

COPYRIGHT IN COMMUNITY LAW: RECENT DECISIONS OF THE

EUROPEAN COURT OF JUSTICE AND OF THE EUROPEAN

COMMISSION

submitted by

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" The fact that the European Community is seeking to assimilate the economies of the nine Member States does not mean that the cultural diversity of the Member States should be eliminated at the same time. Indeed, the merit of European culture is the variety of cultures and languages it contains, yet all within a broadly similar tradition. Because each Member State needs, for example, its own publishing industry, just as it needs its own television service, does not mean that there is a failure to integrate the Community."

Memorandum on European Community law and copyright in literary works, submitted by the British Publishers Association, September 1980.

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I.) Introduction.

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In the 1970s almost all intellectual property cases before the European Court of Justice dealt with patents and trademarks.¹⁾ In the same period the European Patent Convention²⁾ and the Community Patent Convention³⁾ came into effect, and the Commission's draft regulation and directive on trademarks was published.⁴⁾

The early 1980s have, however, evidenced a series of important copyright cases decided by the European Court of Justice. These cases, as Dietz points out⁵⁾, represent the actual commencement of a copyright jurisprudence of the Community Court. The relationship between copyright law and Community law⁶⁾ has not only been before the European Court of Justice, but has also been the subject matter of two important decisions⁷⁾ of the Commission of the European Communities. Other steps towards the building of a European copyright law are found in Commission documents notably those emanating from the division "Problems of the Cultural Sector".

In 1977 the Commission submitted a document to the Council entitled "Community Action in the Cultural Sector". It submitted an amendment "Stronger Community Action in the Cultural Sector"⁸⁾ in October 1982.

In addition, the British Publishers Association submitted a "Memorandum to the Commission of the European Communities and to Her Majesty's Government on European Community Law and Copyright in

Literary Works", which emphasizes the cultural aspects of copyright and the question of the existence or non-existence of a flourishing cultural industry.⁹⁾

Despite these developments it would nevertheless be an exaggeration to refer to a "true" European copyright law.¹⁰⁾ Indeed, Harris appears to be right in assuming that it looks as if most of the fundamental problems of copyright in the Community context are yet to come.¹¹⁾ The recent decisions of the European Court of Justice and the Commission can, however, be regarded as a first important step in the direction of building a European copyright law along the lines that have already taken place in patent and trademark law.

Before discussing and evaluating the above-mentioned decisions, the relationship between community and copyright law will first be discussed. The most important provisions of the copyright laws of the different Member States will be outlined. The organization of the E.E.C., the relationship between community law and domestic law and those provisions of the E.E.C. Treaty that are of particular interest and importance in respect to matters of copyright law will also be reviewed briefly.

II.) The Relationship between Copyright and Community Law.¹²⁾
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The relationship between copyright law and Community law is, to say the least, difficult and perhaps even one of conflict.¹³⁾

In its Hag decision¹⁴⁾ in 1974 the European Court of Justice held that one of the fundamental aims of the E.E.C. Treaty was the fusion of national markets into a single market.¹⁵⁾ To achieve such a single market¹⁶⁾ and not merely a more or less loose association of different markets, the Treaty tries to insure the so called "four freedoms".¹⁷⁾ These are free movement of goods, persons, services and capital.¹⁸⁾ Before treating the relationship between copyright and Community law in more detail it will be useful to look first at the nature of Community law and its fundamental concepts.

a) The Nature of Community Law.¹⁹⁾

The special juridical nature of Community law can be illustrated by referring to two decisions of the European Court of Justice.²⁰⁾

In Van Gend en Loos²¹⁾ the Court stated:²²⁾

" The purpose of the E.E.C. Treaty - to create a Common Market, the functioning of which directly affects the citizens of the Community - implies that this Treaty is more than an agreement creating only mutual obligations between the contracting parties. This interpretation is confirmed by the preamble to the Treaty which, in addition to mentioning governments affects individuals...we must conclude from this that the Community constitutes a new legal order²³⁾ in international law for whose benefit the States have limited their sovereign rights, albeit within limited fields."

In Costa v. ENEL²⁴⁾ the Court said:

" As opposed to other international treaties, the Treaty instituting the E.E.C. has created its own order which was integrated with the national order of the Member States the moment the Treaty came into force; as such it is binding upon them. In fact, by creating a Community of unlimited duration having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers²⁵⁾ resulting from a limitation of competence or a transfer of powers from the States to the Community, the Member States albeit within limited spheres have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves²⁶⁾."

Guy & Leigh draw two convincing conclusions from these passages that are of particular importance with respect to the nature of Community law. In the first place, Member States have abandoned part of their traditional sovereign powers in certain defined areas of activity by ratifying the E.E.C. Treaty. In areas covered by the Treaty, common policies have replaced national policies.²⁷⁾ The Treaty does not constitute merely an agreement to coordinate activities.²⁸⁾ In the second place, the Community exercises "real powers". Certain acts emanating from it are binding on the Member States, e.g. regulations under Article 189 of the E.E.C. Treaty. Sometimes too such acts are binding on individuals in the Member States.²⁹⁾

b) The Fundamental Concepts of Community Law.³⁰⁾

The European Court of Justice³¹⁾ has worked out two basic principles which are of eminent importance with regard to the relationship between Community law and national law. These concepts are supremacy of Community law and direct applicability. They will shortly be discussed.

aa) Supremacy of Community Law.³²⁾

The concept of supremacy of Community law means that Community law prevails if it conflicts with a rule of national law. This concept is not based on mere juridical theory, the juridical nature of the Community or the federal principle. It stems from the principle of functionality.³³⁾ The Community Court expressed the necessity of this principle for the Community clearly in the Costa v. ENEL case already cited:³⁴⁾

" The pre-eminence of Community law is confirmed by Article 189 which prescribes that Community regulations have an 'obligatory' value and are 'directly applicable within each member-State'. Such a provision which, it will be noticed, admits of no reservation, would be wholly ineffective³⁵⁾ if a member-State could unilaterally nullify its purpose by means of a Law contrary to Community dictates. It follows from all these observations that the rights created by the Treaty, by virtue of their specific original nature, cannot be judicially contradicted by an internal law, whatever it might be, without losing their Community character and without undermining the legal basis of the Community."³⁶⁾

The concept of supremacy of Community law is virtually undisputed³⁷⁾, since it is necessary to attain the aim of a common market. It does not matter whether the national law is earlier or later than the Community regulation with which it is in conflict. The rule lex posterior derogat legi priori³⁸⁾ does not apply in such a conflict.³⁹⁾ The Court has in fact reaffirmed the inapplicability of the lex posterior rule in many cases.⁴⁰⁾

bb) Direct Applicability.⁴¹⁾

Article 189 of the Treaty also provides that a regulation shall be 'binding in its entirety and directly applicable in all Member States'. This means that rights and duties are automatically created and incorporated into the legal order of each Member State without any national legislative or administrative act.⁴²⁾

Beside the practical precondition that a provision has to be sufficiently clear to be operable without the need for implementing legislation, the European Court of Justice has required several other conditions to be fulfilled.⁴³⁾ In the already quoted decision N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Tariefcommissie⁴⁴⁾ the Community Court held "it necessary to look at the spirit⁴⁵⁾, the economic aspects and the terms used" of a provision in order to determine whether it was directly applicable or not.

In Reyners⁴⁶⁾, for example, the Court held Article 52 of the Treaty⁴⁷⁾, which enshrines freedom of establishment, to be directly applicable. The Court referred to Article 7 of the Treaty⁴⁸⁾ and held that " the rule on equal treatment with nationals is one of the fundamental legal provisions of the Community".⁴⁹⁾ Although the general programme for the abolition of existing restrictions on freedom of establishment within the Community mentioned in Article 54 had not then been implemented, the Court held that Article 52 contained a basic right and therefore was not dependent on the implementation of a programme of progressive measures.⁵⁰⁾

In Defrenne v. Sabena⁵¹⁾ the Community Court also held Article 119 of the Treaty⁵²⁾, which enjoins equal pay for men and women, to be directly applicable. It referred to the place of Article 119 among the social objectives of the Community⁵³⁾ and also to the principle of free competition within the Community.⁵⁴⁾

c) Copyright and Community Law.⁵⁵⁾

The special relationship between copyright and Community law must now be examined. Copyright law is not as a matter of course enshrined in Community law.⁵⁶⁾

Already in 1958 Gotzen, Sen.⁵⁷⁾ postulated that industrial property was not covered by the E.E.C. Treaty. Invoking Articles 36⁵⁸⁾ and 222⁵⁹⁾ of the Treaty he argued that national law governed industrial property law and that a harmonization of the differ=

ent national laws was the only way to reach a common market in this particular field of law.⁶⁰⁾

In 1971 Gotzen, Jr.⁶¹⁾ contended in his dissertation that copyright was completely excluded from the scope of Community law.⁶²⁾ He argued that the European Community aims only at economic integration, and not at an intermixture of the various European cultures. He therefore rules out the application of Articles 85⁶³⁾ and 86⁶⁴⁾ to any phenomenon of copyright law, including performing right societies.⁶⁵⁾ Indeed, it is undisputed that the E.E.C. Treaty does not affect national sovereignty in cultural affairs.⁶⁶⁾

Copyright law protects the economic as well as the artistic or personality interests (moral rights) of the author.⁶⁷⁾ It can, at least in some European jurisdictions, be viewed as a special personality right, such as the right to a name.⁶⁸⁾ The dualism of economic and moral rights vested in an author is mirrored in the cultural-political and economic-political aims in the public interest of "culture-industry".⁶⁹⁾

It is, however, impossible to separate the cultural aspects from the economic aspects of copyright law and to apply Community law to the latter only on the ground that the E.E.C. Treaty does not affect national sovereignty in cultural affairs. The argument is, as Harris puts it briefly⁷⁰⁾, that copyright is an essential factor in the cultural life of the Community and that the strict application of the Treaty to cultural works, as though

they were tins of coffee⁷¹⁾ or packets of tablets⁷²⁾, would not attain the social and cultural objectives of the Treaty.

It has been argued that since copyright law has not been explicitly incorporated in Article 36 of the Treaty⁷³⁾ it is subject to the provisions of Article 30⁷⁴⁾. Ullrich⁷⁵⁾ has shown the harsh consequences of this viewpoint. Harris⁷⁶⁾ emphasizes that the expression "intellectual property", although recognized in Switzerland already a long time ago, was not fashionable when the E.E.C. Treaty was drafted, so that the term "industrial and commercial property" was used. It was not fully recognized internationally until 1967, when the Convention establishing the World Intellectual Property Organization (WIPO), Stockholm, was concluded. *What are they?*

It can hardly be disputed that cultural works differ substantially from mere consumer goods and that this can justify their exemption from the Treaty provisions concerning free movement of goods and free competition.⁷⁷⁾

A commercial aspect has, however, to be added to this 'cultural' argument. The culture-industry of the Community could be impaired, if subject to totally unrestricted competition. This is especially true for goods coming from outside the Community. Such goods, though legally imported, could hamper not only the cultural identity and development of one or more Member States, but also their commerce.⁷⁸⁾ *Examples?*

In spite of these arguments it would nevertheless appear appropriate to subject copyright to the provisions of the E.E.C. Treaty. The following arguments appear to have more weight than those just mentioned.

In the first place, the reasoning of Gotzen, Jr. that the Community does not have cultural sovereignty is basically correct, but very much exaggerated. Articles 52 et seq. concerning the right of establishment apply to all self-employed persons, including artists, writers or architects.⁷⁹⁾ In addition Article 57(1) of the Treaty⁸⁰⁾ dealing with recognition of diplomas applies to all self-employed activities.

In the second place, there are some fields of intellectual property law, e.g. character marketing and computer software, where the difference between copyright protection and the protection afforded by other intellectual property rights is so minute that a distinction between copyright and other intellectual property rights could only be drawn quite arbitrarily.⁸¹⁾

In the third place, the fact that the publishing that depends on copyright is a considerably profitable one shows that important economic interests are involved. These cannot simply be disregarded because of the 'moral right' factor in copyright.

In the fourth place, copyright is granted without regard to the quality or purpose of a work. A large number of works that enjoy copyright protection, probably even a substantial majority, are based on virtually minimal creative efforts and can hardly be viewed as products that try to influence or represent the cultu=

ral objectives of a specific European area. To emphasize the culturo-political aspect of copyright law for such products would be unjustified and idealistic.⁸²⁾

In the fifth place, the attitude that the economic aspects of copyright can be completely separated from the cultural and artistic aspects is not realistic and fails to find support in the constitutional law that enshrines the respective rights.⁸³⁾ The fact that the constitution protects freedom of art and freedom of the press, for example, does not mean that the legislature is prohibited from regulating the economic effects of such activities. On the contrary, the legislature might even be obliged in certain cases to adopt economic regulations in order to guarantee the exercise of these rights. The German Federal Supreme Court, for example, has held such a rule relating to the constitutional right of freedom of the press to be valid.⁸⁴⁾

An analogy can also be drawn between the Community and its Member States on the one hand and the states and the federal government in a federal system such as the U.S., West Germany, Canada and Australia on the other hand. The fact that the states (Länder) in West Germany have cultural sovereignty in that they have (exclusive) competence to enact laws and administrative regulations on cultural affairs does not imply that the federal government is prohibited from enacting laws and regulations on economic affairs (for which it has the necessary competence) even though these also affect cultural affairs.

