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COPYRIGHT IN THE EUROPEAN COMMUNITIES: THE PROPOSED HARMONIZATION MEASURES

*Dr. Silke von Lewinski**

I. INTRODUCTION

Until quite recently, the field of copyright law has not been one of the primary issues of interest within the European Community (EC). The Treaty of Rome¹ (the EEC Treaty) does not contain any explicit reference to copyright, nor does it provide any legal base for Community measures with respect to the field of copyright as such. Even the summit of Maastricht did not change this legal situation.² Consequently, there will not be a unified European copyright law in the near future. The national copyright laws of the member states will continue to apply and will have to be amended according to the specific harmonization measures which have been or will be adopted by the Council of the EC.

During the first period of Community activity in the field, in the 1970's, copyright was mainly regarded from the angle of its cultural rather than economic implications. This may, *inter alia*, be due to the fact that the first communications³ adopted

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY]. The EEC Treaty is also commonly referred to as the Treaty of Rome.

2. According to the Draft Treaty Establishing the European Union, 1984 O.J. (C 77) 33, the competence of the EC is widened by the introduction of new policies in the Treaty of Rome. However, intellectual property is not envisaged as such; only culture is introduced in art. 128. This article, however, excludes any harmonization of laws and regulations of the member states.

3. Community Action in the Cultural Section. Commission Communication to the Council, Sent on November 22, 1977, Bulletin of the European Communities, Supplement 6/77; Stronger Community Action in the Cultural Sector. Communication from the Commission to the Council and Parliament, Transmitted on October 12, 1982, Bulletin of the European Communities, Supplement 6/82; A Fresh Boost for Culture in the European Community (Note de Réfexion de la Commission), COM(87)603 final; Books and Reading: A Cultural Challenge for Europe (Communication from the Commission), COM(89)258 final; Communication from the Commission to the Council and Parliament on Audiovisual Policy, COM(90)78 final.

by the European Commission (the Commission) at the request of the European Parliament⁴ (the Parliament) had been prepared by the Directorate General, which is responsible for questions of culture. This Directorate General had also commissioned several comparative law studies in order to examine the situation of authors' rights, neighboring rights, and the contractual relationships of authors.⁵ Yet, with the increasing worldwide exploitation of copyrighted works, the economic impact of copyright also became evident. Moreover, several studies on the economic importance of the copyright furthered the general awareness of the fact that copyright-related activities amounted to an unexpectedly high percentage of the Gross National Product.⁶

Since the 1980's, the Commission has regarded copyright primarily from the viewpoint of its economic implications. Copyright has been included in its program for the completion of the Internal Market, which is dealt with by the Directorate General III (DG III) in "Completion of the Internal Market and Industrial Affairs."⁷ Whereas, in the Commission's 1985 White Paper on "Completing the Internal Market,"⁸ only one of 279 proposals for Council Directives related to copyright questions,⁹ the 1988 Green Paper on Copyright (the Green Paper)¹⁰ discussed a number of measures that the Commission regarded as the most ur-

4. In the resolution of May 13, 1974, the European Parliament requested that the European Commission propose measures for the harmonization of the national regulations on the protection of culture, on authors' rights, and on neighboring rights. Commission Proposal for a Resolution to Protect the European Cultural Heritage 54/74, 1974 O.J. (C 62) 5.

5. The most important studies are: ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY (1978); ADOLF DIETZ, DAS PRIMÄRE URHEBERVERTRAGSRECHT IN DER BUNDESREPUBLIK DEUTSCHLAND UND IN DEN ANDEREN MITGLIEDSTAATEN DER EUROPÄISCHEN GEMEINSCHAFT (1984); FRANK GOTZEN, DAS RECHT DER INTERPRETEN IN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (1980).

6. For these studies see Herman Cohen Jehoram, *Critical Reflections on the Economic Importance of Copyright*, in ASSOCIATION LITTÉRAIRE ET ARTISTIQUE INTERNATIONALE 1989, at 21 (Journées d'étude Munich, 1988).

7. See Alan K. Palmer & Thomas C. Vinje, *The EC Directive on the Legal Protection of Computer Software: New Law Governing Software Development*, 2 DUKE J. COMP. & INT'L. L. 65 (1992).

8. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final [hereinafter The White Paper].

9. This is a proposal on the legal protection of computer programs. The White Paper proposed that the Commission submit a proposal for a directive on the protection of computer programs in 1987, which should be adopted by the Council in 1989. *Id.* at 92.

10. Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action Communication from the Commission, COM(88)172 final [hereinafter Copyright and the Challenge of Technology].

gent for the completion of the Internal Market through the removal of trade barriers and distortion of competition. In light of the delicate problems of harmonizing copyright law within the EC, the Commission reduced its original, very broad harmonization program to the following issues in the Green Paper: piracy, audio-visual home copying, distribution right/exhaustion and rental right, computer programs, databases, and the role of the EC in multilateral and bilateral external relations.¹¹

The Green Paper was criticized largely for being one-sided and industry-oriented; for presenting piecemeal, instead of comprehensive, global approaches; and, for omitting a number of important issues.¹² Two years later, an essentially renewed staff of the copyright division within DG III presented a follow-up paper to the Green Paper¹³ that stressed the need to take a comprehensive approach to copyright regulation and to strengthen the protection of copyright and neighboring rights. It extended the working program, in particular, to include terms of protection, authors' moral rights, reprography, the resale right, and collecting societies.¹⁴

Part II of this Article will provide an overview of the legislative procedures relevant to copyright harmonization. Part III will first address each of the harmonization measures that have already been proposed by the Commission, namely the proposed adherence to and compliance with the two most important international conventions in the field of authors' rights and neighboring rights — the Berne Convention and the Rome Convention (Section A). Later sections of Part III will discuss the proposals to harmonize rental rights, lending rights, and certain neighboring rights (Section B); the proposal on satellite broadcasting and cable retransmission (Section C); the proposal on the legal protection of databases (Section D); and, the harmonization of the terms of protection (Section E). Finally, Part IV will conclude with a brief outlook on the future of harmonization.

11. *Id.* chs. 2-7.

12. See e.g., Margret Möller, *Author's Right or Copyright?*, in *COPYRIGHT AND THE EUROPEAN COMMUNITY* 9, 11 (Frank Gotzen ed., 1989); Adolf Dietz, *Harmonisierung des Europäischen Urheberrechts*, in *ENTWICKLUNG DES EUROPÄISCHEN URHEBERRECHTS* 57, 59 (Georg Röss ed., 1989).

13. The Follow-up to the Green Paper - Working Program of the Commission in the Field of Copyright and Neighboring Rights, COM(90)584 final [hereinafter Follow-up to the Green Paper], was adopted by the Commission on December 5, 1990.

