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HARMONIZATION OF COPYRIGHT AND RELATED RIGHTS IN THE EUROPEAN UNION

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Introduction

For many years, copyright law was less important. In the past few years, it has been the subject of increased attention and has been constantly becoming the centre of interest. This can be put down to the rapid technical development which we have been witnessing and will continue.

New technical developments, as well as new economic developments, make it - or have made it - necessary to adapt copyright law. For example, to mention just one keyword, the Internet exposes copyright law to new challenges. But one can also mention the compact disc, which has almost completely replaced traditional records. In contrast to records, CDs do not wear out with time. They can be played any number of times without a loss of quality in playback. This led to the appearance of a new branch of industry - that of CD rental. The question was posed of whether copyright law permits this rental, which is disadvantageous to CD producers and the artists involved. This led to a revision of distribution law and rental law, as well as to the Directive on rental right and lending right on the level of the EU. (CD rental virtually ceased to exist subsequent to this legal amendment.)

There are other new recording media which simplify the reproduction and distribution of protected works, for example computer disks or hard disks. The international distribution of protected contents is possible with no problems whatsoever. The possibility of distribution via cable and satellite contributes to making protected contents accessible to a considerably larger circle of users than has ever been possible before. After all, the problem is no longer just the protection of literature, music or fine art. Also where the creation of computer programs and databases is concerned, the question has been raised of whether these are works which should be protected by copyright.

The growing importance of this field of law has led to the European Union becoming and being able to become active. Differing provisions relating to copyright law and neighboring rights could have negative effects on the functioning of the Internal Market, so that harmonization was called for - particularly on the basis of Article 100a of the EU Treaty. Ten years ago now, the Commission of the European Union submitted the "Green Paper on copyright and the challenge of technology - matters of copyright which require immediate action" ((COM 88) 172 final of 23 August 1988). The Commission subsequently instituted the harmonization of various areas of copyright law. Since then, five Directives have already entered into force. Two further proposals are still under consideration.
The following Directives are currently in force:

- Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs,

- 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,

- 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,

- Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection on copyright and certain related rights,

- Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

The following proposals are under consideration:

- Amended proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art,

- Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society.

Five Directives in less than ten years, two proposals still under consideration - this not only makes it clear that copyright law has been subject to enormous change in recent years and that there will be further changes; it is also clear how important legislation is on a European level - legislation which, as already mentioned, takes account of the technological developments of recent years. The need for change which has arisen or will still arise in individual Member States does of course vary in each case. Every Member State will have already national law which corresponds more or less to the EU law which has been or has to be implemented.

Regarding the individual Directives and proposals

I would now like to go into the individual Directives and the proposals still under discussion in more detail.

1. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

The first Directive of the European Union in the field of copyright law dealt with a limited but technically complex field: it served to harmonize the legal protection of computer programs. Clear legal protection of computer programs did not exist in all Member States. However, considerable human, technical and financial resources are required for the development of such programs (cf. recitals 1 and 2), so that they do require legal protection. The fact that computer programs also play a significant role in our industry and commerce (cf. recital 3) nowadays goes without saying.

Regarding the individual articles:

Article 1

Article 1 para. 1 first of all stipulates that computer programs are literary works within the meaning of the Berne Convention. The Directive proceeds from the assumption that a computer program demonstrates all characteristics of a literary work: that it is a linguistic expression of a series of ideas which has come about as a result of the application of human abilities and at the cost of human effort. Computer programs are, like other works, protected if they represent individual works in the sense that they are the result of the author's own intellectual creation (para. 3). The Directive does however refrain from defining the term "computer program" any more closely. Recital 7 does though state that programs "in any form" should be included. Ideas and principles which underlie a program are not protected. Copyright law otherwise also only protects the forms of expression of ideas, but not the ideas themselves. Article 1 thus does not contain any elements of particular interest.

Article 2

According to Article 2, the natural person who created the program is considered to be the author of the program. Legal persons can also be considered to be the author under the legislation of a Member State. If several persons are joint authors, they are jointly entitled to

the right (para. 2). If the program is created within the framework of a contractual relationship of employment, the employer usually is entitled to exercise the economic rights - i.e. to exploitation; an agreement deviating from this can be made (para. 3).

Article 3

Article 3 makes it clear that national copyright legislation shall apply with respect to beneficiaries of protection. If the protection of literary works of natural persons is dependent on the person's domicile or nationality, or if Member States guarantee copyright protection because of the first publication of a work in a Member State, this also applies for the protection of computer programs. With this, Article 3 also simply expresses something which can be taken for granted: as computer programs are protected as literary works (Article 1 para. 1), that which otherwise applies in respect of literary works also applies here.

Article 4

This provision stipulates in greater detail the content of the exclusive rights which exist for the authors of computer programs. Authorization of any permanent or temporary reproduction is reserved for the rightholder: he must give permission for such reproduction. In this connection attention must be paid to the fact that computer programs are reproduced for technical reasons during their use without these reproductions being permanent. These are not reproductions in the conventional meaning of the word. Even such temporary reproductions are covered by the exclusive right.

This also applies for translations and adaptations, as well as for reproductions of the results thereof (i.e. these actions must be permitted). In addition, the rights of the person who alters the program also exist, who can have his own copyright.

The exclusive right also covers the right of distribution. The principle of the distribution right being exhausted within the Community applies for reproductions sold within the Community. In respect of rental, the exclusive right is not exhausted. Rental always has to be allowed.

Article 5

Article 5 provides for limitations. Even in the absence of express contractual provisions, the acts referred to under Article 4 (a) and (b) which are reserved for the author are possible without the author's authorization if they are necessary for the use of the program in accordance with its intended purpose. This benefits the "lawful acquirer" - which means the user who is entitled to use the program because he bought the program or because he has been granted a licence, i.e. copyright permission.

Under para. 2, the making of a back-up copy may not be prevented by contract. There is inaccuracy here insofar as it is stated that the copy must be "necessary for that use". A back-up copy is never necessary for the use of a program; it provides security for the acquirer against the destruction of the reproduction acquired. This condition may therefore not be taken literally. What is meant is that the making of a back-up copy may not be prevented if it is necessary to protect future use.

The point and the intention of para. 3 is obviously to ensure that a person who has acquired a program only acts within the contractually specified scope, even if he wishes to ascertain the ideas and principles on which the program is based. As these ideas and principles are not protected (Article 1 para. 2), and it cannot therefore be prohibited to attempt to ascertain these, and, on the other hand, as the acquirer must of course comply with the licence contract, the question can at least be posed of whether this provision is really necessary in addition to paras. 1 and 2.