It suffices that the requirements for federal competence in economic matters are met. The different competences, economic and cultural, refer only to functions and not to special limited fields.⁸⁵⁾ An example illustrating this is the jurisdiction of the U.S. Supreme Court on the relationship between performing arts and interstate commerce.⁸⁶⁾ *Explain further.*

For the same reasons it may therefore be concluded that Community law also applies in the field of cultural affairs if the requirements of the E.E.C. Treaty are met.

III.) National Copyright Law in the Member States of the E.E.C.

In this chapter a short survey of the different national copyright laws of the Member States of the E.E.C. will be given. Only some selected information that appears to be of practical importance will be presented. More detailed information on the applicable statutes and regulations can be found in the " Copyright Law Survey " of the World Intellectual Property Organization⁸⁷⁾ and the first chapter of Dietz' "Copyright Law in the European Community".⁸⁸⁾

It should also be kept in mind that the different copyright laws not only have different structures but their scope is also different. Matters covered by copyright law in one Member State may be covered by a different body of law in another Member State.⁸⁹⁾

a) Belgium.

The relevant legislation is contained in the Law on Copyright (Loi sur le droit d'auteur) of March 22, 1886, amended by the laws of March 11, 1958 and October 10, 1967. Belgian Copyright Law applies to literary and artistic works, including writings of all kinds and any other oral manifestation of thought (Art. 10), musical works (Art. 16) and works of plastic art (Arts. 19 to 21). No formalities are required.⁹⁰⁾ The same is the position in all other Member States.

The author of a literary or artistic work has the exclusive right to reproduce it (or authorize its reproduction) in any manner or form (Art. 1). The author of a literary work enjoys an exclusive right of translation (Art. 12). He also enjoys an exclusive right of performance (Arts. 15 and 16).

A special law (of June 25, 1921) affords artists an inalienable right in respect of works put up for public sale. Heirs and successors in title for the term of protection have the same rights. The rates that are applied range from 2 percent to 6 percent of the selling price. Droit de suite is conceded to foreign authors only on the basis of reciprocity.

Speeches made in deliberative assemblies, in public court proceedings or at political gatherings may be freely published, but only the author has the right to print them separately (Art. 10).

Copyright protection continues for 50 years after the death of the author (Art. 2). In the case of works published posthumously the term begins on the day the work is published, performed or exhibited (Art. 4).

Copyright is assignable and transmissible in whole or in part (Art. 3). Belgium is, inter alia, a party to the following multilateral conventions:

- Berne Convention: Brussels Act, 1948, as from August 1, 1951 (substantive provisions); Stockholm Act, 1967, as from February 12, 1975 (administrative provisions).

- Universal Copyright Convention, 1952, as from August 31, 1960.
- European Agreement on the Protection of Television Broadcasts, 1960 (with the 1965 Protocol and the 1974 Additional Protocol), as from March 8, 1968, with reservations under Article 3(1).

b) Denmark.

The relevant legislation is contained in the Law on Copyright in literary and artistic work (Lov om ophavsretten til litterære og kunstneriske værker) No. 158 of May 31, 1961, as amended on March 21, 1973 (Act No. 174) and June 8, 1977 (Act No. 240).

A person who has created a literary or artistic work has copyright therein (Art. 1). The provisions of the Act apply to works of Danish nationals and persons domiciled or habitually resident in Denmark and to works first published in Denmark (Art. 58).

The economic rights granted to the author include the exclusive right to produce copies (including recording) and to make it available to the public. A work is made available to the public by public performance or by having copies thereof offered for sale, lease or loan, or if it is otherwise distributed or publicly exhibited (Art. 2).

The moral rights include the right to claim authorship, the right to oppose changes or the making of the work available to the public in a manner or context prejudicial to the author's literary or artistic reputation or to his individuality (Art. 3).

No liability for payment is incurred if a disseminated work is reproduced in single copies for private use (Art. 11) or quoted, in accordance with proper usage, to the extent necessary for the purpose (Art. 14).

The general term of protection is 50 years after the year of the author's death (Art. 43). Photographic pictures are protected 25 years after the year of their production (Photo: Art. 15). Subject to the author's moral rights the right of disposal in a work may be transferred entirely or partially (Art. 27). The Act contains detailed provisions on public performance contracts (Art. 32), publishing contracts (Arts. 33 to 40) and film contracts (Arts. 41 and 42). After the author's death, the normal inheritance laws apply to copyright (Art. 30).

Denmark is, inter alia, a party to the same multilateral conventions listed for 'Belgium'. On condition of reciprocity, the application of the Act may be extended by Royal Decree to other countries or to works of international organizations (Art. 60; Photo: Art. 20).

c) Federal Republic of Germany.⁹¹⁾

The law is contained in the Act dealing with Copyright and Related Rights (Gesetz ueber Urheberrecht und verwandte Schutzrechte) of September 9, 1965, as amended up to October 25, 1978 and the Act dealing with the administration of copyright and related rights (Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten) of September 9, 1965.

Works of German nationals and Germans within the meaning of the Basic Law are protected regardless of whether or where they were published. Works of foreign nationals published within the jurisdiction of the Act are likewise protected unless the work or a translation thereof has been published elsewhere more than 30 days earlier. Stateless persons are granted the same rights as the nationals of the country where they reside permanently (Arts. 120 to 122). The term "works" includes only personal intellectual creations (Art. 2(2)). The Law protects literary, scientific and artistic works (Art. 2(1)).

Copyright gives protection to the author with regard to his intellectual and personal relations to the work, and in relation to the utilization of the work (Art. 11). The author has the exclusive right (= economic right) to exploit his work in material form (Art. 15(1)). This right comprises in particular rights of reproduction (Art. 16), distribution (Art. 17) and exhibition (Art. 18). The author also has the exclusive right to communicate his work publicly in non-material form (Art. 15(2)). This right comprises rights of recitation, performance, representation, presentation (Art. 19), broadcasting by radio or telegraphic means (Art. 20) and communicating broadcasts to the public by any technical device (Art. 22).

Furthermore, the author has the (moral) right to determine whether and how his work is to be disclosed to the public (Art. 12), the right of recognition of authorship (Art. 13) and the right to

prohibit any distortion or other mutilation of his work which would prejudice his lawful intellectual or personal interests therein (Art. 14). He also has the right to revoke licences and to prohibit reproduction in collections if the work no longer reflects his views. The licensee is entitled to be indemnified equitably (Arts. 42 and 46(4)).

Droit de suite: Should the original of an artistic work, other than an architectural work or work of applied art, be resold through, by or to an art dealer or auctioneer, 5 percent of any selling price of 100 German Marks or more is to be paid by the vendor to the author. The author may not waive this right in advance. Claims of this kind become unenforceable after 10 years (Art. 26).

It is permissible to reproduce or otherwise utilize works, including portraits, in judicial proceedings or those of public authorities (Art. 45). Other limitations of copyright are contained in Articles 47 - 60.

Copyright protection expires 70 years after the author's death. For posthumous works first publicly disclosed more than 60 but prior to 70 years after the author's death the period is 10 years after the public disclosure (Art. 64). In the case of co-authors it is 70 years after the death of the last surviving author (Art. 65) and in the case of unidentified authors 70 years after the public disclosure of the work (Art. 66). An author may grant a licence to another to use the work generally or in a particular

manner. The licence may be exclusive or non-exclusive (Art. 31(1)). Licences may be limited as to place, time or purpose (Art. 32).

Besides the abovementioned multilateral conventions, the Federal Republic of Germany has entered into bilateral agreements, inter alia, with the United States, Mexico, Colombia, Italy, Norway and France.

Foreigners enjoy copyright protection if the Federal Minister of Justice confirms by notice that German nationals enjoy protection corresponding to that granted to their own works in the state of which the author is a national (Art. 121(4)).⁹²⁾ Protection of moral rights is granted to foreigners unconditionally (Art. 121(6)).

d) France.⁹³⁾

The relevant provisions are found in Law No. 57-298 on Literary and Artistic Property of March 11, 1957 (Loi sur la propriété et artistique).

The author enjoys an incorporeal property right in his work by the mere fact of its creation (Art. 1). The Law protects the rights in all intellectual works, regardless of their kind, form of expression, merit or purpose (Art. 2).

The author's right includes elements of an intellectual, moral and economic nature (Art. 1). He enjoys the exclusive right to exploit the work in any form whatever and to profit economically therefrom (Art. 21). The moral rights of the author include the right to respect for his name, his authorship and his work. This right is vested in him personally and is inalienable and imprescriptible (Art. 6).

Droit de suite: Authors of graphic and plastic works have an inalienable right to participate in the proceeds of any sale of their works by public auction or through a dealer. The levy is 3 percent and applies only to purchase prices exceeding 10,000 francs (Art. 42).

The duration of the right to exploit is 50 years from the death of the author (Art. 21). For pseudonymous, collective or posthumous works, the term is counted from the date of publication of the work (Arts. 22 and 23). Moral rights are perpetual (Art. 6).

e) Greece.

The relevant provisions are found in the Law on Literary Property, No. 2387, of June 29, 1920, with amendments subsequently adopted and the Law on Copyright of Playrights, No. 3483, of December 16, 1909, with amendments subsequently adopted.

Original works, arrangements, copies or translations are protected without formality (Art. 1). The Law does not apply to sermons, speeches in the Chamber of Deputies or in a national assembly or congress, and to addresses by counsel (Art. 10).

Copyright continues for 50 years from the death of the author (Art. 2). Possessors of unpublished works of deceased authors enjoy protection for 50 years after they have been made public for the first time (Art. 5).

Authors may transfer their rights to others (Art. 1). However, if the right to publish has been transferred for remuneration and the work has not been published within 3 years of payment of the remuneration, the property therein reverts to the

author (Art. 12). Greece is a party to the Berne and the Universal Copyright Conventions.

f) United Kingdom.⁹⁴⁾

The relevant statute is the Copyright Act 1956 (came into force: June 1, 1957), as amended up to February 17, 1971.

Copyright subsists in every original literary, dramatic, musical or artistic work, if

- (a) in the case of a published work, the work was first published in the United Kingdom or the author was a qualified person at the time of the first publication or, if the author was dead at that time, was a qualified person immediately before his death;
- (b) in the case of an unpublished work, the author was a qualified person at the time of making the work (Sects. 2 and 3).

The term "qualified person", in the case of an individual, means a person, who is a British subject or a British protected person or a citizen of the Republic of Ireland, or a person domiciled or resident in the United Kingdom; in the case of a body corporate, it means a body incorporated under the laws of the United Kingdom (Sect. 1(5)).

Copyright in every literary, dramatic, artistic or musical work subsists for a period of 50 years from the end of the calendar year in which the author died.

Copyright is transferable by assignment or testamentary disposition or by operation of law, as personal or moral property. The assignment may be in whole or in part. No assignment is valid,

unless it is in writing, signed by or on behalf of the assignor (Sect. 36).

g) Ireland.

The relevant statute is the Copyright Act, No. 10, of 1963. Entry into force: October 1, 1964.

Copyright in relation to a literary, dramatic or musical work includes the right to reproduce it in any material form, to publish or perform it in public (which includes performance by the use of a record, by the exhibition of a cinematographic film or by wireless broadcast), to broadcast the work, or to cause the work to be transmitted to subscribers by diffusion service, or to do any of these acts in respect of an adaptation or translation of the work, or to adapt the work (Sect. 8(6)). The Act contains no provisions on moral rights or droit de suite.

h) Italy.

The relevant provisions are contained in the Civil Code (Codice Civile), confirmed by Royal Decree No. 262 of March 16, 1942, Book V (concerning "labour"), Heading IX, Para I, Articles 2575 - 2583 and the Law for the protection of Copyright and other rights connected with the exercise thereof, No. 633, of April 22, 1941 (Protezione del diritto di autore e di altri diritti connessi al suo esercizio), last amended on January 8, 1979.

Protected are intellectual works having a creative character appertaining to literature, music, painting, architecture, the theatre and cinematography, whatever their mode or form of expression (Art. 1).

Rights of economic utilization include the exclusive right to publish (Art. 12), to reproduce by any means (Art. 13), to diffuse using means of diffusion such as telegraphy, telephone, radio or television broadcasting etc. (Art. 16), to put into circulation with gainful intent (Art. 17) and to translate or elaborate (Art. 18).

Moral rights of the author include the right to claim authorship, to prohibit any distortion, mutilation or modification or any derogatory action in relation to the work which would be prejudicial to his honor or reputation (Art. 20). The author is also entitled to withdraw the work from commerce, subject to liability to indemnify any persons who have acquired rights to use it (Art. 142).

Droit de suite: Authors of works of art and of original manuscripts are entitled to a percentage of the price of the first public sale of original copies. In successive public sales they are entitled to 2 to 10 percent of the increase in value (Arts. 144 to 155).

Rights of economic utilization continue for the life of the author and a period of 50 years after his death (Art. 25).

i) Luxembourg.

The relevant provisions are contained in the Copyright Law (Loi sur le droit d'auteur) of March 29, 1972. The author's rights include intellectual, moral and economic elements (Art. 1) as specified below.

The author's exclusive right of exploitation is the right to reproduce the work or to communicate it in any other way to the public (Art. 3). It includes the right of public performance and any communication to the public of the performance, the right of public recitation and any communication to the public of the recitation (Art. 15), the right to make translations, arrangements, adaptations and other alterations (Art. 16), the right to broadcast and any communication to the public of the broadcast (Art. 23), the right of cinematographic adaptation and reproduction, of public performance and communication to the public of the works thus adapted or reproduced (Art. 26).

