Stefan Breuer (Brrste005)
6 Milner Road
Tamboerskloof
8001 Cape Town

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# The European Union and its efforts concerning the harmonisation of copyright law



Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of requirement for this degree was the completion of a programme of courses.

Supervisor: Prof. Derry Devine

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## - Preface -

The increasingly accelerating process of integration in the whole European area causes a tremendous amount of problems in different sections of social, economic and political life. The solutions to all these integration related problems have one thing in common: they all need to be based on a solid ground of EU-laws, which are applied and enforced in every Member State. This so important because otherwise the measures taken by the EU institutions are completely useless. That leads to the observation that in every area of conflicts due to the application of different domestic laws a harmonisation is required. Harmonising EU laws adopted by the competent EU institutions have a crucial key role in the achievement of complete integration of every Member State in every conflict area, whatever that might be.

One of these areas is the protection of copyrights. The value of the protection of copyrights must not be underestimated. The EU Commission assessed that the contribution of the copyright-related products and services to the EU-wide gross national product is about 5 %.[1] In contradiction to this great value of copyright-related products and services the EU institutions started very late to scrutinise the different issues which might have to be solved in this context. Especially the issues, which are due to different levels of protection of copyrights in different Member States, started being solved by the adoption of harmonising directives. The first directive was adopted on 14 May 1991.[2]

This dissertation intends to scrutinise the commencement and the continuity of the harmonisation process in the area of copyrights in the EU. This scrutiny shall be embedded in the context of the development of the European Union as a such and the functioning of its institutions and the harmonisation of laws in the EU in general. A sound overview about these different areas of the European Union and the process of harmonisation concerning the harmonisation of national copyright laws shall be given.

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[1] See the Green Book "Copyright and related rights in the information society", COM (95), 382 (final), page 12

[2] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EC L 122/42

## I. Historical Development

The idea of the European Union had its real starting point after the Second World War. The common idea beneath all European countries was to prevent such a horrific event ever to happen again. The Second World War demonstrated the futility of conquests and the vulnerability of the sovereign state concept. The sovereign state could no longer guarantee the protection of the citizen. Interdependence of states rather than independence became the key to post-war international relations.[3]

Generally speaking there have been four shaping influences in creating the European Union.[4] The first one was peace. The prevention of another war should be achieved by creating more interdependence in the economy. The second is prosperity. Both aims should be achieved by accelerating the regional integration, which lead to the ECSC and the Euratom. Thirdly self-sufficiency in food should be achieved by the means of a common agriculture policy with the aim of growing a surplus. And fourthly there is the aim of influence, which is aimed to be achieved by collecting all powers. As a means of attainment serves the regional integration, which lead to the ECSC, the Euratom and the European Community. The historical development of the EU shall be examined below.

1) Churchill's speech and Treaty of Dunkirk

It was on 19th September 1946 that Winston Churchill proposed a "sovereign remedy", i.e. to "recreate the European family, or as much of it as we can, and provide it with a structure under which it can dwell in peace, in safety and in freedom. We must build a kind of United States of Europe." This British idea also inspired the French government in 1950 to propose the establishment of the European Coal and Steel Community.[5] In addition to the speech of Churchill there was the Treaty of Dunkirk concluded on March 4, 1947 between France and the United Kingdom. This was a treaty of alliance and mutual assistance in which each party undertook to come to the assistance of the other in the event of the renewal by Germany of a policy of agression. Moreover they undertook to co-operate with each other in the general interests of their prosperity and economic security. Immediately after it was signed, the British Foreign Secretary expressed the hope of signing similar treaties with Belgium and her neighbours.[6]

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[3] Lasok and Bridge, Law and institutions of the European Communities,page 4
[4] see the lecture of Prof. Devine from Wednesday, 15 September 1999
[5] Mathijsen, A guide to European Union Law, page 13
[6] Robertson, European Institutions, page 5

2) Marshall Plan – OEEC

On 5th June 1947, George Marshall, United States Secretary of State announced that the U.S.A would do "whatever it is able to do to assist in the return of normal economic health in the world." This offer was accepted by 16 European countries on 15th July 1947, and so the Marshall plan was born. But more important for the future of European integration was the setting up of the Organisation of European Economic Co-operation (OEEC)[7] in 1948.

3) Schuman Plan

On the 9th May 1950 the French Foreign Minister, Robert Schuman, read a sensational declaration. It contained the proposal to place the whole of Franco-German coal and steel output under a common High Authority, in an organisation open to the participation of the other countries of Europe. He described this pooling of production as the first stage of the European Federation. This proposal was revolutionary in two respects. Firstly it meant a complete turn of the tide in French policy with regard to Western Germany. Secondly the form which would have to be given to this cooperation was equally revolutionary. A combination of coal and steel production under the direction of a common High Authority, capable of taking decisions binding on France, Germany and other participating countries.[8] The Consultative Assembly of the Council of Europe endorsed the Schuman Plan in August and expressed the hope that all the principal coal and steel producing countries would participate in the scheme.[9]

4) European Coal and Steel Community

After nine months of negotiations, on 18th April 1951 the Ministers representing France, Germany, Italy, Belgium, Holland and Luxembourg signed in Paris a treaty which established the European Coal and Steel Community (ECSC). An attempt to persuade the United Kingdom to join as well had failed. On 25 July 1952 it came into force. The most important feature of the Coal and Steel Community is its supra-national character . It is no longer an inter-governmental but a truly supra-national organisation.[10] The Community was endowed with five organs: an executive, called the High Authority, a Consultative Committee attached to the High Authority, a

[7] In 1961, it became the Organisation for Economic Co-operation and Development (OECD), with the participation of the U.S.A and Canada

[8] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 1

[9] Robertson, European Institutions, page 18

special Council of Ministers, an Assembly and a Court of Justice. According to the Schuman Plan the High Authority occupies a central place in the institutional structure of the Community. It is composed of independent persons jointly designated by the governments, has its own financial resources from a levy on coal and steel production. It is provided with powers for binding the Member states and companies coming under the treaty regime.

5) European Defence Community

The following two years were difficult. It has been said that the easing of the international political situation (Stalin died in March 1953 and July 1953 marked the end of the Korean war) diminished the necessity for "closing the ranks. Two additional proposals for close co-operation among the six original members of the ECSC in the form of the European Defence Community (EDC) and a European Political Community (EPC) failed.[11]

6) European Atomic Energy Community and European Economic Community

In 1955 the Benelux countries proposed to their partners in the ECSC to take another step towards economic integration by setting up a common market and jointly developing transportation, classical and atomic energy. This led to the conference of Messina in the same year. There the Belgian Foreign Minister Spaak was asked to the feasibility of those plans. The "Spaak Report" was ready in 1956, and was discussed in Venice, where the six foreign ministers met. The decision was taken to start negotiations for drafting treaties that would establish a "common market" and an Atomic Energy Community. With incredible speed (June 1956 to February 1957) these two complicated treaties were prepared for signature in Rome on 25th March 1957. And on 1st January 1958 the EEC and the Euratom became reality. Unlike the ECSC treaty they were concluded for an indefinite period of time. The Euratom was created as a specialist market for atomic energy. In the sixties the six states imported about a quarter of their energy from countries outside the Community. By 1975 it was considered, they will have to import 40 % of their needs unless atomic energy takes over from the traditional sources of power. However, this target was not realised as in 1973 the Community was importing some 63 % of its energy and the oil crisis aggravated the situation. A common energy policy embracing the Euratom for which the Community has been striving, albeit without success, has become not only a matter of economic urgency but also a factor in European integration. The objectives

[10] Lasok and Bridge, Law and institutions of the European Communities,page 12

of the EEC are wider than the objectives of the remaining two Communities. The EEC is not a mere specialist organisation but an instrument of economic integration with a considerable political potential. Therefore whilst bearing in mind the three separate juristic entities the EEC is by far the most important and may be regarded as a prototype of an integrated European Community.[12]

In 1961, the British Government decided to apply for negotiations to determine whether satisfactory arrangements could be made to meet the needs of the United Kingdom, of the Commonwealth and of the EFTA

7) The merger of the Communities

When the EEC and the Euratom were established, their institutions were modelled upon those of the ECSC and this naturally suggested the merger of the separate institutions in order to avoid a multiplicity of institutions responsible for the achievement of similar tasks. This merger has taken place in two stages. A convention relating to certain Institutions common to the European Communities was concluded simultaneously with the Rome treaties and provided for the establishment of a single Court of Justice and a single Parliamentary Assembly to serve all three Communities.

On 8th April 1965 the institutional set-up of the Communities was simplified bythe treaty establishing " a single Council and a single Commission of the European Communities", commonly referred to as the "Merger treaty".[13] It came into force on 1 st July 1967 and completed the institutional merger of the Communities. As from that date there was one Council, one European Court and one Assembly for all three Communities.[14]

8) The Customs Union

The Customs Union became fully operative in the EEC on 1st July 1968. It meant that tariff and quota restrictions between member states had by then completely been abolished and that the replacement of the national external by the common external tariff had been completed. The Community was 18 months ahead of the schedule laid down in the Treaty.[15]

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[11] Mathijsen, A guide to European Union Law, page 14
[12] Lasok and Bridge, Law and institutions of the European Communities, page 17
[13] Mathijsen, A guide to European Union Law, page 15
[14] Weil, G.L. " The merger of the Institutions of the European Communities (1967) 61 AJIL 57

9) The first accession wave – United Kingdom, Ireland and Denmark –

The British government applied to the council for membership of the Communities on 10th May 1967. In December 1967 it was clear that the six original member states could not reach the unanimity necessary under the Community Treaties to return a reply to Britain's application. The British government decided to maintain its application for membership and it was discussed at many meetings of the Council of the Communities in the following two years. At the meeting of Heads of State or Government in December 1969 at the Hague, it was finally agreed to open negotiations between the Communities and the states that have applied for membership, i.e. United Kingdom, Denmark, Ireland and Norway. On 22nd January 1972 the Treaty of Brussels relating to the accession of United Kingdom, Denmark, Ireland and Norway was signed. In simple legal terms it is a Treaty signifying admission of new members to the three Communities. However, only three joined since Norway, in view of the reverse result of the national referendum, was unable to accede.[16] Full membership as from 1st January 1973 was conditional upon the incorporation of the Community law into the domestic laws of the new members. The period of transition was completed on 1 July 1977 which meant that as from that date the Community of Nine was fully established.

10) The second Treaty of Accession

On 12th June 1975 Greece applied for membership of the Communities and Greece became a member on 1st January 1981 after the ratification by the Greek Parliament.

11) The third Treaty of Accession

Portugal applied for membership on 28th March 1977 and so did Spain on 28th July 1977. Formal negotiations with Portugal started on 16th October 1978, and with Spain on 5th February 1979. Subject to a complex transitory regime, these two countries, associated with the Community since 1970 and 1972 respectively, became full members as from 1st January 1986, bringing the total of Member states to twelve.[17]

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[15] Mathijsen, A guide to European Union Law, page 15

[16] Lasok and Bridge, Law and institutions of the European Communities, page 21

[17] Mathijsen, A guide to European Union Law, page 17

12) The single European Act (SEA)[18]

After a complex development of negotiations and discussions starting with a meeting of the European Council in Fontainebleau in June 1984, in June and September 1985 in Milan the result of the Spaak Committee's work, out of the proposals before it, was the Single European Act. It was signed on 17th February 1986 by nine member states and on 28th February 1986 by Denmark (after a referendum), Greece and Ireland (also after a referendum). The SEA, which came into force on 1st July 1987, made on the one hand a number of amendments to the existing Community Treaties. On the other hand, it contained a number of independent provisions relating to the European Council.[19] Of the amendments made to the Community Treaties, the inclusion of the internal market concept in Article 8a EEC, and the envisaged completion of the internal market by 31st December 1992 were of particular significance. The so-called "internal market" is defined as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. And the cohesion policy, designed to strengthen economic and social cohesion between the Member States of the Community was strengthened. [20] Furthermore it provides for closer involvement of the European Parliament in the legislative procedures.[21]

13) The Treaty of European Union (TEU or Maastricht Treaty)

After the entry into force of the Single European Act on July 1987, and inspired by the progress of the market integration process, the drive towards an economic and monetary union (EMU), which had started in the early Seventies but had quickly appeared unattainable because of global monetary developments, was resumed. A completed internal market cannot continue to function without the keystone of an EMU. This economic reality caused the Hannover European Council in June 1988 to entrust to a committee o specialists the task of studying and proposing concrete stages towards EMU. This Delors Committee Report was presented in April 1989. And in December 1989 The Strasbourg European Council decided that the first phase of EMU could begin on 1st July 1990 with the full liberalisation of capital movements. At the same time it was decided to convene an intergovernmental conference before the end of 1990, for the purpose of amending the EEC Treaty with a view to the final stages of EMU. An attempt by the Dutch – at the time holding the Presidency – to

[18] The act was designated as "single", because it combines two different instruments. The first one provides for modifications to the three European Treaties and the second constitutes an agreement between the member states to jointly formulate and implement a European foreign policy