Article 6

The heading of Article 6 is "Decompilation". Decompilation means the translation of a certain program back into a programming language. Such translation - or decompilation - is necessary to achieve the interoperability and compatibility of computer systems. Software and hardware producers have an interest in their programs being compatible with those of other producers. This is also in the user's interest. Recital 22 states in this respect: "Whereas an objective ... is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together".

Article 6 makes decompilation possible by providing that the rightholder's authorization not be required for certain acts of reproduction if the preconditions detailed in para. 1 have been met. Para. 2 stipulates that the information gained through decompilation may not be used for other goals than to achieve interoperability. In particular, it may not be used in order to produce a program with a similar content and it may not be given to others. Para. 3 makes it clear that the provision is not to be applied in a manner which prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the work.

Article 7 obliges Member States to create provisions on the basis of which action can be taken against acts which infringe the copyright of computer programs. National legislation must also provide possibilities for taking action against the putting into circulation or possession for commercial purposes of any means the intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical devise which may have been applied to protect a computer program (para. 1 (c)). Member States may provide for the seizure of any such means (para. 3). They must provide for the possibility of seizure of infringing copies (para. 2).

Article 8, which deals with the term of protection, has been repealed (by Article 11 para. 1 of the Directive 93/98/EEC, which has brought about a more far-reaching harmonization of the term of protection; see below in this connection).

Article 9 makes it clear that other legal provisions, e.g. those relating to patent rights or trademarks, remain unaffected - i.e. continue to apply. Contractual provisions contrary to Article 6 or Article 5 (2) and (3) are, however, null and void. Articles 10 and 11 contain the usual final provisions.

2. 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

The above-mentioned increase in the significance of rental and lending of objects - such as phonograms - which constitute copyright works and of the subject matter of related rights protection, along with the very different starting positions in the Member Sates (cf. recitals 1 and 4), have led to the harmonization of the rental and lending right as well as other equally important exclusive rights, as a result of the 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. Articles 1 to 5 (Chapter I) regulate the new rental and lending right, and

Articles 6 to 10 (Chapter II) regulate the rights related to copyright (for performers, phonogram producers, film producers and broadcasting organisations). These are followed by further articles containing transitional and final provisions.

Regarding the individual articles:

Article 1

Under Article 1, Member States are obliged, with respect to originals and copies, to provide for an exclusive right of rental and lending. The terms "rental" and "lending" are defined under paras. 2 and 3. Reference is only made here to the fact that lending, within the meaning of the Directive, means making available for use, for a limited period of time and not for commercial advantage, when it is made through establishments which are accessible to the public. Libraries are meant by this. Private lending is thus not covered by the definition. Para. 4 provides for the rental and lending right not to be exhausted, either by sale or by any other act of distribution. Therefore, the person entitled can decide, even after sale, whether the original or reproduction sold may be rented or lent, subject to limitations.

Article 2

The group of persons entitled is specified in Article 2. Pursuant to this article, the exclusive right belongs to authors in respect of their work, as well as to performers in respect to fixations of their performances, phonogram producers in respect of their phonograms and producers of the first fixation of a film in respect of the original and copies of the film.

With the provisions of paras. 5, 6 and 7, an attempt has been made to resolve the conflict of interests between performers and film producers. Under para. 5 it is presumed in case of doubt that a performer also assigns his rental right when concluding a contract with a film producer, i.e. that the rental right is transferred to the film producer. Under para. 6, Member States may provide for a similar presumption with respect to authors. Para. 7 enables Member States to diverge from the provisions mentioned above in one respect. Namely, Member States may provide that the signing of a contract has the effect of authorizing rental (only) if the contract provides for an equitable remuneration for the rental. (This provision (para. 7) is based on the French model). Finally, Member States can provide for the extension of the effect of presumption set out in para. 5 to the rights harmonized in Chapter II of the Directive as well (recital 19). Whether these provisions relating to presumption really

are significant can at least be called into question. Contracts between those involved frequently make express provision, so that there is no room for doubt.

Article 3 makes it clear that the special provision on rental of computer programs in the relevant Directive remains unaffected, i.e. that that Directive takes precedence.

Article 4

In Article 4, the position of the author and of the performer is strengthened. Even if the rental right with respect to a phonogram or an original or copy of a film has been transferred to a phonogram or film producer, the right to an equitable remuneration for the rental is retained. This right also cannot be waived (para. 2). Paras. 2 and 3 concern the administration of the right to payment of an equitable remuneration by a collecting society.

In practice, the rental of phonograms is now virtually non-existent - as already mentioned in the introduction. Phonogram producers do not permit rental because they fear that the damage to their business would be too great. However, video films continue to be rented. Those who rent out must pay equitable remuneration to authors and performers, even if the rights should, as a rule, belong to the film producer. To quote a few figures: in Germany, in 1997 less than 500,000 DM were received for the rental of phonograms; in contrast, approximately 16,600,000 DM had to be paid in remuneration for the rental of visual recording media, i.e. video films. (To be understood is remuneration which is payable pursuant to the Copyright Act [*Urheberrechtsgesetz*] in addition to the rental fees - these were considerably higher.)

Article 5

Article 5 enables Member States to provide for exceptions with respect to public lending, i.e. for the benefit of libraries accessible to the public. However, a condition for this is that at least authors obtain remuneration for such lending (para. 1).

Under para. 2 Member States also have the possibility of not applying the exclusive lending right within the meaning of the Directive as regards phonograms, films and computer programs. Where Member States avail themselves of this possibility, they must provide for remuneration at least for authors.

Paras. 1 and 2 relativise the provision of Article 1 para. 4, under which the lending right cannot be exhausted. The limitations possible pursuant to Article 5 paras. 1 and 2 amount to the effect of exhaustion.

Under para. 3, certain establishments may be completely exempted from the obligation to pay remuneration.

Articles 6 to 10 contain provisions on certain rights related to copyright. Article 7, which harmonizes the reproduction right, is to be repealed by the new Directive submitted by the Commission of the European Union in December 1996 (see below in this respect). The new Directive carries out a more far-reaching harmonization with respect to this. Therefore, Article 7 will not be looked at in greater detail.

Article 6

Article 6 para. 1 specifies that provision must be made for performers to have the exclusive right to authorize the fixation of their performances. Para. 2 provides for this exclusive right for broadcasting organizations in respect of their broadcasts. It does not matter what form of transmission is used (cable, satellite, by wire or over the air). A cable distributor who merely retransmits the broadcasts of other broadcasting organizations does not have this right (para. 3).