Moral rights include the right to claim authorship and to prohibit any distortion, mutilation, modification or other derogatory action which would be prejudicial to the author's honor or reputation (Art. 9).

The general term of protection is 50 years from the death of the author (Arts. 2 and 10).

k) The Netherlands.

The relevant law is the Law on the reorganization of Copyright Law (Wet houdende nieuwe regeling van het auteursrecht) of September 23, 1912, last amended by the law of October 27, 1972. The Law protects the rights of the author of any work in the literary, scientific or artistic fields, whatever the mode of expression may be (Art. 10).

Laws, decrees or ordinances issued by public authorities and judicial or administrative decisions are not protected by copyright (Art. 11).

Economic rights include the right of reproduction by any means such as translation, arrangement of music, cinematography, partial or total adaptation and recording (Arts. 13 and 14). They also include rights of publication, distribution, public recitation, performance or presentation, including broadcasting and transmission by wire (Arts. 1 and 12).

Moral rights are protected to the extent provided in Article 25. They include the right of the author to claim authorship, to prohibit modifications prejudicial to his honor or reputation etc.

Droit de suite: There are no provisions.

The term of protection is the life of the author plus 50 years or the death of the last surviving co-author in the case of joint works (Art. 37).

1) General Features of National Regulations.

Comparing the national copyright laws of the E.E.C. Member States a few points seem to be noteworthy.

In the first place, all ten Member States are parties to the most important international copyright conventions, i.e. the Revised Berne Convention (RBC) and the Universal Copyright Convention (UCC).

In the second place, it can be stated that quantitatively the Federal Republic of Germany, the United Kingdom, Ireland and Italy all possess very detailed laws, whereas Belgium's regulations are less detailed and sometimes incomplete. The laws of the remaining countries lie somewhere between.

In the third place, Denmark, the Federal Republic of Germany, the United Kingdom, Ireland, Italy and Luxembourg have, in addition to copyright law in the strict sense, regulations concerning so-called neighbouring or related rights. The remaining countries with the exception of France which has issued a special directive not included in copyright law leave the protection of related rights to the judiciary.

IV.) Provisions of the E.E.C. Treaty Pertinent to Copyright Issues.

In this chapter some provisions of the Treaty of special interest to copyright⁹⁵⁾ will be discussed.

a) Article 222 of the E.E.C. Treaty.

Article 222 of the E.E.C. Treaty provides that the Treaty shall in no way prejudice the rules in Member States governing the ownership of property. Although there was no dispute that Article 222 protected the rights of Member States to nationalize enterprises⁹⁶⁾ it was vigorously debated whether the scope of this provision went further.

In Parke, Davis & Co. v. Probel⁹⁷⁾ the Advocate-General Roemer demonstrated⁹⁸⁾ that the Commission was of the opinion that Article 222 was essentially only a reservation of the rights of Member States to transfer property into public ownership.⁹⁹⁾

Some writers¹⁰⁰⁾, however, suggest that Article 222 exempts all property rights including intellectual and industrial property, from the operation of other provisions of the Treaty, e.g. the regulation of free movement of goods and competition.

The European Court of Justice did not follow either of these opinions. Although it agreed partly with the Advocate-General, whose view was that Article 222 intended to preserve the basic elements of property law in the Member States, it made clear that the Community had the right to regulate the exercise of property

rights if this was necessary to secure the creation of a common market. The distinction between the existence and the exercise of rights¹⁰¹⁾ is fairly problematic, because in the last analysis one could ask what was the use of a right if every possible exercise was denied. The Community Court nevertheless continues to make the distinction.¹⁰²⁾

In the important Grundig case¹⁰³⁾ the Court of Justice held that Grundig's distribution practice, which resulted in the partition of the Common Market into separate national markets, violated the E.E.C. Treaty. Imports into France of Grundig products by other importers could not be prohibited.¹⁰⁴⁾ In short, the national trademark rights could not be used to impair the competition rules of the Common Market. NB

The essential difference between the two cases is that in the Parke case the Court sanctioned the use of national patent legislation to exclude importation in violation of the patent holders' rights. In the Grundig case Grundig and Consten (its French licensee) tried to bar the importation of Grundig products into France, although these products bore a genuine 'Grundig' trademark which indicated their true origin.¹⁰⁵⁾

b) Article 36 of the E.E.C. Treaty.¹⁰⁶⁾

As already discussed¹⁰⁷⁾ Gotzen, Jr. would exclude copyright law entirely from the application of the E.E.C. Treaty, since it contains important personal right factors and should therefore fall within the sphere of cultural-political matters appertaining to the jurisdiction and competence of the Member States.

Mestmaecker & Schulze¹⁰⁸⁾ and Johannes¹⁰⁹⁾ have pointed out that this view is simply too formalistic. Although both factors, the economic and the cultural, have to be kept in mind, "culture-industry" has to be viewed and judged on the basis that culturo-political and economico-political objectives are dependent on each other.

If, therefore, the term "industrial and commercial property" in Article 36, Sentence 1 is not deemed to comprise copyright law, then this provision has, at least, to be applied by way of analogy to copyright as Johannes¹¹⁰⁾ has emphasized.¹¹¹⁾

c) Articles 85 and 86 of the E.E.C. Treaty.¹¹²⁾

In addition to the provisions governing free movement of goods laid down in Articles 30 to 34 of the Treaty¹¹³⁾ the provisions of Articles 85 and 86 regulating free competition within the Common Market have to be examined.

Even if one agrees to apply cautiously the provisions relating to the free movement of goods¹¹⁴⁾ with the restrictions in Article 36, Articles 85 and 86 cannot be deemed inapplicable¹¹⁶⁾ by merely emphasizing the culturo-political aspect of copyright.¹¹⁷⁾

The European Commission has applied Articles 85 and 86 in the copyright cases GEMA¹¹⁸⁾, SABAM¹¹⁹⁾ and S.I.A.E.¹²⁰⁾ and the Court of Justice in the SABAM case.¹²¹⁾

V.) Copyright Decisions of the European Court of Justice.

The facts of this case which was submitted for a preliminary ruling by the Hanseatisches Oberlandesgericht (Hanseatic Court of Appeal) at Hambourg were as follows. Deutsche Grammophon was the respondent on appeal in the action for an injunction. It was the holder of a right in a recording under German law analogous to copyright.¹²³⁾ It produced grammophone records and marketed its products under a number of marks. Until 1971 the records under the mark 'Polydor' were subject to a fixed price of 20 Deutsche Mark (DM). The price for the retailers was DM 12,33 (tax excluded). A discount (depending on the quantity taken by the retailer) of up to 12 % was available.

In other countries in and outside of the European Economic Community Deutsche Grammophon sold its records either through its subsidiaries or through companies that belonged to Philip's Gloeilampen-Fabrieken and Siemens AG. Both hold 50 % of Deutsche Grammophon. In France distribution took place through Polydor S.A. in which Deutsche Grammophon held a 99,55 % interest.

Since the price in Germany was considerably higher than in other Member States, there was a great incentive to export to Germany.¹²⁴⁾ Many records came from France because the retail price was the lowest there. Records delivered to Deutsche Grammophon's French subsidiary were protected under German law¹²⁵⁾ and were sold after their return to Germany by Metro for a price less than the retail price that Deutsche Grammophon maintained in Germany.¹²⁶⁾ Metro refused to sign an agreement to maintain Deutsche Grammophon's retail price and business relations were broken off. Metro continued selling reimported records below Deutsche Grammophon's retail price for Germany. Deutsche Grammophon sued it successfully in the District Court (Landgericht) at Hambourg. The court referred to Section 17(2) of the German Copyright Act that reads:

" If the original work or copies thereof have been distributed through sales thereof with the consent of the holder of the right to distribute the work for the area within the jurisdiction of this Act, their further distribution shall be permissible."¹²⁷⁾

The court held this provision only applicable for distribution that had taken place in the Federal Republic of Germany. Hence the marketing of reimported records in Germany could be prohibited by Deutsche Grammophon. On appeal, the Hanseatic Court of Appeal suspended the proceedings and submitted the following two questions to the Court of Justice.¹²⁸⁾

" 1.) Does an interpretation of Articles 97¹²⁹⁾ and 85¹³⁰⁾ of the Act concerning Copyright and similar Protection Rights of September 9, 1965, whereby a German manufacturer of sound recordings, by virtue of his distribution rights, can prohibit the marketing in the German Federal Republic of recordings which it has itself supplied to its subsidiary in France which is legally separate but economically completely dependent, conflict with Article 5(2) or Article 85(1) of the E.E.C. Treaty ?

2.) Can the exercise of the distribution rights by the manufacturer of recordings be regarded as abusive if the tied selling price of the recordings is higher than the price of the same product re-imported from another Member State and at the same time the performers in question are bound by exclusive contracts to the manufacturer of the recordings (Article 86¹³¹⁾ of the E.E.C. Treaty).¹³²⁾"

Focusing on Articles 30 and 36¹³³⁾ the European Court of Justice referred to the distinction between the existence and the exercise of the right and applied the same principles developed for the limitation of Article 222 to Article 36¹³⁴⁾. It held:

" 1. It conflicts with the provisions regarding the free movement of goods in the Common Market if a manufacturer of recordings so exercises the exclusive right granted to him by the legislation of a member-state to market the protected articles as to prohibit the marketing in that member-state of products that have been sold by himself or with his consent in another member-State solely because this marketing has not occurred in the territory of the first member-State.

2. (a) A manufacturer of recordings who is granted an exclusive distribution right by national legislation does not have a dominant position within the meaning of Article 86 of the Treaty merely because he exercises this right. The situation is different if in the circumstances he is able to prevent effective competition in a considerable part of the market in question.

(b) A difference between the tied price and the price of the product re-imported from another member-State does not justify without qualification a finding of an abuse of a dominant position, although it may be conclusive evidence of such an abuse if it is large and cannot be explained on any objective grounds."¹³⁵⁾

In answering the first question the Court referred especially to Articles 36, 85 and 86 and focused on the extent the marketing of products imported from another Member State could be prohibited by the maintenance of a national protection right similar to copyright. It answered this question by arguing that a right analogous to copyright could be covered by Article 36, that the Treaty did not affect the existence of the industrial property rights mentioned in this article but that the exercise of the rights in question could be prohibited by the Treaty.

The Court held that Article 36 only allowed such restrictions on the free movement of goods as were necessary to protect the rights in question. It emphasized that the main aim of the Treaty was to create a single market, and it would conflict with this aim if respondents were allowed to divide the Common Market by means of a special national provision merely because the marketing of the records had not occurred in the Federal Republic of Germany.¹³⁶⁾

Discussing the second question the Court cited Article 86 of the Treaty which prohibits "one or more undertakings exploiting in an improper manner a dominant position in the Common Market or within a substantial part of it, in so far as trade between Member-States could be affected thereby."

The Court held that respondent did not hold a dominant position within the meaning of Article 86 just because it exercised its exclusive right to market the protected articles. If the artists in the recordings were bound to the manufacturer by exclusive contracts, the requirements for such a dominant position would be popularity of the artists with the public, duration and extent of the obligations undertaken by them and opportunities for other manufacturers of recordings to obtain artists for comparable performances.¹³⁷⁾

Moreover, the Court held that Article 86 presupposed the abusive exploitation of a dominant position. In the instant case this requirement had not been met because of the underlying facts. However, the evidence of such an abuse might be conclusive if it was substantial and could not be explained on objective grounds.¹³⁸⁾

The Courts decision encountered both support and sharp criticism. The Hanseatic Court of Appeal applied it fully.¹³⁹⁾ Desbois¹⁴⁰⁾, however, points out that Deutsche Grammophon had not been protected if it had sold in France, because it did not enjoy industrial or commercial property rights in recordings there, so that Parke, Davis¹⁴¹⁾ should govern the case.

The vast majority of writers¹⁴²⁾ concluded from Deutsche Grammophon that once a protected product has been sold in the Common Market, importation into another Member-State can not be prohibited by invoking Article 36 of the Treaty, provided that there were no relevant facts other than that of the importation itself.¹⁴³⁾

Kroitzsch¹⁴⁴⁾, a sharp critic of the decision, has argued that the substance of copyright, enshrined in Article 14 of the Federal German Basic Law (Grundgesetz), included also the power to prohibit reimportation.

Ulmer¹⁴⁵⁾, on the other hand, refers to discussions that an expert committee of the Department of Justice had had. If, for example, an article had been produced and marketed in Austria, Switzerland or France then the manufacturer should not have the power to prohibit importation into Germany. Another result could, however, be obtained in the case of a separated copyright. If, for example, the author had assigned the copyright for England and America to an English manufacturer and that for the European Continent to a German manufacturer, sale in England or America would not be governed by the German rule. The German manufacturer could therefore prevent the importation of the items into Germany. The Deutsche Grammophon decision throws light on the relationship between Community law and national laws that can be harmonized under Article 100 of the E.E.C. Treaty.¹⁴⁶⁾ The more extensive Community law is the less is the need to harmonize national laws.

In holding that prohibition of reimportation violates Community law the Court made it clear that an economically important part of industrial property law does not need harmonization.¹⁴⁷⁾

The rule of exhaustion is now recognized in Community law. The so-called "territoriality principle", i.e. the exclusion of legitimate marketing in another country, has been abolished within the European Community.

