EDITED BY

Brigitte Lindner

and

Ted Shapiro

Copyright *in the* Information Society

A Guide to National Implementation *of the* European Directive

Copyright in the Information Society

A Guide to National Implementation of the European Directive

Edited by

Brigitte Lindner

Rechtsanwältin, Member of the Bar of Berlin, Germany
Registered European Lawyer, Lincoln's Inn, London

Ted Shapiro

Attorney (Massachusetts Bar)/Solicitor (England and Wales – non-practising), Brussels

Edward Elgar

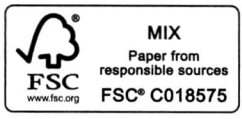
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2011927288



ISBN 978 1 84980 010 5

Typeset by Columns Design XML Ltd, Reading
Printed and bound by MPG Books Group, UK

Copyright in the Information Society

Contributors

Peter Adamsson is a graduate of Uppsala University and is a member of the Swedish Bar Association. He lives in Stockholm and practises law with the firm Sandart & Partners in which he is a partner and specializes in matters concerning intellectual property law. Adamsson has a past as an associate Court of Appeal judge and a legal adviser in the Ministry of Justice and the Ministry of Culture. He has been commissioned by the Ministry of Justice to draft a green book within the field of copyright law and is chairman for the Swedish Board of Applied Art.

Patricia Akester, Law Degree, LL.M, Ph.D, called to the Portuguese Bar (1996), Registered European Lawyer, Bar Council of England and Wales (2009), is President of the Portuguese group of the International Literary and Artistic Copyright Association (since 2009), a member of the British group of the International Literary and Artistic Copyright Association (since 1999) and a member of the Centre for Intellectual Property and Information Law, Faculty of Law, University of Cambridge, where she also teaches. Her research interests lie particularly in copyright law and information law.

Tanya Aplin, Dr, is a Reader in Intellectual Property Law at the School of Law, King's College London. She has written extensively on intellectual property law, in particular copyright law and new technologies, and the protection of confidential information. Her publications include *Copyright law in the digital society: the challenges of multimedia* (Hart, 2005), *Intellectual Property Law: Text, Cases and Materials* (OUP, 2009) (with Dr Davis), *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* 7th edn (Sweet & Maxwell, 2010) (with Professors Cornish and Llewelyn), and *Gurry on Breach of Confidence: The Protection of Confidential Information* (OUP, forthcoming 2011) (with Professor Bently, Dr Johnson and Mr Malynicz). Dr Aplin teaches courses on UK Copyright Law, International and Comparative Copyright Law, EU and UK Patent Law, EU and UK Trade Mark Law, and Legal Regulation of the Music Industry.

Janis Bordans graduated from the Faculty of Law, University of Latvia in 1992. Since 1996, he has been a member of the Latvian Bar Association. He is Partner at *Bordans & Liepins Law firm 'Wall'*. During his legal career, he has been Legal Advisor and Parliamentary Secretary to the Prime Minister of Latvia (2010) and Member of Parliament (1995). Besides legal practice, Janis Bordans also participates at the Public Consultative Council of Intellectual Property Rights Protection at the Ministry of Internal Affairs and is an Arbitrator at the Court of Arbitration of the Association of Latvian Commercial Banks.

Achilleas Demetriades is a partner at Lellos Demetriades Law Office LLC in Nicosia, Cyprus. He specializes in intellectual property rights. He has been conducting litigation

in relation to the enforcement of IPR only on behalf of rightholders and has also provided advice in relation to the necessary amendments of the legislation as well as assisting in anti-piracy efforts in the film, music, software and pharmaceutical industries. He has been practising since 1986 and has been called to the English Bar and holds an LL.M from Georgetown University in DC.

