UPDATING AND CONSOLIDATION OF THE ACQUIS

The Future of European Copyright

Michel M WALTER[*)]

I. INTRODUCTION

More or less eleven years after the first European Copyright Directive, the Software-Directive, having been adopted, it might be worthwhile to stop for a moment and to reflect what has been achieved hitherto and what is still to be done.

Before discussing the question whether further harmonisation of European Copyright seems to be necessary and, if so, on which problems such harmonisation work should concentrate, the question arises, if there is a need to update or revise the harmonisation achieved so far. However, the European legislator's youngest children, the Resale Right Directive and the Infosoc Directive, shall not be dealt with in detail, with respect to the fact that these directives are still in the process of implementation. So it will not be dealt, for example, with the question whether or not the establishing of a vast catalogue of optional exceptions in the Infosoc Directive was a good idea or not. I would only like to mention, with reference to Judge Laddie's remark of yesterday, that the inclusion of an additional fair use rule would rather go against the bit of harmonisation achieved in this field.

Dealing with the updating and consolidation of the acquis three different points must be made: First of all, we may ask the question whether the solutions laid down in the existing directives treat – without good reason - identical or comparable legal issues differently. Secondly, one or the other solution given in a particular directive may be criticised in itself and should, therefore, be modified or clarified. Thirdly, we will have to scrutinise whether there are – still within the framework of the acquis and its objective - gaps of harmonisation to be filled in.

II. UPDATING AND CONSOLIDATION OF THE ACQUIS WITHIN THE FRAMEWORK OF EXISTING DIRECTIVES

1. Harmonisation of issues treated differently in existing Directives

The relationship between the different directives in the field of copyright and related rights is governed by the rule of speciality. As far as the particular rulings of each directive are concerned, such provisions take priority over more general provisions of other directives. For this purpose all directives provide for safeguard-clauses stating that its provisions shall apply without prejudice to other Community provisions and shall leave intact and in no way affect such existing provisions. Thus the rule *lex posterior derogat legi priori* does not apply. However, the rule of *lex specialis* may create inconsistencies and problems of interpretation, since some of such differences may have been provided for intentionally, whereas others not. In case that there are no major reasons for maintaining such differences and anomalies they should, in my opinion, be eliminated. Without claiming completeness, I would like to give the following examples:

1.1. The exploitation rights of authors of computer programs

While the Database Directive provides for all traditional exploitation rights, including the making available right[1] as now generally provided for in Article 3 Infosoc Directive, the exclusive rights granted to authors of computer programs are restricted to the exploitation in material form, namely the reproduction and distribution, including rental but excluding lending (Article 4 Software Directive). Pursuant to the dominant opinion the creators of copyright software enjoy, nevertheless, also the public lending right granted by the Rental and Lending Right Directive; however, one could as well argue that on the grounds of the speciality rule authors of computer programs are deprived of the public lending right. The same problem arises, as far as computer programs are concerned, with regard to the right of communication to the public as it is granted to all kinds of works in the Infosoc Directive, at least with regard to the communication to the public showing some distance element. In my opinion, the public lending right as well as the right of communication to the public now applies also to computer programs, but a clear statement of the European legislator seems to be advisable.

1.2. Exceptions and Limitations

Particular problems are given raise to by the different layers of provisions dealing with exceptions and limitations. So already the Software-Directive as well as the Rental and Lending Right-Directive and the

---

*) Hon Prof Vienna University; lawyer in 1080 Vienna.

1 See Ricital 31 Database-Directive.

Database-Directive each provide a set of special exceptions to and limitations of the exclusive rights granted. That is why the question arises whether the – obligatory or optional – exceptions as provided for in Article 5 Infosoc-Directive may be applied also to computer programs, related rights and original databases, and, if this should be the case, to what extent.

(a) As to computer programs Articles 5 and 6 Software Directive provide for particular exceptions which in a way go beyond the closed list of Article 5 Infosoc Directive. Since these exceptions are tailor-made for software, they shall, indeed, stay intact. However, which exceptions of the Infosoc catalogue shall be applied to software as well? Or, does the safeguard clause auf Article 1 Infosoc-Directive exclude all other exceptions and limitations of the Infosoc catalogue, even if they refer to completely different situations, e.g. teaching or scientific research? With regard to the particular provision of Article 5 para 1 Software-Directive in favour of the lawful acquirer of a computer program, one may agree that neither the exception regarding transient or incidental reproduction by the lawful user[2] nor that in favour of private use by a natural person[3], as provided for in the Infosoc-Directive, shall apply to computer programs. But what's about the transient or incidental reproduction on the occasion of transmissions in a network between third parties by an intermediary?