[19] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 34

[20] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 35

bring the political union and the three Communities into a unitary structure, as had been intended with the EMU all along, backfired dramatically. On 30th September 1991, apart from Belgium, the other member states were not even prepared to accept the Dutch text as a basis for disussion. During the European Council at Maastricht on 9 – 10th December 1991 the negotiations were concluded, after certain concessions to a number of Member states, in particular to the United Kingdom in relation to social policy and EMU, and to the poorer states, which forced a larger transfer of resources in their direction through a new cohesion fund. The final text of the Treaty on European Union (TEU) was agreed and signed in. The ratification of the TEU met unexpectedly severe problems in some Member states.[22] The negative result of the Danish referendum was followed by fierce discussions about the nature of the Community. In these discussions it became very apparent how weakly legitimised in the Member states Community action is, and just how much misunderstanding exists about the Community's structure and functioning. A second referendum in Denmark produced a positive result and in France and the United Kingdom the ratification process proved extremely contentious, but was also ultimately successful. After the German Federal Constitutional Court had ruled that German ratification would not be incompatible with the Basic Law, the Treaty on European Union finally struggled into force, nearly a year later than envisaged, on 1st November 1993. The structure chosen for the Union is tripartite. The most important part, consisting of the three Communities, is strictly separated from the other two, common foreign and security policy (CFSP) and co-operation in the field of justice and home affairs (JHA). These operate in a much more intergovernmental framework. This tripartite structure, often presented as resembling a temple façade with three pillars supporting the architrave and pediment of the Union, is ambiguous and should be regarded as an interim phase in the development of the Union.[23]

14) The Treaty of Amsterdam

Article N(2) TEU provides for an Intergovernmental Conference (IGC) to be convened during 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B. The fifth indent of Article B TEU specifies the objective of maintaining in full the acquis communautaire and building on it with a view to considering, through the procedure referred to in Article N (2), to what extent the policies and forms of co-operation

[21] Mathijsen, A guide to European Union Law, page 19
[22] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 39

introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community. A striking characteristic of the working of the 1996 IGC is undoubtedly the greater degree of transparency of the dialogue than was the case prior to the adoption of the TEU.[24] The actual mandate for the IGC was established at the European Council meeting in Turin in March 1996.Three themes were evident. Firstly, bringing the Union closer to its citizens. Secondly, improving the institutions of the Union to ensure they function with greater efficiency, coherence and legitimacy. Thirdly, the strengthening of the Union's capacity for external action. At the European's Council meeting in Florence in June 1996 the Italian Presidency produced a report assessing the situation for the then incoming Irish Presidency, which latter was requested to prepare a general outline for a draft revision of the Treaties to be discussed at the European Council's meeting in Dublin in December 1996.[25] At the European Council meeting in Amsterdam in June 1997, political agreement was reached on the draft Treaty of Amsterdam, with the IGC formally meeting at the level of Heads of State or Government[26]. After final legal editing and harmonisation of the texts, the Treaty of Amsterdam (TOA) was signed on 2nd October 1997. As part of the exercise of simplification, Article 12 TOA provides that the EC Treaty and the TEU, as amended by the TOA, are renumbered in accordance with the tables of equivalence annexed to the TOA.[27] After the process of ratification by the Member states during 1998 the TOA came into force this year.

This is a correct 1999 interesting picture but is not it a little bit too far from your topic.

## II. The institutions

### 1) The Commission

The E.C. Treaty provides that the Commission consists of 20 members. The members are appointed for a period of five years. The Commission is seated in Brussels. Its main function is to ensure the proper functioning and development of the common

[23] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 38
[24] The availability of many documents on the Internet undoubtedly enabled a rather more informed discussion than was possible prior to the signature of the TEU.
[25]Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 43
[26] A number of major conferences on the TOA have already been held, e.g. in October 1997 in Groningen and Leiden February 1998 in Paris and New York, in March 1998 in Edinburgh and in June 1998 in London

market[28] and all the other tasks provided for under the Treaty result from that. It is possible to categorise the functions and powers of the Commission into three broad groups: it is the guardian of the Community Treaties; it participates in the legislative process and it is also given a number of representative, financial and administrative functions.[29]

Firstly there is the task to enforce the Community law as a "watch-dog" of the Treaties. Pursuant Art.155 E.C.Treaty is the Commission's responsibility to ensure that the provisions of this Treaty and the measures taken by the institutions according thereto are applied. The measures taken by the institutions are referred to as secondary legislation (see details below under III), the Treaties being the primary legislation.
Art.169 E.C.Treaty lays down a general procedure for dealing with breaches of Treaty obligations by Member States. It provides that when the Commission considers that a Member State has not fulfilled an obligation under Community law it has to take a number of consecutive measures. It shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations. If the state concerned does not comply with the terms of the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice in Luxemburg.[30] This procedure has proved to be the most effective one for enforcement.
In addition to this general procedure the Treaties also confer authority on the Commission to deal with special infringements. For example Art. 89 E.C.Treaty authorises the Commission to investigate suspected infringements of the Community's rules of competition. If the suspicion is well founded and if the infringements are not brought to an end the Commission may direct the Member State to take the steps necessary to remedy the situation.

Secondly the three Treaties confer upon the Commission a wide range of legislative and executive powers and functions. The role of the Commission as the delegate of the Council for the purposes of law-making has recently been reinforced and systematised by an amendment introduced by the Single European Act 1986. A further important task of the Commission is to make the proposals for the legislation.

[28] see Art.155 E.C.Treaty
[29] Lasok and Bridge, Law and institutions of the European Communities, page 191

By submitting drafts for regulations, directives and decisions, the Commission participates, as the Treaty calls it, "in the shaping of measures taken by the Council and the and by the European Parliament. [31] Whenever the Commission makes such a proposal in pursuance of the Treaty, it exercises its exclusive right of initiative in the law-making process of the Community. Although the Commission enjoys the exclusive right of initiative, the Treaty provides that both the Council and Parliament may request the Commission to submit to it any appropriate proposals.[32]

Thirdly the Commission is given a number of representative, financial and administrative functions. The Commission represents the legal persona of the Communities. It represents the Communities in negotiations with non-member states[33] and international organisations. And the Commission is responsible for the administration of Community funds, e.g. the European Development Fund (EDF) or the Social or the Cohesion Fund.

## 2) The Council

The Council is made up of one representative of the government of each of the Member States.[34] The composition of the Council varies depending upon the subject matter to be discussed. A basic distinction is drawn between so-called General Council meetings and specialised Council meetings.
The former are attended by Foreign Ministers and the latter are attended by those Ministers whose portfolios relate to the specific subject on the agenda.[35]
The Council is by definition the legislative respectively the decision-making body.[36] But the Council is not endowed with a general regulatory competence. It can only act when this is specifically provided for in a Treaty provision, reason why the latter must always be mentioned in the Community acts.[37]

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[30] Also see Euratom Treaty, Art.141
[31] see Art. 115 E.C. Treaty
[32] see, e.g. Art. 94 E.C. Treaty
[33] as it did pertaining the 1999 co-operation agreement with South Africa
[34] Art. 2 Merger Treaty
[35] Lasok and Bridge, Law and institutions of the European Communities, page 196
[36] see Art. 145 E.C. Treaty
[37] see Art. 190 E.C. Treaty

There are, however, cases where action by the Council appears necessary to attain one of the objectives of the Community, while the Treaty has not provided the corresponding powers. In such a case, the Council may, acting unanimously on a proposal from the Commission and after consulting Parliament, take the appropriate measures.[38]

Being the Community law-maker, the Council's decision-making power covers the whole spectrum of the Community's activities. The Council may share these powers with the Commission, on which it can bestow, in the acts which it adopts, powers for adoption of the necessary acts for implementation of the rules it lays down.[39]

Beside having the power to take decisions in all the cases provided for by the Treaty has the task to ensure co-ordination of the general economic policies of the Member States.[40] The economic and monetary policy is probably the most important addition introduced by the Maastricht Treaty. The Council's task with regard to co-ordination of economic policies is ill-defined as regards its means. And although most of these "measures" can only be taken on the basis of a proposal from the Commission and after consultation of the Parliament, it is not easy to determine whether or not they constitute binding acts submitted to the judicial control of the Courts.

### 3) The European Parliament

Art. 137 E.C. Treaty provides for that the European Parliament shall consist of representatives of the peoples of the States brought together in the Community. The European Parliament is designed to introduce a democratic element into the workings the Communities. The Parliament consists presently of 626 representatives. The number of representatives submitted by each country is determined according to its importance and size in relation to the European Union.

The most important task of the Parliament is to give its opinions and recommendations concerning the proposals of the Commission in the legislative

[38] see Art. 235 E.C. Treaty
[39] see Art. 145 E.C. Treaty third indent
[40] See Art. 145 E.C.Treaty, first indent

process. In February 1990 the Commission proposed a "code of conduct" that would ensure more effective co-operation in the decision-making process, with a bigger role for Parliament in the field of external relations.[41] Parliament's opinions have no binding force. However, mention must be made, in the acts, of the fact that Parliament was consulted.[42] In addition to that it has to be noted that when provided for in the Treaty, consultation of Parliament constitutes an "essential procedural requirement", and failure of the Council to comply with it constitutes a ground for annulment of the act by the Court of Justice.[43]

In addition to that the Parliament is incorporated in the "assent procedure" which was introduced by the SEA[44] and extended by the Maastricht Treaty. It constitutes a veto right, rather than a right of co-decision, where Council and Parliament decide "together", as under the conciliation procedure. When assent is required, the Council may only act after it has obtained the agreement of Parliament.

There are further other tasks of the Parliament, e.g. the right of petition and appointment of an Ombudsman, concerning oral or written questions etc. but this is not the context to go into that into any further detail.

After this survey of these three institutions it can be summarised that the law-making process is as follows. The Commission is the one and only institution, which is empowered to make proposals commencing the procedure to create secondary sources of EU law. These proposals are scrutinised by the European Parliament, which gives opinions and recommendations concerning these proposals. And the last and decisive step of adoption of secondary law is implemented by the Council.

Same remark as previously. This is too general and not sufficiently or directly related to the topic!

[41] Mathijsen, A guide to European Union Law, page 30
[42] see Art. 190 E.C. Treaty
[43] see cases 138/79, Roquette Freres v. Council and 139/79 Maizena v. Council (1980) E.C.R. 3333 and 3393, where the Court annuled a regulation because the Council , although it had transmitted the Commission's proposal to Parliament for its opinion, adopted the regulation without having received it
[44] Art. 8 and 9 SEA

## 4) The European Court of Justice

The Court of Justice of the Communities has its origins in the Court which was originally set up under the ECSC Treaty. Judicial supervision in the Community is exercised by one Institution, the Court of Justice. In the words of the E.C. Treaty the role of the Court is to "ensure that in the interpretation and application of the Treaty the law is observed.[45] The powers and the tasks of this institution are nowadays exercised by two bodies: the original Court of Justice of the European Communities and the Court of First Instance subsequently attached thereto.
The ECJ consists of fifteen judges, assisted now by nine Advocates General.[46] It is the duty of the Advocates General acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice. The judges are unanimously elected by the governments of the Member States.

The rules of procedure are laid down by the Court but they require the unanimous approval of the Council. The procedure consists of three stages. Firstly the written procedure, starting with a request which is served on the defendant, followed by a statement of defence and a reply and a rejoinder and finally the preliminary report of the judge acting as rapporteur on whether the case requires investigation. Secondly if the Court decides so, a stage of investigation in connection with which witnesses and experts may be summoned and heard. Thirdly comes an oral procedure ending with submissions.

In the domain of settling disputes the Court acts in the first place as an administrative court (in the continental sense) for the Communities, whose duty it is to protect the legal subjects, Member States as well as private persons, against the illegal acts or omissions of the institutions. The Court usually exercises this *administrative jurisdiction* when it is seised e.g. of an action for annulment of the legal acts of the European Parliament and the Council acting jointly, the Council, the Commission and the European Bank (ECB). The Court acts more like an *international court* in the following types of cases. For example disputes between the Commission and Member States or between Member States themselves about a Member State's failure to fulfil its obligations under one of the Treaties. In addition to that the Court acts more as a

[45] see Art. 164 E.C. Treaty, 31 ECSC, 136 Euratom
[46] see Art. 165 and 166 E.C. Treaty

*constitutional court* if it has to deliver an opinion e.g. on whether amendments in the so-called "small" revision of the ECSC Treaty conform to the provisions laid down by the Treaty thereon. (The Court has also recently been entrusted with appeals against decisions of a Board of Appeal of the Office for Harmonisation in the Internal Market (trade marks and designs)[47]) The jurisdiction of the Court discussed so far does not cover all cases in which there may be a question of judicial application of Community law. In disputes between Member States and private persons or between private persons themselves questions relating to the interpretation and application of Community law may arise before a national court. Also in this field a specific type of jurisdiction has been conferred on the Court. It can be denoted as a *court of reference*. It is competent to pronounce by way of a preliminary ruling on the interpretation of the Treaty provisions and on the validity and the interpretation of acts of the institutions of the Communities if a question on this subject is raised before a national court or tribunal.[48] Such a court or tribunal may or must request such a ruling from the Court. Thanks to this jurisdiction the Court is able to promote the uniformity of interpretation of Community law in the legal practice of the Member States. Finally the Court of Justice itself has jurisdiction to hear appeals on points of law only from the Court of First Instance.