Wojciech Z. Dziomdziora is attorney-at-law and member of the Warsaw Bar of Legal Advisors. He is a Director of the Key Projects in Telekomunikacja Polska (part of France Telecom Group), responsible for legislation and public affairs. He was a founding partner of Warsaw Cottyn law firm office, where he supervised TMT, IPR and leisure industry law practices from 2007 to 2010. In 2006 and 2007 he served as the Minister – Member of the National Broadcasting Council. In 2005–2006 Wojciech worked as in-house lawyer in the Polish TV group – TVN. He started his professional career as a civil servant working in different positions in the Prime Minister Chancellery and in the Ministry of Culture (as the advisor to the Minister and the Director of the Legal Department).

Stefania Ercolani, after graduating in Political Sciences in 1982 joined SIAE (the Italian Society of Authors and Publishers), where she held the positions of assistant to the Legal Counsel and of Director of International Relations. Since 2008, she has been the Director of SIAE Multimedia Department. She participated in the 1996 Diplomatic Conference for WCT and WPPT as a consultant to the delegation of the Italian Government and co-operated with the European Commission for the programs EU-China Cooperation and ECAP. Since 2005 she has taught Information and Media Law at the University of Rome 'La Sapienza'. Author of numerous articles and books on copyright and media law, she is also editor of the quarterly Revue 'Il Diritto d'Autore'.

Mihály Ficsor, Dr, between 1985 and 1999 worked, first, as Director and, then, from 1992 as Assistant Director General of the World Intellectual Property Organization (WIPO) in charge of copyright and related rights. He was responsible for a great number of important projects. He played a decisive important role in the preparation, negotiation and adoption of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). At present, Dr Ficsor is President of the Hungarian Copyright Experts Council. He has written numerous articles and books on various copyright issues, particularly on the impact of new technologies (especially digital technology and the Internet), including the book 'The Law of Copyright and the Internet – The 1996 WIPO Treaties' published by Oxford University Press.

Kristiina Harenko is currently working as a Referendary Councillor of the Finnish Supreme Court. From 2000 to 2010, she worked for Attorneys-at-law Borenius & Kemppinen Ltd advising clients on intellectual property matters in different business sectors. She served also as a panellist on the World Intellectual Property Organization (WIPO) for domain name disputes. From 1997 to 2000, Harenko worked as an in-house lawyer for the Finnish Composers' Copyright Society. From 1990 to 1997, she worked for the Ministry of Education where her areas of responsibility were copyrights and copyright legislation. She has acted as a representative of the Finnish government in the

activities of the EU, the Council of Europe and WIPO on intellectual property rights issues. Kristiina, along with Pekka Tarkela and Valtteri Niiranen, are the authors of a Finnish book (*Tekijänoikeus – kommentaari ja käsikirja*) that provides commentary on the Copyright Act of Finland.

Pascal Kamina (Dr. Jur., France, LL.M, Ph.D, Cambridge), is Professor at the University of Poitiers and Attorney-at-law of the Paris Bar. He is the author of the books '*Film Copyright in the European Union*', Cambridge University Press, June 2002, and '*Droit du cinéma*', Lexis Nexis, May 2011, and of several monographs and chapters on these subjects in French and in English. He contributes regularly to law journals in France and abroad on these topics, and participates on a regular basis in studies and seminars in the fields of copyright and media.

Marta García León obtained a law degree at Universidad Complutense de Madrid in 1997 and, a masters degree in Copyright Law at Franklin Pierce Law Center, New Hampshire. Since then, based in Spain, she has worked as an attorney in the entertainment industry, collaborating with different rightholder entities and specialized law firms. She also holds a position as Associate Professor at Universidad Carlos III de Madrid, in the department of Civil Law.