Article 8

This article deals with communication to the public, including broadcasting. Under para. 1, performers have the exclusive right to authorize the communication to the public of their performances. Broadcasting by wireless means is expressly mentioned; an exclusive right is granted in this respect as well. Broadcasting by wireless means is however communication to the public, so that the express provision would not have been necessary. The performer does not have an exclusive right (any longer) with respect to his performance if his performance is itself already a broadcast performance or if a fixation is used in order to communicate his performance to the public.

Under para. 2 Member States must provide that remuneration be paid if a phonogram published for commercial purposes is used for communication to the public. The user, e. g. a broadcaster, must make payment; those who receive payment are the performers and the phonogram producers. Member States can determine the sharing of this remuneration in the

absence of agreement between performers and phonogram producers. It is conceivable, for example, that the remuneration be collected by collecting societies who then share out the remuneration according to their set allocation scheme between those entitled.

Para. 3 gives broadcasting organizations the exclusive right to authorize the rebroadcasting of their broadcasts, as well as to authorize communication to the public of their broadcasts, if such communication is made in places accessible to the public against payment of an entrance fee.

Article 9

Article 9 deals with the distribution right. The exclusive distribution right - defined as the right to make available objects, or copies thereof, to the public by sale or otherwise - belongs to performers in respect of fixations of their performances, phonogram producers in respect of their phonograms, producers of the first fixations of films in respect of the original and copies of their films, and broadcasting organizations in respect of fixations of their broadcasts. Para. 2 provides for the exhaustion of this right within the Community. However, the provision of Article 1 para. 4 continues to apply - the rental right and lending right are not exhausted.

The distribution right may be transferred or assigned or subject to the granting of contractual licences (para. 4). This provision is intended to provide clarification. The distribution right is a property right and can - like any property right - be transferred.

Article 10

Article 10 enables Member States to provide for certain limitations to the rights specified in Articles 6 to 9 - namely for private use, for the use of short excerpts in connection with the reporting of current events (review of the press), for the ephemeral fixation by a broadcasting organization for its own broadcasts, and for use solely for the purposes of teaching or research (para. 1). In addition, provision may be made for limitations which also apply to copyright law (para. 2).

Articles 11 and 12, which deal with duration, have been repealed by Directive 93/98/EEC, which has brought about a more far-reaching harmonization of duration (see below in this respect).

Article 13

This provision is an extremely complex transitional provision which enables Member States to apply the newly-created rights (rental right and lending right) as well as the rights to remuneration laid down in the Directive, to cases which began before the new law entered into force and were still continuing at the time of its entering into force.

Article 14 makes it clear that existing copyright will remain unaffected by the related rights provided for in the Directive; Articles 15 and 16 contain the final provisions.

3. 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

Directive 93/83/EEC represents a further measure by the European Union to create a single audiovisual area. In the Green Paper "Television without Frontiers" of 1984, the creation of such an area was made the subject of discussion for the first time. With Directive 89/552/EEC of 3 October 1989 (the so-called Television Directive; OJ No L 298, 17 October 1989, p. 23), containing law-unifying provisions on advertising, sponsorship, the protection of minors and the right of reply, the measures had only been temporarily concluded (cf. recitals 4 and 12).

In the Directive, the exclusive rights of satellite broadcasting and cable retransmission are harmonized. The starting point of the harmonization were the different national provisions regarding cable retransmission (cf. recital 5) and satellite broadcasting (cf. recital 6), as well as the legal uncertainty of whether satellite broadcasting should only be viewed with respect to the copyright law of the country of transmission or with respect to the law of all countries of reception.

Regarding the individual articles:

Article 1

This Article contains a series of definitions. Para. 2 (b) deserves particular emphasis: the act of communication to the public by satellite (defined under (a)) occurs solely in the Member State where the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. Thus, the Directive

decided on the principle of the country of transmission. If, for example, a German broadcasting organization carries out satellite broadcasting via a German ground station for the territory of the European Union, and the transmission chain began in Paris, it must be presumed in respect of the question of copyright assessment that the communication to the public occurs in France. The rights are only affected in France. Therefore, licences, for example, must have been obtained there.

Letter (d) deals with the case of the communication to the public by satellite occurring in a non-Community State. The aim here is to ensure a level of protection as great as possible and to prevent "evasion" in a non-Community state in order to benefit from that country's lower level of protection.

I would also like to refer to para. 3: fur the purposes of the Directive, "cable retransmission" means the simultaneous, unaltered and unabridged retransmission … of an initial transmission from another Member State“.

In addition, in further paragraphs the terms "satellite" and "cable retransmission" are defined, the principal director of a cinematographic work is defined as its author, and in each of these cases "for the purposes of this Directive". This means that it is entirely possible that these terms could have another meaning when they are used in other Directives. (This is awkward, but not completely unusual in the field of European legislation).

Articles 2 to 7 (Chapter II) deal with the broadcasting of programmes by satellite.

Article 2

Under Article 2, the author has the exclusive right to authorise the communication to the public of his works.

Article 3

Article 3 deals with the acquisition of the exclusive right established by Article 2. Acquisition is only possible by agreement, therefore statutory licences (enabling exploitation by statute on payment of equitable remuneration) are excluded. With respect to the fact that the principle of the country of transmission applies under the Directive, statutory licences have to be excluded. Otherwise, broadcasting would take place from the Member State which provides for a statutory licence. The author would be dependent on a right to remuneration as a result of the validity of the principle of the country of transmission; he would not be able to avail himself at all of his exclusive right within the territory of the European Union.

Para. 2 contains a particular provision for collecting societies and for the agreements concluded by them. Pursuant to this, collective agreements - based on the model of the law in several Scandinavian countries - may be extended. However, this does not apply to cinematographic works (para. 3). In addition, there is a duty of notification.

Article 4

Article 4 includes performers, phonogram producers and broadcasting organizations in the Directive. These rightholders also have the exclusive right of communication to the public by satellite to the extent that they are protected by Directive 92/100/EEC. Thus, a performer must, for example, authorize the transmission by satellite of his live performance, before the transmission can take place. The restrictions of Directive 92/100/EEC also apply.

Article 5 makes it clear that the protection of related rights does not affect existing copyright protection. Under Article 6, Member States may provide for more far-reaching protection for holders of rights related to copyright than are required by Article 8 of Directive 92/100/EEC (regarding communication to the public).

Article 7 contains transitional provisions.