14. *Id.* ch. 8 and annex, p. 39.

II. THE MAIN FEATURES OF EC LEGISLATION

To provide a more comprehensive understanding of the harmonization measures, I will describe the legislative procedures relevant to copyright harmonization. It should be mentioned that Article 189 of the EEC Treaty provides the following five legal instruments for the Community: (a) Council directives, which are binding as to the result to be achieved upon each member state to which they are addressed, but which leave to the national authorities the choices of forms and methods of implementation; (b) Council decisions, which are binding in their entirety upon those to whom they are addressed; (c) Council regulations, which have general application and are binding in their entirety and directly applicable in all member states; (d) recommendations, which have no binding force; and (e) opinions, which also have no binding force.¹⁵

The EEC Treaty provides for different legislative procedures. In the case of the copyright proposals, which have been based in particular on Articles 100A and 57(2) of the EEC Treaty,¹⁶ the cooperation procedure of Article 149(2) of the EEC Treaty¹⁷ applies. The main steps of this procedure are as follows: the Commission¹⁸ has to adopt, by agreement of its Directorate Generals, a harmonization proposal.¹⁹ The European Parliament adopts an opinion on this proposal after discussion in several of its committees.²⁰ While the Commission may at any time during the procedure adopt an amended proposal,²¹ it is generally appropriate to do so after the Parliament's opinion has been adopted so that the Parliament's proposals may be taken over by the Commission. In a very important step, the Council, which

15. EEC TREATY art. 189.

16. EEC TREATY arts. 100A & 57(2).

17. This procedure of cooperation between the Council and the European Parliament has been introduced by art. 6 of the Single European Act of February 10/28, 1986 O.J. (L 169), in force since July 1, 1987, 1987 O.J. (L 169) 29.

18. The Commission, which may be regarded as the administrative body of the Community, has the monopoly on making proposals for legislative measures. The Council, which consists of governmental representatives of the twelve member states, is the central institution of the EC endowed with the power to make decisions on these Commission proposals without which the Council cannot act. The powers of the European Parliament have traditionally been restricted to giving advice, but they have been increased by the Single European Act, 1987 O.J. (L 196) 1, in the framework of the cooperation procedure described in the text following this footnote.

19. EEC TREATY arts. 100A, 57(2) & 149(1).

20. EEC TREATY art. 149(2)(a).

21. EEC TREATY art. 149.

consists of governmental representatives of the twelve member states, may adopt, by a qualified majority, the so-called common position as a compromise between the member states' single positions. This represents the end of the first reading.

During the second reading, the European Parliament may accept this common position explicitly or by silence within three or four months. Thereafter, the Council may adopt the harmonization measure by a single majority according to the common position. If the Parliament rejects the common position, the Council has to adopt the harmonization measure unanimously. If the Council does not vote at all within three or four months, the Commission's proposal is deemed not to have been adopted.

If, however, the European Parliament proposes amendments to the common position, the Commission considers, and eventually takes into account, these proposals in order to pass them together with the proposals which it did not take over to the Council. In this situation, the Council has four options: (1) It may unanimously adopt the harmonization measure if it wants to adopt those proposals made by the Parliament which the Commission did not take over; (2) It may also unanimously adopt a harmonization measure which modifies the Commission's proposal, which itself has taken into account all proposals of the European Parliament; (3) If, however, the Council does not modify a proposal made by the Commission, which includes all of the proposals by the European Parliament, then it may adopt the harmonization measure by a qualified majority; and, (4) Finally, the Council may take no decision at all, so that the Commission's proposal is deemed not to have been adopted.²²

22. EEC TREATY art. 149(2)(f).

III. THE PROPOSED HARMONIZATION MEASURES²³

A. Adherence of Member States to the Berne²⁴ and the Rome²⁵ Conventions

The Commission has chosen a global approach to comprehensively strengthen the protection of authors' rights and neighboring rights. One of the main elements of this global approach is the Commission's proposal, adopted on December 5, 1990, for a Council Decision which would require all member states, by December 31, 1992, to accede to and to comply with the provisions of the Berne Convention, as revised by the Paris Act of July 24, 1971.²⁶ The proposal would further require accession to and compliance with the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations.²⁷

To date, there are some member states which do not meet the requirements of the Commission proposal. With respect to the Berne Convention, only Belgium and Ireland are not yet parties to the Paris Act, but are still bound by the Brussels Act of 1948.²⁸ With regard to the Rome Convention, the situation is less uniform. In Greece, a law on the protection for performing artists has been enacted,²⁹ but, absent implementing regulations,

23. The Council Directive on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 45, has already been adopted and is not the subject of this article, but is dealt with by the contribution of Professor Raskind. See Leo J. Raskind, *Protecting Computer Software in the European Economic Community: The Innovative New Directive*, 18 BROOK. J. INT'L L. 729 (1992).

24. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention]. The Berne Convention grants certain minimum rights for authors and regulates the international protection of author's works. It is the most important international convention in the field of author's rights.

25. The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter Rome Convention]. The Rome Convention grants certain minimum rights to performers, phonogram producers and broadcasting organizations and regulates the international protection of these neighboring rights owners. The Rome Convention is the most important international convention in the field of neighboring rights.

26. Berne Convention, *supra* note 24.

27. Proposal for a Council Decision Concerning the Accession of the Member States to the Berne Convention for the Protection of Literary and Artistic Works as revised by the Paris Act of July 24, 1971, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention of October 26, 1961), COM(90)582 final.

28. See Berne Convention, *supra* note 24.

29. Law 1075/1980, Official Journal of the Government of the Hellenistic Republic,

will not enter into force. At present, a bill with respect to neighboring rights protection is pending in Greece, as is the case in Belgium and the Netherlands.³⁰ Meanwhile, Spain ratified the Rome Convention on November 14, 1991.³¹ Portugal has not yet done so, although it has already passed neighboring rights legislation.³² The Commission intended this proposal to achieve a level of comprehensive minimum protection in all member states as a basis for further and more specified harmonization of protection. Moreover, accession to and compliance with the international conventions appears to best respond to the internationalization of the problems connected with authors' rights and neighboring rights.

The European Parliament had adopted a favorable opinion supporting the Commission's proposal and proposed to strengthen the Commission's original proposal. They would accomplish this by requiring that member state citizens receive remuneration for broadcasting or communication to the public on the basis of commercial phonograms.³³ In addition, the Parliament explicitly proposed that, besides the member states, the Community itself must follow the principles of the Berne and Rome Conventions as far as it has competence in the field of copyright and neighboring rights. The Commission has included these proposals in its amended proposal for a Council decision.³⁴ Member states, however, seem to be hesitant, not for reasons with regard to the content, but for procedural reasons and

No. 218 of September 25, 1980 (Greece).