(b) Comparable questions arise with regard to the exceptions as provided for in the Rental and Lending Right-Directive and in the Database Directive. As far as the former Directive is concerned, Article 11 para 2 generally permits the taking over of exceptions as provided for authors' rights; it is, therefore, consistent with the Rental and Lending Right-Directive when the Infosoc Directive generally speaks of "copyright" as well as of "other subject-matter" of protection. However, are the specific rulings of the Infosoc Directive with regard to private copying applicable also to related rights and, in particular, is this the case also with regard to the claim to fair compensation? In my opinion, this must be the case, since the safeguard clause of Article 11 para 3 now is replaced by the "Three-Step-Test"[4].

As far as the exception in favour of teaching and research work is concerned, it may be noted that the Rental and Lending Right Directive does not restrict such use to a non-commercial one, as the other directives do. Thus one might ask the question whether this provision – irrespective of the safeguard clause – must be read within the light of Article 5 Infosoc Directive.

(c) As to the Database-Directive similar questions arise. Apart from restricting private copying to non-electronic databases and the lack of a claim to fair compensation in this case, the general clause of exceptions provided for other categories of works appear against a different background, because Article 6 para 2 litera d Database-Directive does not refer to the Infosoc catalogue but to traditional solutions of that very Member State.

Summarizing what was said until now, in my view the provisions dealing with exceptions and limitations in all directives prior to the Infosoc Directive should be adjusted and coordinated with the Infosoc catalogue[5].

1.3. First Sale Doctrine

Another example is the circumscription of the first sale doctrine[6]. This fundamental principle was already provided for in the Software Directive, the Rental and Lending Right Directive and the Database Directive. However, the wordings differ from the more general one of Article 4 Infosoc Directive and should, therefore, be adapted as well. Furthermore, Article 5 litera c Database Directive only mentions the 'first sale' of the original or of copies of a database, while the Infosoc Directive as well as other texts speak of "the first sale or other transfer of ownership" which formula is more general; also this inconsistency should be eliminated.

1.4. Technological Measures (Software Directive and InfoSoc Directive)

A harmonisation of the acquis could also extend to the protection of technological measures as provided for in the Software Directive on the one hand (Article 7 para 1 litera c) and – more generally – in Article 6 Infosoc Directive. Though the protection granted under the latter provision is stronger and more comprehensive, no harmonisation was achieved insofar by the Infosoc Directive. One may assume that this hesitant attitude was due to the measures to be taken by Member States under Article 6 para 4 Infosoc Directive. It is true, that the harmonisation achieved in this particular provision of the Infosoc Directive is a rather modest one. In any case, there it is a further example of differing solutions with regard to identical legal issues.

2. Clarifications and modifications

As to the second question, whether – in order to update and consolidate the acquis – one or the other provision of earlier Directives needs clarification or modification, only some examples shall be given.

2.1. Notion of non-commercial use

---

2 Article 5 para 1 .Infosoc Directive.

3 Article 5 para 2 litera b Infosoc Directive.

4 Article 11 Infosoc Directive.

5 See *Walter* in *Walter* (editor), Europäisches Urheberrecht No. 89 et sequ Infosoc Directive.

6 See for details *Walter* in *Walter* (editor), Europäisches Urheberrecht No. 35 et sequ Stand der Harmonisierung (state of harmonisation).

One of such possible clarifications could deal with a more precise and homogenous circumscription of the notion of non-commercial use[7] which is to some extent obscure as such[8]. While Article 1 para 3 Rental and Lending Right Directive defines non-commercial purposes in circumscribing the public rental right as the making available for use, for a limited period of time and "for direct or indirect economic or commercial advantage"[9], other provisions use this expression without definition and without referring to an "economic advantage"[10] in differing wordings[11]. Others combine these two elements following the model of the Rental and Lending Right Directive[12]. With respect to the fact that there is a substantial difference between profit making purposes and only such aiming at whatever economic advantage these different wordings may create confusion and need, furthermore, differentiation.

