Concise European Copyright Law

Second Edition

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Published by Kluwer Law International B.V.
P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands
sales@kluwerlaw.com
http://www.wklawbusiness.com

Sold and distributed in North, Central and South America by
Wolters Kluwer Legal & Regulatory U.S.
7201 McKinney Circle, Frederick, MD 21704, USA

Sold and distributed in all other countries by
Turpin Distribution Services Ltd.,
Stratton Business Park,
Pegasus Drive, Biggleswade,
Bedfordshire SG18 8TQ, United Kingdom

Suggested citation:
[Author name], in Dreier/Hugenholtz, *Concise Copyright* (2nd ed.), [Document name], art. [...], note [...]

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ISBN 978-90-411-2879-9

Printed in the United Kingdom

PREFACE

'Concise IP' is the short name given to a series of five volumes of commentary on European intellectual property legislation. The five volumes cover: Patents and related matters, Trademarks and designs, Copyrights and neighbouring rights, IT and a general volume including jurisdictional issues. The series is based on a successful formula used for a Dutch publication, a series called Tekst & Commentaar (Text & Commentary) and on the equivalent German publication, Kurz Kommentar (Short Commentary). Since their first publication, these have won a prominent place among Dutch and German legal publications with each volume becoming an authority in the field.

Concise IP aims to offer the reader a rapid understanding of all the provisions of intellectual property law in force in Europe enacted by European and other international institutions. The volumes take the form of an article-by-article commentary on the relevant regulations and other legal instruments. It is intended to provide the reader with a short and straightforward explanation of the principles of law to be drawn from each article, rule or other provision. Where appropriate, this is done by reference to the construction of that provision by senior courts. Usually only judgments of the European Court of Justice, higher national courts or other senior tribunals such as the Board of Appeal of the European Patent Office are cited, though there are exceptions where an important point has only so far be considered by a lower tribunal. The citations do not include an analysis of the facts of the case, only the relevant point of law.

In order to keep the commentaries clear, they are in a form that is as brief as the subject-matter allows. For in-depth analysis and discussion the reader will need to move on to specialist text books. Concise IP also differs from other publications in the form of commentaries, such as those in looseleaf format, by reason of its shorter, more direct style. The idea is that the reader will find it easy to gain a rapid appreciation of the meaning and effect of the provision of interest and thereafter be in a position to look in the right direction should further information be needed. The editors and authors are all prominent specialists (academics and/or practitioners) in their fields.

It is the intention of the editors and publisher to publish new editions every two to three years.

March 2006

Karlsruhe,	Amsterdam,	London,
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INTRODUCTION

1. General. This book is a concise commentary on the European Union directives adopted in the field of copyright and neighbouring (related) rights, and on the main international conventions in this field with relevance for the EU. This chapter introduces and provides some background to the harmonization process and the relevant international legal framework. **(a) No unitary copyright.** Despite extensive harmonization the Member States of the EU have remained autonomous in the field of copyright and neighbouring rights. No unitary Union-wide copyright, like the Community trademark or Community design right, presently exists. The 2010 Treaty on the Functioning of the European Union (TFEU) has introduced a specific competence to establish a regime of unified intellectual property protection throughout the Union (art. 118). In the future this might provide the basis for unitary rules on copyright that would replace national copyright laws. **(b) Legislative competence of the EU in the field of copyright.** The EU legislature derives its main legislative competence in the field of copyright and related rights from its general mandate to establish an internal market by way of approximation (i.e. harmonization) of national laws, as provided by art. 114 TFEU, formerly art. 95 of the EC Treaty. The Member States of the EU are obliged to transpose the rules of a directive within the time limits specified therein. Directives bind Member States only 'as to the results to be achieved [...], but shall leave to the national authorities the choice of form and methods' (art. 288 TFEU). In other words, implementation into national law need not be done literally. The norms of the directives are primarily addressed to the Member States, and are not directly binding upon the citizens of the EU. However, national courts are generally obliged to interpret national law in line with the norms of the directives. In appropriate cases national courts may ask preliminary questions to the Court of Justice of the European Union (ECJ) as to the meaning and interpretation of certain provisions of a directive. The decisions of the ECJ constitute an important source of EU copyright law (see the cases listed in the Appendix). **(c) No discrimination.** Art. 18 of the TFEU, prohibiting discrimination within the European Union on grounds of nationality, requires Member States to offer the same level of protection to all citizens and residents of the EU even in situations where discrimination by requiring reciprocity would not violate the national treatment rules of international copyright and neighbouring rights conventions. In *Phil Collins*, the ECJ held that this non-discrimination clause (formerly art. 7 of the EC Treaty) barred Germany from denying neighbouring rights protection to a British national under circumstances in which it would have given protection to a German national; see also *Ricordi* (ECJ) and *Tod's* (ECJ)).