Brigitte Lindner, Rechtsanwältin, is a member of the Bar of Berlin/Germany and practises as Registered European Lawyer (Bar Council of England and Wales) in association with Serle Court in Lincoln's Inn, London, specializing in international, regional and comparative copyright law as well as international private law. After studies in law in Würzburg/Germany and following her call to the German Bar in 1988, she started her legal career with a firm of French Avocats in Paris. From 1992 to 1999 she was Legal Adviser to the International Federation of the Phonographic Industry (IFPI) in London with responsibility for international conventions and national copyright legislation worldwide which included the participation on the industry's behalf at the Diplomatic Conference in 1996 at WIPO. She is the author of numerous contributions to legal textbooks and has published extensive articles on copyright in different jurisdictions. She also lectures on the Postgraduate Diploma/Masters Course in UK, EU and US Law of Copyright and Related Rights at King's College, London and serves on the Executive Committee of the British Literary and Artistic Copyright Association (BLACA), the British group of the Association Littéraire et Artistique Internationale (ALAI).

Katia Manhaeve is a partner at Allen & Overy Luxembourg where she heads the intellectual property department. She advises on both contentious and non-contentious intellectual property matters and also specialises in distribution law, trade practices and e-commerce. Katia obtained her law degree from the Universities of Namur and Leuven (Belgium) and Salamanca (Spain) and is admitted to the Brussels and the Luxembourg bars. She is the current President of the Benelux Association for Trademark and Design Law and has been appointed as a Luxembourg representative to the Benelux Council for Intellectual Property for a period of four years.

Benoit Michaux is a lawyer at the Brussels bar. He is a specialist in copyright and database protection. Benoit is appointed as deputy judge at the Court of Appeal of Brussels and is a CEPINA approved arbitrator for domain-name disputes. He is a member of the Intellectual Property Council, and of the executive board of the copyright law review 'Auteurs & Media'. Benoit is the co-author of a reference book on Copyright (*Précis du droit d'auteur et des droits voisins*, Brussels, 2000) and the author of a book on database protection (Brussels, 2005). He is guest lecturer on copyright issues at the Vrije Universiteit Brussel and HU Brussel.

Viive Näslund has substantial experience and expertise in representing international and local companies on various aspects of intellectual property law, including copyright, patents, utility models, industrial design and has successfully represented clients in many trademark infringement disputes. Her practice areas are intellectual property, supply agency and distribution, information technology and public procurement law. Viive Näslund holds a BA degree from the University of Tartu, Estonia (Faculty of Law, cum laude 1997) and an LL.M degree (Masters of Law) in Law and Information Technology from the University of Stockholm (2001). She has been a member of the Estonian Bar Association since 1999, a member of the Intellectual Property practice group of Lex Mundi – the World's Leading Association of Independent Law Firms – and acts as a panellist for .eu domain name disputes at the Czech Arbitration Court. Ms. Näslund is recommended in the practice areas of Intellectual Property, Information Technology and Telecommunications by Legal 500 EMEA 2008/2007/2006 editions.

Slavomír Olšovský (born 1972) was already active in the field of copyright during his studies at the Comenius University Bratislava, where he graduated in 1995. Between 1995 and 2001, he worked as International Affairs Manager for the Slovak collecting society SOZA, taught Intellectual Property at the Comenius University and served as member of the Advisory Board of the Minister of Culture. In 2001, Mr. Olšovský was appointed Director of IFPI – National Group Slovakia. In 2005, he joined the services of a regional integration organization where he has worked as a translator ever since.

Florian Philapitsch studied Law at the University of Vienna. He also obtained an LL.M in Information Law and Legal Informatics in 2002 and a Doctorate in 2006. In 1998 he co-founded Juridicum Online, Austria's first IT-law-initiative, established at the University of Vienna. From 2002 to 2006 he worked as an Academic Assistant at the Department of Information Technology Law and Intellectual Property Law at the Vienna University of Economics and Business Administration, specializing in copyright and competition law. From 2007 to 2010 he was Deputy Head of the Austrian Supervisory Authority over Collecting Societies. In October 2010 he was appointed Vice Chairman of the new Austrian Communications Authority.