## 5) Other bodies of the Community

### The Office of Harmonisation in the Internal Market (Trade Marks, Designs and Models)

The Office for the Harmonisation in the Internal Market was established on 22 December 1993. It is seated in Alicante (Spain). It is not really involved in the protection of copyrights, but in the protection of very similar sectors of industrial property. Therefore it shall be mentioned here. The Office shall grant a uniform Community-wide protection, which shall allow its owner to prohibit the use of the mark, design or model for similar goods and services. Before granting the protection, the Office shall examine whether any absolute motive prevents the grant from being made. The protection is granted for a renewable period of 10 years, to anyone having

[47] see under 5) Other bodies with further details
[48] see Art. 177 E.C. Treaty

his domicile in one of the Member States, or in one of the countries party to the Paris Convention on the protection of industrial property rights. The Community protection does not replace the existing national protections, and the economic operators have the choice between the two. They shall be able to present their request in one of the nine languages of the Community, but the working languages shall be limited to German, English, French, Spanish or Italian.[49]

## III. The sources of Community law

### 1. Primary sources

These are the so-called Constitutional Treaties because together they form the organisational law of the Community. They constitute the basis of the Community legal order and the fons et origio of all Community law. They are its primary sources. The general rule concerning the relationship between EU-law and national law is the primacy of EU-law. That means that any kind of EU-law (either primary or secondary) prevails national law.

a) Founding Treaties
The primary sources of Community law consist of the three foundation Treaties (ECSC of 1950, Euratom of 1957 and EC of 1957) with their Annexes and Protocols.

b) The Treaties of Accession
The first Treaty of Accession and its annexes (1972: United Kingdom, Ireland and Denmark), the second Treaty of Accession (1981: Greece), the third Treaty of Accession (1985:Portugal and Spain) and the fourth Treaty of Accession (1994: Sweden, Finland and Austria).

c) Supplementary Treaties
The Merger treaty (1965), the Single European Act (1986), the Treaty on European Union of Maastricht (1993) and the Treaty of Amsterdam (1997)

[49] Mathijsen, A guide to European Union Law, page 124

In addition to that the Convention on certain institutions common to the European Communities (1957), the Luxembourg Treaty on Budgetary Matters (1970), the Second budgetary Treaty (1975) and the Act of the Council concerning direct elections to European Parliament (1976) are further supplementary Treaties that have to be mentioned in this context.

d) About the primary sources

The Treaties establishing the European Communities are more than classical international agreements creating mutual obligations between the contracting parties. Indeed by ratifying those Treaties the Member States intended to do more than that, although they most probably did not, at that time, foresee all the conclusions which the Court has , over the years, drawn from their specific nature.

The European Court of Justice held that "by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have created a body of law which binds both their nationals and themselves."[50]

It took years before all national courts and tribunals came to share the view that the European Treaties create a separate legal order. But at the time several of them were quick to agree, as was the German Supreme Administrative Court. It stated that Community law constitutes " a separate legal order, whose provisions belong neither to international law nor to the municipal law of the Member States."[51]

The foundation treaties are self executing treaties, which means that, when ratified, they become law automatically within the member states. In contrast with non-self-executing treaties. These constitute international obligations but require implementing legislation before they become applicable in domestic law. Self-executing treaties must be applied directly by the municipal courts as the law of the land.[52]

[50] Case 6/64, Costa v. Enel (1964) E.C.R. 585 at 593
[51] C.M.L. Rev 1967, 483

Community law, being distinct from national law, is also independent from it. This means that rights can be conferred and obligations imposed directly by Community provisions, i.e. without interference or intervention from national authorities. There is indeed no necessity for Member States to intervene in order to ensure that decisions, regulations and, in certain cases, directives have binding effect throughout the Community.[53]

Some provisions in the Treaties are directly applicable, which means they are directly applicable as law within the Member States. But you never know in advance, if a certain provision is directly applicable or not. It remains a case by case decision of the ECJ.[54]

In addition , Member States are committed not to interfere with the application of Community law. This also follows from the E.C.Treaty, which provides inter alia that Member States shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.[55] If the consequence of direct applicability for the Member States is non-interference, for the citizens it means, in most cases, the possibility of invoking those Community rules in their national courts and tribunals, i.e. direct effect. This allows them to protect the rights which those Community rules confer upon them.[56]

## 2 . Secondary sources

By the secondary sources of Community law we understand the law making acts of the Community organs which result in a body of law generated by the Community itself in its quasi-autonomous capacity. Article 189 of the E.C. Treaty provides a variety of forms that secondary legislation can take. These sources are to be regarded as secondary because their authority is derived from the provisions of the founding Treaties. The legislative procedure involves in general firstly the Commission, which makes a certain proposal for an intended act. Secondly the European Parliament,

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[52] Lasok and Bridge, Law and institutions of the European Communities, page 99
[53] Mathijsen, A guide to European Union Law, page 149
[54] The possibility of direct application of some provisions is admitted since the landmark decision of the ECJ from the year 1962,(26/62 Van Gend en Loos v. Nederlandse Administratie der Belasingen ECR I 29),in which the direct application of Art. 12 E.C. Treaty was decided.
[55] see Art 5.1 E.C.Treaty
[56] This was clearly stated by the ECJ in case 43/75, Defrenne v. Sabena (1976) E.C.R. 455 at 474

which gives its opinion concerning the proposed act and thirdly the Council, which adopts the act of secondary legislation. To these sources might be added the judgements of the Court of Justice which although not legislative in character nonetheless derive legal authority from powers bestowed upon the Court in the Treaties.[57]

**a) Obligatory Acts**

These encompass regulations, directives and decisions made by the Council or the Commission in order to carry out their task in accordance with the E.C. Treaty Art. 189.

i) Regulations

Regulations have three characteristic elements, which are mentioned in Art. 189 E.C. Treaty. A regulation has general application, it is binding in its entirety and is directly applicable in all the Member States. Regulations are adopted by the Council or by the Council together with Parliament under the "co-decision" procedure, by the Commission and by the European Central Bank.[58] Regulations must be published in the Official Journal of the Community, and they come into force on the date specified in them or, if no date is specified, on the 20th day following their publication. Thus regulations are the most powerful law making tools available to the Community institutions. Without any intervention by national governments or legislatures, regulations become part of the national legal system of each Member State. [59]

Regulations are the appropriate where the legal rule must be the same in each Member State, but regulations are also used to govern the procedures of the common institutions.[60]

In order to constitute a regulation the act of the Community organ must comply with certain conditions. In the first place regulations must rest upon the authority of the Treaty which means that they are made where so provided by the Treaty. If not so provided by the Treaty that act can not have the character of a regulation. Regulations have to be reasoned or substantiated in the terms of the Treaty, which means that they

[57] Bronitt/Burns/ Kinley, Principles of European Community law, page 101
[58] Mathijsen, A guide to European Union Law, page 137
[59] Bronitt/Burns/ Kinley, Principles of European Community law, page 102
[60] John Temple Lang, Common market and Common law, page 10

indicate in general terms the aims pursued by the regulation, the reasons which justify the regulations and the outlines of the system adopted.[61]

ii) Directives

As compared with regulations which are, in principle, binding in their entirety, directives issued by the Council and the Commission are binding as to the result to be achieved, upon each Member State to which it is addressed and the choice of the method is left to the state concerned. (Art. 189 (3) E.C.Treaty). It is for instance indifferent whether the national measures are administrative in nature as long as they are binding and as long as they fully meet the requirements of legal certainty.[62] A Community act setting out the terms of draft legislation and requiring Member States to enact it, would probably be a decision or a regulation, not a directive. Directives are the normal means of requiring Member States to carry out harmonisation of laws in general[63] and especially concerning the harmonisation of copyright law as it will be shown later on. Directives can be issued by the Council or by the Council together with Parliament ("co-decision") and by the Commission. They constitute the appropriate measure when existing national legislation must be modified or national provisions must be enacted, in most cases for the sake of harmonisation.

Although directives are not directly applicable, since they normally require implementing measures, their provisions can nevertheless have direct effect. This must be ascertained on a case by case basis, taking into account their nature, background and wording. According to the Court those provisions are capable of producing direct effect in the legal relationship between the addressee of the act, i.e. the Member State and third parties.[64] This is what is referred to as "vertical direct effect of a directive" as opposed to "horizontal direct effect". The latter would occur if two third parties could claim rights, under a directive, in their bilateral relationship. This effect was rejected by the Court.[65]

iii) Decisions

Decisions usually relate to one Member State or one undertaking, rather than being of general application. For example in the competition law area, once the Commission

[61] Lasok and Bridge, Law and institutions of the European Communities, page 114
[62] Case 239/85, Commission v. Belgium (1986) E.C.R.364
[63] John Temple Lang, Common market and Common law, page 10
[64] Case 9/70, Grad v. Finanzamt Traunstein (1970) E.C.R. 825 at 839 (5)

has completed an investigation it may issue a decision, effectively setting out its judgement in the case and often fining the companies who have acted in breach of the competition rules. There are at least fifteen provisions of the E.C. Treaty which provide that Council or Commission decisions will be used, including decisions relating to state aids and decisions on the European Social Fund.[66]

A decision is binding in its entirety upon those to whom it is addressed (Art.189 (4) E.C.Treaty). It may be addressed to Member States as well as to private persons. It is by them that the individual administrative acts of the Communities are realised, i.e. the application of Community law in specific cases. While a decision is distinguished from simple notifications, opinions and recommendations by its binding character, it differs from a regulation by its individual character. In fact, private persons in principle do not have a direct right of appeal against a regulation (Art. 173 (2) E.C. Treaty). The Court considers the limitation of the persons to whom the decision "is addressed" as a characteristic feature.[67] This permits the Court of Justice to treat regulations that are not of general application as being in reality decisions.[68]

It applies to a limited number of specified or identifiable natural or legal persons. Although not required by the E.C. Treaty, some of the more important decisions have been published in the Official Journal. Decisions adopted under Art 189b E.C.Treaty must be published in the Official Journal.

**b) Non-obligatory acts (recommendations and opinions)**

These are listed in Art. 189 E.C. Treaty as attributes of the power of the power of the Council and Commission necessary for the execution of their task. The E.C.Treaty provides for the making of recommendations and opinions in a number of situations and confers a general power on the Commission to make these provisions whenever it considers it necessary. The Treaty is quite explicit that recommendations and opinions have no binding force (unlike regulations, directives and decisions).[69] However, according to recent case law, recommendations should not be dismissed as having no legal effect whatsoever. They do not create rights which can be invoked in the courts, but the national judges must take recommendations into consideration when solving cases submitted to them. This is especially so if the recommendations can help with

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[65] Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority ( 1986) E.C.R. 723 (48) and Butterworths Expert guide to the European Union, page 98

[66] Butterworths Expert guide to the European Union, page 218

[67] Kapteyn/VerLoren van Themaat, Introduction to the law of the European Communities, page 334

[68] Bronitt/Burns/ Kinley, Principles of European Community law, page 103

[69] Bronitt/Burns/ Kinley, Principles of European Community law, page 103

the interpretation of other national or Community legal measures.[70] And it is competent for a national court or tribunal to refer to the European Court a question concerning their interpretation or validity. Such a reference may be appropriate where the recommendation or opinion was the spur for the making of a particular provision of national law relevant to the case before the national court or tribunal.[71] Generally speaking, recommendations aim at obtaining a given action or behaviour from the addressee. An opinion, on the other hand, expresses a point of view, often at the request of a third party.

Due to the lack of a binding force it is debatable whether recommendations and opinions can be regarded as sources of Community law. Taking this aspect into account opinions can not be regarded as a source of Community law but recommendations can only in so far as they are made under the E.C. Treaty. The existence of non-binding acts is not exclusive to the European Community. Such acts are typical of international organisations of sovereign states, which in theory can not take orders from outside.[72]

## IV. Harmonisation[73] of law in the EU in general

### 1. Functions of harmonisation

a) establishment

The first function of harmonisation of laws relates to the *establishment* of a common market. The four freedoms of the internal market have to be supplemented by a harmonised law regime. In relation to the free movement of goods, customs frontiers and associated controls in international trade, fiscal barriers and associated controls resulting from the divergent legislation relating to the basis and tariffs of turnover taxes and excise duties could and can only be removed by far-reaching harmonisation.[74] The exception clause of Art. 36 E.C. Treaty means that so-called technical obstacles to inter-state trade, resulting from technical rules on the composition, quality, presentation, packaging etc. of products, can likewise be largely

[70] Mathijsen, A guide to European Union Law, page 140
[71] Bronitt/Burns/ Kinley, Principles of European Community law, page 104
[72] Lasok and Bridge, Law and institutions of the European Communities, page 130
[73] In accordance with the prevailing views in academic literature, no distinction is drawn between the expressions "harmonisation", "co-ordination", and "approximation of legislation"
[74] To the extent that such controls and formalities are still permitted by the provisions of the E.C. Treaty, in particular Art. 36, 56 and 66

removed only by harmonisation of laws in so far as they can be justified under Art. 36 E.C. Treaty or the rule of reason case-law on essentially non-economic grounds. Finally public services still tend to discriminate on grounds of nationality in purchasing goods. This tradition will only be brought to an end by harmonised legislative safeguards against discrimination. To this end various directives have been adopted in order to ensure that the public procurement sector and regulated procurement by the utilities – which represents a substantial sector of the economy – is opened up to genuine competition in accordance with the philosophy of ensuring that the conditions of competition prevailing within the Community are characteristic of those in a single domestic market.

According to Art. 7 (7) E.C. Treaty the necessary harmonisation should have been achieved by the end of the transitional period at midnight on 31.12. 1969. However, as a result of cumbersome decision-making procedures, particularly the requirement of unanimity in Art. 100 E.C. Treaty and the extremely detailed and wide-ranging scope of the harmonisation initially undertaken, this was not to be the case.[75] In view of the manifest failure of the initial approach the Commission, in its White Paper "Completing the Internal Market" the Commission set out a detailed scheme of some 300 legislative proposals to remove the remaining barriers to a complete internal market by 31.12 1992.