2.2. Protection of posthumous works

Let me pass on to the Duration-Directive which, indeed, is a milestone of successful harmonisation of European Copyright. Nonetheless, the provision of Article 4 creating a new Related Right in providing protection of previously unpublished (posthumous) works should be modified in a way. This provision speaks of unpublished works which are published or communicated to the public for the first time after expiry of copyright protection. On the one hand, it is illogical to attach the protection to two different conditions (publication - communication to the public). But above all, it is not reasonable to grant protection already for an act of mere communication to the public as for instance the performance of a musical work. In my opinion, the provision should be modified in such a way that only the publication of a work not yet published should give raise to this new neighbouring right[13].

Furthermore, the condition of "lawfully" publishing a work which has already fallen in the public domain should be eliminated in my view, because it is unclear whose consent should be asked for, when the work is already in public domain. In case that the text should require the consent of the owner of the manuscript, however, such condition seems to be even counterproductive.

2.3. Broadcasting organisations' fixation and reproduction right

One other example, where clarification is needed: Under the Rental and Lending Right Directive cable distributors shall not have the fixation right provided for in Article 6 where they merely retransmit by cable the broadcasts of broadcasting organisations. The same holds true with regard to the reproduction right. However, as far as this latter reproduction right is concerned, it has been totally abolished by the Infosoc Directive with regard to the more general circumscription of the reproduction right in Article 2 without mentioning, and this is the point, the restriction of the reproduction right of broadcasting organisations with regard to pure re-transmitters. Though this seems to be a mistake of redaction only, also in this respect a clarification is needed[14].

2.4. Fixation right and reproduction right

This leads me to the more general question, whether the distinction made between fixation on the one hand and reproduction on the other is still appropriate in the field of related rights. I will not elaborate on this question and confine myself in mentioning this issue[15].

2.5. Compulsory license (Article 13 of the Berne)

---

7 Respectively a use for "economic advantage".

8 As already mentioned Article 11 para 1 litera d Rental and Lending Right Directive does not refer to this restriction at all.

9 See *Reinbothe/Lewinski*, The EC-Directive on Rental and Lending Rights and on Piracy 38 et sequ; *Lewinski in Walter* (editor), *Europäisches Urheberrecht Article 1* No. *12 et sequ Rental and Lending Right Directive.*

10 See Article 6 para 2 litera b Database-Directive. Article 5 Infosoc Directive: para 2 litera b (neither directly or indirectly commercial); para 2 litera e (non-commercial purposes); Article 5 para 3 litera a (non-commercial purposes); para 3 litera a (non-commercial purposes); para 3 litera b (use of a non-commercial nature); para 3 litera j (excluding any other commercial use).

11 With or without referring to the fact that such economic advantage may be direct or indirect.

12 See Article 5 para 2 litera c (not for direct or indirect economic or commercial advantage).

13 For details see *Walter* in *Walter* (editor), Europäisches Urheberrecht *Article* 4 No. 9 et sequ Schutzdauer-RL (Duration-Directive).

14 See *Reinbothe/Lewinski*, The EC-Directive on Rental and Lending Rights and on Piracy 88 et sequ; *Lewinski* and Walter *in Walter* (editor), *Europäisches Urheberrecht Article 6* No. *5 et sequ. Rental and Lending Right Directive No. 57 Infosoc Directive.*

15 See for details *Walter* in *Walter* (editor), Europäisches Urheberrecht No 48 et sequ (No 53) Infosoc Directive.

Still within the context of possible clarifications, I would like to mention a last point. Pursuant to Article 13 of the Berne Member States may provide for limitations as far as musical compositions (with or without words) had already been licensed for recordings. Several Member States have – to counteract monopolies of the record industries – provided for legal or compulsory licences on the basis of this provision. Under the viewpoint of the closed catalogue of exceptions and limitations as enshrined in the Infosoc Directive one might argue, however, that such legal or compulsory licenses are deemed to be exceptions and limitations, which are not mentioned in the Infosoc catalogue and, therefore, no longer permitted. In my view, such a result would not be reasonable; it should, therefore, be clearly stated that the resort to this reservation is still permitted.