30. For Belgium, see Proposition de loi relative au droit d'auteur, aux droits voisins et à la copie privée d'œuvres sonores et audiovisuelles (10 juin 1988), Senat de Belgique, 329-1 (S.E. 1988). For the Netherlands, see Draft Bill on Neighboring Rights, submitted by the Government in August 1989, TK 21 244, Staatscourant 1989, No. 148 (Regelen inzake de bescherming van uitvoerende kunstenaars, producenten van fonogrammen en omroeporganisaties en wijziging van de Auteurswet 1912/Wet op de naburige rechten).

31. See COPYRIGHT 1992, at 9.

32. Código do Direito de Autor e dos Direitos Conexos [Code of Copyright and Related Rights], Diaro do Governo No. 214 of September 17, 1985 translated in 22 COPYRIGHT 124, 163 (1986).

33. See Rome Convention, *supra* note 25, arts. 12, 16(I)(a)(i) & 16(I)(a)(ii). Commercial phonograms are phonograms that are published for commercial purposes, as opposed to, for example, private recordings made by broadcasting organizations that do not enter commerce.

34. Amended Proposal for a Council Decision Concerning the Accession of Member States to the Berne Convention for the Protection of Literary and Artistic Works, as Revised by the Paris Act of July 24, 1971 and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention of October 26, 1961), COM(92)10 final [hereinafter Amended Proposal].

doubts as to the Community's competence.³⁵

B. Rental Right,³⁶ Lending Right,³⁷ and Certain Neighboring Rights

Together with the proposal for adherence mentioned in the previous section, the Commission adopted a Proposal in 1990 for a Council Directive on Rental Right, Lending Right, and Certain Rights Related to Copyright (the Proposal).³⁸ The Proposal is largely based on Chapter 4 of the Green Paper (distribution right, exhaustion and rental right) as well as Chapter 2 (piracy).³⁹ The combination of two fields of activity in one legal instrument was considered to be appropriate (i.e. the introduction and harmonization of a rental and lending right on the one hand, and the combat against piracy through the provision of a certain minimum level of protection in the field of neighboring rights on the other). This Proposal addresses the difficulty of the harmonization of a rental or lending right for certain neighboring right owners as long as there are still some member states which do not provide any neighboring rights protection at all, not even a simple reproduction right.

With respect to rental and lending rights, the Proposal grants to authors, performing artists, phonogram producers, and film producers the right to authorize or prohibit the rental and lending of the originals and copies of their works, the fixations of their performances, their phonograms, and their visual recordings, whether or not accompanied by sound.⁴⁰ Accordingly, all relevant authors and neighboring rights' owners will be granted separate rights. The relationship between authors and neighboring rights' owners will be governed principally by contracts. The proposal is not limited to the rental or lending of

35. See 6 WORLD INTELL. PROP. REP. 34 (1992).

36. The rental right is the right to forbid or allow commercial rental of protected copyright works or other protected subject matter such as phonograms. It refers, for example, to the rental of a video cassette or compact disc by a rental outlet.

37. The lending right is the right to forbid or allow the lending of books or other materials by public libraries; mostly, this right is granted as a mere remuneration right.

38. Proposal for a Council Directive on Rental Right, Lending Right and on Certain Rights Related to Copyright, COM(90)586 final [hereinafter Rights Related to Copyright]. For the background of this proposal see Silke von Lewinski, *Rental Right, Lending Right and Certain Neighboring Rights: The EC-Commission's Proposal for a Council Directive*, 4 EUR. INTELL. PROP. REV. 117 (1991).

39. See Copyright and the Challenge of Technology, *supra* note 10.

40. See Rights Related to Copyright, *supra* note 38.

sound or video recordings, even though these objects are currently the most rented objects. The only exclusion relates to buildings and to works of applied art. Likewise, the rental of computer programs is excluded from this Proposal Directive, since it is covered by the computer program Directive.

The activities covered by this proposal are "rental" and "lending." Whereas "rental" refers mainly to commercial activities,⁴¹ "lending" refers mainly to the activities of public libraries. Although the Green Paper did not envision any harmonization measure with respect to lending, the Commission's proposal included it for several reasons, including the economic relationship between rental and lending. Since public libraries offer videograms and compact discs to an increasing extent, consumers might shift from rental outlets to public libraries that generally charge insubstantial or no lending fees. The same development took place at the beginning of this century when rental book shops disappeared because of the more competitive public libraries emerging at that time. An exclusive lending right might enable the right owners to seriously affect the functioning of public libraries. This would be contrary to the cultural policy of the most member states.⁴² In addition, most national legislatures are prepared to provide a lending right only outside the framework of copyright laws. Therefore, the Commission has proposed that member states may derogate from the copyright-based exclusive nature of the lending right for one or more categories of works, provided that authors at least obtain an equitable remuneration through administering bodies for such lending.⁴³ Thus, member states would remain free to implement lending rights in various ways, in particular by providing a remuneration system known as a public lending right. This measure of flexibility seemed to be in order to eventually reach a common position between the eight member states⁴⁴ in which a lending right does

41. The original Commission proposal defines "rental" as "making available for use, for a limited period of time and for profit-making purposes, without prejudice to paragraph 3" (paragraph 3 defines the term of "lending"). See Rights Related to Copyright, *supra* note 38, art. 1.

42. Only the United Kingdom has provided an exclusive lending right for authors of computer programs and producers of sound recordings and films. So far, the right owners have not totally prohibited lending of such objects nor seriously affected the functioning of public libraries. Copyright, Designs and Patents Act 1988, Ch II, § 18(2) Sched. 7 §§ 6, 8 & 34 (Eng.).

43. See Rights Related to Copyright, *supra* note 38, art. 4.

44. Belgium, Luxembourg, Greece, France, Italy, Spain, Portugal, and Ireland.

not exist or is not exercised, and the four member states⁴⁵ with different systems of a lending right.

In addition, the Proposal contains a specific article intended to ensure that all groups of first right owners concerned will effectively benefit from their rights.⁴⁶ Without specific legislation, the weaker parties of exploitation contracts, usually authors and performing artists as opposed to producers of sound recordings and films, would normally assign their rights to the producers for exploitation of the work without obtaining separate remuneration for every right (or more than remuneration on a flat-rate basis and at very low percentages). The Commission states that, in light of the existing situation and the underlying purpose of copyright, total contractual freedom is not acceptable. Legislatures in Europe have long since recognized that copyright laws should provide minimum protection in exploitation contracts for the generally weaker parties (authors and performing artists) against the generally stronger parties (publishers, producers of sound recordings and films, and broadcasters).⁴⁷

In order to meet this need, the Commission has proposed that member states provide for the first right owners an unwaivable right to obtain an adequate part of the rental or lending revenues that may be assigned only for administration.⁴⁸ Thus, producers are free to exploit their exclusive rental and lending rights, and performing artists and authors may adequately share in the proceeds generated by rental and lending of sound and video recordings.