Particularly since the judgement in case 120/78 REWE Zentral AG v. Bundesmonopolverwaltung fuer Branntwein[76] (more popularly known as the Cassis de Dijon judgement) and extensively in the White Paper, the Commission has rethought its entire policy in the harmonisation field. Two strands characterise its present policy: firstly the *new strategy* and secondly the *new approach.* The new *strategy* was made possible by the positive gloss put on Art. 30 – 36 E.C. Treaty by the case-law of the Court of Justice based on the mutual acceptance of goods (also called mutual recognition). Departing from the principle that goods lawfully produced or marketed in one Member State must be accepted in all other Member States save where refusal is justified on grounds known to Community law, the need to harmonise everything vanishes. Accordingly the new strategy concentrates on harmonising national measures which create barriers to trade which are justified. It is occupying the field and guaranteeing the health and safety concerns involved. The *new approach* deals with how this is done. No longer will detailed technical provisions need to be

[75] An overview of the situation at the end of the transitional period is contained in Bull.EC Supp 6/70.
(1979) ECR 649

incorporated in Community directives. With the development of European standards being entrusted to the European standardisation bodies such as CEN and CENELEC the European standards can be incorporate by reference into Community directives. This has the advantages of removing technical details from the legislative field, lessening the workload of the Council and ensuring that no new legislation is needed to take account of technical progress.[77]

b) functioning

The second function of harmonisation is related to Art. 3 (h) E.C. Treaty. This Article makes it clear that harmonisation is also prescribed whenever these provisions directly affect the *functioning* of the common market. In the first place this includes provisions which, whilst they do not hinder access to the market, do determine and may distort the conditions of competition in the market. In principle this is particularly the case for all legislative and administrative provisions which directly concern market behaviour. That means particularly behaviour towards competitors (e.g. patent and trade mark law and provisions relating to unfair competition), workers (many directives have already been adopted dealing with the labour market, conditions of work and workers protection ), consumers (particularly consumer protection) or buyers or sellers in general (e.g. many parts of private commercial law). There is also direct influence on the functioning of the common market whenever the provisions concerned, such as fiscal and environmental provisions, influence the market position (or competitive position) of the undertakings involved, even though they do not directly concern market behaviour.

## 2. General harmonisation provisions of the E.C. Treaty

The general harmonisation provisions of the E.C. Treaty are to be found in Art. 100 E.C. Treaty and since the amendments made by the SEA, Art. 100a E.C. Treaty. Procedurally the most important difference between the two provisions is that whereas Art. 100 E.C. Treaty requires unanimity in the Council for the adoption of directives, Art. 100 a now makes possible the adoption of measures by the co-decision procedure, thus with a qualified majority in the Council.[78] The second, instrumental,

[77] Criticisms of this approach in terms of a consequent absence of judicial control and the lack of a clear delimitation between the roles of public authorities and private industry have been voiced out.

[78] Art. 100 E.C. Treaty provided for simple consultation of the European Parliament and the Economic and Social Committee in the case of directives whose implementation would involve the amendment of

difference is that the measures to be adopted under Art. 100 are not confined to directives. Particularly regulations may also be used. However, the practical effect of this is somewhat weakened by the fourth declaration annexed to the Final Act signed on the adoption of the SEA which states that in its proposals pursuant Art. 100 a (1) " the Commission shall give precedence to the use of instrument of a directive if harmonisation involves the amendment of legislative provisions in one or more Member States". Legally this declaration can not fetter the Commission's discretion but politically it is in such cases a powerful disincentive to the use of instruments other than directives.[79]

The procedural improvements introduced in Art. 100 a E.C. Treaty are to a great extent undermined by the safeguard clause of Art. 100 a (4) which was the political price paid for majority voting in various areas of harmonisation. It enables a Member State, after a harmonisation measure has been adopted with a qualified majority in the Council, to derogate from that measure if it deems it necessary to apply national provisions on grounds of major needs referred to in Art. 36, or relating to the protection of the environment or the working environment and has notified such provisions to the Commission, which has confirmed them. Both in terms of substance and procedure this safeguard clause raises a number of questions, some of which have been answered in case C-41/93 *France v. Commission* [80] in which France (under the third paragraph of Art. 100a (4) E.C.) sought review of the Commission's decision under the second paragraph of Art. 100 a (4) confirming the measures Germany had notified it. The Court explained that as Art. 100 a(4) E.C. Treaty permitted a derogation from a common Community measure designed to achieve one of the fundamental objectives of the Treaty, in casu the free movement of goods. Its application had been specifically made subject to review by the Commission and the Court.[81] Although a literal interpretation of Art. 100 a (4) might seem to indicate otherwise, that provision is thus not a unilateral safeguard clause which the Member

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legislation in one or more Member States. This limitation, which meant nothing in practice, has now been dropped.

[79] The vast majority of measures adopted under Art. 100a E.C. Treaty are directives. There are a couple of dozen regulations, largely in the customs field, where as a part of the process of removing internal border controls and tightening the common commercial policy the previous Community directives have been replaced by regulations, see Gormley in Emiliou and O'Keefe " The European union and World Trade law after the GATT Uruguay Round (Chichester, Wiley 1996) 124. Very few decisions have also been based on Art. 100 a E.C. Treaty

[80] Case C- 41/93 France v. Commission (1994) ECR I-1829 at 1847

[81] Case C- 41/93 France v. Commission (1994) ECR I-1829 at 1848

States can use at will for the protection of the interests specified therein.[82] The court found that the procedure of Art. 100 a (4) was "intended to ensure that no Member State may apply national rules derogating from the harmonised rules without obtaining confirmation from the Commission.[83]

Art. 100 a has evolved, both in law and in fact, into virtually a general power to enact rules relating to the establishment and functioning of the internal market. Indeed the wording of Art. 100a itself points in this direction. On the other hand, Art. 100a (2) specifically excludes fiscal provisions, provisions dealing with the free movement of persons, and provisions dealing with the rights and interests of employees from the ambit of harmonisation under Art. 100a (1). As a result of the wide concept of "establishment and functioning of the internal market" the scope of Art. 100a is extensive. The only general limitations for the exercise of the power to harmonise laws flow from Art. 2, 3, 3a and 3b EC. There are also more specific limitations through the terms of Art. 100a (2) and through the existence of other provisions of the Treaty which envisage specific powers of harmonisation. The wide scope of Art. 100a has a number of important consequences. First, it can be used for measures concerning matters which are only very indirectly linked with the internal market.[84] Secondly, the concept of harmonisation can have a relative meaning. In some cases the actual harmonisation of national laws is extremely limited and the measure really concerns an individual specific action.[85] Legislative practice confirms that the old discussion in academic literature about whether harmonisation of laws was correctly involved in matters which were not yet covered by legislation in the Member States has now become obsolete. Thirdly, harmonisation directives relating to certain flanking policies do not always have to be based on the specific powers relating to those policies, but if the emphasis of the measure is on the removal of distortions of competition, Art. 100a will be an adequate legal basis.[86] And fourthly the wide scope of Art. 100a means that conflicts regularly arise between the Community Institutions themselves, or between the Member States and the Council or Commission in particular, when preference is for political reasons given to a legal basis which requires unanimity or a lesser degree of involvement for the European Parliament.

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[82] ibid. at 1849

[83] ibid. Otherwise harmonising measures designed to remove hindrances to intra-Community trade would be rendered ineffective.

[84] e.g. Dirs. 94/21 (O.J. 1994 L 164/1) and 97/44 (O.J. 1997 L 206/62)

[85] e.g. the Mattheus Programme on Community action for vocational training for customs officers, Dec. 91/341 (O.J. 1991 L 187/41)

[86] Case C-300/89 Commission v. Council (1991) ECR I-2867 at 2901

Art 100 b E.C. Treaty permits the Council, acting in accordance with Art. 100 a E.C. Treaty, to decide that the provisions in force in a Member State must be recognised as being equivalent to those applied by another Member State. The intention was to remove any barriers still remaining on 31 December 1992. Apart from the fact that the Commission, together with each Member State, still has not drawn up the inventory of national laws, regulations and administrative action which will fall under Art. 100a E.C. Treaty and had not been harmonised pursuant thereto, it may very seriously be doubted whether the procedure of Art. 100 b E.C. would in reality reduce the need for harmonisation under Art. 100a E.C. Treaty.

### 3. Specific harmonisation provisions

Besides the general provisions the E.C. Treaty contains a series of provisions concerning harmonisation of laws concerning specific subjects and sectors which are not extensively discussed here. There is inter alia Art. 27 (customs), 43 (agriculture), 49 (b) (eligibility restrictions for available employment), 54 (3) (company law safeguards), 113 (common commercial policy).

### 4. Methods of harmonisation and the scope of directives

In relation to harmonisation a distinction should be drawn between the method of harmonisation which is adopted, usually by a directive, and the scope of a harmonising directive.

In the case of total harmonisation the Member States may not derogate from the provisions of the directive, save to the extent permitted by the directive itself.[87] Free movement of all products covered by such a directive is assured, as it is no longer possible for Member States to invoke Art. 36 E.C Treaty. Although Art 100a (4) could be used if the conditions for its application were satisfied. In such (rare) cases the total Community harmonisation is transformed into a geographically differentiated harmonisation. For products covered by an optional harmonisation directive, free movement is in any event assured for products conforming with its requirements.

Thus undertakings operating on a common market scale or who otherwise engage in intra-Community trade may simply manufacture to one set of requirements, whereas those operating merely locally are not obliged to take the Community measure into account. The choice is thus left to the manufacturer.[88]

In the case of minimum harmonisation, the Member States must comply with the minimum requirements of the directive concerned, but are free to apply stricter or more far-reaching requirements. Art 118a E.C. Treaty expressly requires this method of harmonisation to be used in the fields which it covers.

The question of the scope of a directive is relevant for the examination of national measures against the terms of the directive itself and against primary Community law. If the directive exhaustively occupies the field, thus harmonising all relevant provisions on the matter concerned, there is no possibility for Member States to rely on Art. 36 E.C. Treaty or the rule of reason justifications recognised in relation to the free movement of goods.[89] In such cases the matters are governed entirely by Community law itself, so that the directive means that any national measures incompatible with it are in fact ultra vires the Member States.[90] In the case of non-exhaustive Community provisions, in which the Community provisions only occupy certain areas of the field, the Member States remain free to maintain or introduce national measures in the non-harmonised areas, subject to their being compatible with Community law.

Poor quality legislation with vague provisions resulting from political compromises sometimes make it difficult to ascertain what the precise character of a harmonisation directive really is. In many cases the determination of the precise scope of a directive will require a close analysis of its objectives and the system involved.[91]

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[87] see e.g. the case 5/77 Tedeschi v. Denkavit Commerciale (1977) ECR 1555

[88] whereas in the case of partial harmonisation the Community measures are binding in all cases in the matters which they cover

[89] e.g. case 148/78 Pubblico Ministero v. Ratti (1979) ECR 1629 at 1644

[90] see e.g. the case 123/76 Commission v. Italy (1977) ECR 1449

## 5. The present state of harmonisation of laws

Most of the directives adopted on the basis of the general harmonisation provisions of the E.C. Treaty by the Council and the Commission are aimed at removing barriers to trade justified under Art. 36 E.C. Treaty or under the rule of reason doctrine espoused first in case 8/74 Procureur du Roi v. Dassonville et al.[92] and subsequently in the Cassis de Dijon line of authority. As mentioned above the present policy of the Community legislator is largely based on the new approach, the principal elements of which were set out in a Council Resolution of 7 May 1985 and worked out in the White Paper on Completing the Internal Market.[93] First harmonisation is confined to the adoption of essential safety requirements (or other requirements in the general interest) to which products placed on the market must conform in order to enjoy free movement throughout the Community. Secondly the task of drawing up the technical specifications to ensure manufacture and marketing of products meeting those essential requirements was entrusted to the standardisation bodies, taking due account of technical progress. Thirdly those technical specifications would be voluntary as opposed to mandatory. This is the key distinguishing feature of standards as opposed to technical regulations. Finally national administrations are obliged to presume that products manufactured to harmonised standards conform to the essential requirements laid down in the directives. This means that there is a positive incentive for a manufacturer to produce to the harmonised standards, as such products automatically enjoy a presumption of conformity. He or she remains free to manufacture to other standards if desired, but in such a case the burden of demonstrating conformity with the essential requirements of the relevant directive shifts to the manufacturer.[94]

The new approach has been used e.g. for directives on simple pressure vessels[95], toys[96], medical devices[97] and many other products. In relation to foodstuffs, harmonisation is as yet still incomplete, although considerable progress has been made. The main point of departure is the principle of mutual acceptance in other Member States of products lawfully produced or marketed in a Member State,

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[91] see e.g. the case 249/84 Ministere public et al. v. Profant (1985) ECR 3237
[92] (1974) ECR 837 at 852
[93] COM (85) 310 Final
[94] see the Commission's Communication O.J. 1989 C 267/3. The new approach is also conveniently summarised in the "19th General Report on the activities of the European Communities of the European Communities 1985 (Brussels, Luxembourg, 1986) points 210-212
[95] Dir.87/404 (O.J. 1987 L 220/48)
[96] Dir. 88/378 (O.J. 1988 L 187/1)
[97] Dir. 90/385 (O.J. 1990 L 189/17)

enshrined in the *Cassis de Dijon* judgement, so that only the protection of health (under Art. 36 E.C. Treaty) or consumer protection (under the rule of reason) will justify a refusal to accept such goods.

until p. 34 your analysis is general / too general.

## V. Harmonisation of copyright law in the EU

### 1. Introduction

The essential ingredients necessary for books, films, television- and radio broadcasting up to the new technologies related to the internet are engendered and delivered by creative people. These are the authors, writers, directors, conductors, componists and any other kind of artists. They produce works and render services, which are the subject of any kind of exploitation, respectively films, theatre and especially music. That shows: without the creative people there is no content for the different kinds of media. But on the other hand the creative producing people are nothing without the institutions and the people involved in the process of exploitation of their engendered contents.

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History and practice have shown that the creative people in general are in the weaker position as far as any kind of negotiations are concerned. That leads to the conclusion that the copyright has to fulfill the task to give them a sound legal basis from which they can decide and negotiate if and how their creative products can be exploited. That is the central premise that has to be met to grant an appropriate income for the creative people.[98]

### 2. Historical development

The development of national copyright law is increasingly influenced by the premises set by E.C. law coming from Brussels. The copyright law, which is not explicitly mentioned in the E.C. Treaty, was envisaged rather late by the Commission. In 1971

the European Court of Justice has applied the notion of E.C.-wide exhaustion of distributing rights for music records as well.[99] What do you mean!?!