Articles 8 to 12 deal with cable retransmission. The fact that collecting societies are granted a special position deserves particular emphasis.

Article 8

Article 8 obliges Member States to ensure that when programmes from other Member States are retransmitted by cable, this retransmission occurs on the basis of individual or collective contractual agreements between the rightholders and cable operators. Statutory licence systems provided for under national law could be retained until 31 December 1997.

Article 9

Article 9 provides that the cable retransmission right may be exercised only by a collecting society (para. 1). The collecting society obligation is intended to prevent outsiders from being able to avail themselves of their rights in such a way that they do not allow cable transmission where their rights are affected and thus make cable retransmission impossible. Collecting societies are subject (at least in Germany) to an obligation to conclude a contract (under reasonable conditions), which means that the cable operators are able to acquire the cable retransmission right without too many problems.

The Article makes further provisions in the event of a rightholder not having transferred the management of his rights to a collecting society. In this case, a collecting society which manages rights of the same category is deemed to be mandated to manage his rights.

Article 10

Article 10 makes special provision for broadcasting organizations. Article 9 is not applicable to broadcasting organizations, i.e. broadcasting organizations are not subject to a collecting society obligation. They can exercise their cable retransmission rights themselves. This applies both in respect of the broadcasting organization's own rights as well as in respect of rights which have been transferred to the broadcasting organization by other copyright owners and/or holders of related rights.

Article 11

Under Article 11, Member States must provide for a mediation procedure in the event of no agreement being concluded regarding cable retransmission. (In Germany, pursuant to the act which is the basis of the activities of collecting societies - the Copyright Administration Act [*Urheberrechtswahrnehmungsgesetz*] - an arbitral body is provided for who can make proposals for a settlement in the event of a dispute.)

Article 12

Article 12 has, similarly to Article 11, the aim of ensuring that agreements on cable retransmission are concluded. Member States are obliged to ensure by means of appropriate law that negotiations regarding the granting of authorization cannot be prevented or hindered. It should not be possible to abuse a monopoly position. This does not mean, however, that an agreement must always be concluded. If no unfair behaviour can be established in spite of a failure to agree, cable retransmission may not occur.

Article 13 makes it clear that Member States may regulate the activities of collecting societies; Articles 14 and 15 contain the usual final provisions.

4. Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection on copyright and certain related rights

The Directive harmonizing the term of protection is of rather less significance compared to the other Directives of the European Union and to the most recent proposal still under discussion; the harmonized area is clearly restricted. As is clear from the title, the matter of concern here is the harmonization of the term of protection of copyright and certain related rights. The harmonization was prompted, in particular, by the differences in terms of protection in the individual Member States (cf. recitals 1 and 2).

The Berne Convention grants authors a term of protection covering the life of the author and fifty years after his death (Article 7 para. 1 of the Berne Convention). However, this is a minimum term; the countries of the Union may provide for a longer term of protection (Article 7 para. 6 of the Berne Convention). The European Union has availed itself of this right.

The European Union has also harmonized the special terms of protection for certain works, e.g. cinematographic works, referred to in Article 7 of the Berne Convention, as well as for works which are not expressly referred to in the Berne Convention, e.g. collective works.

The Directive also applies for certain related rights. In this respect, Article 14 of the Rome Convention contains a relevant provision which is exceeded.

Regarding the individual articles:

Article 1

Article 1 deals with the duration of authors' rights. The term of protection runs for the life of the author and for 70 years after his death. Paras. 2 to 6 contain additional provisions relating to certain works, namely for works of joint authorship (para. 2), for anonymous or pseudonymous works (para. 3), and for works which are published in several parts (para. 5). Para. 4 concerns the eventuality that a Member State may make particular provision in respect of collective works (as in France, Italy, Portugal and Spain) or for a legal person to be designated as the rightholder.

Article 2

Article 2 para. 1 stipulates that in the case of cinematographic or audiovisual works, the principal director is considered to be its author (as already the case under Article 2 para. 2 of the Directive 92/100/EEC and Article 1 para. 5 of the Directive 93/83/EEC). However, para. 1 has no significance of its own in relation to para. 2. Under para. 2, the term of protection of cinematographic or audiovisual works does not in fact necessarily expire 70 years after the death of the principal director, but instead, 70 years after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in that work.

Article 3

Article 3 specifies the duration of the following related rights: the rights of performers, the rights of producers of phonograms, the rights of producers of the first fixation of a film, and the rights of broadcasting organizations. The duration of the rights is in each case 50 years. The beginning of the term depends on the individual situation as described in greater detail in each case.

Article 4

Article 4 contains a provision for the special case of publication of previously unpublished works where copyright protection has expired at the time of publication. Any person who publishes such a work is protected for a term of 25 years. He is also entitled to the same exploitation rights as an author.

Aticle 5

Article 5 also regulates a special case: Member States may protect, for a maximum term of 30 years, critical and scientific publications of works which have come into the public domain. Germany protects, for example, scientific publications of works or texts which are not (any longer) protected, if they are the result of scientific work and are significantly different from previously known works or texts (Section 70 of the Copyright Act [*Urhebergesetz*]; the author enjoys protection; term of protection: 25 years after publication; where the edition has not been published, 25 years after production).

Article 6

Article 6 deals with the protection of photographs. In this respect, the provision represents a special case, as it first of all specifies which conditions must be met by a photograph in order for it to enjoy protection. The condition is that the photograph must be original in the sense that it is the author's own intellectual creation (particular composition, contrast, portraits). This corresponds to the condition that works must meet in order to enjoy copyright protection. Photographs are, accordingly, protected as works - pursuant to Article 1 of the Directive.

Member States may also protect other photographs which do not have the particular quality of a work (Article 6 sentence 3). Germany provides for protection of this kind. (The term of protection is 50 years. As the Directive already leaves it up to Member States to decide whether they wish to protect "other photographs" at all, it does not specify a term of protection.)

Article 7

Article 7 makes provisions for works which have their country of origin in a third country and the author of which is not a Community national. As in Article 7 para. 8 of the Berne Convention, provision is made here for the comparison of terms of protection. In the cases covered, protection expires no later than the date of expiry of the protection granted in the country of origin. However, the term referred to under Article 1 may not be exceeded. This applies in a similar way for the related rights.

Article 8 stipulates that the terms in each case begin on 1 January of the year following the event which gives rise to them; Article 9 makes it clear that the provisions of the Member States regulating moral rights are not affected.

The other Articles - Articles 10 to 14 - contain the usual transitional and final provisions (including the repeal of articles contained in previous Directives which have become obsolete as a result of more far-reaching provisions in this Directive).

5. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

On 29 January 1992, the Commission passed the proposal for a Directive on the legal protection of databases. The Council adopted the Directive on 11 March 1996. It had to be implemented by 1 January 1998. In Germany, the Directive has already been implemented (by amendment of the Copyright Act by Article 7 of the Information and Communication Services Act of 22 July 1997, Federal Law Gazette I p. 1870 ff); the adaptation of national law in other Member States is imminent.

What is the subject matter of the Directive?

The Directive establishes a two-tier protection for databases:

- in Chapter II, copyright protection for databases which, by reason of the "selection or arrangement" of their contents, constitute the author's own intellectual creation,

- in Chapter III, a "*sui generis*" right, by which the entrepreneurially responsible maker of a database is rewarded for the substantial investment made in creating the collection of data with a monopoly on exploitation with respect to the collected contents.

Due to the different conditions of protection, it can occur in a particular case that both rights or only one of the two exist with respect to the very same database.

Copyright protection of databases is nothing new. Article 2 para. 5 of the Berne Convention protects collections of literary or artistic works which, by reason of the selection and arrangement of their contents, constitute intellectual creations. Article 10 para. 2 of the TRIPS Agreement protects compilations of data or other material, which - again, by reason of the selection or arrangement of their contents - constitute intellectual creations. In all cases, the protection does not extend to individual works or other material which constitutes the contents of the database. In this respect, other - independent - rights can exist. Chapter II of the Directive, which relates to the copyright of databases, thus does not involve any significant innovation with respect to the fundamental existence of this legal protection.

However, what is new - and as yet without an international parallel - is the "*sui generis*" protection provided for in Chapter III, which is aimed at protecting the investment involved in the obtaining, verification and presentation of the contents of a database, to the extent that this investment can be described as qualitatively or quantitatively substantial. Collections of facts - e.g. addresses, telephone numbers or test results - can usually not be protected for lack of intellectual creation. Insofar as the creation of such databases involves a substantial investment, the "*sui generis*" protection finds application. However, protection against the use of insubstantial parts is not provided for. This restricted scope of protection serves to harmonize the necessary protection of investment with the interest in a flow of information as unrestricted as possible.

Regarding the individual articles:

Articles 1 and 2

Articles 1 and 2 contain general provisions on the scope of the Directive. Under Article 1 para. 1, the Directive grants legal protection to every form of database, regardless of the form it takes - i.e. not only for databases in electronic form. Para. 2 defines the term "database". According to this definition, databases are collections of independent works,

data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

Articles 3 to 6

Articles 3 to 6 provide for copyright protection of databases.

Under Article 3 para. 1 it is made a condition of protection - in conformity with the above-mentioned provisions of the Berne Convention and the TRIPS Agreement - that, by reason of the selection or arrangement of their contents, the database constitutes the author's own intellectual creation. Para. 2 makes it clear that the protection granted does not apply to the contents and does not affect any existing rights in this respect.

Aticle 4 stipulates who is to be considered the author. Under this provision, the author is usually the natural person or the group of natural persons who created the database. Where the legislation of the Member States so permits, a legal person may also be considered to be the author. The latter is above all intended for Member States whose national legislation provides that where the database has been created by an employee, the employer obtains the original authorship (Great Britain, Ireland, the Netherlands).

Article 5 determines the extent of the author's exclusive right. Letter (a) is extremely significant. Under (a), the exclusive right includes the right of temporary or permanent reproduction by any means and in any form, in whole or in part. Particularly with respect to the fact that numerous reproductions are made during electronic transmission, with the comprehensive right of reproduction the author has the possibility of comprehensive control.

Letter (b) concerns, *inter alia*, translations and adaptations. Letter (e) supplements this provision, in that the author is also granted certain exclusive rights in this respect as well.

Letter (c) gives the author the exclusive right of distribution and, at the same time, regulates exhaustion. The principle of exhaustion within the Community applies: the first sale in the Community of a copy of the database by the rightholder or with his consent exhausts the right of distribution within the Community. The principle of exhaustion within the Community also applies in other fields of law, e.g. in trademark law. In the most recent proposal of the Commission as well (see below in this respect), provision is made for this, although it is rejected by a number of Member States where it is not already in force - as for databases.

Finally, letter (d) makes provision in particular for the exclusive right of communication to the public. To the extent that displays and performances are mentioned here, this can hardly have any practical relevance for databases.

Article 6 specifies exceptions and limitations. Under para. 1, the lawful user of a database - i.e. the person who has acquired a licence or is acting within the statutory limits - does not require the authorisation of the author in certain instances if he performs any of the acts of exploitation listed under Article 5. This applies where the acts are necessary for the purpose of access to the contents of the databases and normal use of the contents.

Para. 2 enables Member States to specify limitations to the exclusive rights. This applies in particular to the reproduction for private purposes of a non-electronic database (letter (a)), for use in teaching or scientific research, to the extent that it is for non-commercial purposes (letter (b)), and where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure (letter (c)). Finally, letter (d) allows for further limitations which are traditionally authorized under national law. Thus the list is not exhaustive.

Para. 3 stipulates that provisions on limitations and exceptions may not lead to the interests of the rightholder being unreasonably prejudiced as a result of provisions on limitations which are excessive. This has already been provided for in international conventions (the so-called three steps test; Article 9 para. 2 of the Berne Convention; Article 13 of the TRIPS Agreement).

Articles 7 to 11

Articles 7 to 11 deal with the new *sui generis* right and are thus the key articles of the Directive.

Under Article 7 para. 1 , Member States provide for the right for the maker of a database to prevent extraction and/or re-utilization of the whole or of a substantial part of the contents of that database. The condition for this is that the maker of the database made a substantial investment in the obtaining, verification or presentation of the contents of the database. The "substantial investment" may be defined quantitatively (was a large amount of money invested?) or qualitatively (by which is meant: was a significant investment made in terms of time and effort?). The right does not apply where an insubstantial part of the database is extracted or re-utilized. However, under para. 5 the repeated and systematic extraction

and/or re-utilization of insubstantial parts is also prohibited - i.e. covered by the exclusive right - where this conflicts with a normal exploitation of that database or where this unreasonably prejudices the legitimate interests of the maker.

Para. 2 defines the terms "extraction" and "re-utilization" and also makes it clear that public lending - e.g. lending by libraries - does not fall under the instances covered. Extraction is the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium. Re-utilization includes, in particular, the distribution of copies by renting, by on-line or other forms of transmission. Moreover, in the event of the first sale of a copy, provision is made for the principle of exhaustion of the right within the Community.