With reference to Chapter 2 of the Green Paper, Part II on neighboring rights protection provides the following rights of material exploitation: An exclusive fixation right for performing artists of their performances and for broadcasting organizations of their broadcasts, as well as exclusive reproduction and distribution rights for performing artists, phonogram and film producers, and broadcasting organizations.⁴⁹ With respect to the exhaustion of the distribution right, the Proposal only reaffirms

45. Denmark, Germany, the Netherlands, and the United Kingdom.

46. First right owners are authors, performing artists, producers of phonograms, and of films. The first owners *concerned* are those who have contributed in a given case to the phonogram or lent object, such as the composer, musician and phonogram producer. See Rights Related to Copyright, *supra* note 38, art. 2.

47. The awareness for the need of improving such legislation has grown recently. Compare as an example the French Copyright Protection Amendment 1985, art. 13.

48. See Rights Related to Copyright, *supra* note 38, art. 3.

49. See Rights Related to Copyright, *supra* note 38, arts. 5, 6 & 7.

the established jurisdiction of the European Court⁵⁰ and does not interfere with national concepts, such as the concept of the *droit de destination*,⁵¹ which might not include any exhaustion at all.

On February 12, 1992, the European Parliament voted in support of the proposed Directive in the amended version proposed by Parliament. Meanwhile, the European Commission has presented its amended proposal⁵² which intends to take into account the opinion of the European Parliament. The Commission has included in its amended proposal most of the more than twenty amendments which were passed by the Parliament and rejected only two of the proposed amendments.⁵³ The amended proposal includes six major modifications which are discussed below.

First, the definitions of rental and lending are explicitly clarified so that rental and lending for the purpose of public performance are not covered by the proposed Directive. In particular, the rental of film copies to cinemas for the purpose of public performance and to broadcasting organizations for the purpose of broadcasting is not covered by the rental right.

Second, a very interesting amendment with respect to the determination of the right holders has been passed by the Parliament and included in the Commission's amended proposal. It provides that the principal director of a cinematographic work shall be considered an author. This is not yet the case in the United Kingdom, Ireland, and Luxembourg. The Commission has in principle decided not to define the single groups of right holders for the purpose of different Directives which deal only with certain aspects of copyright protection. It has, however, taken up this amended proposal of the Parliament in order to safeguard the legal protection for this important group of creative persons throughout the Community, especially since three

50. See the first decision of this jurisdiction, Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmärkte GmbH & Co. KG*, 1971 E.C.R. 487, 498-501.

51. According to the concept of the *droit de destination*, the author may control not only the first act of distribution of his work, but also the further acts of distribution. Hence, the other right to distribute his or her work is not exhausted after the first act of distribution.

52. Amended Proposal for a Council Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, COM(92)159 final at 1 [hereinafter Amended Proposal on Rental Right].

53. *Id.* at 4.

member states⁵⁴ do not yet provide such protection. This amended proposal would not regulate the delicate problem of who is to be regarded as the author of the film but it is conceived as a minimum provision allowing member states to remain free to determine, in detail, which other contributors to a film should be considered to be its co-authors under national law. Co-authors might even include a film producer.

Third, the original proposal left it to member states to regulate, if at all, the contractual relationships between film producers and performing artists. However, the amended proposal takes up a Parliament proposal, according to which a rebuttable presumption of performers' rights in favor of film producers shall be provided under national law. This presumption relates to contracts concerning film production and covers the exclusive rights of rental, lending, reproduction, and distribution. Such a Community-wide presumption of transfer of rights will, in practice, considerably facilitate the exploitation of films and film producers. In order to compensate to a certain extent this potential loss of rights and the weakening of the performers' bargaining position, the presumption of assignment is only provided when there is a written contract concerning film production. In addition, this presumption is rebuttable by contractual provisions to the contrary and subject to the right of economic participation in the revenues from exploitation under Article 3 of the proposed directive.⁵⁵

Fourth, the new Article 4 bis proposes that no changes, cuts, or additions may be made to a work by the person making available for rental, the renter, the lender, or the borrower without the specific authorization of the author.⁵⁶ This proposal may be regarded as a partial harmonization of authors' moral rights in the field of rental and lending. It may also be seen as covering aspects of the adaptation right which are recognized in all member states. Accordingly, this proposal obliges member states to hardly any change of their domestic laws.

Fifth, with respect to Chapter 2 on neighboring rights, the Parliament has proposed extending the rights to forms of immaterial exploitation. Accordingly, the Commission has taken up the new Article 6 bis, which provides an exclusive right of broad-

54. The United Kingdom, Ireland, and Luxembourg do not yet provide such protection.

55. See Rights Related to Copyright, *supra* note 38, art. 3.

56. See Rights Related to Copyright, *supra* note 38, art. 4.

casting and communication to the public for performing artists with respect to their live performances. Modelled on Article 13(a) and (d) of the Rome Convention,⁵⁷ Article 6 bis also provides an exclusive right of rebroadcasting and communication to the public of television broadcasts under the conditions already mentioned in the Rome Convention for broadcasting organizations.⁵⁸ In addition, a right to remuneration for both performing artists and phonogram producers is provided if a phonogram published for commercial purposes is used for broadcasting or communication to the public. The proposed protection in Article 6 bis constitutes a minimum protection which member states may exceed in their national laws, as is already often the case.⁵⁹ Since the proposed Directive on satellite broadcasting and retransmission by cable provides certain minimum rights with respect to broadcasting via satellite, Article 6 bis ensures that these specifically relevant provisions will not be prejudiced.⁶⁰

Finally, the Commission, in its original proposal, had provided for an immediate application of the Directive to all protected works and subject matter in order to achieve harmonization as early as possible. The Parliament proposed, as had certain groups of users and producers, an explicit transitional period. According to the proposal, which has been taken over into the amended proposal by the Commission, the Directive will in principle apply as of its entry into force, but will not affect existing contractual rights and obligations for a period of three years following this event.⁶¹ Within this period, contracting parties may bring their contracts into accordance with the provisions of the Directive. After three years, the Directive applies whether or not the contracting parties have come to an agreement on the adaptation of their contracts.⁶²

During the debates in the Council working group, various disagreements emerged which often related to the fact that member states in general are not easily persuaded that they should amend their national laws. Whereas the harmonization or introduction of a lending right seems to be premature for a number of member states, the other provisions of the proposed Di-

57. Rome Convention, *supra* note 25, art. 13(a), (d).

58. Rome Convention, *supra* note 25.

59. For example, Germany, France, and Spain.

60. Amended Proposal on Rental Right, *supra* note 52, at 3.

61. Amended Proposal on Rental Right, *supra* note 52, at art. 11.

62. Amended Proposal on Rental Right, *supra* note 52, at art. 11.

rective seem to be acceptable for most member states — at least in principle. The earliest possible date for the adoption of a compromise in the form of the common position of the Council was mid-May 1992. At the moment, it seems that the European Parliament and the European Commission are prepared and willing to harmonize copyright on a higher level and to balance the diverging interests in a more appropriate manner than the member states.