In 1985, the Commission of the European Communities stated in its White Paper on the completion of the internal market: differences in legislation on intellectual property rights have an immediate negative impact on trade in the Community and the ability of business to regard the common market as a whole for their economic activities. [100]

This was the lesson the Commission had finally learned from the case law handed down by the Court of Justice of the European Communities. After the Polydor-decision the Court had removed one large obstacle to harmonisation in the field: the territorially restricted exhaustion of rights. The Common Market is now the only relevant market in which the first sale of a copy of a copyright work or of a product protected under trademark or patent law triggers the so-called exhaustion of the respective intellectual property rights to control its further distribution within the Community.

After the Commission has demanded several comparative appraisals [101] the first Green Paper on Copyright, which was published in 1988[102], shocked the interested public. The EU Commission scrutinised the question of copyright law rather from an industry-political point of view. The existence of different national copyrights distorted the free movement of goods and services. Therefore this divergence in national laws as an obstacle for free trade was deemed to be necessary to be abolished. The Green Paper on Copyright contained the proposal not to tackle copyright in its entirety but only some choice topics. This paper was severely criticised [103]because of the meagre content of the proposals made and because of the

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[98] Detailed reason for for example for the German copyright law „Urheberrechtsgesetz" of 1965, published in Archiv für Urheber-, Film-, Funk- und Theaterrecht (UFITA) volume 45, page 279

[99] EuGHE (ECJ decisions) 1971, 487 – Polydor decision

[100] Herman Cohen Jehoram, " Harmonising intellectual property law within the European Community in: International Review of Industrial Property and Copyright law (IIC 05/1992, page 622 )

[101] e.g. Adolf Dietz, Das Urheberrecht in der EU 1978

[102] Commission of the European Communities "Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action", Communication of the Commission ,COM (88) 172 final, Brussels, 7 June 1988

[103] see e.g Gerhard Schricker " Harmonisation of Copyright in the European Economic Community" in International Review of Industrial Property and Copyright law (IIC 04/1989, page 466 – 484)

apparent exclusive preoccupation of the European Commission with the plight of the entrepreneurs who exploit copyright works, e.g. publishers, record and film producers and the like. The position of the authors themselves was neglected.
Yet soon thereafter a quite different wind started blowing in Brussels. Much work was deployed after so many years of stagnation resulting in only tepid proposals.

The „challenge of technology" phrase was employed in the title to the Commission Green Paper but what actually is this challenge and how does it relate in practice to copyright ? Only in the last couple of decades has renewed pressure to develop copyright beyond its literary, musical and fine art origins become apparent. It is the new technologies, which have made both the reproduction and dissemination of copyright works easier. But at the same time they increasingly demand themselves protection by copyright and thereby prompted this trend.

Insofar as they arise from the new technologies the challenges, which copyright law now faces take two different forms:
1) those relating to accepted forms of copyright work but occasioned by the greater ease of copying: reprography, audio and video recording technology and digital reproduction.
2) those relating to new forms of work of increasing economic significance, which do not fit conveniently into other intellectual property laws and which copyright has in effect been extended to cover: computer software and databases.

Of these two issues the latter is the more challenging from a harmonisation point of view , as it is the one which brings sharply into focus the difference between what one can term the common law approach to copyright and the civil law approach to it. Such differences bear both on subsistence and on first ownership of copyright, and the struggles that the Commission has faced in seeking to reconcile the two approaches to these issues are instructive.

In addition to that, it is trade interests, which influence the development of copyright. Entertainment continues as a vast and ever expanding industry and one to which copyright is of enormous significance as can for example be seen from the balance

sheets of companies in the music business.[104] The relative value of copyright to companies in other sectors, such as films, computer software and database services is likely to be similar, even though, as a matter of accounting practice, such assets are only rarely capitalised. Entertainment has now been joined by information technology, which in its many forms has itself become a major industry. In the course of his copyright law has been „hijacked" and is being moulded by commercial pressures to suit the new requirement of the information industry.

A further factor of special concern to the Commission was the distorting effect of differences in copyright laws on trade between Community Member States. Differences in the term of protection, as well as to what acts are and what acts are not restricted by copyright, are major causes but the issue also arises in relation to crossborder broadcasting. That means in particular satellite broadcasting, where there can be different holders of rights in a particular copyright work in different countries. An example of the effect of differences in term of protection on interstate trade is provided by the Patricia case.[105]
Such differences make copyright more subject than other intellectual property rights to apparent limitations on the principle of exhaustion of rights, which generally prevents the use of such rights against the the import into a Member State of articles first marketed in another Member State by or with the consent of the owner of the right.[106]

But exhaustion of rights does not extend to parallel imports from outside the Community, even if the country in which the goods are first placed on the market has a free trade agreement with the Community.[107]

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[104] Thorn EMI valued ist music publishing copyrights as at end of 1998 at 325 million Pounds out of total fixed assets of 1554 million Pounds.
[105] ECJ decision, EMI Electrola GmbH v. Patricia Im- und Export and others (1989) ECR 79, also published in GRUR Int. 1989, page 319
[106] Two cases in which exhaustion of rights rendered copyright ineffective against parallel imports of goods first placed on the market elsewhere in the Community by or with the consent of the copyright owner were ECJ decision, Deutsche Grammophon v. Metro (1971) ECR 487, also published in GRUR Int. 1971, page 450 and ECJ decision, Musik-Vertrieb Membran v. GEMA (1981) ECR 147, also published in GRUR Int. 1981, page 229.
[107] See e.g. the ECJ decision, Polydor v. Harlequin Record Shops (1982) ECR 329

The above mentioned two different approaches lay the origins for many problems the Commission faces in seeking to harmonise copyright in the Community. The common law approach to copyright as characterised by the U.K. tends to view it as an economic right. And the civil law approach on the other hand tends to view it as an author's right. Though all Community Member States are parties to the Berne Convention[108], such differences in approach can affect the interpretation which they put on its provisions.

On first ownership, the common law is associated with a broad view as to who or what can be the author and thereby first owner of copyright. In contrast to that the civil law is associated with the view that the first owner can only be an individual – a natural person or maybe a group of natural persons. The position of employed authors manifests these differences. Thus in common law countries it is the employer who tends to be the first owner of copyright. But in civil law countries the employee is always the first original owner of copyright. That leads to the necessity of an agreement by which the copyright is subrogated to the employer. This agreement is typically included in the contract of employment.[109]

On subsistence, the common law tends to be associated with lower thresholds of originality whereas the civil law seeks to make some judgement as to level of creative input in determining whether or not copyright subsists.

This dichotomy between the two approaches has been exacerbated by the attractions of copyright as a means of protecting certain aspects of new technology, such as computer software and electronic databases. Conventional concepts of originality as involving creative input, and as to there being individual and identifiable authors, can not readily applied to such works. Thus during the passage of the Software directive there was controversy as to standards of originality and as to whether or not computer generated works could be protected.[110] The draft Database Directive faced similar

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[108] The Berne Convention relating to literary and artistic works provides for copyright protection in „original works" to „operate for the benefit of the author and his successors in title" (see Art. 2 sect.6) but does not explain these terms further

[109] see § 43 of the German Urhebergesetz and according to that Schack „Urheber- und Urhebervertragsrecht", page 409 and 410

[110] Trevor M.Cook „Copyright in the European Community" in Europäische zeitschrift für Wirtschaftsrecht (EuZW), page 9

problems, indeed so much so that the Commission, which had originally suggested adopting a purely copyright approach to protection has finally abandoned this approach. Instead it proposed, alongside a harmonised copyright regime, a new, sui generis right, which is effectively a type of neighbouring right.

## 3. Competence of the EU institutions for copyright harmonisation

The copyright law is not mentioned in the Rome Treaties concerning the foundation of the European Community. The European Community bases its competence for the harmonisation of copyright law on the concept of free movement of goods and services. In this context it was the Community's duty to abolish any kind of obstacles to establish an internal market in which the free movement of goods, services, persons and capital is bestowed.[111]

Because the cultural function of copyright law is evident, the competence of the EU to adopt measures concerning copyright has not been doubted at any time. But the Commission had hoped that the Maastricht Treaty would bring a general competence rule concerning copyright within the context of Art. 128 E.C. Treaty, which deals with the rules of cultural matters. Unfortunately this hope was not fulfilled, because Art. 128 section 5 E.C. Treaty explicitly excludes any kind of harmonisation of administrative from the measures that can be adopted by the Council.

The ECJ always treated the application of rules of the E.C. Treaty towards copyright problems as correct[112] and has emphasised this point of view in its Phil Collins-decision.[113]

Thus copyright and neighbouring rights are governed by Art. 30 and 36 E.C.Treaty, the norms concerning the free movement of goods. In addition to that by Art. 59 and 66 E.C. Treaty, the norms concerning the free movement of services and the rules about fair competition in Art. 85 and 86 E.C. Treaty. And proved by the ECJ since the Phil Collins decision Art. 7 respectively Art. 6 E.C. Treaty with the general prohibition of discrimination applies as well.

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[111] Art.7 a E.C.Treaty

[112] A sound overview about the ECJ decisions concerning copyright since 1971 is given by Adolf Dietz in his report „The copyright law in the EU" in GRUR 1991, page 1445

[113] ECJ decision, 20.10 1993, ECR 1993, 5145, also published in GRUR Int. 1994, page 53

The copyright directives as a means of harmonisation, which aim to erect and support the functioning of the internal market, are mostly based on Art. 100 a and 100 section 1 in conjunction with 189 section 3 E.C. Treaty. The directive on rental and related rights and the directive on duration are supplementary based on Art. 57 section 2 and 66 E.C. Treaty. The Satellite and Cable directive on the contrary is solely based on Art. 57 and 66 E.C. Treaty, because the central aim of this directive is just to pave the way for a free movement of services.

## 4. The influence of the principle of subsidiary competence (Art. 3 b E.C. Treaty)

The Commission never attempted to reach a general harmonisation of copyright law within the Member States. Instead the Commission concentrated its attempt of harmonisation on questions raised by copyright problems, which necessitated immediate measures. Some of the directives have a certain topic of copyright, which they aim to protect, e.g. the Software directive. Other directives aim to protect certain detailed related rights like the Rental directive. The one and only general directive, which comprises the moral right of the author, is the directive concerning the harmonisation of the duration of copyright protection. This situation makes it quite clear that with an increasing number of copyright directives there may develop many contradictions underneath all these detailed directives. That may engender the necessity to adopt another directive in the future, which abolishes these contradictions. [114]

As mentioned above the Commission opened a broad discussion amongst copyright specialists with its 1988 Green Book about copyright and the technological challenges. The Commission justified the limitation to certain areas of copyright issues already at that stage with the principle of subsidiary competence pursuant to Art. 3b E.C. Treaty. According to Art. 3b section 2 E.C. Treaty, the Commission is in these areas, where it does not have the exhaustive competence, only permitted to act insofar as the aims of the envisaged measures cannot be reached on the level of

[114] Kreile and Becker, „ Neuordung des Urheberrechts in der EU" in GRUR Int. 1994, page 902

Member States and therefore can be reached better on the Community level. That means for the copyright, that there is no necessity for the Commission to act, where the Member States themselves are legislative active and thereby build no new obstacles to free trade within the internal market. The mandate of the Commission is thereby confined to legislative measures on certain areas and topics of copyright and neighbouring rights.

## 5. Means of harmonisation

The ECJ has with its decisions crucially contributed in accelerating the necessary harmonisation of copyright law on a European level. Since 1991 the harmonisation is achieved by the adoption of directives.[115] Besides this measure, the Commission has the instruments of decisions and regulations pursuant Art. 189 E.C. Treaty and State treaties between the Member States. The instrument of a State treaty was chosen for the Union agreement concerning patents of 15.12. 1975. And the means of a regulation (which is directly applicable according to Art. 189 section 2 E.C. Treaty as shown above) was chosen for the Union brand-mark protection.[116]

The biggest advantage of the directive as a means of harmonisation of laws is on the one hand that it leaves enough space when being implemented into national law. This advantage comprises on the other hand another disadvantage: because the directive sets only the upper and lower limits for protection there may be crucial amendments introduced during the implementation. And these deviations may be contradictory to the original aim of the directive. Another danger in the context of directives as an instrument of harmonisation is the incorrect, misunderstandable and especially delayed implementation of EU directives.

## 6. Original Objectives of EU Copyright Harmonisation

[115] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EC L 122/42, also published in GRUR Int. 1991, page 545 - 548

[116] see GRUR Int. 1994, 402-425

The first impetus for the European Community to harmonise the copyright laws of its Member States was not to improve copyright protection as such. In fact, its primary objectives were quite external to copyright law. The concerns of the European Commission and of the EC Council of Ministers in their harmonising efforts were of a character, which would at first even seem to be quite alien to copyright law or to worries over adequate protection of authors. The original objective was quite simply to complete the internal market of the European Community.
In 1985 the Commission of the European Communities expressed this quite clearly in its abovementioned White Paper on the completion of the internal market: "differences in legislation on intellectual property rights have an immediate negative impact on trade in the Community and the ability of business to regard the common market as a whole for their economic activities." It had taken a relatively long time before the Commission had learned this lesson. But finally a number of decisions of the Court of Justice of the European Communities had alerted the Commission and prodded it into harmonising activities, which would really only take off in the nineties, i.e. in these last few years.

One can only speculate on the reasons why it took such a long time before the Community became aware of certain dangers inherent in territorial intellectual property rights. Now it is only meant dangers for the attainment of certain principles of the EEC Treaty, amongst which loom large the freedoms of movement of goods and of providing of services across national borders within the Community and the non- discrimination of Community nationals.