Para. 4 makes it clear that the *sui generis* protection exists irrespective of whether the database as a whole or individual contents are protected by copyright or other rights. Existing copyright or other right is moreover not affected by the *sui generis* right. As a result, numerous rights may exist alongside one another.

Article 8 deals with the rights and obligations of the user of a database. In the main provision is made that the maker of the database may not prevent the user from extracting or re-utilizing insubstantial parts of the contents of the database for any purposes whatsoever. The user may not perform acts which conflict with the normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database. Article 8 mentions the "lawful" user in each case. This means the user who is acting within the contractual or statutory possibilities of exploitation.

As Article 7 already makes provision that the exclusive right only exists in the case of extraction or re-utilization of substantial parts of the contents of a database, Article 8 only has a limited, mainly clarifying significance. Article 8 gains increased importance through Article 15, which provides that any contractual provisions contrary to Article 8 - and, incidentally, also to Article 6 para. 1 - are null and void.

Article 9 enables Member States to retain or make provision for certain limitations to the exclusive right of the maker. In this way, substantial parts of the contents of a non-electronic database may be used for private purposes, substantial parts of electronic and non-electronic databases may be used for teaching or scientific research to the extent that this involves non-commercial purposes. This also applies to cases which involve the purposes of public security or an administrative or judicial procedure. This provision relating to limitations

ensures that the maker's interest in protection and the interest of the public in free availability of information are in a state of equilibrium.

Article 10 deals with the term of protection, which is usually 15 years. If a database which is already protected is subjected to substantial change which can be considered to be a substantial new investment, a new database is created which is in turn protected for 15 years (Article 10 para. 3).

Article 11 stipulates who are considered to be beneficiaries and, with respect to the fact that comparable protection does not exist outside the European Union, is of particular significance. Beneficiaries are makers or rightholders who are nationals of a Member State or who have their habitual residence in a Member State, as well as companies whose registered office, central administration or principal place of business is within the Community. The registered office alone is not sufficient. The Council may conclude agreements with third countries extending the right.

Articles 12 to 17

Articles 12 to 17 contain a series of transitional and final provisions. Article 13 makes it clear that other rights - for example, patent or trademark rights - remain unaffected, i.e. continue to apply. Article 14 makes transitional provisions for databases which were made before the expiry of the deadline for implementation - 1 January 1998.

6. Amended proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art

As far as this proposal for a directive is concerned, I would like to restrict myself to a small number of general observations, for one thing because the proposal is still under discussion, and for another because it is less significant, at least in comparison to the latest proposal by the Commission, which I will be going into in detail later.

The proposal for a directive serves to harmonise a manageable area of copyright law, namely the so-called resale right. Some Member States make provision for such a resale right, whilst others do not.

The resale right is the right of an author of a work of art to receive a percentage of the sale price obtained from any resale of the original after a first sale by the author. Sales effected by individuals acting in their private capacity are not covered.

The resale right ensures that the author is able to receive a percentage of any increases in the value of his/her works. It is not only the art dealers which should benefit from the sometimes tremendous increases in value, but also the artists themselves.

The fact that the law differs between Member States has the consequence that, for instance, a big share of European art dealing is carried out in London. The United Kingdom has no resale right. There is no share of the proceeds of the sale. The problem is exacerbated by the fact that, when works of art by British artists are sold in those Member States which have a resale right, these artists are to be allowed to receive a percentage of the sale price; they may not be discriminated against in comparison to local artists.

Criticism against the proposal for a directive focuses inter alia on the claim that European art dealing will turn to Geneva or New York once the directive has entered into force.

The proposal for a directive makes provisions which are concerned inter alia with those works of art which fall under the resale right, with the amounts payable and with the duration of the resale right.

The European Parliament has already submitted a statement. The "amended proposal" (which was to be and has been submitted by the Commission after the legislative procedure, taking account of the observations) will have to be discussed during the next Presidency. Perhaps the directive can enter into force within the next year.

7. Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society

I would like to come now to the latest proposal for a directive in the copyright area, namely the Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society. The European Commission submitted this proposal on 10 December 1997. The deliberations in the competent Council working group started in February 1998 - under the British Presidency.

Since this proposal for a directive is of particular significance – both at national and at EU level - I would like to go into it in some detail.

The proposal serves for one thing to transpose the WIPO Treaties (WIPO Copyright Treaty - WCT; WIPO Performances and Phonograms Treaty - WPPT), and is highly significant if only for this reason. For another, certain exploitation rights and their limits should be harmonised. The further course of the deliberations is difficult to forecast. In particular the statement of the European Parliament has not yet been submitted. I presume, however, that the directive will enter into force in the course of 1999.

With regard to the proposed regulations:

Article 1

Article 1 is intended to govern the directive's scope. In accordance with paragraph 1, the directive concerns the legal protection of copyright and related rights in the framework of the Internal Market, with particular emphasis on the Information Society. This is a somewhat general statement which has no particular regulatory character. It is however made clear that those technological developments which constitute the so-called Information Society make it necessary to adapt copyright law.

Greater significance attaches to Article 1 paragraph 2, which is intended to govern, or at least clarify, the relation between the provisions contained in this directive and existing EU legislation. The regulation in the directive goes further to state "unless otherwise provided", followed by a list of the areas regulated by the directives in force.

This provision is hardly clear. Are the provisions contained in this directive to take priority, or is priority to attach to the provisions of those directives which are already in force? Article 4 of the directive on the legal protection of computer programs states for instance, as has been explained, that temporary reproduction is also covered by the exclusive rights of the rightholder. Articles 5 and 6 of the directive on the legal protection of computer programs permit certain exceptions. Article 5 paragraph 1 of the proposal for a directive – which I will be going into in greater detail later – on the other hand provides that temporary acts of reproduction are to be exempted from the exclusive rights. The provisions contradict one another. Article 1 paragraph 2 of the proposal does not make matters any clearer. In the deliberations, the Commission agreed to submit alternative wording for Article 1

paragraph 2. The regulation should be such that the existing directives in the copyright area should not be affected by the new directive, in other words that they should take priority.

Article 2

Article 2 governs the reproduction right. Accordingly, authors, for whom the reproduction right was previously harmonised only with regard to computer programs and databases, are to receive the exclusive right to authorise reproductions. Furthermore, performers, phonogram producers, producers of the first fixations of films and broadcasting organisations are to be granted the exclusive reproduction right. Community legislation as it stands has already recognised an exclusive reproduction right for these rightholders (Article 7 of the directive on rental right and lending right); this is the orientation followed by the proposal. Article 7 of the directive on rental right and lending right, which has more general wording, and which does not take account of the electronic environment, is rescinded at the same time (Article 10 of the proposal for a directive).