The view of Alexander¹⁴⁸⁾ has, therefore, prevailed¹⁴⁹⁾ that the abolition of the "territoriality principle" was not to be achieved by harmonization, but was a question of the free movement of goods.

b) Coditel I v. S.A. Ciné Vog Films.¹⁵⁰⁾

Considering the Community Courts statement in Deutsche Grammophon that only " a protection right analogous to copyright " was involved Dietz'assertation that the first Coditel case of March 18, 1980 (hereinafter called Coditel I) was the " first real and pure copyright case" decided by the European Court of Justice¹⁵¹⁾ appears to be justified.¹⁵²⁾

Ciné Vog, a cinematographic film distribution company, acquired from the producer "Les Films La Boétie" for seven years the exclusive right to show the film "Le Boucher" publicly in Belgium in all its versions in the form of cinema performances and television broadcasts.¹⁵³⁾ The contract was made on July 8, 1969. The right to broadcast the film on Belgian television could not be exercised until forty months after the first performance in Belgium.¹⁵⁴⁾

La Boétie later assigned the broadcasting rights to a German television broadcasting station. On January 5, 1971 German television's first channel broadcasted a German version of the film.

Coditel, the Belgian cable television companies, picked the film up and distributed it by cable to their subscribers.¹⁵⁵⁾ Ciné Vog found that the distribution by Coditel had jeopardized the commercial future of the film in Belgium and filed suit against Coditel.¹⁵⁶⁾

On June 19, 1975 the Tribunal de Première Instance (Court of First Instance) Brussels decided that Coditel, acting without the authorization of Ciné Vog, had infringed the copyright of Ciné Vog.¹⁵⁷⁾

On appeal, the Cour d'Appel (Court of Appeal) Brussels first examined Coditel's activities as an infringement of copyright and then Coditel's argument that prohibition on transmission of films, the copyright in which had been assigned by the producer to a distributor for all of Belgium, was contrary to the E.E.C. Treaty.¹⁵⁹⁾ Coditel argued that Article 59 of the Treaty¹⁶⁰⁾ prohibited restrictions on the freedom to provide services and not only restrictions on the freedom of activity of those providing services. On this the Court of Appeal submitted the following two questions to the European Court of Justice:¹⁶¹⁾

- " 1. Are the restrictions prohibited by Article 59 of the Treaty establishing the European Economic Community only those which prejudice the provision of services between nationals established in different Member States, or do they also comprise restrictions on the provision of services between nationals established in the same Member State which however concern services the substance of which originates in another Member State ?
2. If the first limb of the preceding question is answered in the affirmative, is it in accordance with the provisions of the Treaty on freedom to provide services for the assignee of the performing right in a cinematographic film in one Member State to rely upon his right in order to prevent the defendant from showing that film in that State by means of cable television where the film thus shown is picked up by a third party in another Member State with the consent of the original owner of the right ?"

The Court first turned to the second question, because if it was answered in the negative, the Belgian Court of Appeal would have the necessary information to decide the case in compliance with Community law.¹⁶²⁾ The issue was whether Article 59 of the Treaty prevented a limited assignment of the copyright in a film, e.g. for the territory of just one Member State. Such a practice could lead to a partition of the Common Market and therefore conflict with the goals of the Treaty.

Coditel¹⁶³⁾ claimed that the Community Courts case law on the application of Articles 30 and 36 to industrial property rights should be applied *mutatis mutandis* to services, i.e. that the Community law should prevail over the laws on copyright.¹⁶⁴⁾ Since both Ciné Vog and the German television channel had obtained assignments from the original copyright-owner, the Hag rule was applicable, i.e. the diffusion restriction, according to Coditel, represented

an illicit obstacle to the freedom to provide services in the Common Market.¹⁶⁵⁾

The opposite thesis that national laws on copyright were not displaced by the Treaty was upheld by the government of the Federal Republic of Germany.¹⁶⁶⁾ It claimed that national legal protection against re-transmission by an unauthorized third party of a film picked up in another Member State should be considered as a limitation on Community law. To apply the same rules as for trademark could, according to the government of the Federal Republic, damage the essence of copyright. Copyright (unlike trademark, in which the right was exhausted after marketing) embodied a lasting protection. This difference between trademark and copyright cases was due to the function of copyright in terms of property, remuneration and reputation which would not be exhausted when the right was exploited.¹⁶⁷⁾

The Commission¹⁶⁸⁾ taking an intermediate position agreed with the analogy drawn between industrial property rights and copyright. It drew, however, a distinction between copyright in a material medium and copyright in a performance.¹⁶⁹⁾ It supported the exhaustion rule (as in trademark cases) in copyright cases where the object was material, e.g. a book, film or sound recording, but not where such a material object did not exist, especially for performance rights. According to this view, exercising the copyright in question was only possible with the consent of

the author. He would therefore be able to obtain a fair remuneration.

The European Court of Justice¹⁷⁰⁾ followed largely the argument of the Commission. It concluded¹⁷¹⁾ that the exclusive assignee of the performing right in a film for all of a Member State may rely upon his right against cable diffusion companies which had transmitted that film on their diffusion network after having received it from a television broadcasting station in another Member State. It was clear from the answer given to the second question that Community law had no effect upon the application by the Court of Appeal of the provisions of copyright legislation in a case such as the one in question. Hence, the first question did not have to be answered by the Court of Justice.

c) Coditel II v. S.A. Ciné Vog Films.¹⁷²⁾

The second Coditel case (Coditel II) dealt with the same circumstances as in Coditel I.¹⁷³⁾ It was an appeal from the Cour d'Appel (Court of Appeal) which held that Article 85¹⁷⁴⁾ was not applicable to the dispute. The Court of Appeal submitted only the two abovementioned questions (concerning Articles 59 and 60 of the Treaty) to the European Court of Justice.

On appeal to the Cour de Cassation Coditel claimed, inter alia, that the Court of Appeal had erred in holding that Article 85 of the Treaty was not applicable to the case in point.¹⁷⁵⁾ Coditel argued that exclusive copyright licences, especially on a territorial basis, were incompatible with the competition rules of the Treaty. According to Coditel Article 36 could not restrict the scope of application of Article 85.¹⁷⁶⁾ Considering the submission of Coditel as a question of interpretation of the E.E.C. Treaty the Cour de Cassation referred the following question to the Court of Justice:

" Where a company which is the proprietor of the rights of exploitation of a cinematographic film grants by contract to a company in another member-State an exclusive right to show that film in that State, for a specified period, is that contract liable, by reason of the rights and obligations contained in it and of the economic and legal circumstances surrounding it, to constitute an agreement, decision or concerted practice which is prohibited between undertakings pursuant to the first and second paragraphs of Article 85 of the Treaty or are those provisions inapplicable either because the right to show the film is part of the specific subject-matter of copyright and accordingly Article 36 of the Treaty would be an obstacle to the application of Article 85, or because the right relied on by the assignee of the right to show the film derives from a legal status which confers on the assignee protection erga omnes and which does not fall within the class of agreements and concerted practices referred to by the said Article 85 ? " ¹⁷⁷⁾

The Court explicitly stated that Article 36 applied to copyright and reiterated the distinction between the existence of a right, unaffected by the Treaty, and its exercise which would possibly be subject to the provisions of the Treaty. It then went on to reason that some aspects of the exercise of rights might be incompatible with Article 85. This was true where the agreement or concerted

practice might have as its object or effect distortion of competition in the Common Market.

The Community Court went on to say that the mere fact that a sole licensee had been granted the exclusive right to exhibit the film in the territory of a Member State was insufficient to support the finding of a violation of Article 85. The Court referred to the characteristics of the cinematographic industry and its different markets in the Community, especially those relating to dubbing and subtitling for the benefit of different language groups, to show that an exclusive licence, in itself, did not distort or prevent competition. The court focused on the specific facts of each case in question, i.e. whether there were legal or economic circumstances that restrict film distribution to an appreciable degree or distort competition on the cinematographic market. It referred the case back to the national court, because the file did not provide the necessary information in this respect. The Court of Justice held that it was for the national court to establish whether or not the exercise of an exclusive right to exhibit a cinematographic film created barriers which were artificial and unjustifiable in terms of the needs of the cinematographic industry. It is also for the national court to decide if there was the possibility of charging fees which exceeded a fair return of investment, or an exclusivity the duration of which was disproportionate to those requirements, and whether or not, from a general point of view, such exercise in a given geographic area was such as to prevent, restrict or distort competition within the Community. 178)

d) Musik Vertrieb Membran and K-tel International v. GEMA.¹⁷⁹⁾

GEMA is a German society seeking to protect copyrights. On behalf of its members it seeks to enforce their mechanical right in musical works and charges a fee of 8 percent of the German price on records made there.¹⁸⁰⁾ Both cases stem from actions taken by GEMA against the two undertakings Membran and K-tel which had imported tapes into the Federal Republic of Germany.¹⁸¹⁾ The musical works recorded on these tapes were protected by copyright. Case 55/80 was concerned with records and cassettes originating in various countries, including Member States of the Community. Case 57/80 involved records originating in the United Kingdom. In both cases the product involved was lawfully produced and marketed in a Member State by the copyright-holder himself or with his consent. The licences and the calculation of royalties for the copyright-holder had, however, been based solely on distribution in the country of manufacture, i.e. 6,25 percent in the United Kingdom.¹⁸²⁾

GEMA claimed that the importation of these tapes and records constituted an infringement of copyright. It therefore claimed payment of the royalties, which would be due under licence in Germany (8 percent) minus the amount of the lower royalties that had already been paid in the manufacturing Member State.¹⁸³⁾ The German Federal Court of Appeal (Bundesgerichtshof) agreed with GEMA's contention. However, it asked whether such a use of copyright was compatible with the principle of free movement of goods and submitted the following question to the European Court of Justice:

" Is it compatible with the provisions concerning the free movement of goods (Article 30 et seq. of the E.E.C. Treaty) for a management company entrusted with the exploitation of copyrights to exercise the exclusive rights held by the composer in member-State A to the transcription of his musical works onto sound recordings, their reproduction and marketing in such a way as to require, in respect of the marketing in member-State A of sound recordings which have been produced and placed on the market in member-State B - the composer's authorisation being however restricted to member-State B against payment of a licence fee which is calculated on the quantity and final selling price relevant to that member-State - a payment which is equal to the customary licence fee in respect of production and marketing in member-State A, but which takes into account the (lower) licence fee which has already been paid in respect of production and marketing in member-State B ? "

The European Court of Justice first stressed that sound recordings, even if incorporating musical works, were subject to the rules on free movement of goods. It concluded that national legislation that resulted in obstructing trade in sound recordings between Member States had to be regarded as a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.¹⁸⁴⁾

The Court then discussed Article 36 that provides an exception to the application of Articles 30 to 34 and held that copyright was within the ambit of Article 36. Citing the Terrapin case¹⁸⁵⁾ the Court, once again, ascertained that the proprietor of an industrial property right protected by the law of a Member State could not rely on that national law to prevent the importation of an item that had been lawfully marketed in another Member State by the proprietor himself or with his consent.¹⁸⁶⁾

Although the Court of Justice agreed with the French government that copyright comprised also moral rights, it did not follow the French conclusion that copyright had to be clearly distinguished from patents and trademarks, but emphasized the economic side of copyright. The Court said that in the instant case there was no reason to exempt copyright from the scope of Article 36. The Court gave as a reason for this that the commercial exploitation of copyright was not only a source of remuneration for the owner, but that it also constituted a form of control on marketing exercisable by the owner or GEMA.¹⁸⁸⁾

The Court of Justice then rejected the attitude of the Belgian and Italian governments saying that in the absence of harmonization the principle of territoriality of copyright laws should prevail and pointed out that a united market could not be attained, if nationals of Member States were able to divide the market.

GEMA, however, counter-argued that the marketing of the records was not the issue in the case but equality of royalties paid for any distribution of the sound recordings on the German market. The copyright-holder, according to GEMA, had a legitimate interest in receiving the benefit of his artistic effort regardless of the degree of distribution. Hence, the author should be entitled to an equal royalty in the country where the product was marketed, i.e. to the 8 percent granted in the Federal Republic of Germany.¹⁸⁹⁾

The Court of Justice held that no provision of national legislation could permit an undertaking like GEMA to charge a levy on products imported from another Member State where they had been put into commerce with the consent of the copyright-holder. This, as the Court put it bluntly¹⁹⁰⁾, would result in allowing the establishment - by a private body¹⁹¹⁾ - of a customs duty on sound recordings already in free circulation in the Common Market. Furthermore, it would result in the partitioning of national markets.

The Court further stated¹⁹²⁾ that GEMA by claiming the difference between 8 (West Germany) and 6,25 (United Kingdom) percent royalties tried to neutralize the price differences resulting from U.K. conditions and to eliminate the economic advantage derived from the establishment of the Common Market for importers of sound recordings. It concluded, citing Centrafarm v. Sterling¹⁹³⁾, that disparities existing because of the absence of harmonization of national rules on the commercial exploitation of copyrights should not, and could not, be used to impede free movement of goods in the Common Market.¹⁹⁴⁾

The Court therefore ruled that Articles 30 and 36 of the Treaty had to be interpreted in the abovementioned way. Hence GEMA was precluded from obtaining any remuneration.