C. *Satellite Broadcasting and Cable Retransmission*

On July 17, 1991, the Commission adopted a proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Neighboring Rights Applicable to Satellite Broadcasting and Cable Retransmission.⁶³ The aim of a free exchange of sound and television programs within the Community (once these programs have been broadcast in any of the member states) has been pursued already in the context of the Green Paper, *Television without Frontiers*,⁶⁴ and, more concretely, in an initial proposal for a Council Directive which provided a compulsory license system in the case of cable retransmission. Since this compulsory license system was firmly rejected by the right holders and member states, the copyright provisions were omitted from the first EC Directive on television.⁶⁵

In its proposal of 1991, the Commission dealt with both broadcasting of programs by satellite and cable retransmission of programs.⁶⁶ With respect to the coordination of certain rules

63. Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Neighboring Rights Applicable to Satellite Broadcasting and Cable Retransmission, COM(91)276 final [hereinafter *Satellite Broadcasting and Cable Retransmission*]. In November 1990, the Commission had already published a preparatory discussion paper entitled *Broadcasting and Copyright in the Internal Market*, SEC(90)2194, of November 8, 1990. For comment, see Thomas Drier, *Broadcasting and Copyright in the Internal Market: The New Proposal by the EC Commission Concerning Cable and Satellite Broadcasts*, 2 EUR. INTELL. PROP. REV. 42 (1991).

64. *Television Without Frontiers*, Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable, COM(84)300 final [hereinafter *Television Without Frontiers*].

65. Accordingly, this Directive deals only with the promotion of production and the distribution of European television programs, with advertising, sponsorship, and protection of minors. See Council Directive of 3 October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulations or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1988 O.J. (L 298) 23.

66. See *Satellite Broadcasting and Cable Retransmission*, *supra* note 63, chs. II & III.

in the field of satellite broadcasting, the main question is whether satellite transmission is subject only to the copyright law of the state in which the program originates or whether it is subject to the laws of all states in which the signal can be directly received (the so called Bogsch-theory).⁶⁷ The Commission is of the opinion that this uncertainty would seriously affect the creation of the intended European audio-visual area. Accordingly, it has proposed that the right to broadcast protected subject matter will have to be acquired only in the state in which the program originates, i.e., "where the broadcaster takes the single decision on the content and the transmission by satellite of programme-carrying signals."⁶⁸ This solution is intended to prevent the whole satellite transmission from being hindered merely because one right owner in a certain member state has not conducted the necessary contract. It is also intended to avoid difficulties in ascertaining the states in which the signals can be said to be directly receivable.

This solution would of course lead satellite broadcasters to originate programs only in states without the relevant copyright or neighboring rights protection. Right holders in other member states could neither prohibit nor demand any remuneration for such broadcasting via satellite. Therefore, the Commission has included in its proposal certain minimum rights for authors, performers, phonogram producers, and broadcasting organizations.⁶⁹

67. For discussion see, e.g., WIPO/UNESCO, COPYRIGHT 1985, at 180 and COPYRIGHT 1986, at 218, 231; Adolf Dietz, *The Shortcomings and Possible Evolution of National Copyright Legislation in View of International Programme Transmission, in TELEVISION BY SATELLITE - LEGAL ASPECTS* 113 (Stephen de B. Bates ed., 1987); Walter Dillenz, *Legal System Governing the Protection of Works Transmitted By Direct Broadcasting*, COPYRIGHT 1986, at 386; Mihaly Ficsor, *Direct Broadcasting by Satellite and the 'Bogsch Theory'*, INT'L BUS. LAW 258 (1990); Gunnar W.G. Karnell, *A Refutation of the Bogsch Theory on Direct Satellite Broadcasting Rights*, INT'L BUS. LAW 263 (1990); Ewald Orf, *Television Without Frontiers-Myths or Reality* 8 EUR. INTELL. PROP. REV. 270 (1990). So far, there have been Austrian decisions in support of the Bogsch-theory: Court of Appeals of Vienna, of November 10, 1989, (1990) GRUR Int. 537; Supreme Court, of May 28, 1991, (1991) GRUR Int. 920, and Court of Appeals of Vienna, of June 27, 1991, (1991) GRUR Int. 925; see also Cour d'appel de Paris, of December 19, 1989, J.C.P. II, No. 21462 (1990) (on terrestrial transborder transmission).

68. Satellite Broadcasting and Cable Retransmission, *supra* note 63, art. 1(b).

69. The exclusive right of communication to the public by satellite shall be granted to authors, performers (with respect to live-broadcasts); performers shall, in addition, be granted the exclusive right of fixation and reproduction, and, together with phonogram producers, a remuneration modelled Rome Convention, *supra* note 25, art. 12 but restricted to the communication to the public by satellite. Broadcasting organizations shall

In addition, the Commission has included the transmission of programs via Fixed-Service Satellites (FSS) and treated them on an equal footing with direct broadcasting satellites as far as the transmission is comparable in terms of individual direct receivability. This seems appropriate since the satellite and aerial technology has developed so far as to make reception of signals transmitted via FSS economically feasible.

With respect to simultaneous and unchanged cable retransmission of programs, the Commission provides that member states shall ensure that the applicable copyright and neighboring rights are observed. It bases its proposal on the system of contractual agreements between right holders and cable operators and excludes statutory license systems, except such existing systems which may be retained until December 31, 1997.⁷⁰ In order to avoid certain problems which may arise with a view to the Internal Market, the Commission proposed additional measures. In order to prevent a right holder who is not a party to a collective agreement between right holders and cable operators, a so-called outsider, from blocking the retransmission to the detriment of the operator, the other right holders or the cable subscribers, the Commission proposes a mandatory collective administration of all of the relevant rights, except for those exercised by broadcasting organizations.⁷¹ However, this mandatory administration through collecting societies does not guarantee that right holders and cable operators will arrive at the conclusion of contractual agreements. For this situation, the Commission proposes that member states ensure some mechanisms for mediation and dealing with abusive behavior of the parties, such as improper prevention of negotiations.⁷²

In the Council working group, discussions seemed to concentrate on the definition of "communication to the public by satellite" and in particular, on the determination of the relevant member state as to where the act of communication to the public by satellite occurs, as well as on the problem of eventually enforcing contractual agreements between right holders and

be granted the exclusive right of simultaneous retransmission of their broadcasts by satellite, as well as the rights of fixation and reproduction. See *Satellite Broadcasting and Cable Retransmission*, *supra* note 63, arts. 2, 4, 5, & 6.