Taking into consideration that mechanical rights in the field of music regularly are administered by Authors' Societies, one might think of an additional provision installing obligatory collective administration which leads me to another and last question which I would like to touch upon in this context.

2.6. Obligatory collective administration (extended licenses)

The Satellite- and Cable-Directive provides for a system of extended licences respectively obligatory collective administration of rights through Authors' Societies[16]. Here again, the question may arise, whether such systems established in other fields of copyright or related rights are deemed to be exemptions or limitations within the meaning of Article 5 Infosoc Directive. However, the establishing of such systems in other fields than satellite- and cable transmission may be reasonable, for instance as regards mechanical rights as just mentioned. It should be made clear, therefore, that such systems are reconcilable with the closed catalogue of exceptions and limitations as provided for in Article 5 Infosoc Directive.

3. Gaps of harmonisation in existing Directives

Let me pass on to the third category of a possible updating of the acquis, namely gaps of harmonisation to be filled in, again within the framework of existing Directives, and highlight the following three examples only, all taken from the Duration-Directive.

3.1. Concept of joint works and duration of copyright

First of all, there are still different concepts of joint authorship in the legislation of Member States. Whereas countries of roman tradition conceive also the combining of works of different character for the purpose of joint exploitation as joint works, most of the other European countries, however, presuppose the inseparability of the result of joint authorship. This question regards, above all, operas, operettas, musicals and other dramatico-musical works and – more generally - also the words and the music of a song. Since the term of protection runs from the death of the last surviving author in case of co-authorship, the notion of joint authorship is decisive with regard to the harmonisation of the term of protection aimed at by the Duration-Directive.

One may discuss, therefore, to follow the Roman tradition with this regard and thus complete the harmonisation on a high level as this is already tradition in this Directive. Thus – in following the example of audio-visual works[17] - at least as far as dramatico-musical works are concerned, the term of protection could run from the death of the last surviving author of the music or of the text (dialogue, libretto). One might consider, furthermore, a similar solution also with regard to the combination of text and music in songs and the like on condition that the music is specifically created for use in combination with the specific text or vice versa.

4.2. Anonymous or pseudonymous works and duration of copyright

A similar problem arises with regard to anonymous and pseudonymous works. Whereas some legislations understand all works to be cryptonymous works the author of which is in fact unknown, other legislations assume, from a more formal viewpoint, that only the publication or communication to the public of a work in indicating the proper name of the author renders it outside the circle of pseudonymous or anonymous works.

In close context with this problem the further question arises how the revealing of the author's name must be made. Some legislations provide for particular copyright-registers where anonymous or pseudonymous works may be registered with the effect that the term of protection runs from the death of the author. Other legislations don't provide such public registers and recognise any revealing of the author's proper name or publication under the real name of the author as revealing the author's identity. Also with this respect, further harmonisation seems to be necessary.

4.3. Prolongation de guerre

Third and last example: Some national legislations provide on the grounds of largely differing systems for prolongations of the term of protection on account of world war I and/or II. Some of such prolongations have

---

[16] For details see *Dreier* in *Walter* (editor), Europäisches Urheberrecht Article 3 No. 9 et sequ. and Article 9 Satellite and Cable Directive.

[17] See *Schricker*, Musik und Wort – Zur Urheberrechtsschutzfrist dramatisch-musikalischer Werke und musikalischer Kompositionen mit Text, GRUR Int 2001, 1015.

been absorbed by earlier general prolongations of the protection term, however others have not and still cause terms of protection differing from Member State to Member State. Pursuant to Article 10 para 1 Duration-Directive such longer terms of protection are not affected. Also with this regard a still more homogeneous system of protection may be discussed.

To summarise, it can be noted that a considerable harmonisation work has already been done. Nevertheless, some questions concerning the interaction between existing directives and with regard to some other issues should be clarified; furthermore one or the other provision should be slightly modified and some gaps within the framework of the acquis should be filled in. Thus a first step of further harmonisation of European Copyright could consist in such a consolidation and gap filling exercise. This should be a first step to be taken, but not the last.