One cause of the original complacency and inactivity of the EC might well have been that the same European Court of Justice, which would later so much alarm the EC authorities had started out with decisions having exactly the opposite effect.[117] The ECJ, in a long series of cases on unauthorised parallel imports of goods protected by intellectual property rights, had indeed succeeded in removing all by itself one large obstacle to the freedom of movement of goods: the territorially restricted exhaustion of rights, which in the past had served as an effective means to close borders. As a result of the case law development by the ECJ in Luxembourg, the internal market of

Which cases are you referring to?

[117] Beseler, "Die Harmonisierung des Urheberrechts aus europäischer Sicht", in ZUM 1995, page 437

the Community is now the only relevant market in which the first sale of a copy of a copyright work triggers the so-called exhaustion of the copyright to control the further dissemination of this copy within the whole Community. A copyright record, once sold in one internal market country by the right owner himself or with his consent, can now circulate freely throughout the whole internal market. The former merely nation-wide exhaustion of copyright has given way to a Community-wide exhaustion of the same right. This success of the ECJ, of course, freed the European executive branch from taking any action. The European freedom of movement of goods was, despite certain old copyright counter-arguments, automatically guaranteed by case law. Article 30 of the EEC Treaty, proscribing the free movement of goods within the Community, took immediate precedence over the formerly territorially divided copyrights.

## VI. The five directives adopted until today

### 1. Introduction

Until today there have been five directives adopted by the EU Commission. The first one was the Software directive from 1991.[118] The second was the Rental and Related Rights directive from 1992.[119] The third directive adopted by the Commission was the Cable and Satellite directive.[120] The fourth one was the Duration directive.[121] The fifth and last directive is the one concerning the protection of data bases.[122]

The second until the fourth directive have been caused by certain decisions of the European Court of Justice (ECJ) and will therefore be discussed in one context. The

[118] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EC L 122/42, also published in GRUR Int. 1991, page 545 - 548

[119] Council directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ EC L 346/61 also published in GRUR Int. 1993 144 - 147

[120] Council directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ EC L 248/15, also published in GRUR Int. 1993, page 936 - 940

[121] Council directive 93/98/EEC of 29 October 1993, harmonising the term of protection of copyright and certain related rights, OJ EC L 290/9, also published in GRUR Int. 1994, page 141

[122] Council directive 96/9/EEC of 11 March 1996 on the protection of data banks, OJ EC L 77/20, also published in GRUR Int. 1996, page 806 - 811

so-called "Phil Collins decision" of the ECJ is also discussed in this context because it has a crucial impact on copyright law and therefore a kind of harmonisation in itself. The chronologically speaking first directive from 1991 and the last one from 1996 will be discussed after that.

## 2. Three ECJ Decisions Prodding the EC into Harmonising Activity

It has already been mentioned that the ECJ with its verdicts related to copyright law issues had a tremendous influence concerning the development of copyright harmonisation. This process had originally been started with the Polydor-decision of the ECJ from 1971 which has been cited above.

After a while, however, it became clear that the establishment of the Community-wide exhaustion of copyrights was about as far as the ECJ could go on the basis of Art. 30 of the EEC Treaty. It also had to reckon with Art. 36 of the same Treaty, which provided that Art. 30 shall not preclude prohibitions or restrictions on cross-border trade if they are "justified" on the grounds of, inter alia, copyright. The interplay of those Arts. 30 and 36 of the EEC Treaty has led the ECJ to perform a rather breathtaking tightrope-walking act between the two fields of law at issue: EC law and intellectual property law. It shall be omitted to describe this act in all its sometimes hair-raising manoeuverings. In the ensuing part there will only be mentioned three cases in which the ECJ did not succeed in giving precedence to the European freedoms over copyright, where consequently the reverse happened, i.e. where the copyright to forbid prevailed over the freedoms of cross-border movement of goods and providing of services. Those three decisions of the ECJ were each the immediate cause for the EC executive to adopt three of the now existing five copyright directives.

### (1) Coditel I case – the Cable directive

a) the case: The first such decision was given in the *Coditel I* case,[123] where the question was whether the freedom to provide services across borders could be restricted by a copyright owner in a film who wanted to forbid the unauthorised cable

[123] ECJ decision, 18 March 1980, case 62/79, Coditel v. Cine Vog (1980) E.C.R. 881, also published in GRUR Int 1980, page 603

retransmission in Belgium of an authorised German broadcast of his film. The copyright owner won his case. The ECJ indeed made a distinction between this case of a performance and its earlier decisions on the EC-wide exhaustion of copyright in copies sold anywhere within the Community. According to the ECJ in the *Coditel I* case "the right of a copyright owner and his assignee to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work." The exclusive assignee of the performing right in a film for a certain Member State may rely upon his right against unauthorised cable television diffusion by cable operators which have received it from a television broadcasting station established in another Member State, without thereby infringing Community law.

This restriction of Community law, sanctioned by an ECJ decision of 1980, at the time perplexed and angered the European Commission, which subsequently threatened with draconic measures like a directive containing compulsory licenses. But after furious opposition, and 13 years later, in 1993, this was all toned down to the mild directive on copyright applicable to satellite broadcasting and cable retransmission.[124]

b) the directive and its special features

The Satellite and Cable directive from September 1993 in conjunction with the television directive of 1989 intends to build a unique and common legal framework for television broadcasting and its further conducting within the European area.

This directive adresses the conflict between the transnational nature of satellite broadcasts and the territorial nature of copyright. Several Member States, each with different copyright or licensing situations, can fall within the footprint of the Satellite, with the broadcast infringing copyright in some, but not others. Due to this fact, for satellite transmission, broadcasters only require copyright licences in the Member State „where under the control and responsibility of the broadcasting organisation the programme carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth"[125]. This is the

[124] Council directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ EC L 248/15, also published in GRUR Int. 1993, page 936 - 940

[125] Castendyk and Albrecht „Der Richtlinienvorschlag der EG-Kommission zum Satellitenfernsehen", in GRUR Int. 1992, page 734

crucial feature of this directive. By virtue of this completely new rule the until then existing unsafe situation was abolished. Before the adoption of the directive it was an intense discussion amongst copyright specialists, which rights a broadcasting station had to acquire before distributing the program by satellite all over Europe across all borders. The Commission refused to follow the two other opinions, the so-called „Bogsch-theory" and the theory of the intended area of transmission. Further details concerning the conflict between these theories follow below in the context of Art.1 (2) (b) of the directive.

The essential aim of the directive is on the one hand that the acquiry of the distribution rights is implemented on a contractual basis (not by compulsory licenses as the Commission actually threatened). And on the other hand the directive aims to block the veto-rights of some authors, who may have any kind of copyright related to the certain program. Otherwise these persons could stop the further distribution of such programs across the European borders. To compensate these owners of rights they are granted special claims to royalty payments.

The rules about the further distribution of the program via cable are only referring to the distribution across the boundaries of Member States. The legislation for the further distribution within one country remains at every Member State.

But without harmonisation it could encourage some kind of „copyright heavens" with low levels of protection, broadcasting to countries with more protection and where licenses might be hard or expensive to obtain. Accordingly the directive also harmonises the relevant copyright laws throughout the Community, by aligning these with those being established under the Rental Rights directive. The directive leaves open, however, the position of broadcasts originating from outside the Community, unless they pass via an uplink station in the Community, or are at the behest of a broadcasting organisation within the Community.[126]

According to Art. 2 of this directive , all Member States shall provide an exclusive right for the author to authorise the communication to the public by satellite of

[126] Dreier, "Die Umsetzung der Richtlinie zum Satellitenrundfunk und zur Kabelweiterleitung", in ZUM 1995, page 460

copyright works. Compulsory broadcasting license systems, as allowed by Art. 11bis of the Berne Convention, and practised in Luxembourg, are thus precluded.

Also in the case of cable retransmission of programmes from other Member States, Art. 8 prescribes that all Member States shall ensure that the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between right owners and cable operators. This contractual freedom was not envisaged at all in earlier drafts of a directive on cable retransmission. On the contrary, the EC Commission had originally ventured a system of compulsory licenses for cable retransmission, as indeed also permitted by Art. 11bis of the Berne Convention, and, for instance, practised in Denmark. Later on the EC Commission proposed a system of obligatory arbitration.

The last remnant of this constraint is to be found in Art. 11 of the directive containing a soft system of mediation. The only real, but inevitable, constraint left in the directive consists of a canalisation of claims. Article 9 (1) provides: "Member States shall ensure that the right of copyright owners and holders of related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society."

The actually most important feature of the satellite part of the directive is that its Art. 1 (2) (b) now clearly specifies where the act of communication to the public by satellite occurs: "solely in the Member State, where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth." As Recital 14 of the directive explains: "such a definition is necessary to avoid the cumulative application of several national laws to one single act of broadcasting." This is a direct rejection of the so-called theory of the intended area of transmission and of the so-called Bogsch-theory.

According to the Bogsch-theory the question which copyrights have to be acquired depends on the number of countries, in which the broadcasted signal *in fact* can be

received.[127] This theory is supported by the World Intellectual Property Organisation (WIPO) and of course by all the authors and other people who might be entitled to claim some royalties.

Pursuant the theory of the intended area of transmission it is only necessary to acquire the copyrights for these countries, to where the transmission is intended. That means an exclusion of any unintended overspilled transmission across the border of an adjacent country nearby (in contrast to the Bogsch-theory). The scope of the intended area is appraised by using objective criteria. These criteria are: language of the program, aimed audience of the broadcasted advertisments and the sale of decoders (especially for satellite pay TV, like M-net). This mediating third theory is commonly used in the international license practise.[128] Despite this fact the Commission favoured the theory with the least premises to be met.

This principle of the applicability of one sole national legislation to the satellite operation, which will - at least in Europe - cover a whole series of national territories, does not, of course, preclude financial differences between traditional terrestrial and satellite broadcasts. Recital 17 of the directive, speaking of the amount of payment to be made for the rights acquired, reminds us that the parties should take account of all aspects of the broadcasts, such as the actual audience, the potential audience and the language version.

**(2) Warner-Metronome case – the Rental directive**

a) the case: The second case to be mentioned in this context is the Warner-Metronome decision of the ECJ in 1988. [129] The question here was whether the copyright owner in a film could rely on his Danish rental right with respect to the unauthorised renting out of a videocassette of his film in Denmark, despite the fact that this videocassette had legally been sold to the defendant in the United Kingdom, where no such rental right existed. The ECJ could not deny that the Danish right to prohibit the unauthorised rental of the videocassette, bought in the United Kingdom,

[127] Kreile und Becker, "Urheberrecht im europäischen Binnenmarkt", in ZUM 1992, page 589
[128] Castendyk und von Albrecht, "Der Richtlinienvorschlag der EG-Kommission zum Satellitenfernsehen",GRUR Int.1992, page 735
[129] ECJ decision, 17.May 1988, case 158/86, Warner Bros. and Metronome Video v. Erik Viuff Christiansen 19 IIC 666 (1988) also published in GRUR Int. 1989, page 668

is liable to restrict international, intra-Community trade in videocassettes. The Danish legislation must therefore be regarded as a measure having an effect equivalent to a quantitative restriction on imports, which is prohibited by Art. 30 of the EEC Treaty. But then the ECJ went on to argue that rental laws of the Danish kind are clearly justified on grounds of the protection of intellectual property pursuant to Art. 36 of the EEC Treaty and therefore exempted from the application of Art. 30.

b) the directive and its special features

This decision led to the adoption in 1992 of the EC Directive on rental, lending and certain neighbouring rights.[130] This introduces rental rights throughout the Community. The Warner-Metronome decision curtailed the free movement of goods within the Community. Yet the question which gave rise to the whole decision in the first place, the disparity in national laws on the subject of rental rights, will simply cease to exist.

This directive is in effect two measures in one. *Chapter I* of the directive establishes on the one hand a rental and on the other hand a lending right. And *Chapter II* obliges those Member States which do not do so to confer neighbouring rights of fixation, reproduction and distribution for the benefit of performers, phonogram producers of the first fixations of films and broadcasting organisations.

From 1st July 1994 originals and copies of works capable of being rented or lent (e.g. books, audio cassettes, video cassettes, compact discs – computer software is already by then protected in all Member States by virtue of the Software directive) are protected from rental or lending under the provisions of *Chapter I* of the Rental Rights directive. Thus to rent, or for libraries to lend such an article without the consent of the rights owner, notwithstanding their ownership of property in the physical article breaches these rights. Member States can however, opt out of the exclusive lending right, if they remunerate authors for lending. Extending rental rights to all Community Members overcome disparities such as those revealed by the

[130] Council directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ EC L 346/61 also published in GRUR Int. 1993 144 - 147

Warner Bros. case[131], in which a videocassette, bought in the U.K. (which at the time could be lawfully rented out there without the consent of the copyright owner as the U.K. did not have rental rights at the time) could in contrast not lawfully be rented out in Denmark (which instead did have rental rights), thus constituting an apparent limitation on the „exhaustion of rights-doctrine".

Pursuant Art. 1 section 1 of the directive the rental right is designed as a prohibition right and not solely as a claim to royalties. Art.1 section 2 of the directive gives a very wide definition of what "lending" means: it is the granting of possession for the intention of commercial or economic use for a limited period of time. This clearified the situation concerning the question whether a rental contract might be necessary or not. According to Art. 2 section 3 of the directive buildings are excluded from the application of the rental right. Another last conspicuous feature of the directive concerning the rental right is the possibility of an assumption concerning the subrogated rights. According to the directive the Member States are free to include such an assumption when implementing the directive into domestic law. But if a Member State decides to do so, Art.2 section 5 and section 6 have to be met. Such an assumption concerning the scope of ceded rights is only permitted in the context of a contract related to a film production. Furthermore this assumption has to be rebuttable. And finally the directive comprises in Art.4 an unalienable claim to royalties for the authors due to the renting of their works.