70. See *Satellite Broadcasting and Cable Retransmission*, *supra* note 63, art. 10(2).

71. See *Satellite Broadcasting and Cable Retransmission*, *supra* note 63, art. 11.

72. See *Satellite Broadcasting and Cable Retransmission*, *supra* note 63, arts. 14 & 15.

cable operators. Another problem being discussed concerns the possibility of keeping, under national law, the obligation of collecting societies to conclude an agreement with cable operators, in view of the recognition for mediation and prevention of the abuse provided in Art. 14 and 15 of the proposed Directive.⁷³

D. Databases

In view of the increasing economic importance of databases and the differences in their legal protection offered by the laws of the member states, the Commission included a chapter on database protection in the Green Paper.⁷⁴ On January 29, the Commission adopted a proposal for a Council Directive on the Legal Protection of Databases.⁷⁵ The proposal covers only electronic databases and leaves the protection of non-electronic databases to the member states.⁷⁶

One of the most important questions which the Commission had to answer in its proposal was whether databases should be protected by copyright or by *sui generis* provisions. At a hearing held in April 1990, the interested circles expressed overwhelming support for the copyright approach. However, copyright only protects works which are original, which means in most member states that the work or database must show some creativity. To be original in these states requires more than that the work be from its author and not copied.⁷⁷ Therefore, a number of databases would not meet the originality criterion and would not be protected. Alternatively, the originality criterion could be harmonized in a detailed manner throughout the Community or an additional non-copyright protection could be provided. As the computer Directive has already shown, it seems rather diffi-

73. See Satellite Broadcasting and Cable Retransmission, *supra* note 63.

74. Copyright and the Challenge of Technology, *supra* note 10, ch. 6.

75. Proposal for a Council Directive on the Legal Protection of Databases, COM(92)24 final [hereinafter Proposed Directive].

76. Art. 1(1) of the Proposed Directive defines the term "database" as "a collection of works or materials arranged, stored and accessed by electronic means, and the electronic materials necessary for the operation of the database such as its thesaurus, index, or system for obtaining or presenting information; it shall not apply to any computer programme used in the making or operation of the database." *Id.* art. 1(1). The Proposed Directive purports to harmonize the protection only of databases as such and hardly contains any substantive provisions with respect to the works or materials included in any database. *Id.* arts. 2(4) & 4.

77. Recently, the United States Supreme Court has held that mere "sweat of the brow" is not sufficient in order to confer copyright protection to a compilation of facts; see *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282 (1991).

cult, if not impossible, to achieve a detailed harmonization of the originality criterion, which has traditionally been interpreted only by the courts. Moreover, it does not seem appropriate to provide a specific originality standard for just one object of protection in national laws. The Commission, willing to provide expansive protection for databases, has consequently chosen the alternative indicated above — an additional protection besides copyright protection.

Copyright protection itself represents a protection of databases as collections within the meaning of Article 2(5) of the Berne Convention.⁷⁸ As is the case in the computer Directive, the proposed Directive provides copyright protection only for original databases. This means that the database is a "collection of works or materials which, by reason of their selection or their arrangement, constitutes the author's own intellectual creation. No other criteria shall be applied to determine the eligibility of a database for this protection."⁷⁹ It should be emphasized that this protection is available for collections of works, as well as collections of information or other material that are not protected as such. Likewise, it should be stressed that this copyright protection extends only to the database itself and is without prejudice to any right subsisting in the works or materials contained in the database.⁸⁰ Accordingly, the author⁸¹ shall have her exclusive rights only with respect to the selection or arrangement of the contents of the database and the electronic materials used in the operation of the database (excluding the computer program). These rights include the exclusive rights of reproduction, translation, adaptation, arrangement, and any other alterations of the database, as well as the exclusive right of the reproduction of the results of any of these acts. Additionally, these exclusive rights also cover any form of distribution to the public, including rental.⁸² The rental right shall not be affected

78. Berne Convention, *supra* note 24, art. 2(5).

79. Proposed Directive, *supra* note 75, art. 2(3).

80. See Proposed Directive, *supra* note 75, art. 2(4).

81. The provisions on authorship in art. 3 of the proposed Directive will generally correspond to the existing national provisions. Thus, "the author of a database shall be the natural person or group of natural persons who created the database. . . ." Member states' provisions on the authorship of legal persons or on collective works may be applied. In the case of employment, a rebuttable presumption for the exclusive entitlement of the employer to exercise all economic rights in the database has been created. See Proposed Directive, *supra* note 75, art. 3.

82. See Proposed Directive, *supra* note 75, art. 5(a)-(d).

by the exhaustion of the distribution right. Furthermore, the author shall have the exclusive rights of communication, display, or performance of the database to the public.⁸³

Limitations to these rights (in other words, exceptions to these restricted acts) are only provided for the following two situations: (1) The further authorization of the right holder is not required where the lawful user of the database performs any of these restricted acts that are necessary to use that database in the manner determined by contractual arrangements with the right holder; and, (2) Likewise, the authorization of the right holder is not required where the lawful acquirer of a database performs any of these restricted acts that are necessary to gain access to the contents of the database and use thereof, "in the absence of any contractual arrangements between the right holder and the user of the database in respect of its use."⁸⁴ These exceptions to the restricted acts again relate only to the subject matter of copyright protection, i.e., the selection or arrangement of the contents of the database and the electronic material used in the creation or operation of the database. These exceptions are "without prejudice to any rights subsisting in the works or materials contained in the database."⁸⁵

Until further harmonization, the duration of copyright protection of the database shall be the same as that provided for by most of the member states for literary works, i.e. in most member states, 50 years after the authors' death.⁸⁶ In order to take into account the fact that a database is constantly rearranged and brought up to date, the Proposed Directive provides that insubstantial changes to the content or arrangement of a database shall not extend the term of protection of that database.⁸⁷ The Directive defines an "insubstantial change" as "additions, deletions or alterations . . . to a database . . . which are necessary for the database to continue to function in the way it was intended by its maker to function."⁸⁸

The additional protection mentioned above is modelled on the so-called "Scandinavian Catalogue Rules." These rules present neighboring rights protection which is granted in all Nordic