The provision contains a comprehensive definition of the reproduction right, to which all acts of reproduction are subjected, whether on-line or off-line, on paper or on a sound carrier, or in connection with electronic transfer in a computer's working memory. Temporary acts of reproduction are also covered.

The regulation goes further than the WIPO Treaties: the WCT refers to Article 9 of the Berne Convention, which applies only to authors (Article 1 paragraph 4 of the WCT); Article 7 of the WPPT grants to performers the exclusive reproduction right only where it is a question of performances fixed on sound carriers.

Article 3

Article 3 is one of the central Articles contained in the proposal. It governs the right of communication to the public, including the right of making available works or other subject matter (falling under the right of communication to the public). It hence also serves to transpose Article 8 of the WCT, as well as Articles 10 and 14 of the WPPT.

Article 3 paragraph 1 gives the author the exclusive right to authorise any communication to the public of his works, by wire or wireless means, including the making available to the public. The making available to the public is - in implementation of Article 8 WCT - the making available in such a way, that members of the public may gain access from a place

and at a time individually chosen by them. This covers interactive transmission on demand, in other words on-line transmission. A work is already deemed to have been made available to the public if it is held and offered on demand. It does not need to be actually called up. Having said that, broadcasting is not covered because there is no on demand possibility.

The regulation applies to works of all kinds. Communication by wire means communication by cable, and hence as a rule over a distance. This speaks in favour of wireless communication being also communication over a distance, namely by broadcasting or by similar technical means. The performance of a work before an audience is therefore not covered. (This opinion was shared by several delegations in the course of the deliberations in Brussels.) The proposal does not define what is to be understood by "public "; the statutes of the individual States are to establish this.

Article 3 paragraph 2 implements Articles 10 and 14 of the WPPT. The holders of related rights named therein – performers, phonogram producers, producers of films and broadcasting organisations – are granted the exclusive right to allow access as fare as their performance is concerned. Here too, accessibility means the offer of interactive transmission.

Article 3 paragraph 2, however, goes beyond the regulations contained in the WPPT; it covers all rightholders (those listed) already benefiting from related rights in accordance with present Community legislation. The regulation also covers not only sound performances, but also – as was proposed by the European Union at the WIPO negotiations – audio-visual material.

Article 3 paragraph 3 is merely declaratory in nature. It makes it clear that communication to the public – in contrast to distribution in physical form – cannot lead to exhaustion of the rights.

Article 4

Article 4 governs the distribution right. In accordance with paragraph 1, the authors have the exclusive right to distribution. This is likely to already be in force in the law of most, if not all Member States. This provision (Article 4 paragraph 1) therefore causes no problems.

Article 4 paragraph 2 governs exhaustion of the distribution right. As, for instance, under trademark law or for the distribution of computer programs, the principle of EU-wide

exhaustion is to apply. If the original or copies thereof are distributed within the Community by means of the first sale – with assignment of ownership – or other transfer of ownership, there is no longer a distribution right within the Community in regard of this original or the distributed copy. This principle is the subject of dispute. Those Member States who have so far applied the principle of worldwide exhaustion reject the proposed provision. They would like to retain the possibility of having parallel imports from third states. The outcome of the conflict of opinions remains to be seen.

A further problem related to the proposal is that there is no provision for limitation regulations. Many Member States – including Germany – also provide for limitations on the distribution right, and are interested in being able to retain these limitations. In accordance with German law, the distribution right is limited, for instance, insofar as it is a question of carrying out judicial and administrative procedures. After a long discussion in the competent Council working group, the Commission agreed to examine inserting limitation regulations for the distribution right into the proposal for a directive, and to make corresponding proposals.

If one proceeds on the understanding of other legal orders, one could however also argue that expressly normed limitations on the distribution right are unnecessary. Finnish law, for instance, presumes that, if the reproduction right has been limited, for example for the purpose of a judicial procedure, the distribution right is of necessity also limited, without the need for an expressly normed limitation.

Article 5

Article 5, too, is central to the proposal, as well as being one of the most controversial provisions. At a first discussion, the Council working group spent two days on this provision.

Article 5 is to harmonize the limitations and exceptions in relation to the reproduction right and the right of communication to the public. Whilst the WIPO Treaties – in Article 10 of the WCT and in Article 16 of the WPPT – only provide for general guidelines for the application of regulations on limitations, Article 5 paragraphs 2 and 3 of the proposal for a directive contain concrete regulations on limitations. The list contained in Article 5 is exhaustive. The Member States may not provide for other exceptions. Article 5 paragraphs 2 and 3 are however not binding. It is left to the Member States whether they wish to adopt the limitations. Article 5 paragraph 1, on the other hand, is binding; the Member States must create corresponding national law.

In accordance with Article 5 paragraph 1, such acts of reproduction are exempted from the exclusive reproduction right which are carried out for the sole purpose of enabling use to be made of a work or other subject matter as an integral part of a technological process, and which have no independent economic significance. This provision is the subject of considerable dispute.

According to the explanations provided by the Commission, it is targeting the on-line environment, but also removes from the exclusive right off-line acts of reproduction which are related to the use of the subject matter. The transmission of a video on demand from a data base in Germany to a home computer in Portugal, for instance, entails at least 100 brief - ephemeral – acts of storing, and hence reproductions. If the legal situation differed between the Member States, some of which even call for approval of such acts of storing, the free movement of works or services in the Member States could be prevented – according to the Commission.

Rightholders – from the phonographic industry, as well as authors and the collecting societies representing them – require to only exempt such ephemeral acts of reproduction from the exclusive right which are carried out on the basis of authorised use – by means of a contract or a statute. The directive on the legal protection of computer programs and the directive on the legal protection of databases provide for special exceptions for the lawful acquirer (Article 5 of the Directive on the legal protection of computer programs; Article 6 and – to a limited extent – Articles 8 and 9 of the Directive on the legal protection of databases). The rightholders refer to these precedence regulations. They fear that their position might become undermined if they were no longer able to also prohibit the ephemeral reproductions. This could become necessary, for instance, if protected contents were transmitted without the proper licence, and without the sender or recipient being accessible. In such cases, the possibility must remain – according to the rightholders – for ephemeral reproductions to be prohibited, in other words that a claim could be asserted against the service provider.