2. International treaties. The EU and its Member States are bound by a number of international treaties in the field of copyright law and related rights. Besides the TRIPS Agreement, the main conventions in the area of copyright

are the Berne Convention and the 1996 WIPO Copyright Treaty (WCT). In the field of neighbouring rights (for performing artists, phonogram producers and broadcasting organizations) the main treaties are the Rome Convention (1961), the Geneva Convention (1971) and the WIPO Performances and Phonograms Treaty (WPPT, 1996). Noteworthy are also two more recent WIPO treaties, the Beijing Treaty on Audiovisual Performances (2012), and the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (2013). Both these treaties have not yet entered into force, and are therefore not included in this volume. All countries of the European Union belong to the Berne Union, adhere to the Rome Convention, and, through membership of the WTO, are bound by the TRIPS Agreement. On December 14, 2009, the European Union and its Member States also ratified the WIPO Treaties.

3. Harmonization of copyright and related rights in the EU. (a) Copyright and the free movement of goods and services. There is a clear tension between, on the one hand, the territorial exclusivity of intellectual property rights, which enables rightholders to partition the single market of the EU, and the principle of free movement of goods and services on the other. Applying arts. 28 and 30 EC Treaty (formerly arts. 30 and 36 EC Treaty, currently arts. 34 and 36 TFEU), the ECJ has established the principle of Union-wide exhaustion of the exclusive right to distribute works in material form after they are first placed on the market (*Deutsche Grammophon* (ECJ) and *Musik-Vertrieb Membran* (ECJ)). By contrast, there is no exhaustion of the exclusive rental right after first sale (*Metronome Musik* (ECJ)) or first rental (*Laserdisken* (ECJ)). Moreover, there is no exhaustion of the exclusive right of communication to the public (*Coditel I* (ECJ)). In the absence of EU-wide harmonization the ECJ has in several other cases accepted violation of the freedom of movement of goods resulting from differences in national copyright laws (*Christiansen* regarding national rental rights, and *Patricia* concerning differences in national terms of protection). In *Tournier* the ECJ upheld a requirement under national law of payment of an additional fee for the public performance of musical works by means of sound recordings imported from another Member State, where copyright royalties had already been paid. The rule of Union-wide exhaustion of the distribution right was eventually codified in art. 4(2) of the Information Society Directive of 2001. **(b) History of harmonization.** The harmonization of the law of copyright and neighbouring (related) rights in the EU has occurred in roughly two stages. *First generation directives*. The 'first generation' directives have their roots in the European Commission's Green Paper on Copyright and the Challenge of Technology (1988). The Green Paper set out an ambitious harmonization agenda to remove disparities in the laws on copyright and neighbouring rights of the Member States that might negatively affect the internal market, with special focus on emerging information technologies. Much of this work program materialized in the course of the 1990s. The first directive in the field of copyright, the Computer Programs Directive, was