Lucia Pressburgerová, junior associate, is a member of the Czech Bar Association. She graduated from the Law Faculty of Charles University in Prague. She has been working at DLA Piper Prague LLP for almost two years. Prior to joining DLA Piper she worked i.a. in another global law firm where she gained much experience in commercial and administrative law. Lucia specializes in project and banking finance, real estate finance,

general corporate and commercial matters, employment and copyright issues. In the future Lucia would like to study for a postgraduate degree at one of the European universities.

Antoon A. Quaedvlieg (1958) studied at the Catholic University of Nijmegen and the Université de Poitiers (1981–82). 1987, thesis *Copyright on technical subject matter*, awarded with the Ruijgrok prize of the Royal Dutch Society of Sciences in 1988. Admitted to the Bar in Amsterdam 1987. 1990, professor in private law, in particular industrial property and copyright, Nijmegen; as from 2003 combined with a partnership with Klos, Morel, Vos & Schaap IP lawyers in Amsterdam. Member of the Dutch Copyright Committee, the Benelux Council on Intellectual Property, the Bureau of ALAI.

Gediminas Ramanauskas is an attorney at law, Head of the Intellectual Property, Media and Privacy Group at the leading Baltic law firm LAWIN Vilnius office, Lithuania. He started his legal career with the Copyright Division at the Ministry of Culture of Lithuania, but subsequently the core part of his professional career was continued in private practice. In 2009, Gediminas graduated from Munich Intellectual Property Law Centre, Germany, with an LL.M in Intellectual Property and Competition Law and is currently studying for an international executive master of business administration at the Baltic Management Institute, Vilnius, Lithuania. Gediminas is the author of various contributions to legal textbooks and articles on copyright law, privacy and advertising. He frequently speaks at conferences and seminars, professional and business meetings; contributes to business articles, professional and popular websites and *blogs*. Gediminas is also a member of leading trademark associations (ECTA and INTA) and the International Association of Privacy Professionals (IAPP).

Jörg Reinbothe, Professor, Dr., is an official of the European Commission in Brussels. He has masterminded the drafting, adoption and implementation of several EU Directives in the field of copyright, including Directive 2001/29/EC on Copyright in the Information Society. He participated in the negotiations on the WTO/TRIPs Agreement and was Head of the EU delegation at WIPO Diplomatic Conferences, including the 1996 Diplomatic Conference on the WIPO 'Internet Treaties'. From 1996 to 2004, he was Head of the Copyright Unit in DG Internal Market. Jörg Reinbothe is author or co-author of numerous articles and several books on intellectual property. He teaches copyright and industrial property at the University of Saarbrücken (Germany).

Linda Scales, BCL, LL.M, practises as a Solicitor in Dublin, specializing in copyright and other areas of law governing the protection and dissemination of content, both on- and offline. She is an occasional lecturer in these topics at University College, Dublin. Linda is also an approved expert in intellectual property law for the purpose of various EU-funded programmes, and has participated in projects concerned with the development of copyright and the enforcement of intellectual property laws in countries in Eastern Europe, Eurasia and Central Asia.

Martin Schaefer, Dr. jur., studied law at the Universities of Saarbrücken and Berlin. From the early 1990s, Dr. Schaefer was working for the German recording industry

associations (German National Group of IFPI and BPW – both jointly acting as BVMI today) as General Counsel and from 1998 as Managing Director. In 2001, he moved to BMG (Bertelsmann Music Group) as Vice President, Legal Counsel Europe before leaving the company at the beginning of 2004 in order to join the IP law firm Boehmert & Boehmert, Berlin. He has specialized in copyright law with an emphasis on the development of future-oriented industry projects, public policy and collecting society issues and electronic media law.

Thierry Schiltz holds a Masters in Private Law (maîtrise en droit privé) from the University Robert Schuman of Strasbourg (France), an LL.M in European legal studies from the University of Glasgow (United Kingdom) and a Master of Arts in European political and administrative studies from the College of Europe of Bruges (Belgium). He was admitted to the Luxembourg bar in 2007 and worked for Allen & Overy Luxembourg's intellectual property department from 2007 to 2010. He left Allen & Overy in September 2010 to become a judge in Luxembourg.