The Bundesgerichtshof¹⁹⁵⁾, which had to decide the case in the last resort, gave some relief to GEMA against the strict ruling of the Court of Justice by accepting the argument that there was no

first marketing at all. The sound recordings concerned were not really put on the market in the country of origin but were directly delivered to a sister company in the country of import.¹⁹⁶⁾

e) Dansk Supermarket A/S v. A/S Imerco.¹⁹⁷⁾

Imerco, a Danish limited company with shareholders who are hardware merchants, as are its customers, operates as a wholesaler and has its registered office in Glostrup, Copenhagen. On the fiftieth anniversary of its foundation in 1978 it ordered from Broadhurst & Sons Ltd., a china manufacturing company in the U.K., china services decorated with pictures of Danish royal castles and the inscription on the reverse side "Imerco Fiftieth Anniversary". As a result of the high quality standards which were stipulated for the manufacture of the services approximately 1,000 substandard services were not accepted.¹⁹⁸⁾

Imerco and Broadhurst concluded an agreement permitting Broadhurst to sell the substandard services itself, but not in the Scandinavian countries. Broadhurst sold some of the services in the U.K. subject to a prohibition on resale in Denmark.¹⁹⁹⁾

Dansk Supermarket, which has its registered office in Århus, bought 300 odd services through a Danish intermediary, who had bought them in the U.K. It offered them for sale in Denmark at prices considerably lower than those of the services sold by Imerco's members, which were not substandard.

Confronted with Dansk Supermarket's refusal to withdraw the services from sale Imerco instituted proceedings before the Byret

(Court of first instance) Århus and obtained a provisional injunction prohibiting Dansk Supermarket from selling the services in question.²⁰⁰⁾

On appeal the Sjø og Handelsret i København (Maritime and Commercial Court, Copenhagen) upheld the injunction stating that Dansk Supermarket's actions were in breach of approved commercial usage and infringed Articles 1 and 5 of Law No. 297 of June 14, 1974 on marketing (Lov om Markedsføring).²⁰¹⁾

Dansk Supermarket appealed against the judgment to the Højesteret (Supreme Court) claiming that the provisions of Community law, especially Articles 30 and 85 of the E.E.C. Treaty, precluded the application of the Danish law on marketing. The Supreme Court stayed the proceedings and submitted the following question to the European Court of Justice:

" Do the provisions of the E.E.C. Treaty or measures in implementation thereof preclude the application to the case of the Danish laws on copyright, trademarks and marketing?"²⁰²⁾

In its reply the Court of Justice first stated that only Articles 30 and 36 of the Treaty were pertinent and that Article 85 was irrelevant to the case. Imerco relied on the national law on protection of copyright and trademarks because of the creative work entailed by the design and production of the service, on the one hand, and because of the affixing of its name to the service, on the other hand.²⁰³⁾

The Court deemed it sufficient to invoke the abovementioned Terrapin case²⁰⁴⁾ and distinguished, once again, between the existence and the exercise of a right. Moreover, it reiterated that Article 36 admitted exceptions to the free movement of goods principle only where exceptions were justified for the purpose of safeguarding rights which constituted the specific subject-matter of that property.

The Court went on to say that the exclusive right guaranteed by the legislation on industrial and commercial property was exhausted when a product had been lawfully distributed on the market in another Member State by the holder of the right or with his consent.²⁰⁵⁾

The Danish Government explained that the Law of June 14, 1974 upon which Imerco relied was comparable in certain respects to the legislation in force in other Member States against unfair competition, but that it also had other objectives, in particular the protection of consumers.²⁰⁶⁾

The Community Court remarked that in the case of importation of goods from one Member State into another Community law did not prevent the application of the provisions on marketing in the state of importation. The Court concluded therefore that the marketing of imported goods could be prohibited if the conditions on which they were sold constituted an infringement of marketing usages considered proper and fair in the Member State of importation.²⁰⁷⁾ The Court went on to say that the mere fact of importation, however, was in any case insufficient to constitute such an infringement.²⁰⁸⁾

Moreover, the Court held that it was in any event not for individuals to derogate from the mandatory provisions of the Treaty on the free movement of goods. Finally, the Court replied to the question submitted that Article 30 of the Treaty had to be interpreted as meaning

"that the importation into a Member State of goods lawfully marketed in another Member State could not as such be classified as an improper or unfair commercial practice, without prejudice however to the possible application of legislation of the State of importation against such practices on the ground of the circumstances or methods of offering such goods for sale as distinct from the actual fact of importation; and that an agreement between individuals intended to prohibit the importation of such goods could not be relied upon or taken into consideration in order to classify the marketing of such goods as an improper or unfair commercial practice."²⁰⁹⁾

VI.) Copyright Decisions of the European Commission.

Important decisions of the Commission in GEMA-Statutes and GVL will be discussed. The latter case has also been before the Court of Justice. That decision will be treated after discussion of the Commission's decision.

a) Re The GEMA Statutes.²¹⁰⁾

GEMA²¹¹⁾, established in Berlin/West Germany, is an economic association incorporated under German law for the purpose of protecting authors and administering their rights. It administers as trustee copyrights in musical and cinematographic works assigned to it by its members or third parties ("beneficiaries").²¹²⁾

The protection and administration assigned to GEMA is exclusive. During the currency of the contract of assignment GEMA is entitled to authorize performances, radio and television broadcasts etc. in its own name. While only composers, librettists and music publishers can enter into a contract of assignment with GEMA, music publishers are in a special position, because they are not creators, but merely reproducers. Having an intermediary role their interests may run counter to those of composers and librettists.²¹³⁾

Under section 11 of the German Act on the protection of copy-right and related rights (Gesetz über die Wahrnehmung von Urheber-rechten und verwandten Schutzrechten) GEMA is obliged to permit usage to any person so requiring.²¹⁴⁾ GEMA had applied to the Com-mission²¹⁵⁾ for negative clearance. Failing such clearance it applied for approval of an additional provision in its statutes. This would involve an amendment of the articles whereby authors could protect themselves against harmful practices by music users. The amendment²¹⁶⁾ would prohibit members from concluding agreements with music users under which the latter receive a direct share of the income of GEMA-members if they play certain pieces of their compositions to the detriment of those GEMA-members who have not entered into such agreements.²¹⁷⁾

The Commission had no objections to GEMA's amendment.²¹⁸⁾ In its legal assessment the Commission affirmed that GEMA was holding a dominant market position within the meaning of Article 86 of the Treaty.

The Commission cited the European Court of Justice' decision in the SABAM case²¹⁹⁾ of 1974. The test was whether the collecting society, through its statutes, takes account of all the relevant interests in such a way that a balance is ensured between maximum freedom for librettists, composers and publishers to dispose of their works on the one hand and the effective management of their rights by the collecting society on the other hand.²²⁰⁾ Unlike in the first GEMA-Statutes case of 1971²²¹⁾, the European Commission showed more understanding of the practical need for strong and efficient collecting societies for authors, especially because of powerful users.²²²⁾ It underlined the necessity for GEMA to avoid being influenced in its activities by parties representing the users' interest.²²³⁾ It pointed out the detriment to GEMA-members who did not have special agreements and it concluded that the new provision provided a means, which was not excessive. The Commission deemed the new provision to be effective in preventing these harmful practices and thus not constituting an abuse of dominant position within the meaning of Article 86.²²⁴⁾

b) Interpar v. GVL.²²⁵⁾

The Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), which has its registered office in Hambourg, is a German collecting society set up to manage rights which are vested pursuant to the German Act on Copyright and Related Rights (Urheberrechtsgesetz)²²⁶⁾ in performing artists, film artists, visual and sound recording manufacturers and promoters or which are assigned to manufacturers and promoters.²²⁷⁾

Articles 76(2) and 77 of the German Copyright Act grant artists a statutory right to payment of royalties where a performance has been recorded on a visual or sound recording with their consent and is subsequently broadcast or otherwise made public by way of secondary exploitation.

Where an artist's performance has been recorded with his consent on visual or sound recording and the recordings have been published, the artist may no longer prevent broadcasting or public reproduction of such recordings by relying on his rights as a performer. According to Article 86 of the German Copyright Act, manufacturers of sound recordings have a claim against the artist for a share in the royalty payable in respect of secondary exploitation.²²⁸⁾

Prior to November 21, 1980 GVL refused to enter into management agreements with foreign artists not residing in Germany²²⁹⁾ and to manage their performer's rights in Germany. GVL does not, however, deny that foreign artists are entitled to payment of royalties in respect of secondary exploitation in Germany.²³⁰⁾

On November 21, 1980 GVL decided to conclude management agreements with artists, who were nationals of a Member State, but were not residents in Germany.²³¹⁾ It always maintained, however, that it was not legally obliged to and that it could go back to its former practices. It argued that the residence-requirement was a justified condition for the management of rights. It was legally

because German artists were still unable to exploit their performer's rights abroad.²³²⁾ The Commission held that GVL's conduct prior to November 21, 1980 constituted an abuse of a dominant position within the European Community and a violation of Article 86 of the E.E.C. Treaty.²³³⁾

In its legal assessment the Commission applied Article 86 of the Treaty for GVL's conduct²³⁴⁾ and distinguished between the period prior to November 21, 1980 and afterwards.²³⁵⁾

In the first place, the Commission ruled that GVL was an undertaking within the meaning of Article 86, because it participated in the commercial exchange of services. GVL's lack of a profit motive was deemed to be irrelevant in this context.²³⁶⁾ The Commission then stated that GVL was in fact the only company dealing with the management of secondary exploitation rights in Germany and was thereby monopolizing a substantial part of the Common Market.²³⁷⁾ This factual monopoly was not a legal one. Examining the requirement of an abuse of dominant position the Commission referred to general principles laid down in the E.E.C. Treaty and especially to Article 7 which provides that any discrimination on grounds of nationality shall be prohibited. The Commission determined that GVL's refusal as a de facto monopoly to contract with non-resident foreigners constituted an abuse within the meaning of Article 86, particularly because these foreign artists, as GVL knew, were entirely dependent on GVL's services.²³⁸⁾

GVL's conduct also violated Article 86(c)²³⁹⁾ because GVL had discriminated against certain trading partners on grounds unrelated to the transaction involved.²⁴⁰⁾

Moreover, the Commission rejected GVL's defence that the legal position with regard to the recognition of performing rights within the Community was not uniform and was complex. The Commission recognized, however, that manufacturers and artists only had a statutory right to receive royalties in certain Member States and that the remaining Member States granted statutory rights of a similar nature to artists only or to manufacturers only or not at all. The Commission did not consider these facts sufficient to provide a justification.²⁴¹⁾

On the question of the effect on trade between Member States, the Commission, citing Consten and Grundig v. Commission²⁴²⁾, held that the sole criterion was whether GVL's conduct was likely directly or indirectly, actually or potentially, to restrict freedom of trade in goods or services in a manner which ran counter to the attainment of the objectives of a single market.²⁴³⁾ The Commission deemed this requirement to be fulfilled.

In respect of GVL's conduct after November 21, 1980 (equal treatment of Germans and foreigners) the Commission held that the procedures were still not perfect, particularly the question of apportioning royalties fairly, but that they were excusable because of great practical difficulties.²⁴⁴⁾

Later, GVL brought an action against the European Commission under Article 173(2) of the E.E.C. Treaty for a declaration that the Commission's decision was void.²⁴⁵⁾ The European Court of Justice dismissed GVL's application and upheld the Commission's decision in its entirety.²⁴⁶⁾

VII.) Conclusions.

It appears doubtful, at least, whether Harris is right²⁴⁷⁾ that the European Court of Justice will assimilate the different branches of intellectual property in the future. The same is true for his conclusion that as far as copyright was concerned the assimilating process was as nearly completed as the special features of copyright permitted.²⁴⁸⁾

As has been shown²⁴⁹⁾ the following basic structures have to be kept in mind and should determine to a great extent future copyright issues that will come before the European Court of Justice: ?

The Member States of the European Community have transferred only part of their sovereignty in economic matters to the Community. This is not true, however, for cultural matters. Copyright as pointed out²⁵⁰⁾ contains economic and cultural aspects at least in some countries of the European Community. The latter aspects are not present in patents and trademarks.

It is therefore hardly surprising that the purely economic fields of patents and trademarks are far more developed on the European level than copyright. The E.E.C. presently possesses a modern and well-functioning European patent system, which as Dietz²⁵¹⁾ states still functions somewhat outside the Common Market and beyond its frontiers. Nevertheless, it is already foreseeable that it will be completed by a 'real' common market patent in the near future.

In the field of trademarks the development is certainly not as advanced as in patents, but there already exists a very elaborate draft regulation for a European trademark system.²⁵²⁾

Patents and trademarks demonstrate the truth of a phenomenon that Europe has often experienced. This is that the trend towards harmonization and unification of law manifests itself in the purely economic fields of law.

It is no accident that, with the exception of the Deutsche Grammophon case, the Community Court did not have any copyright cases to decide before this decade and that copyright still has a long way to go to reach the level of "Europization" that patents and trademarks have attained. The two elements of copyright, economic and cultural, prevent a rapid evolution and require consideration and patience.

It must not, however, be forgotten that the unification of European law constitutes both a political and a juridical duty.

Over-emphasizing the cultural aspects of copyright and in particular exempting copyright from the application of Community law militates against the aims of the E.E.C. Treaty. Hence it appears necessary to tread the difficult path of a case-by-case evolution and to weigh realistically the economic and cultural aspects of copyright against each other. It seems unavoidable that the ideology of the decision maker in question will influence the future development of copyright on the European level.