adopted in 1991, closely followed by the Rental Right Directive of 1992 that also harmonized the neighbouring rights of performers, phonogram producers, broadcasting organizations and film producers. Two more directives were adopted in 1993: the Satellite and Cable Directive, which was anticipated by the 1984 Green Paper on Television without Frontiers, and the Term Directive that harmonized the terms of protection of copyright and neighbouring rights. The Database Directive, adopted in 1996, harmonized copyright protection for databases and introduced sui generis protection for databases that are the result of substantial investment. In 2001, the Resale Right Directive that harmonized – and for many EU Member States introduced – resale royalties for works of art was finally adopted, after a long journey between the Commission, the European Parliament, and the European Council. The work program set out in the 1988 Green Paper was largely completed by the adoption in 2004 of the Enforcement Directive, which provides for harmonized remedies against piracy and other acts of infringement of intellectual property rights, including copyright, neighbouring rights and the database right. *Second generation directives*. The 'second generation' directives originated in the 1995 Green Paper on Copyright and Related Rights in the Information Society, which was mostly inspired by the challenges of the internet. At the same time, ongoing discussions at WIPO on a possible revision of the Berne Convention accelerated, which in 1996 led to the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty. The two treaties were signed by the Commission on behalf of the European Union, reflecting a commitment to implement the new international norms in a harmonized fashion. This gave an impetus to what eventually became the Information Society Directive of 2001. After almost a decade of standstill the process of harmonization of copyright and neighbouring rights in the EU resumed in 2011 with the Term Extension Directive, followed in 2012 by the Orphan Works Directive and the Collective Rights Management Directive of 2014.

4. Areas of copyright not (yet) covered by the acquis. Whereas the law of copyright and neighbouring rights in the EU has by now been extensively harmonized, certain areas remain where harmonization has not (as yet) occurred, such as moral rights, performance and adaptation rights, and author's contracts.

5. Copyright and competition law. Dealings in copyright and neighbouring rights are not exempt from the application of competition law. **(a) Contractual restrictions.** Although decisions with regard to contractual restrictions in the area of copyright are rare, clauses of an exclusive license agreement concluded between a copyright holder and a broadcaster that obliged the broadcaster not to supply decoding devices enabling access to that rightholder's protected subject-matter outside the territory covered by the licence agreement, were held to constitute a restriction on competition prohibited by art. 101 TFEU (*Football Association Premier League and*

others (ECJ)). **(b) Abuse of a dominant market position.** As regards abuse of a dominant market position (art. 102 TFEU), the ECJ has held that, in general, the mere exercise of the exclusive rights under copyright is not as such in violation of EU competition law. However, the exercise of an exclusive right by a rightholder who is in a dominant market position may, under exceptional circumstances, amount to abusive conduct, in particular if the refusal to license prevents the appearance on the market of a new product for which there is potential consumer demand (*Magill* (ECJ), *Microsoft* (CFI)), or if the refusal is not justified and results in reserving the after-market to the rightholder, excluding competition in a market other than the market of the original product (*IMS Health* (ECJ)). According to the Court of First Instance, general competition law rules may apply in tandem with specific harmonized rules, such as art. 6 of the Computer Programs Directive regarding decompilation of protected computer programs (*Microsoft* (CFI)). **(c) Collecting societies.** Collective rights management, the usefulness of which has been expressly recognized in several directives (see arts. 3(2), (4) and 9 Satellite and Cable Directive, and more generally the Collective Rights Management Directive), and the monopolistic licensing practices of the collecting societies have been the object of intensive scrutiny by the European Commission (the EU competition authority) and the European courts. The ECJ has so far been rather sympathetic to the basic elements of collective management of rights by collecting societies, although it does not regard collecting societies as 'undertakings entrusted with the operation of services of economic interest' benefiting from the special regime laid down in art. 106(2) TFEU (formerly art. 86(2) EC Treaty) (*GVL* (ECJ)). However, the ECJ did on several occasions redress certain instances of unjustified behaviour of the societies, both vis-à-vis their licensees (*SABAM II* (ECJ) and *GVL* (ECJ)), and in their dealings with other societies (*Tournier* (ECJ) and *Lucazeau* (ECJ)). Regarding the transborder management of rights in the field of online music licensing by collecting societies, which also gave rise to litigation (*CISAC* (CFI)), the EU enacted the Collective Rights Management Directive in 2014.