In accordance with the models described, the Commission had initially also made provision for this kind of further limitation in Article 5 paragraph 1. In response to pressure from service providers in the run up to the adoption of the proposal by the Commission, this precondition was however taken out of the proposal. The providers claim that they cannot be made responsible for unlawful contents inserted into the networks by third parties.

The outcome of this dispute, in other words which version of Article 5 paragraph 1 will ultimately be adopted by the Council of the European Union, remains to be seen.

Article 5 paragraph 2 provides for limitations to the exclusive reproduction right, Article 5 paragraph 3 for the reproduction right and the right of communication to the public. The list is exhaustive. The Member States may make use of the limitations, but are not obliged to do so.

In fact, it seems that all Member States have regulations in their national laws concerning limitations. In accordance with German law, for instance, there are limitations favouring the use of reproductions in judicial or administrative procedures, benefiting schools, for the preparation of press reviews and – very important – for private and other personal use. This also covers scientific research. The proposed list of limitations will make it possible to retain many of these limitations. Article 5 paragraph 2 (a) makes it possible, for instance, for the limitation favouring private reproduction to be retained. Article 5 paragraph 3 is concerned with judicial and administrative procedures.

However, not all of the limitations which have applied to date can be subsumed in the list. Since each Member State is interested in retaining its present law as far as possible, even if this is not in the interest of extensive harmonization, there will have to be further discussion of the list.

I do not wish to go into any greater detail with regard to the individual limitations, but would like to point out two problems arising in connection with the harmonization of the reproduction right:

For one thing, the proposal does not distinguish between reproductions in the digital domain and those in the analogue domain, although this distinction might well be necessary. New digital technologies open up the possibility of creating any number of reproductions with no loss of quality whatever, so that generous regulations on limitations might mean that it would become considerably more difficult for the rightholders to market a work or protected

performance. On the other hand, digital technology makes it possible to keep an effective check on private reproduction – at least for the foreseeable future – so that it becomes possible to issue individual licences, i.e. that limitations for private reproduction can be abolished in this sense. In the EU, Danish law contains provisions which go in this direction.

On the other hand, the proposal for a directive omits to harmonise the varying regulations on fees, for which most Member States make provision in connection with private reproduction. In Germany, for instance, picture and sound carriers, as well as appliances which make it possible to make reproductions, are subject to a levy. The various regulations in the Member States lead to considerable distortions of competition, so that there is an urgent need for harmonization.

Article 5 paragraph 4 makes provision for the three step test. The establishment of limitations and exceptions may not unreasonably prejudice rightholders' interests – for instance by means of too far-reaching regulations on limitations. This provision is also made by the relevant international agreements in the copyright area (Article 9 paragraph 2 of the Revised Berne Convention; Article 13 of TRIPS; Article 10 paragraph 2 of the WCT; Article 16 paragraph 2 of the WPPT).

Article 6

Article 6 of the proposal for a directive implements Article 11 of the WCT and Article 18 of the WPPT. In doing so, Article 6 goes much further than the provisions of the WIPO Treaties. It targets acts which are carried out in order to facilitate the unauthorised circumvention of any effective protective technological measures. According to the proposal, the manufacture or distribution of devices or the performance of services, including those which have a purpose or use other than circumvention, are to be covered. Preparatory acts are also covered. The trade in devices which (also) make circumvention possible, but primarily or largely serve another purpose, is not to be prevented. Some rightholders fear that the regulation in its proposed version will favour the trade in devices usable for circumvention because the argument will always be put forward that the devices have a purpose other than making circumvention possible.

It should also be pointed out that another proposal for a directive relating to legal protection of conditional access systems (such as PAY-TV) is just about to be adopted by the Council.

Article 7

Article 7 serves to implement the Articles 12 of the WCT and 19 of the WPPT. Article 7 largely corresponds to these provisions in the Treaties. It therefore targets the protection of electronic information intended to defend the rights. What is meant by this is explained in greater detail in paragraph 2. It is therefore concerned with information –as is the case in the WIPO Treaties – which identifies the protected items, the rightholder and the conditions for use.

Article 8

Article 8 imposes an obligation on the Member States to provide appropriate sanctions and remedies. The law of all Member States will be in line with this requirement. The level of sanctions is not harmonised, however. The Member States have considerable scope. It is therefore not prescribed, for instance, whether there is to be provision for civil and criminal law sanctions. Paragraph 2 specifies some of the usual sanctions, namely an action for damages, injunctions and seizure of infringing material. Interim injunctions must be granted.

Article 9

Article 9 is concerned with transitional provisions. In accordance with paragraph 1, the directive covers all works and other subject matter protected when the directive enters into force in the Member States, or which meet the criteria referred to in the directive. In accordance with paragraph 2, all acts of exploitation performed before entry into force remain unaffected. Paragraphs 3 and 4 should be regarded in this context. In accordance with paragraph 3, any contracts concluded before the date of the entry into force of the directive are unaffected. In accordance with paragraph 4, however, all contracts not corresponding to the provisions contained in the directive are to be adapted in line with the directive within five years. This is how paragraph 4 is to be understood. This provision is highly significant. There are existing contracts in all Member States with a long term. These contracts will frequently not cover the new rights – particularly in accordance with Article 3 of the directive – because at the time they were completely unknown. Such contracts will have to be renegotiated, even if it was possible under the law of some Member States for rights to be effectively transferred for a use which was previously completely unknown. This would be likely to lead to considerable practical problems where, for instance, the whereabouts of rightholders can no longer be established. There is therefore a need for a further regulation

alleviating the problem, such as along the lines of Article 13 of the Directive on rental right and lending right.

Article 10

Article 10 adapts other directives. Thus, for instance, Article 7 the of the Directive on rental right and lending right is deleted because, in Article 2, the new directive more comprehensively harmonises the reproduction right.

Articles 11, 12 and 13 contain the usual final provisions. The date for implementation set in Article 11 paragraph 1 may naturally change – depending on the duration of the deliberations.

Final remark

The harmonization of copyright law is not yet complete.

The question of responsibility in cases of transmission through data networks is a question of a horizontal concern, which however also concerns copyright law. A proposal for a directive by the Commission has been announced in this respect.

The question as to whether digital reproductions should be treated differently to those which are produced with traditional analogue technology should be subjected to further examination.

As has already been mentioned, there are varying regulations in the Member States as regards remuneration, in connection with the rules on private reproduction. There is an urgent need for harmonization in this area.

We will therefore have sufficient future opportunity to discuss further proposals for directives from the European Commission.

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