encrypted PDF-files to its users. DRM-based electronic document delivery has now a share of around 25% of all document delivery by the British Library and during its three years existence the service transmitted around a million documents.⁹⁰²

Software Rental

Software as a service (SaaS) models (see section 3.5.2 above) are often also described as software rental. The software is not purchased by the user but rather access to the software is provided and paid for a fixed time, typically a monthly subscription fee. Included in the usage fee are a variety of services beyond the simple provisioning of the software.

But also software that is not delivered in a browser-based model can be licensed under rental agreements. Microsoft, for example, is offering two software rental licenses in Europe, Open Value Subscription for small companies and Enterprise Agreement Subscription for larger companies. Both allow companies to avoid large up-front investments for software and instead pay fixed yearly fees for the usage of the software per PC.⁹⁰³

⁸⁹⁸ <<http://www.gamefly.com>>.

⁸⁹⁹ <<http://vod.t-online.de>>.

⁹⁰⁰ C. Orwat, 'Digital Rights Management in Public Science', Report on the 4th INDICARE Workshop held on 8 Dec 2005 in Brussels, April 2006, <www.indicare.org> (last visited 28 April 2006) [Orwat 2006], p. 8.

⁹⁰¹ <<http://www.bl.uk>>.

⁹⁰² *Ibid.* p. 15.

⁹⁰³ <<http://www.microsoft.com/licensing/programs>>.

1.5 Some observations

The above tentative overview over the transition from traditional to new, online forms of distribution and business models reveals a number of common trends:

Convergence

A clear trend that can be observed in all areas is convergence. Convergence relates to a number of factors here.

First, providers of content, software, databases as well as of rental and lending services have a broad variety of distribution channels at hand over which they can make their services available. They increasingly do not rely on one channel alone but offer their services over a number of different channels in parallel, traditional offline channels as well as the internet and mobile networks. This also involves that users can access the services over different devices such as TV sets, the internet and mobile phones.

Second, services are based on various business models that are also frequently offered in parallel. Providers offer for example one-to-many streaming services in parallel with new on-demand download services. Some of these services are for free to users, others require a subscription or are based on pay-per-use models.

Third, convergence relates to the players that are active in providing content, software, database and rental and lending models. Increasingly, their main lines of business cannot (easily) be distinguished: Software providers, for example, also engage in content and database distribution; content providers also offer access to databases and renting services; infrastructure providers such as ISPs or mobile operators become heavily active in content distribution directly to users; and databases become an integral part of content distribution.

The role of the user

Fundamental changes can currently also be observed concerning the role of users in all of the four described areas. There is a trend that the usage of audio and video content, software and databases is turning from a predominantly passive to a more active activity. IP-based transmission channels today allow for active choice and for active participation of users in two ways:

- 1) Active choice: Due to on-demand distribution models, users can now actively choose when, where and what kind of content they want to consume.
- 2) Active participation: Because IP-based networks allow for two-way communication, users are enabled to actively participate in the process of production and distribution of content, software and databases in a number of ways. First, users increasingly create and distribute content, software and databases themselves. Second, social network components in online services, e.g. rankings, recommendations, or playlists, allow consumers to more and more influence the popularity and characteristics of services. And third, over P2P networks users can actively take part in the distribution process – in legal AND illegal ways. As a result of active participation, the distinction between creators/providers and users often becomes fuzzy.

DRM and broadband as driving technologies

Two important technologies can be identified as important drivers of the above described changes. First, the growing availability of broadband access is an important prerequisite for the development of many of the described services. For example, the streaming as well as the download of large files such as movies, the usage of certain database services and the functioning of SaaS models all rely on broadband connections. Second, DRM technologies oftentimes form the basis of business models that involve the online distribution of digital files. This can be ascribed to the desire of rightholders to keep the same level of control over the usage of their content in the digital as in the analogue world. It is beyond the scope of this interim report to evaluate whether this same degree of control it is at all feasible and/or necessary for a thriving online environment.