Peter Schønning was Head of Division (responsible for copyright and later also sport and general legal matters) in the Danish Ministry of Culture from 2002–2008. Since 2008 he has been attorney-at-law at the Johan Schlüter Law Firm, Copenhagen, where his practice areas are copyright, media and entertainment law and sports law. He is the Head of the Danish Anti-Piracy Organization. Peter Schønning has written a number of articles and books on copyright, including the commentary on the Danish Copyright Act (now 4th edn., 2008). In the 1990s he was an external lecturer in copyright at the Law School of Copenhagen University for seven years.

Ted Shapiro is a lawyer admitted to the bar of Massachusetts and a solicitor (non-practising) in England and Wales. He has an LL.M from the University of Amsterdam, a JD from the Dickinson School of Law (Pennsylvania) and BA from Connecticut College. Ted currently holds the position of Senior Vice President, General Counsel and Deputy Managing Director at the Motion Picture Association in Brussels and is responsible for the MPA's European legal department overseeing the provision of legal services – advice, litigation, and compliance – to the MPA and the companies it represents. As Deputy Managing Director, Ted assists in the overall management of the MPA Brussels operation.

Velizar Sokolov is managing partner of ARSIS Consulting law firm specialized in the field of intellectual property. He graduated in law from Sofia University and specialized in intellectual property rights at the International Law Institute in Washington, DC. He is the author of numerous publications on the protection and enforcement of Intellectual Property Rights and co-author of the Media Dictionary published in 2005. Mr Sokolov is also a guest lecturer at local and international conferences on IPR enforcement and Visiting Lecturer in IPR at Sofia University and the University of National and World Economy. He is an IP expert involved in legislative initiatives and has been the member of working groups drafting amendments and supplements to the copyright legislation (revisions 2000, 2002, 2005, 2010) and industrial property acts (2006).

Jaroslav Tajbr, senior associate, is a member of the Czech Bar Association. He studied law at the Law Faculty of Charles University in Prague and international trade at the International Affairs Faculty of the University of Economics, Prague. He works for DLA Piper Prague LLP, a part of DLA Piper, a global law firm, operating through various separate and distinct legal entities. Jaroslav has in particular advised clients on various commercial and regulatory matters. In commercial law he has extensive experience in dealing with IP, IT and commercial contracts; for example, Jaroslav advised a major IT company listed in US stock exchange in relation to acquisition in the Czech Republic and he has represented a major alcoholic beverages producer in IP disputes. In regulatory law he mainly focuses on data protection, telecoms and competition matters.

Miha Trampuž graduated at the Law Faculty of Ljubljana (1974), where he obtained his LL.M (1987) and LL.D (1995). For one year he was research fellow at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich. He was, among other, Civil Judge at the Municipal Court of Ljubljana and legal clerk at the Supreme Court of Slovenia. Since 1990 he has held the position Head of Law Offices within the Copyright Agency of Slovenia. He has been representing Slovenia at WIPO (including at the Diplomatic Conference for the WIPO Treaties in 1996), WTO, the European Commission and the Council of Europe. During Slovenia's Presidency of the Council of the European Union in 2008, Dr Trampuž chaired the Working Party Copyright of the EU Council and represented the EU and its Member States at WIPO. Dr. Trampuž has published several books and numerous articles on Copyright Law.

Evangelia Vagena is a lawyer with professional experience and an academic background in information technology and copyright law. She received her Masters of Laws in law and information technology from the University of Montpellier. She also holds a Ph.D from the University of Athens. Her thesis was on digital protection and management of copyright. She works as a legal counsellor for the Hellenic Copyright Organization of the Greek Ministry of Culture. In this capacity, she represents Greece at international organizations and the European Union in issues regarding copyright policy. She also consults privately as a legal expert.