III. Where Should European Copyright go in the Future?

Prior to answering to the rather exciting question where European Copyright should go in the future, we will have to make out the state of harmonisation achieved in adopting seven directives with regard to seven different fields of copyright and related rights. Two of them refer to particular subject-matter of protection, namely computer programs and databases, the latter adding a new related right or *sui generis* right in favour of non original databases. The harmonisation achieved by these directives is, therefore, only a vertical one. Three more Directives refer to particular exploitation rights or claims to an equitable remuneration, as there are the rental and lending right, the broadcasting and re-broadcasting right by satellite and cable as well as the resale-right. Although from a different viewpoint, also these Directives only grant vertical harmonisation restricted to these particular rights or financial claims.
On the other hand the Duration Directive already achieved horizontal harmonisation with regard to this particular and important issue. The same holds true, last but not least, for the Infosoc Directive, which, therefore, sometimes is called Copyright-Directive. However, this directive concentrates on issues in the digital world and is, therefore, likewise incomplete from a more general viewpoint. In all, a great deal of harmonisation work has already been done. However, there is still a vast field, where harmonisation is not yet achieved and where further harmonisation could or even should be envisaged. I will confine myself in briefly describing these fields, and conclude in expressing my personal opinion which is, of course, open to discussion.
In dealing with the question, whether further harmonisation should be envisaged and, if so, which method shall be adopted, here again, it could be helpful in order to structure the discussion to distinguish between different fields of possible further harmonisation.

1. Extending vertically harmonised solutions horizontally

A further harmonisation could start in extending vertically harmonised solutions horizontally. Several directives provide for solutions which could easily be transferred to other comparable fields of copyright and related rights. Let me briefly describe the following examples:

1.1. Concept of originality

So for instance the concept of (reduced) originality, as laid down for computer programs[18], original databases[19] and photographs[20] in the respective directives could be extended to all categories of works. Though the circumscribing of the notion of originality with respect to the mentioned subject-matter of protection was due to the particular concern of the respective directives, I don't see any argument against the adoption of this understanding as a general rule. Furthermore, a different understanding of originality may cause serious obstacles to the free circulation of goods and services with regard to other works as well[21].

1.2. Adaptation right for all kinds of works

As far as the catalogue of exclusive rights granted to authors and other rightholders is concerned, it may be noted that the Software Directive as well as the Database-Directive provide for the adaptation right which is also

---

18 Article 1 para 3 Software-Directive.
19 Article 3 para 1 Database-Directive.
20 Article 6 Duration Directive.
21 Another question of the same kind is the protection of works of applied art under copyright and the problem of its relationship to national or European design protection. I refer with this respect only to the rules of the Design-Directive (Article 17) and the Design-Regulation (Article 96) which refuse, it is true, exclusive systems granting either copyright or design protection, but leave it to the legislator of the Member States to draw the line of demarcation between copyright and design protection. Also with this regard there is still some need for further harmonisation.

acknowledged in the Berne. Thus also this exclusive right, which seems to be of crucial importance in particular in the digital environment, should be extended to all kinds of works.

1.3. Introduction, transit and exportation

As to the distribution right, it has been discussed already at the Geneva WIPO Conference to amend this exclusive right in clearly stating that the introduction is already deemed to be distribution without an actual circulation on the internal market being necessary. With regard to the seizure of pirated goods this concept is already anchored as well in the Berne as in the Anti-Piracy-Regulation of 1994/99 and has tradition in French and US-American copyright law. The right of importation and exportation is explicitly stated also in the Trademark-Directive and, last but not least, in the Infosoc Directive itself, but restricted to technological protection measures and rights management information[22].

1.4. Unwaivable right to an equitable remuneration

Last but not least I would like to ask a more general and may be somewhat provoking question which seems to me to be of eminent importance: Why should the unwaivable right to an equitable remuneration[23], as anchored in the Rental and Lending Right Directive, not be applied to all economic rights of authors and performing artists?

2. Possible further development of existing Directives

Leaving more and more the stable terrain of the acquis or vertically adopted solutions one could think also of further developing existing Directives. This seems to me rather to be a logical follow up of the track already taken than a revolutionary issue. Let me give some examples.