6. Other issues. There are a number of additional issues which a practitioner usually has to deal with when litigating a copyright case that touches upon one or more EU Member States. These issues include the following. **(a) Jurisdiction and enforcement.** Jurisdiction and enforcement of transborder disputes in the area of copyright are regulated by Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (formerly Regulation (EC) No. 44/2001). **(b) Applicable law.** Whenever copyright is infringed and the infringement is connected with more than one Member State, the question arises as to which national copyright law governs the infringement. Since 2007 the law applicable to cases of infringement of intellectual property rights is governed by Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations. Art. 8(1) of the Regulation provides: 'The law applicable to a

non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.' According to the Regulation's recital 26, this reflects 'the universally acknowledged principle of the lex loci protectionis.' Derogation by contract from this rule is prohibited (art. 8(3)). However, it is as yet unclear to what extent the lex loci protectionis applies to issues other than those closely related to infringement, such as first ownership and transferability of rights. Note that the rules on transborder satellite broadcasting of the Satellite and Cable Directive do not regulate applicable law, but merely determine in which country an act of transborder satellite broadcasting takes place. **(c) Interpretation of EU law.** National courts are bound to give effect to EU legislation (so-called 'effet utile') by way of an EU-friendly interpretation of national law. Moreover, according to art. 267 TFEU (formerly art. 234 EC Treaty), whenever a national court is of the opinion that a decision on the interpretation of primary or secondary Union law is necessary in order to decide a case, this court may – or, if it is a court against whose decisions there is no judicial remedy under national law, it must – request the ECJ to give a preliminary ruling thereon. The ECJ thus has the last word in interpreting both primary and secondary EU law, and in judging the conformity of national law norms with EU law. In several instances the ECJ has considered terms of the directives as autonomous concepts which must be interpreted in a uniform manner throughout the territory of the European Union, thus reserving for itself not only the ultimate, but likewise the exclusive competency to interpret these concepts. Arguably, in doing so the ECJ has in some cases gone beyond strict interpretation of secondary law by filling in gaps left by the EU legislature (e.g., as regards the concept of 'originality' for works in general, *Infopaq International* (ECJ) and *Painer* (ECJ)). **(e) Non-compliance with the provisions of a directive.** If a Member State fails to implement all or part of a directive in due time, upon application by the Commission, the ECJ in a first step may require the Member State to take the necessary measures to comply with its judgment and, if the ECJ finds that the Member State has not complied with its judgment, it may impose a financial penalty (arts. 258-260 TFEU). In addition, Member States may be held liable for any damage which the non-implementation has caused to individuals, provided the provision of the directive in question is so unambiguous that the damage would not have occurred had the directive been properly implemented in due time (*Francovich* (ECJ)). Although a directive is not itself directly applicable, its provisions may have direct effect between private parties (*Marleasing* and *Faccini Dora* (ECJ)). **(f) Newly acceding Member States.** Newly acceding Member States are generally under an obligation to implement the existing directives in their national law, even before the final date of accession to, and full membership of, the EU. **(g) European Economic Area.** Pursuant to the EEA Agreement the non-EU Member States of the European Economic Area, i.e. Iceland, Liechtenstein and Norway, are bound by the EU's directives in the field of copyright and related rights.