Ingrida Veiksa, Dr. iur, is Vice Dean of the Faculty of Law and the Director of Program of Law Sciences at the School of Business Administration Turiba in Riga, Latvia, where she lectures intellectual property law. From 1994 to 2009, Ms Veiksa was Legal Adviser to the Latvian public broadcaster 'Latvian Television'. She has also been a Member of the Legal Committee of the European Broadcasting Union and a delegate from the Latvian Government to the WIPO meetings on the preparation of a Treaty on the Protection of Broadcasting Organizations. Ms Veiksa has participated in the Latvian Parliament for the drafting of intellectual property and broadcasting law. At present she is a member of the Latvia Media Institution and Consultative Committee of the National Broadcasting Council.

Maria Voican is Attorney at Law. She has ten years experience in the field of protection of intellectual property rights. She is a WIPO alumnus and holds an LL.M in Intellectual Property Law from WIPO Academy and University of Turin. She also holds two other master degrees and followed up with studies in the field of film production

with Erich Pommer Institute and Internet Governance Capacity Building with Diplo Foundation. Maria is an IP trainer for the National Institute of Magistracy and keeps attending to various IP oriented projects.

Preface

With the tenth anniversary of the Directive 2001/29/EC on copyright in the information society looming on the horizon, a friend and colleague of ours suggested 'you should write a book on the "Copyright" Directive'.

There is certainly no shortage of writings on the Directive. Yet, we thought that a collection of essays on national implementation of the Directive in each Member State by contributors from those countries could provide a new insight on this important European legal instrument at a crucial stage not only in the life of the Directive, but indeed for copyright itself. Our aim was to explore how legislators in the different Member States, who, in one form or another, had previously played a part in negotiating first the WIPO Treaties in Geneva and then the Copyright Directive in Brussels, had dealt with the complex provisions at the national level.

We were lucky enough to convince the architect of the Directive, Dr. Jörg Reinbothe, to help us set the stage with a thorough introduction to the Directive, its background and an explanation of its impact. His 'unusual' Foreword is followed by two more stage setting Parts, first on the WIPO Treaties, which formed the basis for the Copyright Directive, and secondly on the Directive itself. Their purpose is to describe the challenges created for regional and national legislators, to identify and try to explain the complex compromises and the varying levels of discretion left to these lawmakers as they carried out their difficult legislative tasks.

All that was required thereafter was to find a group of well-versed contributors to describe how their national legislators confronted these challenges. Here again we were very fortunate: Our contributors are an incredibly diverse group of talented lawyers who include academics, judges and referendaires, practitioners and (past and present) government officials. This Book contains 27 compelling stories about the Directive. It is for this reason that this is our contributors' book and not ours; each chapter and the views taken therein belong purely and simply to their author. We therefore express our gratitude for our contributors' amazing efforts and patience with us editors along with some help from another of our colleagues, Violetta Psofiou, and the crucial support from friends and family.

So the idea for this book was not ours – in any event ideas are not protected by copyright. More seriously, rather than imposing any barriers, copyright was the driving force behind this labour of love which, although not unrelated to our usual professional activities, is entirely our own private initiative. While the diversity of views expressed by our contributors in the country chapters may not necessarily be shared by us, those taken in the parts of the Book authored by us represent purely our own and are completely independent from positions taken by any future, present or past clients, associates, friends or employers.

Brigitte Lindner
Ted Shapiro
London/Brussels
March 2011

Foreword

AN UNUSUAL FOREWORD ...

Forewords are usually pretty short and limit themselves to whetting the reader's appetite for the book that they introduce as well as stressing its importance and uniqueness. This Foreword, too, could have merely stated that Directive 2001/29/EC on Copyright in the Information Society,[1] which this book is about, is one of the most important, if not the most important Directive in the series of European Union copyright directives, that its implementation matters, and that, hence, this book is instrumental. All this is true; nevertheless, I feel that both this Directive and this book deserve a much more thorough introduction.