Concerning the lending right, on the other hand, the Member States have a broader range of flexibility while implementing the directive. Even if it would have been possible to construct the lending right as exhaustive right as well, there are several exceptions in Art. 5 of the directive. This was necessary as a kind of compromise because this part of the directive was the mostly discussed one.[132]
The German legislative power has used this opportunity to establish a mere limited claim to royalties for the lending right in the German copyright law. Entitled persons are not only the owners of the copyright, but also the artists, record producers and film producers according to their performance. Copyright owners, who have

[131] ECJ decision, Warner Bros. Inc. v. Christiansen (1988) ECR 2605, also published in GRUR Int. 1989, page 668
[132] Lewinski, "Die Umsetzung der Richtlinie zum Vermiet- und Verleihrecht", in ZUM 1995, page 443

subrogated their rental right to a record- or a film producer retain an unalienable claim to royalties.[133]

For neighbouring rights existed a need for harmonisation insofar as neither all EU-Member States are parties to the Rome Convention nor did this Convention establish a common level of copyright protection amongst the European Member States to this Convention.

*Chapter II* of the directive concerns neighbouring rights, and for those Member States not yet parties to the Rome Convention, brought levels of protection for such rights up to a similar level to that provided under the Convention and thereby lay the ground for its ratification in time for the 1st January 1995 deadline set by the Council resolution on adherence. It establishes a minimum duration of rights for film producers in fixation of films (which not covered yet by the Rome Convention) of twenty years from fixation. For artists and broadcasting enterprises it encompasses an exhaustive recording right.[134] An exhaustive multiplication- and distribution right is granted to artists, record- and film producers and broadcasting enterprises.[135] In addition to that the directive comprises a claim to royalties for the second use of sound recordings for the purpose of broadcast and public display. Entitled are the artists and the record producers.[136]

**(3) EMI/Electrola case – the Duration directive**

a) the case. The third and last example to be mentioned here is the EMI/Electrola decision of the ECJ in 1989.[137] The question at issue here was whether the owner of rights in recordings could obtain a court injunction in Germany against an unauthorised importer of records from Denmark. The records had been manufactured in Denmark without any consent, but because the rights had lapsed in that country the records were still to be regarded as legal. In the country of import, however, Germany, the rights in the records still subsisted. The defendant, of course, relied on the Euro-defence of the freedom of movement of goods within the Community.

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[133] Loewenheim, „Harmonisierung des Urheberrechts in Europa", in GRUR Int. 1997, page 286
[134] see Art. 6 of the Rental Rights directive
[135] see Art. 7 and 9 of the Rental Rights directive
[136] see Art. 8 of the Rental Rights directive

The ECJ in its decision stressed that the fact that the sound recordings were lawfully marketed in another Member State is due, not to an act or the consent of the copyright owner or his licensee, but to the expiry of the protection period provided for by the legislation of that Member State. Recognising that it then had to deal with problems arising out of "differences between national legislations," the ECJ considered that in the present state of Community law, which is characterised by a lack of harmonisation or approximation of legislation governing the protection of literary and artistic property, it is for the national legislatures to determine the conditions and detailed rules for such protection. In so far as the disparity between national laws may give rise to restrictions on intra-community trade in sound recordings, such restrictions are justified under Art. 36 of the E.C. Treaty if they are the result of differences between the rules governing the period of protection and this is inseparably linked to the very existence of the exclusive rights.

b) the directive and its special features

This was another whiplash of the ECJ to force the European Commission into harmonising activity in the field of copyright law. It finally resulted in the directive on the duration of copyright and related rights. [138] It was adopted, with the minimum of the required majority in the Council of Ministers, on 29 October 1993.

This directive provides a clear example of the so-called "upward harmonisation" of copyright. Although the vast majority of Member States now have the traditional 50 years post mortem auctoris copyright protection, nevertheless the single longest term existing within the Community, i.e. the German term of 70 years post mortem auctoris (p.m.a.), has been chosen as the harmonised one for the whole Community, as of 1 July 1995. For the neighbouring rights of performers, producers of phonograms and films and broadcasting organisations a liberal term has also been chosen, namely 50 years.

Recital 5 of the directive defends prolonging - for most Member States - the copyright term with the argument that the average lifespan in the Community has grown longer.

[137] ECJ decision, 24 January 1989, case 341/87, EMI Electrola v. Patricia Im- und Export Verwaltungsgesellschaft 21 IIC 689 (1990) also published in GRUR Int., page 319

Recital 9 provides a more technical argument, which can indeed tip the scales here: due regard for established rights. This, of course, means established rights in the Member State with the longest existing term, which is Germany with its 70 years p.m.a. A choice in the directive for 50 years p.m.a. would have meant that the goal of removing existing barriers to free cross-border intra- Community trade, as exemplified by the described EMI/Electrola decision of the ECJ about the consequences of different national terms of protection, [139] would not have been completely attained for another 120 years. The choice for the term of 70 years p.m.a. is justified, if not on grounds of copyright itself, then certainly by the aim of all the harmonising effort, namely the realisation of the internal market.

In passing, this directive has also suddenly created two new neighbouring rights. Article 4 provides for protection of any person who, after the expiry of copyright, for the first time lawfully publishes previously unpublished works. This "editor" gets protection equivalent to economic copyrights, for a term of 25 years.

Article 5 provides for still another, this time optional, neighbouring right. Member States may protect critical and scientific publications of works, which have fallen into the public domain. The maximum term here is 30 years.

Article 7 (1) maintains the Berne Convention rule of comparison of terms with respect to works which have a third country as their country of origin. Here one would think of the US with its traditional 50 years p.m.a.

An important rule of transitional law is contained in Art. 10 (2) of the directive: "The terms of protection provided for in this Directive shall apply to all works and subject matter which are protected in at least one Member State" on 1 July 1995 "pursuant to national provisions on copyright or related rights". As a consequence of this provision all German works, which on 1 July 1995 are still protected in Germany because of its long term of 70 years p.m.a., but which have fallen into the public domain in most other countries where the shorter term of 50 years p.m.a. exists, will be revived in

[138] Council directive 93/98/EEC of 29 October 1993, harmonising the term of protection of copyright and certain related rights, OJ EC L 290/9, also published in GRUR Int. 1994, page 141-144

those other countries. Up until the Phil Collins decision, described above, it was often assumed that only German works would profit from this revival. For instance Dutch works, which had fallen into the public domain in their own country of origin, the Netherlands, would not enjoy the longer German term of 70 years p.m.a., because Germany practised the reciprocity rule, permitted by the Berne Convention, which is called the comparison of terms. Through Art. 6 of the EC Treaty, however, as now interpreted by the ECJ in Phil Collins,[140] the situation has changed. As of 1 January 1958 (the date on which the EEC Treaty took effect at least in the six original Member States), Germany is also under the obligation to extend its 70 years p.m.a. rule to the successors in title of Dutch authors. Through a copyright in a Dutch work, which eventually still subsists only in Germany on 1 July 1995, the protection will, as of that date, be revived throughout the Community.

One small concrete example may be useful here.[141] The famous Dutch painter Piet Mondriaan died on 1 February 1944. The copyrights in his paintings are still very lucrative because of all sorts of merchandising activities. His highly abstract expressions are still widely used as patterns for designs of fashionable rugs, textiles, place-mats etc.: a regular Mondriaan industry. Now the copyrights in these works will lapse in the Netherlands, and in nearly all countries of the world, 50 years p.m.a., i.e. on 1 January 1995. Since the Phil Collins decision it is clear, however, that the successors in title of Piet Mondriaan will enjoy another 20 years of copyright protection in Germany, with its term of 70 years p.m.a. This means that on 1 July 1995, half-a-year after the rights have lapsed in the rest of the world, they still subsist in one Member State of the Community. Now through Art. 10 (2) this German copyright protection will trigger a revival of Mondriaan's rights in the rest of the Community, as of 1 July 1995, for another 19 1/2 years. Between 1 January and 1 July 1995, i.e. for half-a-year, the works will be in the public domain in the Netherlands and nearly everywhere in the Community. In that half- year they can be freely exploited, as Art. 10 (3) provides, in order to protect acquired rights of third parties. The beauties of the EC directives are boundless.

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[139] ECJ decision, 24 January 1989, case 341/87, EMI Electrola v. Patricia Im- und Export Verwaltungsgesellschaft 21 IIC 689 (1990) also published in GRUR Int., page 319

[140] ECJ decision, 20 October 1993, case C-92/92, Phil Collins v. Imtrat Handelsgesellschaft, published in GRUR Int. 1994, page 53

### (4) The Phil Collins" Decision: A Harmonisation in Itself

Besides the three decisions of the ECJ, which are mentioned above, the ECJ made another decision, which had a tremendous impact on copyright law within the European Union. The ECJ, with its Phil Collins decision of 20 October 1993, [142] caused a landslide in (inter)national copyright law. It ruled that copyright and related rights fall within the scope of application of the EEC Treaty within the meaning of Art. 7 (nowadays Art. 6), containing the principle of non-discrimination of Community nationals, and also that this prohibition of discrimination may be directly invoked before national courts by an author or by an artist from another Member State in order to demand that they be accorded the same protection which used to be reserved to national authors and artists.

Both the Berne and Rome Conventions have always allowed for some specific exceptions to be made to the national treatment principle. These exceptions concerned performers' rights with respect to recordings made outside the territory of Rome Convention countries - the direct Phil Collins case - and further the permitted reservations made at the ratification or accession of states to the Rome Convention, according to which states could resort to reciprocal treatment of foreign performers and producers with respect to the secondary remuneration rights in cases of broadcasting or public playing of commercial records.

The Berne Convention allows for reciprocity with respect to resale rights (Art. 14 Berne Convention), copyright protection of industrial designs (Art. 2 (7) Berne Convention) and the term of protection: the so-called comparison-of-terms provision (Art. 7 (8) Berne Convention). All these exceptions have been widely practised and they have now all lost their effect within the Community vis-à-vis Community nationals. For example Italian designers can now all of a sudden enjoy copyright protection for their industrial designs in France and the Benelux countries, because those countries can not any longer uphold the formerly valid reciprocity treatment,

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[141] example according to Herman Cohen Jehoram, " The EC copyright directives, economics and authors rights", in International Review of Industrial Property and Copyright Law, page 836

[142] ECJ decision, 20 October 1993, case C-92/92, Phil Collins v. Imtrat Handelsgesellschaft, published in GRUR Int. 1994, page 53

which was based on the fact that Italy does not reciprocally provide French or Dutch designers with Italian copyright.

In the same way, English and Dutch authors now suddenly enjoy copyright protection in Germany for 70 years post mortem auctoris, because Germany can no longer apply the rule of the comparison of terms. English and Dutch painters can now claim resale royalties over the sales of their artworks in France, Germany and Belgium.

Finally, all neighbouring rights' privileges formerly only granted to nationals now have to be extended to the nationals of all 15 Community countries, and probably wider to the nationals of all countries of the European Economic Area (the EEA Treaty in its Art. 4 also contains the non-discrimination rule). This abolition of all former reciprocity rules does not just take effect from the date of the Phil Collins decision, i.e. 20 October 1993. This decision only gave an interpretation of Art. 6 (formerly Art. 7) of the EEC Treaty which took effect - at least for the original six Community countries - on 1 January 1958.

It shall not be veiled at this point that the Phil Collins decision of the ECJ has been severely criticised. [143] The most frequently used argument against it is that such imposed non-discriminating treatment on the one hand helps to abolish national foreigner-rules, but on the other hand contributes nothing to the harmonisation of international and European copyright regimes. On the contrary: national lacks of protection concerning copyrights are emphasised because the authors can benefit from a higher level of copyright protection in other EU Member States automatically. And their home countries are not even compelled to grant the same rights reciprocally.

### (5) The chronologically speaking first directive ( the Software Directive)[144]

It has been mentioned before that three of the five directives, which are in place at this moment are each the direct result of three decisions of the ECJ. This might raise the

[143] see e.g. Schack, Urheber- und Urhebervertragsrecht, page 70
[144] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ EC L 122/42, also published in GRUR Int. 1991, page 545 - 548

question: what then caused the chronologically first directive? If no specific decision of the ECJ can be quoted as the cause of this directive, where then do its origins lie?

The fourth Recital to the Software Directive contains a veiled allusion to certain differences in the legal protection of computer programs offered by the laws of the Member States, which then, of course, have direct and negative effects on the functioning of the common market as regards computer programs. What were these "certain differences"? Certainly not any difference in the view that computer programs should be under copyright protection. This was already generally accepted law in Europe when work on the directive started.

The main reason for any harmonising directive in the field really seems to reside in the widely divergent national traditions within the Community with respect to the most central question of copyright protection in general: when does a work qualify as an object for protection?

Within the European Community three systems exist, or at least existed up until the first EC Directive on copyright, the very Software Directive being discussed now.
Firstly the common-law tradition in the UK and Ireland always took the most relaxed view of requirements for copyright protection: the expenditure of "skill, labour and investment" was enough. Apart from that a certain "originality" is required, but this word in the common-law countries simply means that the work originates from the maker and is not copied from another source. In the UK and Ireland a mere non-copied telephone directory would qualify for full copyright protection.

Secondly another group of countries was formed by France, Italy, the Benelux and indeed nearly all Continental countries. Here the general requirement for copyright protection is "originality," in the sense of personal expression of an author. Compared to the common-law tradition this provides for a certain threshold, albeit a low one in practice: any jingle, personal letter or snapshot would already qualify. Nevertheless, a mere telephone directory would be excluded.

The third system in the Community is to be found in Germany, where indeed the least relaxed view is taken. Here the courts require more than just personal expression.