7. Treaties and directives covered. (a) International treaties. Part I of this volume covers the main international conventions in the field of copyright and neighbouring rights: the Berne Convention for the Protection of Literary and Artistic Works (BC), the WIPO Copyright Treaty (WCT), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (RC), the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva Convention), the WIPO Performances and Phonograms Treaty (WPPT) and relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). **(b) Directives.** The European legislature has enacted nine directives that harmonize the national law of the EU Member States on copyright and rights related to copyrights. These directives are in the order of their adoption: Directive 91/250/EEC on the legal protection of computer programs (Computer Programs Directive); Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental Right Directive); Directive 93/83/EEC on the coordination of certain rules concerning copyright and related rights to copyright applicable to satellite broadcasting and cable retransmission (Satellite and Cable Directive); Directive 93/98/EEC harmonizing the term of protection of copyright and certain related rights (Term Directive); Directive 96/9/EC on the legal protection of databases (Database Directive); Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society (Information Society Directive), Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art (Resale Right Directive), Directive 2012/28/EU on certain permitted uses of orphan works (Orphan Works Directive) and Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Collective Rights Management Directive). So-called codified versions of the Term Directive (Directive 2006/116/EC) and the Rental Right Directive (Directive 2006/115/EC) were enacted in 2006, updating and renumbering certain provisions without however changing the norms of the original directives. The Term Directive was eventually revised by the Term Extension Directive (Directive 2011/77/EU) of 2011. In 2009 a codified version of the Computer Programs Directive (Directive 2009/24/EC) was enacted. Directive 2004/48/EC on the enforcement of intellectual property rights (Enforcement Directive) also has a bearing on copyright, as does Regulation (EU) No. 608/2013 concerning customs enforcement of intellectual property rights (Regulation on Customs Enforcement). However, since the Enforcement Directive and the Regulation are not limited in scope to copyright, but affect all EU intellectual property rights alike, they are not covered in this volume. **(c) Appendices.** The appendices to this volume contain a list of abbreviations, a comprehensive listing of treaties, directives, cases and other documents cited in this volume, as well as an index.

BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS

of September 9, 1886,

completed at Paris on May 4, 1896,

revised at Berlin on November 13, 1908,

completed at Berne on March 20, 1914,

revised at Rome on June 2, 1928,

at Brussels on June 26, 1948,

at Stockholm on July 14, 1967,

and at Paris on July 24, 1971,

and amended on September 28, 1979

1. Introduction. As a matter of principle, national copyright laws which grant exclusive rights to authors of literary and artistic works only have effect within the territory of the State which enacted them. Although copyright works are intangible and ubiquitous, until now there exists no universal copyright. Rather, absent international treaties to the contrary, it depends on each individual State's national policy whether or not it grants copyright protection, and if so, how broad the exclusive rights conferred upon authors shall be. Moreover, absent the belief in a natural right of the individual author to enjoy copyright protection, no State is under a duty to grant protection to foreign authors. However, at a relatively early stage in the history of copyright, the need became apparent for authors who were nationals of States which did grant them copyright protection to receive some sort of protection for their domestic works abroad. At the same time, foreign authors of state B reciprocally asked for some kind of protection for their works abroad. In the second half of the 19th century, this led to numerous bilateral treaties based on the principle of material reciprocity, that is, foreign authors from state B were reciprocally granted copyright protection in state A because – and to the extent that – national authors of state A were protected within state B.

2. The birth of the Berne Convention; fundamental principles. Soon, however, the system of bilateral treaties became rather impractical. Hence, as early as 1886, nine mainly European States met in Berne, Switzerland, in order to conclude a multilateral agreement based on formal rather than on material reciprocity. **(a) National treatment.** In essence, any author who is a national of one of the contracting States should receive in any other contracting State the same protection as this other State grants its own nationals (principle of national treatment, art. 5(1) BC). National treatment under the BC is a principle of formal rather than of material reciprocity because