Annex 2 – Minutes ‘Recasting of European Copyright Law’

Joint Institute for Information Law (University of Amsterdam)/Wittem Symposium, Renaissance Hotel, Amsterdam, 22 September 2006

On September 22, 2006 a small invitation-only symposium was held in Amsterdam to discuss parts of the Draft Recasting Study in an academic forum. The symposium focussed on institutional questions relating to the future regulation of copyright in the EU, and on the appropriate legislative instruments. The meeting was jointly organised by the Institute for Information Law and the Wittem Group. Participants, mostly from academia, were selected on the basis of their expertise in European copyright law, and European Union law. Officials of the European Commission were also invited, but did not attend. A list of participants is appended to these minutes.

Introduction of the Wittem project and of the EC Recasting Study

The Wittem project is an academic endeavour, aiming at a normative approach for the formulation of principles of European copyright which can serve as a frame of reference for discussion at the EU level. The Recasting exercise as tendered to IViR by the European Commission is primarily aimed at an evaluation of the present state of the European copyright and related rights acquis (with a number of specific issues, such as term extension of related rights to be addressed as well). Considering the drawbacks of the harmonization process that are identified so far, the Recasting study also includes a more forward looking approach, outlining potential options for the long term. This exercise is of course rife with difficult and contentious issues, but nonetheless merits consideration. The primary objective of the meeting is to debate the preliminary results, specifically as regards the desirability and method of arriving at a European copyright title.

The legal competence of the EU in the field of copyright and related rights

An overview is given of the objectives of European copyright and related rights law, and their relation to the principles of attribution, subsidiarity and proportionality as applied in practice. The EC must make clear (e.g. in recitals) what the legal basis is for action, and show a close connection between the aims and content of the measure. The proportionality principle prescribes a choice for the least intrusive instrument and maximum respect for the integrity of the legal systems of member states. In practice, art. 95 EC treaty provides a broad legal basis for harmonisation of intellectual property (through either directives or regulations). An argument often made is that the mere existence of differences in national laws requires community action, but ECJ case law makes clear that the creation of a level playing field as such (i.e. abolishing disparities) is not sufficient basis for legislation on the basis of art. 95. There must actually be real internal market problems caused by disparities in national laws to warrant action.

Additional legal bases to be taken into account are arts. 151 and 153, respectively requiring a high level of consumer protection and the exercise of restraint in areas where intellectual property has a strong cultural undertone.

The principle of proportionality, if taken seriously, must be taken into account from the start of the political and legislative process; for all practical purposes however, it also ends there. This is because the ECJ allows the community a wide margin of appreciation, and also takes recitals (in their function of indicating the legal basis and justification of the substantive approach taken) at face value.

The question is raised to what extent art. 95 is in effect the appropriate legal basis, considering that harmonization in practice leads to the extension of intellectual property, which in principle – certainly for goods – amounts to a hindrance to the free flow. It is argued that the European legislature pays too little attention to the double face of intellectual property. On the one hand it constitutes a barrier to free trade, on the other it can be a driver for economic activity. Discussion then focuses on the difference between 95 and 308 as legal basis. The latter, a residual competence, not only requires unanimity but also provides for a limited role for Parliament. There is no doubt art. 308 allows for the creation of community intellectual property titles, even though intellectual property is an area of shared competence. But art. 95 goes a long way as basis for harmonization, even though it is questionable whether complete harmonization is possible on art. 95.

The issue is raised what would happen if directives are invalidated by the ECJ. In some countries (UK) sunset rules will invalidate the implemented national rules as well. In most, the implementing legislation will still be valid, but the member state will be free to revoke it. In practice, revocation will be unlikely. This calls for extra caution in legislating at European level: once introduced, member states are stuck with it, regardless of competence issues and fit for purpose considerations.

The future of territoriality

For the outsider, it may seem obvious that from an internal market perspective the first thing to tackle in European intellectual property law is the territorial nature of rights, which enables the partitioning of the common market. Harmonization so far has not addressed territoriality, except for the exhaustion doctrine of the ECJ as incorporated in the Information Society directive and the limits to the Bogsch theory in the Satellite and Cable directive.