2.1. Scope of authors' economic rights

Under such an aspect the economic rights granted to authors could be further developed beyond those provided for in Articles 2 to 4 Infosoc Directive. Besides the general adoption of an adaptation right, one could take into consideration to extend the exclusive right of communication to the public to cases without an element of distance[24] (in particular to live-performances) and – with regard to the particular situation of works of art – discuss a display right in favour of such authors. One could classify this objective also as a the mere extension of solutions already touched upon in other Directives, since e.g. the Database-Directive provides for an unlimited right of communication to the public in using, however, different formula which do not necessarily presuppose a distance element.

2.2. Harmonised system of equitable remuneration in particular cases

Apart from completing the harmonisation of the exclusive rights the establishing of harmonised remuneration systems in particular cases seems to be still an issue of harmonisation. Let me remind you in this context that the Infosoc Directive – though providing for fair compensation – does not yet stipulate an equitable remuneration system in the strict sense of the word neither for reprographic copying nor for private copying on other material, in particular on digital carriers. Furthermore, as far as the free use for the purpose of illustration of teaching is concerned, not even a fair compensation is explicitly required. Of course, at the time being further harmonisation seems to be difficult with this regard; however, such harmonisation is still an important issue, which is why at least a bookmark should be kept in our files.

2.3. Economic rights of performing artists and other rightholders of related rights

If we turn towards related rights it was, indeed, a great progress, when the Rental and Lending Right-Directive harmonised the related rights of performers, phonogram producers, film producers and broadcasting organisations not yet granted at that time in all national legislations. However, the level of harmonisation is a rather modest one and goes not far beyond the minimum protection of the Rome Convention. A further development of the protection of related rights, which is indeed a minimum protection, should, therefore, be taken into consideration as well.

2.4. Obligatory protection of critical editions

Again with regard to related rights, the circle of such neighbouring rights was enlarged already by the Duration Directive in providing a special protection for posthumous works, already mentioned above, and by the Database Directive in installing a system of *sui generis* protection for non original databases. However, though Article 5 Duration Directive established a framework for the protecting of critical editions, such protection is only optional; thus a real harmonisation so far has not been achieved. In my opinion, this is a severe obstacle to the free circulation of goods which should not be underestimated.

2.5. Related right for not original photographs

---

22 Article 6 and 7 Infosoc-Directive.

23 See for details *Reinbothe/Lewinski*, The EC-Directive on Rental and Lending Rights and on Piracy 63 et sequ; *Lewinski* in *Walter* (editor), *Europäisches Urheberrecht Article 4 Rental and Lending Right Directive.*

24 See Recital 24 Infosoc Directive.

The same holds true with regard to the protection of non-original photographs. Indeed, the threshold of protection is – pursuant to Article 6 Duration Directive – not a high one. However, the fact that some Member States grant a neighbouring right to such non-original photographs and others do not, is also a lack of harmonisation which should not be under estimated as well.

3. Other fields of possible harmonisation

Whereas the fields of a possible further harmonisation, as touched upon until now, have already been dealt with in existing Directives in principal, there is a series of further questions not discussed until now at all or excluded, so far, explicitly from harmonisation, as this is the case, above all, with regard to moral rights and the question of first ownership.

3.1. Moral rights of authors and performing artists

In my opinion, there is a need of harmonisation also with this respect. Of course, one may object that there are irreconcilable differences between the British, the French or other legal traditions. I do not think, however, that these differences - as great as they may be - are, in fact, insurmountable.

3.2. First ownership of copyright

Apart from moral rights of authors and performing artists, as already mentioned, also the general question of first ownership of copyright is not yet harmonised. Both fields of legal problems are, in my view, not questions of mere academic interest, but have an economic impact and may - directly or indirectly – jeopardise the free circulation of goods and services as well.

3.3. Notion of public

Let me mention in this context, finally, a more technical but nonetheless crucial issue, the notion of public, which is neither harmonised on the international nor on the European level. It is worthwhile noting with this regard that I would rather propose to harmonise this notion than to discuss the inclusion of all secondary uses, for instance with respect to the use of community antennas, in the contracts dealing with primary uses.

4. Additional issues

Effective copyright and related rights protection requires an up to date protection by material copyright and neighbouring rights law. However, effective protection and effective access to copyright subject-matter on fair conditions requires also a legal framework with regard to other legal aspects, as there are enforcement, rights management, in particular through Authors' Societies, Private International Law (including transborder infringement and International Contract Law) as well as, last but not least, a set of harmonised rules concerning authors' and performers' contracts with (primary) users of all kind.