Finally, some observations on the copyright decisions of the European Court of Justice might be interesting:

The Coditel I and the subsequent GEMA case have some important parallels.²⁵³⁾

Both cases involved questions of royalties and stemmed from an action for infringement of copyright. Both cases focussed on the question whether copyright could fall under the notion of 'industrial property rights' for the purposes of the E.E.C. Treaty. In the Coditel I case however the main issue was the problem of discriminatory treatment and the case involved the freedom to provide services.²⁵⁴⁾ The GEMA case dealt with free movement of goods and focussed more on the issue of equal royalty payments. As for the outcome of the cases, in Coditel I copyright considerations prevailed over the aims of the E.E.C. Treaty, while in GEMA the reverse result was obtained.

From a practical point of view it is important to note that the Court of Justice, without²⁵⁵⁾ discussion, determined in Coditel I that copyright is an " industrial and commercial property right " within the meaning of Article 36 and in consequence subject to the test that distinguishes between the existence and the exercise of a right in copyright protection issues.

In the traditional language of some national copyright laws²⁵⁶⁾ on this distinction it can be stated that the exhaustion rule is only applicable to distribution after **first** marketing and not to performing rights.

In the Coditel II case the Court confirmed that the principles of Article 36 were important concerning freedom to provide services. In particular the problem of exclusive licences, a bone of contention between the Commission and European industry²⁵⁷⁾, was an important issue in Coditel II. In the important "Maize-seed" decision of June 8, 1982²⁵⁸⁾ the Court of Justice clarified this question, at least, to some extent.

In Coditel II it was held that the grant of an exclusive licence did not per se constitute an infringement of Article 85(1) thus confirming Coditel I. Referring to the cultural background of the film industry the Court stated in an obiter dictum that cases involving an unnecessarily long period of exclusivity, for instance, could constitute an infringement of Article 85(1).

Dietz' conclusion²⁵⁹⁾ that there is no guarantee that exclusive licences will always find the approval of the Court of Justice is therefore justified.

The GEMA case shows that the European Court of Justice is not willing to accept and consider the "moral right" side of the copyright "coin" in every case as a crucial criterion.

The Court approved of the attitude of the French Government that copyright included moral right aspects, but the French Government did not win the case.

If the outcome of Coditel I, as Harris puts it²⁶⁰⁾, had been favorable to the maintenance of copyright, notwithstanding the arguments based on the provisions of the Treaty, the outcome of the GEMA case was in principle favorable to the maintenance of the provisions of the Treaty, notwithstanding the arguments based on copyright.

The Imerco case was primarily decided in the framework of unfair competition rather than under copyright. This might be at least one explanation of the fact that the Community Court put so much emphasis on the goals of the Treaty and the possibility that private persons could divide up the Common Market under the guise of protection of copyright.

In the GVL case, both in the Commission's decision and the Court's judgment, the Commission and the Court showed a firm will to enforce E.E.C. Treaty regulations. GVL had however objectively good reason from a practical point of view to reject foreigners coming from countries that did not protect the justified interests of German authors. Nevertheless, this decision deserves approval also, because it represents a first step in the right direction.

Dietz' proposal²⁶¹⁾ to make more efforts to harmonize the law in this field and only then to oblige collecting societies to do justice to foreign authors appears too difficult to be realized in practice in the near future. Certainly, copyright harmonization is an important issue and duty, not only in the field of copyright itself, but also in the field of Community law.

The strong determination of the European Court of Justice to realize the ends of the E.E.C. Treaty could promote the assimilation of copyright to patent and trademark law.

Although, as Dietz states, and with respect correctly²⁶²⁾, it is true that thousands and tens of thousands of protected works often only have a minimal relation to culture in the specific sense of the word, Dietz and the passage quoted from the Memorandum submitted by the British Publishers Association appear to show the right way which is to avoid the separation of copyright

law from its cultural background.

The more difficult way requires a full analysis of the economic and cultural elements of the case in question.

It should not be shunned.

VIII.) Footnotes

1

An illustrative list and discussion of cases can be found in the articles of B. Harris, The Application of Article 36 to Intellectual Property, 1 Eur. L. Rev. 515 (1979) and The Exhaustion Principle and the Centrafarm Cases, 4 Eur. L. Rev. 379 (1979). An important exception is the copyright case Deutsche Grammophon v. Metro-SB-Grossmaerkte [1971 - 1973 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8106, which will be discussed later.

2

Convention on the Grant of European Patents, Munich 1973.

3

Convention for the European Patent for the Common Market, Luxembourg 1975, 19 O. J. Eur. Comm. (No. L 17) 1 (1976).

4

See 1980 Eur. Comm. Bull. supp. 5, 8.

5

A. Dietz, Copyright Issues in the E.E.C.: The recent decisions of the European Court of Justice and of the Commission, 30 J. Copyright Soc'y U.S. 517 (1983).

6

France, Italy, West Germany, Belgium, Luxembourg and the Netherlands established the European Economic Community (E.E.C.) in 1957. They signed and ratified the Treaty of Rome (Treaty Establishing the European Economic Community, signed March 25, 1957, 295 U.N.T.S. 2). An instructive description is given by D. Thompson, The Common Market: A New Legal Order, 41 Wash. L. Rev. 385 (1966). For a detailed treatment of copyright see Hoffman, Copyright and the Treaty of Rome - Recent Developments, 9 Eur. Intell. Prop. Rev. 254 (1981).

7

Interpar v. Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), 33 Common Mkt. L. R. 221 (Eur. Comm'n 1981), Re the GEMA-statutes, 34 Common Mkt. L. R. 482 (Eur. Comm'n 1981).

Footnotes (cont.)

8

Dietz, supra note 5, at 518.

9

Id.

10

Dietz, supra note 5, at 519 even thinks that most cases decided - with the exception of the two Coditel cases, which will be discussed later - worked more in the direction of reducing copyright protection. He also supposes that if copyright law was not able to build up some "positive" regulations (like in patent and trademark law) in favour of authors and other copyright owners, there was a great risk that the rights granted by different national copyright laws will be further diminished on the level of Community law without compensation.

11

B. Harris, Community Law and Intellectual Property: Recent Cases in the Court of Justice, 19 Common Mkt. L. Rev. 61, 62 (1982).

12

For details see L. Constantinesco, Das Recht der Europaeischen Gemeinschaften - Das institutionelle Recht 639 -85 (1977); H. Ipsen, Europaeisches Gemeinschaftsrecht 255 - 312 and 545 - 712 (1972) with an extensive bibliography; D. Wyatt & A. Dashwood, The Substantive Law of the E.E.C. 25 - 74 (1980).

13

Dietz, supra note 5, at 519; D. Guy & G. Leigh, The E.E.C. and Intellectual Property 6 - 7 (1981).

14

Van Zuylen Frères v. Hag AG, 1974 E. Comm. Ct. J. Rep. 731, 14 Common Mkt. L. R. 127.

15

Hag, supra note 14, at 744, 14 Common Mkt. L. R. at 144.

Footnotes (cont.)

16

The basic objectives of the E.E.C. Treaty are laid down in Article 2:

"The Community shall have as its task, by establishing a common market and approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it."

For more detailed explanations see 1 H. Smit & P. Herzog, The Law of the European Economic Community: A Commentary on the E.E.C. Treaty 2.01 - 05 (1983); Wyatt & Dashwood, supra note 12, at 13 - 22; Ipsen, supra note 12, at 556 - 67. Article 3 of the E.E.C. Treaty specifies the activities which the Community shall undertake in order to reach the purposes set out in Article 2.

17

This expression is used by Guy & Leigh, supra note 13, at 4.

18

See Article 3 (a), (c), (d), (e) and (h) of the E.E.C. Treaty. The provisions referring to the free movement of copyright, patent and trademark property will be discussed later. Interesting information about the European Court of Justice and the principle of free movement of goods is given by H. Schermers, The Role of the European Court of Justice in the Free Movement of Goods, in 1 T. Sandalow & E. Stein, Courts and Free Markets 222 - 71 (1982).

19

5 Smit & Herzog, supra note 16, at 189.05; Ipsen, supra note 12, at 257.

20

These citations can be found in Guy & Leigh, supra note 13, at 10 - 11.

21

Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Tariefcommissie, 1963 E. Comm. Ct. J. Rep. 1 (1963), 2 Common Mkt. L. R. 105.

Footnotes (cont.)

22

2 Common Mkt. L. R. 129.

23

Emphasis added.

24

Costa v. Ente Nazionale per l'Energia Elettrica (ENEL), 1964 E. Comm. Ct. J. Rep. 585, 3 Common Mkt. L. R. 425.

25

Emphasis added.

26

Costa v. ENEL, 3 Common Mkt. L. R. 455.

27

See e.g. the Common Customs Tariff (Arts. 18 - 29) and the Common Agricultural Policy (Arts. 38 - 47). An example for a (mere) coordination of activities is the General Agreement on Tariffs and Trade (GATT).

28

Constantinesco, supra note 12, at 285 - 90 illustrates the complexity of the relationship between the E.E.C. and its Member States.

29

As for the different sources of Community law, i.e. primary, secondary and "other" sources, see Guy & Leigh, supra note 13, at 12 - 24 and Ipsen, supra note 12, at 111 - 12, with a short historical background to these ideas at 109 - 10; Constantinesco, supra note 12, at 537 - 49.

30

Wyatt & Dashwood, supra note 12, at 25 - 55; Guy & Leigh, supra note 13, at 26 - 30.

31

Constantinesco, supra note 12, at 470 - 78 and 803 - 911 gives a very detailed description of the organization, tasks and procedures of the European Court of Justice. See also Ipsen, supra note 12, at 365 - 74 and 4 Smit & Herzog, supra note 16, at 5 - 255 - 58 (with large bibliography).

Footnotes (cont.)

32

Ipsen, supra note 12, at 277 - 93.

33

Id. at 277.

34

Costa v. ENEL, supra note 24, 3 Common Mkt. L. R. 425, at 456.

35

Emphasis added.

36

Compare also 5 Smit & Herzog, supra note 16, at 5 - 577 - 80; Wilhelm v. Bundeskartellamt, 1969 E. Comm. Ct. J. Rep. 1, 8 Common Mkt. L. R. 100; Amministrazione delle Finanze dello Stato v. Simmenthal SpA (No. 2), 1978 E. Comm. Ct. J. Rep. 629, 23 Common Mkt. L. R. 263; Neumann v. Hauptzollamt Hof/Saale, 1967 E. Comm. Ct. J. Rep. 441; [1967 - 1970 Transfer Binder] Common Mkt. Rep. (CCH) 8059.

37

Ipsen, supra note 12, at 277; Guy & Leigh, supra note 13, at 27.

38

A later statute overrules an earlier one. See D. Sodhi/ R. Vasan, Latin Words & Phrases for Lawyers 139.

39

Guy & Leigh, supra note 13, at 26; Ipsen, supra note 12, at 277 with more sources.

40

5 Smit & Herzog, supra note 16, at 5 - 578; Politi S.a.s. v. Ministry of Finance of the Italian Republic, 1971 E. Comm. Ct. J. Rep. 1039, 12 Common Mkt. L. R. 60; Marimex S.p.a. v. Italian Ministry of Finance, 1972 E. Comm. Ct. J. Rep. 85, at 96, 11 Common Mkt. L. R. 907, at 915; Leonesio v. Italian Ministry of Agriculture and Forestry, 1972 E. Comm. Ct. J. Rep. 287, at 296, 12 Common Mkt. L. R. 343. In the case Commission v. Italy, 1972 E. Comm. Ct. J. Rep. 527, at 532, 11 Common Mkt. L. R. 699, at 708 the Community Court formulated:

Footnotes (cont.)

40 (cont.)

"The attainment of the aims of the Community requires that the norms of Community law, contained in the Treaty itself and enacted under it, should apply unconditionally, at the same instant and with identical efficacy in the whole territory of the Community, without the member-States being able to thwart them in any way.

The grant to the Community by the member-States of the rights and powers envisaged by the provisions of the Treaty implies in fact a definitive limitation of their sovereign powers, over which no appeal to provisions of internal law of any kind whatever can prevail."

The rule of supremacy of Community law applies also to national constitutional law. Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle fuer Getreide und Futtermittel, 1970 E. Comm. Ct. J. Rep. 1125, at 1135, [1967 - 1970 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8126:

"[T]he validity of a Community instrument or its effect within a Member State cannot be affected by allegations that it strikes at either the fundamental rights as formulated in that State's constitution or the principles of a national constitutional structure."

41

5 Smit & Herzog, supra note 16, at 189.10; Politi S.a.s. v. Ministry of Finance of the Italian Republic, supra note 40, at 1049; Marimex S.p.a. v. Italian Ministry of Finance, supra note 40, at 96; Guy & Leigh, supra note 13, at 28 - 30; Wyatt & Dashwood, supra note 12, at 25 - 42.

42

Pigs Marketing Board (Northern Ireland) v. Redmond, 24 Common Mkt. L. R. 177.

43

Guy & Leigh, supra note 13, at 28.

44

Algemene Transport en Expeditie Onderneming Van Gend En Loos v. Nederlandse Tariefcommissie, supra note 21, at 129.

45

The term "spirit" does not only refer to the particular article in question, but also to the "spirit" of the whole Treaty. Guy & Leigh, supra note 13, at 29.

Footnotes (cont.)

46

Reyners v. Belgian State, 1974 E. Comm. Ct. J. Rep. 631, 14 Common Mkt. L. R. 305.

47

Article 52 of the Treaty reads:

" Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital."

48

Article 7 of the Treaty reads:

" Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

The Council may, on a proposal from the Commission and after consulting the Assembly, adopt, by a qualified majority, rules designated to prohibit such discrimination."

49

Reyners, supra note 46, at 326.

50

Id., at 327.

