
EUROPEAN COPYRIGHT LAW

A Commentary

EDITED BY
MICHEL M WALTER
SILKE VON LEWINSKI



OXFORD

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OXFORD
UNIVERSITY PRESS

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Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in

Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
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Published in the United States
by Oxford University Press Inc., New York

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First published 2010

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British Library Cataloguing in Publication Data
Data available

Library of Congress Cataloging in Publication Data
Data available

Typeset by Glyph International, Bangalore, India
Printed by
CPI Antony Rowe,
Chippenham, Wiltshire

ISBN 978-0-19-922732-7

1 3 5 7 9 10 8 6 4 2

PREFACE

When the first edition of this commentary on European Copyright Law was published in 2001 in the German language,¹ the title was chosen in order to signal that the harmonization of copyright in the European Community had achieved a status that deserves this denomination and should be dealt with severally and comprehensively. Since then ever more foreign guests at the Max-Planck-Institute have told us that they gained inspiration for their own works on this matter from our book. The last impetus for this revised edition was when one of them even proudly stated that he liked the presentation and structure in the book so much that he had already translated the entire first chapter of the German edition for his own planned book into an Eastern European language. Thus, we realized that the time had come for us to translate the book before others would do it without authorization.

Indeed, an update was necessary since the first edition was written when only the Council's Common Positions of the Information Society Directive and of the Resale Right Directive were adopted, and when the Enforcement Directive had not yet been enacted, whereas the Product Piracy Regulation was to be applied in its version of 1999 only. Since then, European copyright has developed further: the Directives mentioned were eventually enacted in 2001, the Product Piracy Regulation 1994/1999 adapted and reformulated in 2003, and the Enforcement Directive adopted in 2004. The European Court of Justice has decided a number of cases in which it determined the interpretation of individual provisions of the Directives. In addition, other important developments also took place, in particular in the field of collective management.

The form of an article-by-article commentary is retained, because it seems to be the appropriate means for a structured and in-depth examination of the individual provisions of the copyright-related Directives and Regulations. The Directives dealing exclusively with copyright and related rights, of course, take centre stage in this book. Hence, the European framework for the protection of computer programs, databases, and related rights is examined against the background of recent developments in doctrine and jurisprudence. Furthermore, the particular aspects as dealt with at the European level, namely rental and lending rights, broadcasting by satellite and retransmission by cable, duration of copyright and related rights, and the resale right, are examined Directive by Directive as is the case with regard to the European way of tackling the digital agenda in the Information Society.

An introduction dealing with general questions of Community legislature and the sources of Community law, its interpretation, and the legal consequences of a failure to implement EC Directives opens the commentary, followed by other particular issues of general importance, as there are the principle of non-discrimination, the relationship between authors' rights and related rights on the one hand and the basic principles of European competition law and the principle of free movement of goods and services on the other, and the impact of

¹ MM Walter (ed), *Europäisches Urheberrecht – Kommentar* (Springer-Verlag/Vienna).

fundamental rights as laid down in the Charter of Fundamental Rights, which became binding upon most of the Member States on 1 December 2009 when the Lisbon Treaty entered into force. Given that the manuscripts were finalized by August/September 2009,² we could not change the references to provisions of the EC Treaty to the corresponding articles in the Treaty on the Functioning of the European Union and make other necessary changes, such as to replace 'European Community' ('EC') by 'European Union' ('EU'). Nevertheless, at some relevant places, such as in Part I, we referred to some of the pertinent, planned changes in substance. One advantage of this presentation with the article numbers of the EC Treaty is its user-friendliness, since all existing literature and case law refers to those numbers and the reader may easily consult the table of equivalences for the new article numbers.

In respect to the practical importance of enforcement of intellectual property rights, copyright and related rights included, the Enforcement Directive and the Product Piracy Regulation 2003 are also dealt with in the book, although these instruments do not focus on copyright, but rather extend to most of the intellectual property rights. Since the enforcement of intellectual property rights through border measures is elaborated on at length by Olivier Vrins and Marius Schneider (eds) in a book published in 2006 by Oxford University Press,³ chapter 14 dealing with the Product Piracy Regulation has been kept short.

Of course, European copyright still is not yet an overall and coherent system, but rather a patchwork where, however, the contours of a consistent and comprehensive system may already be recognized. Therefore, in the final chapter, the status of harmonization so far attained is presented from a systematic point of view. This summary also serves as a means to identify and summarize possible gaps and inconveniences of the *acquis communautaire*, and as a platform to discuss briefly the question of whether further harmonization should be carried out and by what means. Whereas the further harmonization of European copyright and related rights—within the boundaries of EC competence—may be a legitimate concern of legal policy, it would deserve cautious deliberation, strict awareness, and political sensitivity. In the editors' opinion, a possible further harmonization must be carried out with a view to maintain and further develop authors' rights at a high level in recognition of the eminent importance of the cultural sector for society as a whole.