In the internet context, the territorial approach causes various problems. Communication to the public (making available) takes place everywhere, as do reproductions (the exception for transient copying in art. 5.1 InfoSoc Dir may not address the problem adequately). The right of communication is not exhausted; however, this is only partially evident from the Coditel I ruling (for cases where on line dissemination substitutes off line sales, the application of Coditel is questionable) but laid down in art. 3.3 Information Society Directive. Consequently, a content provider needs to clear rights for 25 Member States.

There are however a number of arguments against the extension of the country of origin principle (mutual recognition in terms of Cassis de Dijon) to copyright and related rights generally:

- Risk of ‘race to the bottom’
- Member States have limited incentive to enforce for the entire EU
- Locus of ‘injection’ difficult to locate
- Downloading might trigger additional local claims, depending on national laws of Member States
- Satellite model does not preclude territorial licensing & encryption

In the discussion it is argued that there is merit in confronting the territoriality issue head on, as is done in the IVIR draft report. However, various points are raised on the issue of the nature and effect of territoriality. Harmonization has not created only more barriers to free flow, but also addressed them, considering the ECJs position in Warner. Overstating the lack of harmonization may be counter productive.

In theory the question may be what justifies (a certain level of) territoriality. Interestingly, historically the formation of federal states has invariably led to copyright competence for the highest territorial level (US, Germany, Switzerland, Belgium). One could also reverse the question and ask why territoriality should not be allowed to reign. For instance it accommodates cultural

considerations, also beyond the cultural role of collecting societies. More importantly, territoriality enables a possibly legitimate differentiation of geographical markets, and thereby allows price discrimination, which may or may not be a valid economic justification. On the other hand, even absent territorially defined rights, licensing to geographically distinct markets may still be possible.

A question is to what extent licensing or distribution contracts should be regulated. It is pointed out that other Community instruments such as the Plant Variety Regulation contain some rules in this respect. The rights clearance problem will not be solved by getting rid of territoriality, given the divisibility and transferability of IP rights. Harmonized rules on ownership also facilitate rights clearance. Creating a single European market may also favour the interests of large multinationals rather than (European based) small and medium sized enterprises. An idea would be to analyse where territoriality is necessary and where not. Possibly one could have a system where exhaustion is the rule for off line information supplies and on line substitutes, and not for 'true' services. A problem here lies in the consequences for communication rights, especially considering convergence.

Analogous interpretation of the Coditel and Dior/Evora decisions could be used to counter overbroad interpretation of secondary exploitation rights. For instance the reproduction right in computer software might be exhausted once a copy of a product in which the software is incorporated has been legitimately put into circulation. The problem here is not ECJ case law, but the language of art. 3.3. Information Society Directive.

Another aspect to consider is private international law. Rules on the applicable law may accommodate internet-related problems. For instance the reach of a transmission of copyrighted content across European borders might be limited by taking account only of countries where an audience is actually targeted rather all countries of mere reception. For contracts there may be only a single applicable law; however IP issues underlying the contract will still be judged under different laws.

Territoriality is not only a problem. In effect it may play a legitimate role in achieving one of the other objectives of EC law, notably an efficient allocation of resources. It is also not necessarily anti-competitive; one could envisage a system whereby territoriality is the norm combined with a competition based approach to abolish anti-competitive partitioning.

Instruments of further harmonisation: 'hard' law or 'soft' law?

It is set out what harmonization by directive has so far brought us. A number of directives have led to substantial harmonization, e.g. for databases, software, satellite broadcasting, term of protection. Another advantage is that they have shown the emergence of common principles, and allow for the export of these norms to third countries. Harmonization also creates competence for the EC to participate in international treaty making.