51

Defrenne v. Sabena, 1976 E. Comm. Ct. J. Rep. 455, 18 Common Mkt. L. R.

98.

Footnotes (cont.)

52

Article 119 of the Treaty reads:

" Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

53

See Articles 2 and 3 (i) of the Treaty.

54

See Article 3 (f) of the Treaty. Competition within the Community could be endangered if only one or some of the states would follow the order of ensuring equal pay between women and men.

For further details about the concept of ' direct applicability ' see Wyatt & Dashwood, supra note 12, at 25 - 42.

55

See Mestmaecker, Copyright in Community Law (Journal of World Trade Law, Special Supp. No. 3), (1976); A. Dietz, Copyright Law in the European Community (1978); W. Alexander, Industrial Property Rights and the Establishment of the European Common Market, 9 Common Mkt. L. R. 35 (1972).

56

Harris, supra note 12, at 62; H. Johannes, Industrial Property and Copyright in European Community Law 7 (1976).

57

M. Gotzen, Gewerblicher Rechtsschutz und Gemeinsamer Markt, 1958 Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil [GRUR Int.] 224;

Foetnetes (cont.)

57 (cont.)

M. Gotzen, La propriete industrielle et les articles 36 et 90 du Traite instituant la C.E.E., 1958 Revue trimestrielle de droit commercial 261; J. Monnet, Die territoriale Wirkung von Patenten im Gemeinsamen Markt, 1965 GRUR Int. 302.

58

Article 36 of the Treaty reads:

" The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals, or plants; the protection of national treasures possessing artistic, historic or archeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."

59

Article 222 of the Treaty reads:

" This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."

60

E. Windisch, Gewerblicher Rechtsschutz und Urheberrecht im zwischenstaatlichen Bereich 194 et seq. and 30 n. 77 (1969); Johannes, supra note 56, at 7; J. Cohen, Copyright and the E.E.C. - Harmonization of National Laws, 1980 Eur. Intell. Prop. Rev. 189.

61

F. Gotzen, Artistieke Eigendom en Mededingingsregels van de Europese Economische Gemeenschap No. 71 et seq. (1971).

62

Against that conclusion H. Johannes, Gewerblicher Rechtsschutz und Urheberrecht im Europaeischen Gemeinschaftsrecht 55 et seq. (1973), F. Mestmaecker & E. Schulze, 1 Kommentar zum deutschen Urheberrecht 9. Abschnitt §1 I (1976).

Footnotes (cont.)

63

Article 85 of the Treaty reads:

" 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings.

- any decision or category of decisions by associations of undertakings.

- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Footnotes (cont.)

64

Article 86 of the Treaty reads:

" Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

65

See Johannes, supra note 56, at 49.

66

As has already been shown before this is not true for the sovereignty of each Member State **in economic matters.**

67

R. Whale & J. Phillips, Whale on Copyright 18 and 21 et seq. (1983). They cite the UNESCO translations of the German Copyright Law of 1965 and the French Law of 1957 which are both illustrative. The former one reads:

"Copyright shall protect the author with respect to his intellectual and personal relations to the work, and also with respect to the utilisation of the work."

The latter one reads:

" The author of an intellectual work shall, by the mere fact of its creation, enjoy an exhaustive incorporeal property right in the work, effective against all persons.

Footnotes (cont.)

67 (cont.)

Citation (cont.):

" This right includes attributes of an intellectual or moral nature, as well as attributes of an economic nature, as determined by this law."

See also N. Henry, 1 Copyright - Information Technology - Public Policy 1 et seq. (1975); W. Cornish, Intellectual Property: Patents, Copyright, Trademarks and Allied Rights 318 et seq. (1981); H. Hubmann, Urheber- und Verlagsrecht 2 - 5 (1984); Mestmaecker, supra note 55, at 1; H. Laddie, P. Prescott & M. Vitoria, The Modern Law of Copyright 6 (1980) [hereinafter cited as Laddie]; L. Patterson, Copyright in Historical Perspective (1968) contains a very detailed and informative description of the development and scope of copyright law.

68

Haertel & Schiefer, Urheberrechtsgesetz und Gesetz ueber die Wahrnehmung von Urheberrechten und verwandten Schutzrechten 148 (1967); E. Ulmer, Urheber- und Verlagsrecht 35 et seq. (1960); Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 1 I.

69

Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 1 I.

70

Harris, supra note 11, at 62.

71

See Hag, supra note 14. For instructive discussions of this case see Mestmaecker, supra note 55, at 35 - 38; Wyatt & Dashwood, supra note 12, at 350 - 52.

72

See Hoffmann - La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH, 1978 E. Comm. Ct. J. Rep. 1139, 23 Common Mkt. L. R. 217. Discussed by Wyatt & Dashwood, supra note 12, at 357 -60.

Footnotes (cont.)

73

See supra note 58.

74

Article 30 of the Treaty reads:

"Quantitative restrictions of imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States."

75

Ullrich, The Impact of the 'Sirena' Decision on National Trademark Rights, 1972 Int'l Rev. Indus. Prop. & Copyright L. 193, at 202.

76

Harris, supra note 11, at 63.

77

This result is usually reached **in** different ways, to wit by particular interpretation of the Treaty, by means of general exemption or as a result of an amendment to the Treaty. See Harris, supra note 11, at 62.

78

An example of this [?] are English-language books coming from the United States.

79

Johannes, supra note 56, at 49.

80

Article 57(1) of the Treaty reads:

" In order to make it easier for persons to take up and persue activities as self-employed persons, the Council shall, on a pro=posal from the Commission and after consulting the Assembly, acting unanimously during the first stage and by a qualified majority thereafter, issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications."

Footnotes (cont.)

81

Harris, supra note 11, at 63.

82

Dietz, supra note 55, at 14.

83

Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 1 I.

84

20 Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 162, 174 et seq. (1966).

85

Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 1 I.

86

J. Taubman, Copyright and Antitrust 114 et seq. (1960).

87

World Intellectual Property Organization (WIPO), Copyright Law Survey, (1979 with supp. 1981).

88

A. Dietz, Copyright Law in the European Community (1978).

89

In the following only a few sources will be given, because almost all information given derives from the above-mentioned two sources in footnotes 87 and 88; see also E. Ulmer, Intellectual Property Rights and the Conflict of Laws 32 - 34 (1978).

90

Compare R. Joliet, La Circulation de Produits Brevets en Droit Belge, 64 Revue de Droit Intellectuel 197 (1974).

91

See G. Schricker, German Industrial Property, Copyright and Antitrust Laws, Studies in Industrial Property and Copyright Law (vol. No. 6), (1983).

Footnotes (cont.)

92

N. Flechsig, Rueckwirkung der Revidierten Berner Uebereinkunft und einschlaegiges Urheberrecht des Schutzlandes, 1984 GRUR Int. 7, 10.

93

See H. Desbois, Le Droit d'Auteur en France (1966).

94

See W. Copinger & F. Skone James, Copyright including international copyright and forms and precedents (1971).

95

As for the organization of the European Community see Ipsen, supra note 12, at 315-74; Constantinesco, supra note 12, at 363 et seq. A shorter survey gives B. Cawthra, Industrial Property Rights in the E.E.C. 13 - 15 (1973). P. Herzog, The Procedure Before the Court of Justice of the European Communities, 41 Wash. L. Rev. 438 (1966) is instructive on the Community Court.

96

5 Smit & Herzog, supra note 16, at 222.03.

97

Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm and Centrafarm, 1968 E. Comm. Ct. J. Rep. 55, 7 Common Mkt. L. R. 47. For discussion of this case see Johannes, supra note 56, at 1 and 108; Wyatt & Dashwood, supra note 12, at 345 - 47; V. Korah, The Limitation of Copyrights and Patents by Rules for the Free Movement of Goods in the European Common Market, 14 Case W. Res. J. Int'l L. 7, 14 - 16 (1982).

98

Parke, Davis v. Probel, supra note 97, at 74 - 81.

99

5 Smit & Herzog, supra note 16, at 222.04.

100

Id.

Footnotes (cont.)

101

Johannes, supra note 56, at 55 et seq.

102

Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 2 I; Johannes, supra note 62, at 61 - 70.

103

Établissements Consten SARL and Grundig - Verkaufs - GmbH v. Commission of the European Economic Community, 1966 E. Comm. Ct. J. Rep. 299, 5 Common Mkt. L. R. 418. Discussed by Johannes, supra note 62, at 10 - 11; Korah, supra note 97, at 11 - 14; Johannes, supra note 56, at 2 - 3 and 97 - 101; L. Ebb, Common Market Law in Process: The Grundig Case and the Interplay between National Law and Treaty Law, 41 Wash. L. Rev. 481 (1966); Mestmaecker, supra note 55, at 19 - 20.

104

Smit & Herzog, supra note 16, at 222.04; V. Korah, Dividing the Common Market Through National Industrial Property Rights, 35 Mod. L. Rev. 634 (1972).

105

Id.

106

For the text of Article 36 see infra note 58.

107

See infra II c.

108

Mestmaecker & Schulze, supra note 62, at 9. Abschnitt § 1 I.

109

Johannes, supra note 62, at 55.

Footnotes (cont.)

110

Id., at 56.

111

See Dietz, supra note 55, at 13 - 15; Centrafarm v. Sterling Drug Inc., 1974 E. Comm. Ct. J. Rep. 1147; Centrafarm v. Winthrop, 1974 E. Comm. Ct. J. Rep. 1183, 14 Common Mkt. L.R. 480 (both cases).

112

For the text of Arts. 85 and 86 see infra notes 63 and 64.

113

See e.g. D. Reimer, Urheberrecht und freier Warenverkehr, 1981 GRUR Int. 70; Rewe-Zentral AG v. Bundesmonopolverwaltung fuer Branntwein [hereinafter cited as Cassis de Dijon], 1979 E. Comm. Ct. J. Rep. 649, 26 Common Mkt. L. R. 494; A. Dashwood, Cassis de Dijon - A Major Step in the Liberalisation of Trade, 9 Eur. Intell. Prop. Rev. 268 (1981); D. Wyatt, Qualitative Restriction and Measures Having Equivalent Effect, 6 Eur. L. Rev. 185 (1980); Wyatt & Dashwood, supra note 12, at 97; J. Lonbay, The Free Movement of Goods and the Intellectual Property Rights, 8 Holdsworth L. Rev. 54 (1983).

114

See Korah, supra note 97, at 9 -10; D. Reimer, Copyright and Free Movement of Goods, 12 Int'l Rev. Indus. Prop. & Copyright L. 493 (1981).

115

Korah, supra note 97, at 10 - 14; Nungesser KG & K. Eisele v. Commission of the European Communities ("Maize-seed"), 1982 E. Comm. Ct. J. Rep. 2015, 36 Common Mkt. L. R. 278; R. Pietzke, Anmerkung zum "Maissaatgut-Urteil" des Europaeischen Gerichtshofes vom 8.6. 1982, 1982 GRUR Int. 537; O. Axter, Die Maissaatgut-Entscheidung des Europaeischen Gerichtshofes, 1982 GRUR Int. 646; G. Albrechtskirchinger, Zur Patentlizenzpolitik der Gemeinschaft nach Maissaatgut und Coditel II, 1984 Wirtschaft und Wettbewerb (WuW) 109.

116

O. v. Gamm, Urheberrechtliche Verwertungsvertraege und Einschraenkungen durch den EWG-Vertrag, 1983 GRUR Int. 403.

Footnotes (cont.)

117

Dietz, supra note 55, at 10 - 14.

118

GEMA I, 14 J. O. Comm. Eur. (No. L 134) 15 (1971) and GEMA II, 15 J. O. Comm. Eur. (No. L 166) 22 (1972).

119

The procedure in the SABAM case did not lead to a decision, as the collecting societies in question amended the rules where the Commission objected to of their own accord. Dietz, supra note 55, at 304.

120

S.I.A.E., 14 J. O. Comm. Eur. (No. L 254) 15 (1971).

121

Belgische Radio en Televisie v. Société Belge des Auteurs, Compositeurs et Éditeurs (S.A.B.A.M.) and N.V. Fonior, 1974 E. Comm. Ct. J. Rep. 51, 14 Common Mkt. L. R. 238.

122

Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Grossmaerkte GmbH & Co. KG, 1971 E. Comm. Ct. J. Rep. 487, 10 Common Mkt. L.R. 631, [1971 - 1973 Transfer Binder] Common Mkt. Rep. (CCH) 8106.

123

Id. at 494, 10 Common Mkt. L. R. 635.

124

Such imported records had not only been produced outside the Federal Republic of Germany, but even inside. The Deutsche Grammophon GmbH had therefore also to contend with the problem of reimportation.

125

Deutsche Grammophon, supra note 122, at 503, 10 Common Mkt. L. R. at 634.

Footnotes (cont.)

126

Id. at 495, 10 Common Mkt. L. R. at 633.

127

See G. Schricker, supra note 91, at 120.

128

The submission was based on Article 177 of the E.E.C. Treaty. The superior manner in which the Hanseatic Superior Court weighed the relevant interests led to the laudatory remarks even outside the Federal Republic of Germany " Il y a des juges à Hambourg " (See Johannes, supra note 62, at 40).

129

Article 97 of the German Copyright Law (see Schricker, supra note 91, at 137) reads:

(1) As against any person who infringes a copyright or any other right protected by this Act, the injured party may bring an action for injunctive relief requiring the wrongdoer to cease and desist if there is a danger of repetition of the acts of infringement, as well as an action for damages if the infringement was intentional or the result of negligence. In lieu of damages, the injured Party may recover the profits derived by the infringer from the acts of infringement together with a detailed accounting reflecting such profits.