Each Directive or Regulation is preceded by a survey of legislative materials, legal instruments, and bibliography. The latter, in particular, includes books and contributions published in law journals that are quoted in the text or footnotes. However, other literature is also listed without claiming to be complete or exhaustive. The emphasis is laid on articles published in English; however, articles in other languages are also listed, in particular those already quoted in the first edition in the German language. This may be an added value for the reader, since literature in German has traditionally been rich and influential, and

² Nevertheless, the authors refer to and comment shortly on more recent jurisprudence of the European Court of Justice and other developments.

³ *Enforcement of intellectual property rights through border measures*.

an English edition of a European copyright law commentary may be helpful in making the results thereof accessible to a wider, English-speaking readership. Further literature is referred to in the country reports on the implementation of the legal instruments in the Member States of the European Community. If an article is listed in the bibliography, generally it is quoted in the footnotes only in short form (author's name and source without full title); however, where an article or book is not listed in the bibliography, names, titles, and sources are fully quoted.

Differing from the first edition, we did not include implementation reports for each provision of the Directives for Austria and Germany, but added to each Directive at the end a section on implementation in Member States. Not least for practical reasons, we selected a number of countries, for which short reports on the most important issues of implementation and implementation tables were made,⁴ while for the other Member States, only tables of implementation are included.⁵ As to the first series of Member States, they are deemed either of particular importance or interest, or to represent a specific legal tradition as, for example, Sweden for Scandinavian countries. Each group of countries is listed alphabetically, starting with the group for which reports were also made. Regarding the tables, it should be noted that the indicated articles of national law include not only those specifically drafted to implement the relevant EC provisions, but also those that already existed and are intended to fulfil the requirements of such provisions. Where available, a source for the text of the national laws in English (or, by default in the original language) has been indicated under 'latest version', to facilitate the reader's further study.

Several Directives exist already in a 'Codified version' (Computer Program Directive, Rental and Lending Rights Directive, and Term Directive). Of course, it should read 'Consolidated version' rather than 'Codified version', because the consolidation has neither brought about any changes in substance nor an overall copyright code. Since most of the existing literature and all case law refer to the old numbers of articles and recitals of the relevant Directives, we chose to set out the text of the original versions; directly in context with the text of each provision and recital, any changes (such as new article numbers) due to the Codified version are indicated. However, where appropriate, the new articles of Codified versions are commented on separately. Accordingly, unless otherwise indicated, the article numbers used in this work (including in the country reports and tables) refer to the original versions of the relevant Directives, since many of them have already formed part of the legal vocabulary.

As regards terminology, we used synonymously certain terms, such as 'collecting societies', 'collective rights management organizations', and 'collective rights managers', or 'related rights' and 'neighbouring rights'. In particular, in the context with general remarks, the term 'copyright' was used as a synonym for 'authors' rights', since this is the usual English-language equivalent.

⁴ Austria, Estonia, France, Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Slovenia, Spain, Sweden, and the United Kingdom.

⁵ Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, Greece, Ireland, Latvia, Luxembourg, Malta, Portugal, Romania, and Slovakia.

Last but not least, it should be mentioned that this book is an authors' commentary. Whereas several issues have been discussed and views exchanged by the authors, it might occur that in some matters, differing opinions may be put forth in this book. We expect readers to participate in this discussion and eagerly welcome opinions on the issues dealt with in this book.

Silke von Lewinski

Michel M Walter

ACKNOWLEDGEMENTS

Silke von Lewinski would like to thank the Max-Planck-Institute, Munich, which offered its great research capacities and support for the work on this book, and in particular Allison Felmy for her utmost professional, reliable advice as a native speaker. Michel M Walter would like to thank Katharina Lanzinger for her careful support in checking footnotes and bibliography, and for assistance in assembling the final manuscript, and Antony Kammerhofer for his indispensable advice as a 'double native speaker'.

Many thanks, of course, go to the co-authors Walter Blocher, Thomas Dreier, and Felix Daum, who already formed part of our team in the first edition of this book, and to Anke Schierholz, Dominik Goebel, and Lutz Riede who joined us for the second edition. Thanks also must be expressed to all colleagues whose contributions to European copyright law added greatly to the achievement of this book; particular mention must be made of Adi Dietz, Jens Gaster, and Jörg Reinbothe.

Michel M Walter also expresses thanks to Silke von Lewinski for her essential and valuable support in co-editing the book and in supervising the country reports, as well as for the valuable exchange of ideas on many issues dealt with in this book. For her part, Silke von Lewinski would like to commend Michel M Walter for being the most wonderful, cooperative, and patient co-author she could have imagined, and would like to thank him for many fruitful discussions. Last but not least, MM Walter dedicates the book to his wife, Ute, who jointly and uncomplainingly bore the pains of 'intellectual childbirth'.

Silke von Lewinski
Michel M Walter

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