Especially in the fields of designs and computer software further qualitative or aesthetic tests used to be applied to the work under consideration for copyright protection. The threshold of originality required for copyright to subsist is a threshold which appears to be very high in Germany. This is for example shown by the „Inkasso-decision" of the German Supreme Court Bundesgerichtshof (BGH).[145] The BGH held that copyright only protects computer programs „which assume a clearly outstanding creativity in selection, collation, organisation, and division of the material and directions compared to general and average ability". This decision is perceived to have effectively deprived much computer software in Germany from copyright protection.[146]
This was the real and fundamental diversity within the Community that the Software Directive had to abolish.

The Community had to make a choice between the three existing requirements for copyright protection, and it did choose. The most central provision of the Software Directive we find in Art. 1 (3): "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection."

"Intellectual creation": this is the choice for the intermediate position of Western Continental Europe. The words "the author's own" can be regarded as a formal bow to the common-law terminology of "original". The further-reaching German requirement of qualitative tests is firmly rejected with the last sentence: "no other criteria shall be applied."

This definition of originality can be regarded as the main justification of the whole Software Directive.

The hope in the software industry was that in implementing the directive, the high standard of originality as exemplified by the BGH's Inkasso-decision in Germany would be reduced. This hope was fulfilled when the German legislative power Bundestag implemented the Software directive. The new § 69a section 3 of the

[145] BGH decision, published in Neue Juristische Wochenschrift (NJW) 1986, page 192

German Urheberrechtsgesetz clearifies the new lower threshold of copyright protection for the German copyright regime.

This shows clearly that the copyright protection of every software designer is now emphsised in that kind of way that the intellectual result is being protected even when the software has only usual, average features. The „work" in a sense of copyright law does no longer demand a very special, sophisticated performance. It is sufficient that the work is a product of the intellectual ability of the software designer and not a result of mere coincidence.[147]

In general it can be summarised that the Software Directive has introduced copyright protection for computer programs even in Member States in which no comparable kind of protection existed before. Thus the copyright protection of computer programs is based on the following common principles: a) computer programs are protected as works of literature by exhaustive rights pursuant to copyright law; b) a general definition of the person, who owns the rights is given; c) the acts, which necessitate the consent of the owner of the rights, are defined; d) on the other hand the acts, which represent no copyright infringement are defined as well; e) the detailed premises that have to be met are established; f) the term of protection is defined according to the Duration directive.

### (6) The choronologically speaking last directive (the Database Directive)

This latest directive was planned for quite a long time. The Commission had the question of database protection already in 1988 in its mind, when the Green Book of 1988 was published. And already at that time this issue was regarded as one of the questions that needs immediate legislative measures. The first proposal was published in May 1992.[148] The basic concept was the protection of databases as collections in the sense of the Berne Convention. But the Commission did not realise the crucial problem that also databases which stay beyond the threshold of originality necessary for copyright protection, need to be protected against unlawful use. That is the reason

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[146] see Schack „Urheber- und Urhebervertragsrecht", page 89, stating that about 90 percent ! of all computer programs remained without any copyright protection

[147] Becker and Kreile, „ Neuordnung des Urheberrechts in der EU" in GRUR Int. 1994, page 906

[148] Vorschlag vom 15.04 1992 für eine Richtlinie des Rates über den Rechtsschutz von Datenbanken, published in GRUR Int. 1992, page 759

why protection of unlawful excerpts was included, which should protect the owner of the rights against unlawful multiplication and distribution by means similar to the regime of unlawful competition. This protection became a sui generis right in the new proposal of June 1993, which should grant protection against the unlawful retrieval of material from a database. In July 1995 the Council took a general attitude towards the database directive. This new proposal protects not only electronic databases but also any other kind of possible database.[149] And the Council agreed to the newly created right sui generis. On the ground of this common point of view, the Database directive has been adopted on 11. March 1996.

The Commission's directive on database protection aims to harmonise, so far as possible, database protection by means of copyright and to provide, by means of a sui generis right, protection independent of copyright for those aspects of databases not considered capable of protection by copyright. The overall justification for the directive lies in the recognition that the protection accorded electronic databases in certain Member States is inadequate.
The directive intends to harmonise especially the existing copyright-rules of the Member States which are applicable to the content of databases with online access (ASCII) and offline access (CD-ROM and CD-i).[150]

The distinguishing feature of the database directive is that it has a legal structure in two parts. On the one hand the databases have an enhanced protection by copyright law (a). And on the other hand there is a right sui generis for the designer of the database (b). Both rights are applicable at the same time.[151]

(a) Pursuant Art. 3 section 1 of the directive databases are protected if they are an intellectual creation due to the choice and the arrangement of the collected data. This norm resembles to Art. 2 section 5 of the Berne Convention. Art 3 section 1 of the directive makes clear that concerning the threshold of originality no other criteria are involved (similar to the Software directive). That is very important for the implementation into German law, because the German copyright law used to have a

[149] see Art.1 of the Database directive
[150] Frost, „Auf dem Weg zu einem europäischen Urheberrecht", EWS 1996, page 90
[151] see Art. 7 section 4 of the Database directive

rather high threshold for copyright protection, as it is explained above in the context of the "Inkasso-decision" of the BGH

The equivalent construction of Art. 3 of the directive, which resembles to Art.2 section 5 of the Berne Convention, leads to gaps of protection. Similar to collections, only the choice and the arrangement of the collected data is protected, not the content of the database itself.[152] There are further gaps of protection. According to Art. 4 section 1 of the directive, the natural person, who created the database is deemed to be the owner of the copyright. This means for the practice that the owner of the protecting rights are not the creators of the database. These rights belong to their employees.

(b) The sui generis protection closes these gaps of protection. Pursuant Art. 7 of the directive the Member States are obliged to establish a protective right for the creator of a database against the unlawful retrieval and use of the *content* of the database. This sui generis right differentiates from usual copyright protection in several ways. Firstly there is no own creative work necessary. The protection encompasses databases, which necessitated a severe monetary investment. Secondly the protection comprises the immediate *content* of the database. And thirdly the owner of the protecting right is not the creator of the database. It is the owner of the database, who initiated the foundation of the database and who bears the financial risk.

According to Art. 7 of the directive a protecting right sui generis is granted, if the retrieval, the scrutiny or the display of the content of the database required an essential investment. This definition is a little bit flabby. But Recital 40 states clearly that not only pecuniary investments, but also the use of work and time are covered by this definition. Thus Art.7 of the directive does not only protect commercial databases, but also private or scientific databases.

[152] see Art. 3 section 2 of the directive

The question on which level the threshold for the necessary "amount" of investment is located remains quite unclear. The directive leaves this task of defining the least level of investment to the courts.

## VII. Further development

### (1) The 1995 Green Book on copyright and new technologies[153]

After several industry countries have published surveys and reports concerning the importance of the new technologies (especially in connection with the internet) in relation to the copyright, the Commission has published its Green Book on copyright and the new technologies on the 19th July 1995. This Green Book is one of many means that have been anounced by several different EU institutions concerning the topic "information society".[154]

In the first part of the Green Book, the Commission emphasises the crucial role, which the protection of copyrights and related rights may have concerning the completion of the internal market. It is displayed how important the protection of copyrights is in view of a cultural, economic and social dimension.

The second part contains a list of challenges which are involved in the development of the information society and their possible influence on the protection of copyrights and related rights. The new services of the information society are located at the edge of the sectors of computer technology, telecommunication and audio-visual communication.

The distinguishing feature of these services is a huge saving capacity and the easy possibility to retrieve data. And most of them are interactive. By using the technique of digital compression of data it is possible to save a tremendous amount of data on the same data-carrier. By virtue of this new technique it is nowadays much easier to receive identical copies and to distribute them in the same quality or to make certain changes concerning the works.

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[153] Green Book "Copyright and related rights in the information society", COM (95), 382 (final)
[154] Lewinski, "Das europäische Grünbuch über das Urheberrecht und neue Technologien", in GRUR Int. 1995, page 831

Another important issue is the fact that the services of the information society are rendered across all boundaries of adjacent states.
Thus it is expected that new structures of the markets will develop. On the side of service offers the diversification of rendered services seems to be very impressive. The production is going to shift from the now existing rather small traditional structures to the areas of industry, telecommunication and software. On the side of buyers the important change will be the increase of number of users.[154]

In the third part scrutinises the question how a possible legal framework for the information society may look like on a Community wide level. Despite the fact that the information society will cause severe changes concerning the available services, it seems to loom that the existing legal regimes for the protection of copyrights and related rights are capable adapt to the diverse technical changes and developments. It is deemed to be possible that the current development may solely cause a further development of the existing rights, but not necessitate a complete replacement of these rights.[155] The Green Book speaks of a need to redefine the legal structure of "originality" (as it has occured e.g. for the Software and the Database directive) or the definition of an "author" in a sense of copyright.

## (2) The EU proposal concerning copyright and related rights in the information society[156]

This latest proposal represents a direct consequence to the Green Book from 1995. It is its purpose to harmonise the right of multiplication and public display of copyright works. The general access to copyright related sources of information via the digital network and the right of distribution is covered by this proposal. In addition to that certain rules of some treaties of the World Intellectual Property Organisation shall be implemented.

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[154] Lewinski, "Das europäische Grünbuch über das Urheberrecht und neue Technologien", in GRUR Int. 1995, page 832
[155] Frost,"Auf dem Weg zu einem europäischen Urheberrecht", in Europäisches Wirtschafts- und Steuerrecht, 1996, page 92
[156] proposal from the 10th December 1997, published in GRUR Int. 1998, page 402 - 406

This proposal is being discussed by the institutions and it is unclear when a directive concerning this topic will be adopted.

**(3) Planned directives**

The Commission has announced that it is planned to discuss a directive concerning the private copying of sound- and audiovisual records. Besides that the Commission is busy with the question of an ensuing right, that will be granted to authors and artists to make sure that they can benefit from an increasing value of their works if it is resold again. But there are no new directives on copyright expected to be adopted before the year 2001.[157]

## VIII. Conclusion

The development of the European Union until now is an impressing example, what peoples and especially their voted political leaders are able to realise if they made such horrific experiences as they were made during the Second World War. If a person living about a hundred years ago would have been told, to what extend the European countries would grow together on any kind of level, nobody would really have considered such a development to be possible. Bearing in mind how much wars have determined the fate of millions of people in Europe for centuries, it can not be underestimated how lucky the European peoples can be to live now in a European Union. And the final brick into that wall against another war in Europe will be set when the monetary union will be completed with the shift to the distribution of the Euro instead all the national currencies. Because then the political union will be accompanied by a complete economic union.

And this impressing process of integration was only possible due to the establishment of the common institutions and the common legal regime, which is described above. The common institutions and the common legal regime form a kind of "umbrella" which is built all over Europe and unifies all countries. It provides for the solid

ground on which the European Union could grow until today and is still continuing to grow in the future, especially towards the Eastern countries, which apply to become Member States. A common legal regime in a sense of giving the framework for all Member States is a kind of tree from which every Member State can grow, embedded in the Community. Therefore it so important to support the ongoing process of integration by abolishing all the differences between European domestic laws that can interfere with the unification of the Member States. This leads to the crucial role of harmonisation of laws in the European Union in general. And one small but important aspect of this harmonisation process is taking place in the field of copyright law.

As it was said before, the first impetus for the European Community to harmonise the copyright laws of its Member States was not to improve copyright but to lift existing copyright barriers to the realisation of the internal market. Also the growing awareness of the economic importance of copyright industries has played an important role. This all became very clear in 1988, when the Commission started its activities in this field with the publication of the Green Paper on Copyright. This paper was immediately attacked because of the meagre content of its proposals and also because of the apparent exclusive preoccupation of the European Commission with the plight of the entrepreneurs in the copyright industries, i.e. publishers, record, film and software producers and the like. The position of the authors themselves was neglected to an astonishing degree. The criticism found its expression in the slogan "authors' rights without authors." [158]

Yet soon thereafter quite a different wind started blowing in Brussels. It commenced with the described Software Directive of 14 May 1991, and within only a few years a whole series of far-reaching directives had been established, whilst others are still in preparation.

Apparently the Community has restricted itself to piecemeal legislation on very specific copyright topics. Yet it could not refrain from solving fundamental questions and from legislating in really "horizontal provisions" (provisions that concern other

[157] Frost,"Auf dem Weg zu einem europäischen Urheberrecht", in Europäisches Wirtschafts- und Steuerrecht, 1996, page 91

legal areas as well), the most important one being the repeatedly made choice for the general Continental personality approach to the "originality-requirement" in copyright.

The most conspicuous element of the Commission's reorientation after the 1988 Green Paper is that it also started to focus its attention on the position of authors and artists and their protection vis-à-vis their own producers. This is most clearly illustrated in Art. 4 of the Rental and Related Rights Directive.

Today, within the European Union, an impressive level of harmonisation in copyright law is realised. There is a broad consent about the key issues of substantial copyright law essentials. It remains unclear in how far and with what kind of means the European Union reacts to the changes caused by the new technologies. This situation can be clearly monitored on a national level. Most of the European countries have not adopted any legislative measures in relation to the new technologies. The process of discussion was in essence just initiated by the publication of the 1995 Green Book.

But one can state that a "European copyright law " is on its way. The EU Member States are about to establish such a union wide legal regime concerning copyright and related rights. The European legal measures in the field of copyright can be compared to pieces of a jigsaw-puzzle, that create a big picture, if they are put together.[159] Some of these pieces are already put together, others are being built right now and others are being planned. And there are still some gaps in existence.

I would like to draw a historic comparison at this stage to come to an end. Rome was not either built on one day and its law was constructed out of court decisions, decrees and laws over centuries. Despite that fact the laws of Rome have governed and influenced a lot of European countries. And it is still influencing legal systems today.

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[158] Schricker,"Zur Harmonisierung des Urheberrechts in der Europaeischen Wirtschaftsgemeinschaft" in Festschrift fuer Ernst Steindorff, page 1437

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