(2) Authors, persons having rights in scientific editions (Section 70), photographers (Section 72) and performers (Section 73), may, if the infringement was intentional or the result of negligence, recover, as justice may require, a monetary indemnity for the injury caused to them even if no pecuniary loss has occurred. This right is not assignable unless it has been acknowledged by contract or unless a legal action asserting the right has previously been commenced.

(3) Rights arising from other legal provisions shall not be affected.

Footnotes (cont.)

130

Article 85 of the German Copyright Act (see Schricker, supra note 91, at 134) reads:

§ 85. Right of Reproduction and Distribution

(1) The producer of a sound record shall have the exclusive right to reproduce and distribute the sound record. If the sound record has been produced by an enterprise, the proprietor of the enterprise shall be regarded as the producer. The right shall not arise by reason of the reproduction of a sound record.

(2) The right shall expire twenty-five years after publication of the sound record; however, it shall expire twenty-five years after production if the sound record has not previously been published. The period shall be calculated in conformity with Section 69.

(3) The provisions of Chapter VI of Part I, with the exception of Section 61, shall apply *mutatis mutandis*.

131

See infra note 64.

132

Johannes, supra note 56, at 139 - 40.

133

Deutsche Grammophon, supra note 122, at 502, 10 Common Mkt. L. R. at 659.

134

See Korah, supra note 97, at 16

Footnotes (cont.)

135

Deutsche Grammophon, supra note 122, at 502, 10 Common Mkt. L. R. at 654 - 55.

136

Id. at 498 - 500, 10 Common Mkt. L. R. at 655 - 58.

137

Id. at 500 - 01, 10 Common Mkt. L. R. at 658.

138

Id. at 501, 10 Common Mkt. L. R. at 658 - 59.

139

See 1972 GRUR Int. 95.

140

Desbois, supra note 93, at 208 - 09.

141

See infra note 97.

142

See e.g. Alexander, supra note 55, at 48 et seq.; V. Emmerich, Die gewerblichen Schutzrechte im Gemeinsamen Markt, 1972 Der Betrieb (DB) 1275, 1325 et seq.; Ullrich, supra note 75, at 53 and 60; D. Reimer, Der Erschoepfungsgrundsatz im Urheberrecht und gewerblichen Rechtsschutz unter Beruecksichtigung der Rechtsprechung des Europaeischen Gerichtshofes, 1972 GRUR Int. 221, 232 et seq.

143

Mestmaecker, supra note 55, at 33.

144

H. Kroitzsch, Hat die entschaeDIGungslose Enteignung der Patente und Urheberrechte bereits stattgefunden ? 1972 Betriebsberater (BB) 424.

Footnotes (cont.)

145

E. Ulmer, Anmerkung zum Vorlagebeschluss des OLG Hamburg vom 8.10. 1970, 1970 GRUR Int. 379 - 80.

146

Article 100 of the E.E.C. Treaty reads:

" The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation."

147

Johannes, supra note 62, at 49.

148

W. Alexander, L'Établissement du Marché Commun et le Problème des Brevets Parallèles, 1968 Revue Trimestrielle du Droit Europeen 513.

149

See Johannes, supra note 56, at 44.

150

S.A. Compagnie Générale pour la Diffusion de la Télévision, Coditel et al. v. S.A. Ciné Vog Films et al., 1980 E. Comm. Ct. J. Rep. 881, 31 Common Mkt. L. R. 362, 1979 - 1981 Transfer Binder Common Mkt. Rep. (CCH) 8662 [hereinafter cited as Coditel I].

151

Dietz, supra note 5, at 519.

Footnotes (cont.)

152

Compare N. Hunnings, Annotation on Case 52/79 and Case 62/79, 17 Common Mkt. L. Rev. 564 - 69 (1980); Albrechtskirchinger, supra note 115, at 117.

153

Coditel I, supra note 150, at 883 - 84, 31 Common Mkt. L. R. at 397.

154

Id.

155

Id.

156

Together with the Chambre Syndicale Belge de la Cinématographie.

157

Coditel I, supra note 150, at 884, 31 Common Mkt. L. R. at 397.

158

Id.

159

See Harris, supra note 11, at 65.

160

Article 59 of the Treaty reads:

" Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

Footnotes (cont.)

160 (cont.)

Article 59 of the Treaty (cont.):

" The Council may, acting unanimously on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community."

161

Coditel I, supra note 150, at 885, 31 Common Mkt. L. R. at 398 - 99.

162

Harris, supra note 11, at 65.

163

See Coditel I, supra note 150, at 890 - 92.

164

In order to support its opinion the Court cited in Coditel I the cases Centrafarm v. Sterling Drug & Winthrop, 1974 E. Comm. Ct. J. Rep. 1147, 13 Common Mkt. L. R. 480 and Hag, infra note 14.

165

Harris, supra note 11, at 66.

166

Coditel I, supra note 150, at 892 - 93.

167

Harris, supra note 11, at 66.

168

Coditel I, supra note 150, at 893 - 98.

169

Harris, supra note 11, at 66; Korah, supra note 97, at 41.

170

Coditel I, supra note 150, at 899 - 904.

Footnotes (cont.)

171

Id. at 904; Korah, supra note 97, at 41.

172

Coditel S.A., Compagnie Generale pour la Diffusion de la Television et al. v. Cine Vog Films S.A. et al., 1982 E. Comm. Ct. J. Rep. 3381, 36 Common Mkt. L. R. 49; see also 1983 GRUR Int. 175 [hereinafter cited as Coditel II].

173

Coditel I, infra V b.

174

For the text of this provision see, infra note 63.

175

Coditel II, supra note 172, at 3399, 36 Common Mkt. L. R. at 52.

176

Id.

177

Id. at 3399 - 3400, 36 Common Mkt. L. R. at 53.

178

Id. at 3402, 36 Common Mkt. L. R. at 53.

179

Musik-Vertrieb-Membran GmbH and K-tel International v. GEMA-Gesellschaft fuer musikalische Auffuehrungs- und mechanische Vervielfaeltigungsrechte, 1981 E. Comm. Ct. J. Rep. 147, 31 Common Mkt. L. R. 44 [hereinafter cited as GEMA], (Joined Cases 55 and 57/80).

180

Id. at 150, 31 Common Mkt. L. R. at 50; Korah, supra note 97, at 24.

Footnotes (cont.)

181

"Sound carriers" are records and cassettes or other tapes. See Harris, supra note 11, at 68.

182

Id.

183

Id.

184

GEMA, supra note 179, at 161, 31 Common Mkt. L. R. at 63 - 64.

185

Terrapin (Overseas) Ltd. v. Terranova Industrie C. A. Kapferer & Co., 1976 E. Comm. Ct. J. Rep. 1039, 18 Common Mkt. L. R. 482.

186

GEMA, supra note 179, at 161, 31 Common MKT. L. R. at 64.

187

Id. at 162, 31 Common Mkt. L. R. at 64.

188

Id.

189

Id. at 163, 31 Common Mkt. L. R. at 65.

190

Id. at 164, 31 Common Mkt. L. R. at 65 - 66.

191

Emphasis added.

192

For additional GEMA - arguments see Harris, supra note 11, at 71; Dietz, supra note 5, at 522.

Footnotes(cont.)

193

Centrafarm BV and Adriaan De Peijper v. Sterling Drug Inc., 1974 E. Comm. Ct. J. Rep. 1147, 14 Common Mkt. L. R. 480.

194

GEMA, supra note 179, at 165.

195

81 BGHZ 282 (1981).

196

Dietz, supra note 5, at 523.

197

Dansk Supermarket A/S v. A/S Imerco, 1981 E. Comm. Ct. J. Rep. 181, 32 Common Mkt. L. R. 590 (hereinafter cited as Imerco).

198

Id. at 190 - 91, 32 Common Mkt. L. R. 599 - 600.

199

Harris, supra note 11, at 73.

200

Imerco, supra note 197, at 191, 32 Common Mkt. L. R. at 600. The provisional injunction dated from June 22, 1978.

201

The court did not consider it necessary to decide whether there had been any infringement of the national provisions on copy-right and trademarks as was further contended by Imerco.

202

Imerco, supra note 197, at 192, 32 Common Mkt. L. R. at 600.

203

Id. at 193, 32 Common Mkt. L. R. at 601.

Footnotes (cont.)

204

Terrapin, supra note 185.

205

Imerco, supra note 197, at 193, 32 Common Mkt. L. R. at 601.

206

The Commission asserted that the protection of consumers was one of the objectives of unfair competition law and therefore not an objective separate from that of repressing unfair competition.

207

Imerco, supra note 197, at 194, 32 Common Mkt. L. R. at 602.

208

As supporting case the Community Court cited Béguelin Import Co. et al. v. S.A. G.L. Import Export et al., 1971 E. Comm. Ct. J. Rep. 949, 11 Common Mkt. L. R. 81.

209

Imerco, supra note 197, at 195, 32 Common Mkt. L. R. at 603.
Dietz, supra note 5, at 523 n. 7 gives the additional information that the Danish Supreme Court, deciding (on December 2, 1981) upon the European Court of Justice' decision, nevertheless found that the failure of a particular designation of the lower quality of the imported substandard products constituted a violation of honest marketing practices (unfair competition).

Footnotes (cont.)

210

Re The GEMA Statutes, 34 Common Mkt. L. R. 482 (1981)
(hereinafter cited as GEMA-Statutes).

211

The acronym GEMA means Gesellschaft fuer musikalische
Auffuehrungs- und mechanische Vervielfaeltigungsrechte.

212

GEMA-Statutes, supra note 210, at 483 - 84.

213

In practice this conflict of interests is often detri=
mental to the authors, who are in an economically weaker position.

214

For the internal organization and legal supervision of
GEMA see GEMA-Statutes, supra note 210, at 486 - 87.

215

The European Commission had already been involved in 1971
in a case with the German collecting society GEMA (10 Common Mkt.
L. R. 35), where Article 86 (abuse of a dominant position) had
been the issue. In this first GEMA-Statutes case GEMA was obliged
to render its statutes compatible with a series of claims by the
Commission concerning the splitting, categories and duration of
rights transferred to GEMA and the position of foreign authors,
who are nationals of other Member States as affiliates to GEMA.

216

For the literal formulation see GEMA-Statutes, supra
note 210, at 487.

217

Dietz, supra note 5, at 524 - 25.

218

GEMA-Statutes, supra note 210, at 496.

Footnotes (cont.)

219

Belgische Radio en Télévisie and Société Belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior, 1974 E Comm. Ct. J. Rep. 313, 14 Common Mkt. L. R. 238.

220

GEMA-Statutes, supra note 210, at 490 - 91.

221

See supra note 215.

222

GEMA-Statutes, supra note 210, at 491; Dietz, supra note 5, at 525.

223

Id. at 492.

224

Id. at 495.

For a recent press release of the Commission (January 9, 1984) concerning GEMA's restrictive practices on sales royalties see 39 Common Mkt. L. R. 308.

225

Interpar et al. v. Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), 33 Common Mkt. L. R. 221 (1981), (hereinafter cited as GVL). For the Court's later decision see GVL v. E. C. Commission, 38 Common Mkt. L. R. 645.

226

See infra III c.

227

GVL, supra note 225, at 224.

Footnotes (cont.)

228

Id. at 224 - 25. For the right of artists and manufacturers in other Member States and under the Rome Convention see id. at 225 - 26.

229

Irrespective of whether they were artists from Member States of the European Community or not.

230

GVL told foreign 'applicants' that it concluded contracts only with holders of rights, who were German nationals or residents in Germany.

231

Moreover, holders of rights from other Member States, whose rights GVL had refused to manage on an individual basis, were thereafter afforded the opportunity (retrospectively) of sharing in the income from royalties.

232

GVL, supra note 225, at 230.

233

Id. at 238 - 39.

234

For the Commission's reasoning on the inapplicability of Article 90 of the Treaty see id. at 236 - 37; for the inapplicability of Article 222 of the Treaty see id. at 237 - 38.

235

Id. at 231 et seq. and at 238.

236

Id. at 232.

Footnotes (cont.)

247

Harris, supra note 11, at 76.

248

Id.

249

See Chapter I and II.

250

See supra II c and III.

251

Dietz, supra note 5, at 527.

252

Id.

253

See e.g. Harris, supra note 11, at 68.

254

The question whether freedom to provide services relates only to the persons providing these services or the services poses, as shown, an interesting problem.

255

This is no matter of course if one takes the more hypothetical form ("if it be assumed that a right can be covered by these provisions...") of the previous Deutsche Grammophon case into consideration.

256

See supra Chapter III and Dietz, supra note 5, at 520.

Footnotes (cont.)

257

See Dietz, supra note 5, at 521.

258

L. C. Nungesser KG and Kurt Eisele v. Commission of the European Communities, 1982 E. Comm. Ct. J. Rep. 2015, 36 Common Mkt. L. R. 278. See also 1982 GRUR Int. 530 with a subsequent note of R. Pietzke and G. Albrechtskirchinger, supra note 115, at 116 et seq.

This important case has not been discussed here, because it did not involve copyright issues.

259

Dietz, supra note 5, at 521.

260

Harris, supra note 11, at 68.

261

Dietz, supra note 5, at 526.

262

Id. at 528.

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- 3) W. Alexander, Industrial Property Rights and the Establishment of the European Common Market, 9 Common Market Law Review (CML Rev.), 35 - 52 (1972).
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