There are also a number of drawbacks to harmonization through directives. There are high costs associated with the complex and lengthy EU legislative process and the transposition in national laws. The lengthy process causes a slow response to technological development. Untransparency of the legislative process favours lobbies, and there is a lack of 'quality control' (role for academia). In practice all harmonisation leads to an extension of copyright and related rights, distorting the balance of interests. Furthermore, harmonisation does not lead to unification for various reasons (e.g. minimum or optional protection, late or incomplete transposition, homing tendency in transposition process). On the other hand, given time, interpretation of the directives by the ECJ has a certain harmonizing effect, as is the case in trademark law.

The advantages and disadvantages of directives and regulations versus recommendations and communications are set out and discussed. Directives are more flexible because they require result oriented implementation, but only have direct effect in vertical relations (government-

citizen) when provision grants clear and unconditional rights. Regulations unify directly, and have horizontal and vertical effect in relations.

As regards soft law, from the perspective of European law, recommendations have no binding effect legally. However, following the Grimaldi case, courts are to take them into account if possible. They may therefore have some unifying effect, while allowing for flexible and relatively fast reaction to technological developments. Another function of recommendations is that they can serve as pre-stage for action by Commission (e.g. action for infringement of primary EC law). They may have a moral persuasive effect on MS, or encourage self regulation (e.g. online music recommendation). Such effects are most likely where a recommendation is directed at a homogenous group of stakeholders (such as in financial services), which may be lacking in the copyright industries.

There are various drawbacks to soft law generally: there is little democratic accountability because Parliament (or even Council) is bypassed. On the other hand, the non-binding nature enables MS to ignore or follow a recommendation thus giving indirect democratic control. If a recommendation is used to clarify existing directives, there is a conceptual and competence problem when the Commission issues an interpretative recommendation, as directives are legislated by Parliament and Council. The popularity of soft law in some areas also signals a failure to reach consensus, which is increasingly difficult in an expanding Europe with culturally and economically very diverse member states (compare the software patent debacle, the contentious EPLA).

Towards a European Copyright Law:?

A long term solution to the disadvantages of (piecemeal) harmonisation of copyright and related rights, would be a uniform European Copyright Code. The introduction of a European copyright title using a regulation as instrument, could be based on art. 308 EC Treaty (unanimous vote, little influence of European Parliament). Considering the broad scope of the existing copyright acquis, it may perhaps also be based on art. 95 (QMV, co-decision procedure), especially where a European title would replace essentially similar national rights. The introduction of a European title in the long term would have various advantages. It would allow for a clean-up of the acquis, increase transparency and legal certainty, solve problems caused by the territorial nature of rights, and restore the balance between rights and limitations. It would also give the EU a single voice in international fora.

Although the idea of a European copyright code is attractive, there are also serious problems to overcome. Competence in IP matters is shared between EC and member states, which casts doubt on the possibility to have a European copyright title that completely pre-empts all national copyright law. In practice however, the ECJ interprets competence in a broad manner. Given the fact that copyright and related rights come into existence *ex lege*, the co-existence of parallel rights at the national and European level is problematic. Also, the issue of transition from national to European titles must be dealt with (in this respect the Australian example can be useful).

Given the balance of various interests that must be ensured, it is difficult to conceive of a European copyright code that would not address moral rights, ownership, collective management and possibly contracts as well. With regard to the latter, there is a strong connection with contract law in general, some member states having little copyright specific contract law. The ongoing attempt to define general principles of contract law (Lando, etc.) shows how varied national systems are and how difficult it is to agree on common standards. A problem with moral rights is their connection to rights/interests in personality, which are not harmonised either. There is concern that because of the realities of the (political) decision making process, the eventual outcome will not be a balanced Code. In that respect, the problems are similar as to

what happened with previous directives (e.g. not providing legal certainty, extending protection, interests of some stakeholders better represented than others).

Careful consideration must also be given to what may be lost when national rights are replaced by an (all encompassing) European right. How will it affect the current capacity of national legislatures and courts to devise solutions for new problems caused by technological, economic or social developments (the laboratory function of national courts)? Will a Regulation be set in stone considering the difficulty in finding a qualified majority or even unanimous vote required for change? Is it an instrument flexible enough in terms of response time to technological change? How will a European Code affect any existing symbiosis between national cultural policy and copyright law?