protection of an author in another Member State of the BC merely depends upon both States adhering to the BC and not on the level of copyright protection which the home country of the author grants to authors of that other country. **(b) Minimum rights.** In order to ensure that national protection abroad does not fall below a certain level, the BC also provides for a set of so-called minimum rights which a foreign author is entitled to even if the national law of the foreign State grants less protection to its own nationals (art. 5(1) BC). As a matter of fact, the BC is not concerned with the protection granted by its Member States to their own nationals. However, it was generally expected that the granting of certain minimum rights to foreign authors would incite Member States to grant the same rights also to their own nationals, if they had not already done so before the minimum rights were adopted under the BC. Moreover, Member States are free to grant protection to foreign authors greater than that laid down in the minimum rights (art. 19 BC). Over time, in the course of regular revision conferences, the list of minimum rights has steadily increased. This increase of the level of protection reflected the consensus of the BC Member States with regard to what acts should be subject to authorization by the author in view of emerging new technologies such as phonogram, radio and film. It was only later, after the period of decolonization, that BC Member States could no longer agree upon an appropriate level of minimum rights. Hence, the last Revision Conference of the BC was held in Paris in 1971. **(c) Foreign protection independent of national protection; rule of no formalities.** The principle of national treatment and the minimum rights are supported by two other fundamental principles. Firstly, protection of a particular work abroad is independent of any protection granted in the country of origin of the work. Second, protection abroad is not subject to any formalities (art. 5(2) BC). It follows that due to the interplay of national treatment and the rule of no formalities, an author who is a national of one of the BC Member States, receives, by the very fact of creation of his or her work, a bundle of national copyrights throughout the territories of all BC Member States.

3. Universal Copyright Convention (UCC); TRIPS; WCT and the Marrakesh Treaty. In 1952, another international copyright Convention similar to the BC was created in the form of the Universal Copyright Convention (UCC). Its main aim was to integrate both the US and Russia into the international copyright system. At that time, neither state was Member of the BC, the US because the US-Copyright Act of 1909 and later the Copyright Act of 1976 provided for registration as a prerequisite of protection, and the Soviet Union because its copyright system differed from the western property system of copyright. However, after the adherence by the US to the BC in 1989, which led to the abandoning of registration as a prerequisite for statutory copyright protection in the US, and the accession of Russia to the BC in 1995, the UCC has by and large lost its importance. This is all the more true since art. 9(1) TRIPS requires all TRIPS Members to adhere to the substantive rules of the BC in its latest version. Consequently, by now

almost all major States have become BC Members. However, only a limited number of them could agree on a minimum level of protection higher than the so-called Berne-plus approach adopted in 1995 by TRIPS which, in addition to the minimum rights of the BC, provides for copyright protection for computer programs and databases, for a rental right for computer programs and cinematographic works as well as for a limitation on Member States' freedom to create copyright exceptions and limitations. Hence, in 1996, the WIPO Copyright Treaty (WCT) was concluded as a special agreement, and not part of, the BC. In particular, the WCT provides as a minimum right the right to make protected works publicly available, legal anti-circumvention protection and protection of rights management information. In addition, in 2013, the Marrakesh Treaty Contracting to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, not yet in force, the first international Treaty on limitations to the exclusive right, made it mandatory for its Member States to provide in their national copyright laws for a limitation or exception to the right of reproduction, the right of distribution, and the right of making available to the public as provided by the WCT, to facilitate the availability of works in accessible format copies for beneficiary persons. Contracting Parties may also provide a limitation or exception to the right of public performance to facilitate access to works for beneficiary persons.

4. The BC and the EU. All EU Member States are also Member States of the BC. Moreover, since all EU Member States are bound by TRIPS, they have all adhered to the Paris Act of the BC of 1971. It should be noted, however, that copyright protection in the EU Member States goes beyond what is prescribed as the minimum standard by the BC. This is due principally to the high level harmonization of copyright achieved by the EU harmonizing Directives, and the intent of the adherence of the EU along with its Member States to the WCT on 14 March 2010, after the Information Society Directive was fully implemented into national law by all EU Member States.

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