4.1. Sanctions and remedies

The 1994 Anti-Piracy-Regulation concerning the seizure of pirated goods by customs offices is, indeed, a helpful means to fight piracy. However, sanctions and remedies should be harmonised also within the internal market: There should be no Member State where pirates may live safer than in an other. The steps already envisaged by the Commission should, therefore, be pursued strenuously.

4.2. Collecting societies

Rights management through Authors' Societies becomes more and more important, in particular in the digital age. The legal framework of their effective work should, therefore, be harmonised to some extent in taking into account that Collecting Societies serve the interests of the creative world as well as those of potential users, and that Authors' Societies are not comparable with monopolies in the economic world.

4.3. Private International Law including transborder infringement and contract law

(a) The harmonisation of the conflict of laws rules in the field of copyright and related rights seems to be necessary as well on the European level. Though the principle of territoriality is already accepted more or less in all Member States, the law applicable to the question of first ownership is still under discussion as this is the case with regard to transborder infringement, especially in the digital environment. This is true also with respect to the application and the impact of the *ordre public* rule.

(b) The International Contract Law, on the other hand, is already harmonised in the Rome Agreement on contractual relations. However, the attaching of the applicable law to the place, where the characteristic service has been rendered, does not result into foreseeable and adequate solutions with regard to copyright and related rights contracts. Furthermore, the line of demarcation to be drawn between material law and contract law needs clarification as well as the field of application of the so-called positive *ordre public*[25].

4.4. Copyright contracts

As far as copyright contracts are concerned an eventual extension of the unwaivable right to an equitable remuneration as provided for in the Rental and Lending Right Directive was already mentioned. Though keeping in mind the principle of subsidiarity some harmonised legal framework for copyright contracts should be

---

[25] *Lois d'application immédiate; Eingriffsnormen.*

established also on the European level. As Recital 10 of the Infosoc Directive correctly emphasizes, in order that authors and performers are enabled to continue their creative and artistic work, they must receive an appropriate reward for the use of their works as must producers in order to be able to finance this work. Sufficient and effective protection of copyright and neighbouring right is, therefore, of great social and economic importance. However, to ensure to authors and performers a fair participation (equitable remuneration), a legal framework for authors' and performers' contracts must not be lost out of sight either. It seems to me of stringent necessity to take care of authors contracts, to adopt this stepchild of copyright and bring it under the umbrella of European copyright.

Of course, one must be aware of the fact that further harmonisation can only be achieved step by step and that sometimes it may be even more advisable to let Member States come up with national solutions and testing them rather than elaborating them pre-maturely on the European level, as Judge *Bornkamm* mentioned yesterday. However, we must discuss these issues as early as possible and not plead the "time is not ripe" exception straightaway without reflection.

5. Justification of further harmonisation

To conclude, I would like to summarise the arguments in favour of a further harmonisation of European Copyright. In the first line, also the remaining differences between the legislations of the Member States may be an obstacle to the free circulation of goods and services within the Community. Secondly, most of the questions alluded to have a significant economic impact and are not only of academic interest. Furthermore, a country of origin regime, as established for particular questions or under special circumstances, may not serve as a general solution with this regard.

Last but not least, the further harmonisation and development of European Copyright Law seems to be also an end in itself. As the Commission stressed already in its "Follow-up to the Green Paper"[26] there is a need to harmonise copyright and neighbouring rights at a high level of protection since these rights are fundamental to intellectual creation. Furthermore, the Commission has made clear that their protection ensures the maintenance and development of creativity not only in the interest of authors and of cultural industries, but also in the interest of consumers and the society as a whole[27].

I believe, therefore, that we should continue to fulfil – step by step – the goal of harmonisation which could, eventually, end up even in an European Copyright Code (Regulation). Of course, we must not cherish illusions about the difficulties and obstacles which may appear pursuing that way. Nevertheless, I would like to conclude in quoting *Federico Fellini* who said*: The true realist is the visionary - C'est le visionnaire, qui est le véritable réaliste.*

---

[26] Communication of January 17, 1991.

[27] Recital 10 Duration Directive.