It is agreed that the drafting of a European Copyright Code requires first and foremost a clear vision on the role(s) of copyright and related rights in the EU and on what is required to guarantee its fulfilment. Academia has a responsibility here.

Participants

‘Recasting of European Copyright Law’

Joint Institute for Information Law (University of Amsterdam)/Wittem Symposium, Renaissance Hotel, Amsterdam, 22 September 2006

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Annex 3 – Comparative Table of EC Directives on copyright and related rights

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Right of reproduction	Directive 91/250/EC on computer programs	Computer programs	The natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation.	4. The exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize: a) The permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Incl. loading, displaying, running, transmission or storage of the computer program	5.1 Acts necessary for the use of the computer program by the lawful acquirer according to purpose of program 5.2 Back-up copy by a person having a right to use the computer program 5.3 Observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program 6. Decompilation for purposes of interoperability
	Directive 96/9/EC on databases	Databases	Maker of a database, i.e. the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation;	5. Exclusive right to carry out or to authorize: (a) temporary or permanent reproduction by any means and in any form, in whole or in part;	6.1 Acts necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user 6.2 Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases a) reproduction for private purposes of a non-electronic database; b) illustration for teaching or scientific research c) for the purposes of public security or for the purposes of an administrative or judicial procedure d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
	Directive 92/100/EC on rental and lending rights and related rights	Fixations of performances; Fixations of phonograms; Fixations of films; Fixations of broadcasts	Performers; Phonogram producers; Film producers; Broadcasting organisations	7. Member States shall provide the exclusive right to authorize or prohibit the direct or indirect reproduction: - for performers, of fixations of their performances, - for phonogram producers, of their phonograms, - for producers of the first fixations of films, in respect of the original and copies of their films, and - for broadcasting organizations, of fixations of	10.1 Member States may provide for limitations for: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Right of reproduction (cont'd)				their broadcasts, as set out in Article 6 (2).	(d) use solely for the purposes of teaching or scientific research. 10.2 Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention. 10.3 Para. 1 (a) is without prejudice to any existing or future legislation on remuneration for reproduction for private use;
	Directive 2001/29/EC on copyright in the information society	All categories of works, except computer programs and databases	Authors; Performing artists; Phonogram producers; Film producers; Broadcasting organisations	2.1 Exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form: a) for authors, of their works; (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.	5.1 Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2. 5.2 Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: (a) reproductions by means of reprography; (b) reproductions for private use [...] which takes account of the application or non-application of technological measures; (c) reproduction made by publicly accessible libraries, educational establishments or museums, or by archives; (d) ephemeral recordings of works made by broadcasting organisations (e) reproductions of broadcasts made by social institutions. 5.3 Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: a) illustration for teaching; b) people with disability;

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
					c) reproduction by the press; d) quotations; e) public security, administration, justice; f) political speeches; g) religious celebrations; h) works in public places; i) incidental inclusion; j) catalogue of public exhibition; k) caricature, parody, pastiche ; l) demonstration & repair of equipment ; m) artistic work in the form of building for purposes of reconstruction; n) communication or making available for purpose of research on dedicated terminal; o) <i>de minimis</i> exception
Right to translate & adapt	Directive 91/250/EC on computer programs	Computer programs	The author of the computer program	4. The exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize: b) The translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof	5.1 Acts necessary for the use of the computer program by the lawful acquirer according to purpose of program 5.2 Back-up copy by a person having a right to use the computer program 5.3 Observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program 6. Decompilation for purposes of interoperability
	Directive 96/9/EC on databases	Databases	Maker of a database	5. Exclusive right to carry out or to authorize: b) translation, adaptation, arrangement and any other alteration	6.1 Acts necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user 6.2 Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases a) reproduction for private purposes of a non-electronic database; b) illustration for teaching or scientific research c) for the purposes of public security of for the purposes of an administrative or judicial procedure d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Right to fixation	Directive 92/100/EC on rental and lending rights and related rights	Performances Broadcasts	Performing artists; Broadcasting organisations; NOT: Phonogram or film producers	6.1. Member States shall provide for performers the exclusive right to authorize or prohibit the fixation of their performances. 2. Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the fixation of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite. 3. A cable distributor shall not have the right provided for in paragraph 2 where it merely retransmits by cable the broadcasts of broadcasting organizations.	10.1 Member States may provide for limitations for: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research. 10.2 Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention. 10.3 Para. 1 (a) is without prejudice to any existing or future legislation on remuneration for reproduction for private use;
Right of distribution	Directive 91/250/EC on computer programs	Computer programs	The author of the computer program	4. The exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize c) Any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.	
	Directive 96/9/EC on databases	Databases	Maker of a database	5. Exclusive right to carry out or to authorize: c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;	6.1 Acts necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user 6.2 Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases a) reproduction for private purposes of a non-electronic database; b) illustration for teaching or scientific research