83. See Proposed Directive, *supra* note 75, art. 5(e).

84. Proposed Directive, *supra* note 75, art. 6(1) & (2).

85. Proposed Directive, *supra* note 75, art. 6(3).

86. See Proposed Directive, *supra* note 75, art. 9(1).

87. See Proposed Directive, *supra* note 75, art. 9(4).

88. Proposed Directive, *supra* note 75, art. 1(4).

countries. The additional right of unfair copying under Article 2(5) of the proposed Directive may be regarded as a *sui generis* type of protection for the contents of the databases themselves, as far as the contents do not consist of works protected by copyright. This right seems to combine aspects of neighboring rights protection and unfair competition. The *sui generis* type of protection acts with copyright protection under the following four conditions: (1) If the database is a collection protected by copyright, and the material contained in the database is also protected by copyright, then the database and its contents are both independently protected by copyright; (2) If the database is protected by copyright as a collection, but the material contained in the database is not copyrightable, then the copyright protection for the database coexists with the *sui generis* protection of its contents; (3) If neither the database as a collection nor the material contained in the database is protected by copyright, then the database may only be protected by the *sui generis* right as to its contents; and (4) If the database is not protectable by copyright as a collection, but the material contained in it is protected by copyright, then only the normal copyright protection for the material is relevant, and the *sui generis* protection does not apply.⁸⁹ This is provided in order to avoid the applicability of compulsory licenses on copyright works as provided in art. 8 of the Proposed Directive with respect to the *sui generis* right.⁹⁰

The right to prevent unfair extraction is defined as "the right of the maker of a database to prevent acts of extraction and re-utilization of material from that database and for commercial purposes. . . ."⁹¹ Article 2(5) of the Proposed Directive states that the right to prevent the unauthorized extraction or re-utilization refers to the contents of the database "in whole or in substantial part."⁹² Since this right grants a monopoly on information in order to protect the necessary investments and encourage the creation of such databases, the interests of those who want to have access to the information, for whatever reasons, had to be thoroughly taken into account. Accordingly, Article 8 of the Proposed Directive enables competitors who wish to extract or re-utilize the contents of the database for commercial purposes to obtain compulsory licenses on fair and non-dis-

89. See Proposed Directive, *supra* note 75, art. 2(5).

90. See Proposed Directive, *supra* note 75.

91. See Proposed Directive, *supra* note 75, art. 1(2).

92. See Proposed Directive, *supra* note 75.

criminary terms to do so in two situations: (1) Where a database has been made publicly available and its works or materials cannot be independently created, collected, or obtained from other sources; or, (2) where a database has been made "publicly available by a public body which is either established to assemble or disclose information pursuant to legislation or is under a general duty to do so."⁹³ In addition, the lawful users of a database may, without authorization of the database maker, extract or re-utilize insubstantial parts of works or materials from a database⁹⁴ for "commercial purposes provided that acknowledgement is made of the source."⁹⁵ If such acknowledgement is not made, the user may extract or re-utilize and use such insubstantial parts for personal or private use only.⁹⁶

E. Term of Protection

Disparities between the national provisions on the term of protection of copyright and neighboring rights constitute obstacles to the free movement of goods and services and create distortions of competition in the Internal Market. This consequence has become even clearer after a recent judgment of the Court of Justice⁹⁷ which stated that the restrictions to trade are justified under Article 36 EEC Treaty as long as they are due to the disparity between the rules concerning the term of protection, since this was inseparably linked to the existence, and not linked only to the exercise of the exclusive rights. The Court indicated that in the present state of Community law, which is characterized by a lack of harmonization relating to the term of protection, it is for the national legislators to determine the relevant conditions and rules. Given this state of affairs, the Commission purports to have a duty to take harmonization measures relating to the term of protection. Whereas this issue was not part of the Green Paper, the Commission, thereby following many opinions by interested circles, included it in the follow-up

93. See Proposed Directive, *supra* note 75, art. 8(1) & (2).

94. "Insubstantial parts" are defined as "parts of a database whose reproduction, evaluated quantitatively and qualitatively in relation to the database from which they are copied, can be considered not to prejudice the exclusive rights of the maker of that database to exploit the database." Proposed Directive, *supra* note 75, art. 1(3).

95. Proposed Directive, *supra* note 75, art. 8(4).

96. See Proposed Directive, *supra* note 75, art. 8(5).

97. Case 341/87, E.M.I. Electrola GmbH v. Patricia Im-und Export Verwaltungsgesellschaft GmbH, 1989 E.C.R. 79, 2 C.M.L.R. 413 (1989).

paper of 1990.⁹⁸

On February 6, 1992, the Commission adopted a proposal for a Council Directive harmonizing the term of protection of copyright and certain related rights.⁹⁹ This proposal will prevail over any provisional harmonization of the term of protection, as provided in the computer Directive and the proposed rental right and database Directives.

The central and the most discussed item in the context of the term of protection is the term itself. The member states' laws are to some extent different in the field of copyright¹⁰⁰ and, to an even greater extent, different in the field of neighboring rights.¹⁰¹ From a copyright point of view, there may be many arguments in favor of a term of protection of both 50 and 70 years post mortem auctoris (p.m.a). The Commission's proposal to provide 70 years p.m.a. in the field of copyright and 50 years in the field of neighboring rights is primarily justified by the requirements laid down in the Single European Act with a view toward the Completing the Internal Market on December 31, 1992. Harmonization of the term of protection at a lower level would necessitate transitional provisions in order to safeguard acquired rights where works or other protected subject matters had already enjoyed a longer term of protection. Accordingly, the harmonization effect in the field of copyright would take place 70 years after the entry into force of the Proposed Directive. This would be in conflict with the aim to create an area without internal barriers at the earliest possible date.

In addition to the foregoing persuasive argument, other arguments may be brought forward in favor of the choice of 70

98. See Follow up to the Green Paper, *supra* note 13.

99. Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, COM(92)33 final, 1992 O.J. (C92) at 6 [hereinafter Proposal for Copyright Harmonization].

100. The general term of protection is 70 years post mortem auctoris (p.m.a.) in Germany and, for musical compositions with or without words, in France. It is 60 years p.m.a. in Spain and 50 years p.m.a. in all other member states. In addition, Belgium, Italy, and France have introduced extensions thereto in order to offset the effects of the two World Wars on the exploitation of the authors' works. In Spain, the former term of protection of 80 years p.m.a., which was reduced by the Law of November 11, 1987 to 60 years p.m.a., is still valid for old works of authors who died before the new law entered into force, due to a transitional provision which safeguards established rights.