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Right of distribution (cont'd)					c) for the purposes of public security or for the purposes of an administrative or judicial procedure d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
	Directive 92/100/EC on rental and lending rights and related rights	Fixations of performances; Fixations of phonograms; Fixations of films; Fixations of broadcasts	Performers; Phonogram producers; Film producers; Broadcasting organisations	9. Member States shall provide (...), the exclusive right to make available these objects, including copies thereof, to the public by sale or otherwise, hereafter referred to as the 'distribution right'. 2. The distribution right shall not be exhausted within the Community in respect of an object as referred to in paragraph 1, except where the first sale in the Community of that object is made by the rightholder or with his consent.	10.1 Member States may provide for limitations for: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research. 10.2 Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention. 10.3 Para. 1 (a) is without prejudice to any existing or future legislation on remuneration for reproduction for private use;
	Directive 2001/29/EC on copyright in the information society	All categories of works, except computer programs and databases	Authors; Performing artists; Phonogram producers; Film producers; Broadcasting organisations	4.1 Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. 2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.	5.4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Right of distribution: rental and lending	Directive 92/100/EC on rental and lending rights and related rights	Works; Databases; Fixations of performances; Fixations of phonograms; Fixations of films; Does not apply to: Computer programs, and buildings and to works of applied art	Author; Makers of Databases; Performers; Phonogram producers; Film producers;	2. The exclusive right to authorize or prohibit rental and lending shall belong: - to the author in respect of the original and copies of his work, - to the performer in respect of fixations of his performance, - to the phonogram producer in respect of his phonograms, and - to the producer of the first fixation of a film in respect of the original and copies of his film. For the purposes of this Directive, the term 'film' shall designate a cinematographic or audiovisual work or moving images, whether or not accompanied by sound.	
Rights of communication: display or performance to the public	Directive 96/9/EC on databases	Databases	Maker of a database	5. Exclusive right to carry out or to authorize: (d) any communication, display or performance to the public;	6.1 Acts necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user 6.2 Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases a) reproduction for private purposes of a non-electronic database; b) illustration for teaching or scientific research c) for the purposes of public security or for the purposes of an administrative or judicial procedure d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
Rights of communication: broadcasting	Directive 93/83/EC on satellite and cable retransmission	All categories of works	Author Performers; Phonogram producers; Film producers; Broadcasting organisations	2. Exclusive right for the author to authorize the communication to the public by satellite; 4. W/r to the right of communication to the public by satellite for performers, phonogram producers and broadcasters, see Directive 92/100/EC; 9. Cable retransmission right to be exercised only through collective management society;	