101. The terms of protection are between 20 years and 50 years after certain dates such as the date of performance or public communication. Most laws or draft laws provide 50 years.

years p.m.a. and 50 years for neighboring rights.¹⁰² The Commission's proposal seems to be in line with recent international developments such as the fact that the World Intellectual Property Organization (WIPO)¹⁰³ has included in its memorandum on a possible Protocol to the Berne Convention a proposal to extend the general term of protection to 70 years p.m.a. Furthermore, the term of 50 years in the field of neighboring rights has been agreed upon in the course of the GATT Uruguay Rounds negotiations on Trade Related Aspects of International Property Rights (TRIPS).¹⁰⁴

In the field of neighboring rights, not only the term itself, but also the event giving rise to the term of protection have to be harmonized. The Commission's thoughts in this area were led above all by considerations of certainty. Accordingly, the event chosen for the case of performers' rights may be either the date of publication of a fixation of a performance, or the date of dissemination of a performance.¹⁰⁵ In the case of phonogram and film producers, the event is the first publication or the fixation, and in the case of broadcasting organizations, the term begins with the first transmission of the broadcast.¹⁰⁶ The Commission wisely avoided introducing definitions of the employed terms such as "first publication" or "first dissemination" by providing that when a term of protection begins to run in a member state, it shall be considered to have begun to run throughout the Community.¹⁰⁷

Besides the harmonization of specific copyright terms of

102. See, e.g., the explanatory memorandum of the Proposal For Copyright Harmonization, *supra* note 99, paras. 49 & 52.

103. The World Intellectual Property Organization [WIPO] is one of the 16 specialized agencies of the United Nations Systems of Organizations. Its objectives are to promote the protection of intellectual property throughout the world and to ensure administrative cooperation throughout the world and to ensure administrative cooperation among the intellectual property unions. Among other things, WIPO carries out a program of legal-technical assistance for developing countries, helping them to deal with their patent, trademark, industrial design and copyright problems.

104. The purpose of the negotiations on Trade Related Aspects of Intellectual Property Rights [TRIPS] within the GATT Uruguay round is to improve the level of protection for intellectual property including industrial property on a multilateral, world-wide basis. For more explanations see Jörg Reinbothe & Anthony Howard, *The State of Play in the Negotiations on Trips (GATT, Uruguay Round)*, 5 EUR. INTEL. PROP. REV. 157 (1991).

105. See Proposal for Copyright Harmonization, *supra* note 99, art. 2(1).

106. See Proposal for Copyright Harmonization, *supra* note 99, arts. 2(2) & 2(3).

107. See Proposal for Copyright Harmonization, *supra* note 99, art. 4(1). This provision refers to all terms of protection covered by arts. 1, 2 and 3 of the proposed Directive.

protection, such as the terms in the case of works of joint authorship, anonymous or pseudonymous works, or collective works,¹⁰⁸ which have largely been modelled on the solutions of the Berne Convention, the Proposed Directive deals with the term of protection of photographs and moral rights. The Proposed Directive also covers the protection of works and protected subject matter from third countries, and the questions of retroactivity of provisions of this Directive, if the term of protection is the only different element of copyright and neighboring rights protection.

Photographs are dealt with in Article 3 of the Proposed Directive. Article 3 states that all photographs which are protected under national law shall have the general copyright term of protection, that is 70 years p.m.a. In many member states photographs enjoy a term of protection which is shorter than the ordinary copyright term of protection, as is permitted by the Berne Convention.¹⁰⁹ Some member states have a two-fold system of full copyright protection for photographic works and less protection, including a shorter term of protection, for mere photographs which do not meet the originality requirements for copyright protection. This differentiation between a copyright and a neighboring rights protection for different kinds of photographs will have to be abandoned according to this provision of the Directive.

With respect to author's moral rights, the Commission has decided to propose for the time only a minimum solution which corresponds to Article 6 bis (2) of the Berne Convention.¹¹⁰ This solution is the general copyright term of protection. There are a number of member states where it is expressly provided that moral rights are perpetual. However, it seems that authors' moral rights are not of great importance in practice behind the general copyright term of protection. In addition, the exercise of moral rights beyond this term would probably cause problems in practice. For example, it is arguable that the exercise of the authors' moral rights to object to the distortion of his or her work might be misused to censor adaptations or interpretations of his or her work. Given the low economic importance of cases in which the perpetuity of moral rights would be relevant, harmoniza-

108. See Proposal for Copyright Harmonization, *supra* note 99, art. 1(2-6).

109. See Berne Convention, *supra* note 24, art. 7(4), which provides only for a minimum term of protection of 25 years from the making of a photographic work.

110. Berne Convention, *supra* note 24, art. 6 bis (2).

tion insofar does not seem to be necessary, nor would it be useful.

In order to achieve a harmonization which is as comprehensive as possible, the Commission had to take into account works and protected subject matter originated in third countries. In Article 4(2) of the Proposed Directive, the Commission has taken up the solution admitted by Article 7(8) of the Berne Convention¹¹¹ — the so called “comparison of terms of protection” and proposes to oblige the member states to apply this rule. The same rule has been provided for neighboring rights protection.¹¹² However, the concept of a country of origin, which cannot be carried over into the field of neighboring rights, has been replaced with the country of which the right holder is a national. It should be stressed that member states remain free to determine the third countries to whose nationals they wish to grant protection. However, if they grant protection, they have to apply the comparison of terms as provided in Article 4(3) of the proposed Directive.

Article 6(1) of the Proposed Directive provides that the provisions of the Directive shall only apply to rights which have not expired on or before December 31, 1994.¹¹³ Consequently, works protected by copyright and subject matter protected by neighboring rights which have fallen into the public domain will not benefit from the prolongation of that term of protection. Accordingly, a considerable number of works and subject matter will continue to be protected for different terms of protection throughout the Community. The Commission justifies this solution as a protection of the interests of third parties who have made investments with the view to publishing such works or subject matter once they fall into the public domain, as well as the protection of the interests of persons who have made investments in unprotected works and subject matter. The debates in the Parliament and the Council working group will show whether these interests may be safeguarded in a more precise manner and, at the same time, whether works and subject matter which have fallen into the public domain may become pro-

111. This provision states: “In any case, the term shall be governed by the legislation of the country where protection is claimed; however, unless the legislation of that country otherwise provides the term shall not exceed the term fixed in the country of origin of the work.” Berne Convention, *supra* note 24, art. 7(8).

112. See Proposal for Copyright Harmonization, *supra* note 99, art. 4(3).

113. Proposal for Copyright Harmonization, *supra* note 99, art. 6(1).

tected once again.

IV. OUTLOOK

After a long period of inactivity in the field of copyright, the Commission has put on the table an ambitious program of legislative measures to be taken and studies to be carried out in view of the completion of the Internal Market. In the near future, a further proposal for a Council Directive dealing with home copying of sound and audio-visual recordings is to be expected. Further fields of interest are reprography, moral rights, the resale right, and collecting societies. Moreover, the Commission continues to consolidate the role of the Community in the field of bilateral and multilateral external relations, particularly in the framework of WIPO and in negotiations with countries of central and eastern Europe.