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
Rights of communication (cont'd)	Directive 96/9/EC on databases	Databases	Maker of a database	5. Exclusive right to carry out or to authorize: (d) any communication... to the public;	6.1 Acts necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user 6.2 Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases a) reproduction for private purposes of a non-electronic database; b) illustration for teaching or scientific research c) for the purposes of public security of for the purposes of an administrative or judicial procedure d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).
	Directive 92/100/EC on rental and lending rights and related rights	Performances; Phonograms; Broadcasts	Performing artists; Phonogram producers; Broadcasting organisations	8.1. Exclusive right for performers to authorize or prohibit the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation. 2. A right to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public, and to ensure that this remuneration is shared between the relevant performers and phonogram producers. 3. Member States shall provide for broadcasting organizations the exclusive right to authorize or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.	10.1 Member States may provide for limitations for: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research. 10.2 Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with the Rome Convention. 10.3 Para. 1 (a) is without prejudice to any existing or future legislation on remuneration for reproduction for private use;
	Directive 2001/29/EC on copyright in the information society	All categories of works, except computer programs and databases	Authors; Performing artists; Phonogram producers; Film producers;	3.1 Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means (...).	5.3 Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: a) illustration for teaching; b) people with disability; c) reproduction by the press; d) quotations; e)

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
			Broadcasting organisations	See RECITAL 23: "This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts." <u>EXCLUDES:</u> Communications or performances where the public is present (no display to the public, no performance in public)	public security, administration, justice; f) political speeches; g) religious celebrations; h) works in public places; i) incidental inclusion; j) catalogue of public exhibition; k) caricature, parody, pastiche ; l) demonstration & repair of equipment ; m) artistic work in the form of building for purposes of reconstruction; n) communication or making available for purpose of research on dedicated terminal; o) <i>de minimis</i> exception
Rights of communication (cont'd): making available	Directive 2001/29/EC on copyright in the information society	All categories of works	Authors; Makers of databases; Performing artists; Phonogram producers; Film producers; Broadcasting organisations	3.2 Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them: (a) for performers, of fixations of their performances; (b) for phonogram producers, of their phonograms; (c) for the producers of the first fixations of films, of the original and copies of their films; (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.	5.3 Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: a) illustration for teaching; b) people with disability; c) reproduction by the press; d) quotations; e) public security, administration, justice; f) political speeches; g) religious celebrations; h) works in public places; i) incidental inclusion; j) catalogue of public exhibition; k) caricature, parody, pastiche ; l) demonstration & repair of equipment ; m) artistic work in the form of building for purposes of reconstruction; n) communication or making available for purpose of research on dedicated terminal; o) <i>de minimis</i> exception
Technological protection measure	Directive 91/250/EC on computer programs	Software	Author of software	7. Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide appropriate remedies against: [...] (c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.	
	Directive 2001/29/EC on copyright in the	All categories of works, except	Authors Performing artists	6.1 Adequate legal protection against the circumvention of any effective technological	(...) in the absence of voluntary measures taken by rightholders, (...) Member States shall take

Type of right	Relevant Directive	Subject matter	Rights owner	Scope of right	Limitations
	information society	software	Phonogram producers Film producers Broadcasters	measures 6.2 Adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services	appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned. A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned. (...) The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.
Right of extraction and re-utilisation	Directive 96/9/EC on databases	Databases	Maker of a database	7.1 Exclusive right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database. 7.5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.	8.1 The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. 9a) In the case of extraction for private purposes of the contents of a non-electronic database; (b) In the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved; (c) In the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Filename: IViR_Recast_Final_Report_Def.doc
Directory: C:\Documents and Settings\ivir002\My
Documents\EG2006\RecastDraftFinals\FinalDec06
Template: C:\Documents and
Settings\mireille\sjablonenmve\ECtemplate.dot
Title: IVIR Study on the Recasting of Copyright and Related Rights for
the Knowledge Economy (for EC DG Internal Market) - final version 2006
Subject:
Author: Institute for Information Law UvA - mve
Keywords:
Comments:
Creation Date: 1/9/2007 8:32:00 AM
Change Number: 18
Last Saved On: 1/9/2007 2:39:00 PM
Last Saved By: mve
Total Editing Time: 224 Minutes
Last Printed On: 1/9/2007 2:39:00 PM
As of Last Complete Printing
Number of Pages: 307
Number of Words: 136.089 (approx.)
Number of Characters: 775.712 (approx.)