This is, first, due to the impact that this Directive has had in the copyright world. Some detailed explanations are needed on why it is so special to, and of crucial importance for copyright protection in the European Union. And, secondly, I am happy to provide the reader with some background, and share my own experience with and my personal perspective of the Directive through all the various steps: As Head of the EU Delegation at the 1996 Diplomatic Conference, I participated in the negotiations on the two international treaties that laid the foundation for the Directive. Moreover, I was responsible for this Directive at the European Commission – from the first internal discussions and drafting stages to the final adoption of the proposal by the Council and the European Parliament. Against this background, this Foreword should provide the reader with a look at the history, the structure and the assets of this Directive.

... ON A VERY SPECIAL DIRECTIVE

Directive 2001/29/EC, due to its significant horizontal impact, is often referred to as 'The Copyright Directive'. It was adopted at the end of a particularly active phase of copyright harmonization, which took place between 1991 and 2001. Within not more than 10 years, seven Directives were prepared, negotiated and adopted, each of them milestones in their own right. First of all, the Software Directive[2] that set the tone and decided on the parameters for the protection of computer programs including decisions on back-up

[1] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 L 167/10 (22 June).

[2] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs), OJ 1991 L 122/42 (17 May), OJ 2009 L 111/16 (5 May).

copies, reverse engineering and decompilation, all new territory for national and international copyright. These decisions and the negotiations on the Software Directive had both a pioneering and an educational dimension. A pioneering function because this process paved the way for coming to grips with copyright protection in the new environment of computer software technology and, almost as a side effect, inspired and facilitated the negotiations on the WTO/TRIPs Agreement.[3] The educational effect because the preparatory work and the negotiations on this Directive showed us, the Commission officials, who had to mastermind copyright harmonization from the Commission angle, that co-operation with stakeholders was a key to success, and that a common language had to be developed amongst rightholders, users and intermediaries to establish an updated and sustainable balance of rights and interests in the new world of computer software. Both aspects were instrumental for all other copyright directives that followed, including Directive 2001/29/EC, the subject of this book.

In fact, the other copyright directives that followed were based on, and benefited from the experience of the Software Directive, even if these instruments concerned different areas and were arguably more sector or issue-specific. This is certainly true for the Rental Rights Directive[4] (though it contained a distinct horizontal element in its Chapter 2 that harmonized, for the first time, the main related rights), for the Cable and Satellite Directive[5] (which tackled the two rather separate problems of facilitating cable retransmission of broadcasts and satellite broadcasting), for the Term Directive[6] (which harmonized the terms of protection for authors' rights and related rights, and, as a side effect, settled the long disputed issue of the creativity and thus the 'work' character of photographs), for the Database Directive[7] (which corresponded to the rather specific need for protecting non-creative databases), and for the Resale Right Directive[8] (which, again, addressed the specific needs of a specific sector). All of these six directives originated in the 1988 Green Paper[9] and/or the 1990 Work Programme;[10] they all obviously dealt with copyright

---

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994.

[4] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental rights and lending right and on certain rights related to copyright in the field of intellectual property (codified version of Council Directive 92/100/EEC of 19 November 1992 on rental rights and lending right and on certain rights related to copyright in the field of intellectual property), OJ 1992 L 346/61 (27 November)), OJ 2006 L 376/28 (27 December).

[5] 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 1993 L 248/15 (6 October).

[6] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version of Council Directive 93/98/EEC of 29 October 1993 on harmonizing the term of protection of copyright and certain related rights, OJ 1993 L 290/9 (24 November)), OJ 2006 L 372/12 (27 December).

[7] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 L 77/20 (27 March).

[8] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ 2001 L 272/32 (13 October).

[9] Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, COM (88) 172 final of 7 June 1988.

[10] Follow-up to the Green Paper – Working Programme of the Commission in the field of copyright and neighbouring rights, COM (90) 584 final, 17 June 1991.

harmonization in one way or another and no one would deny their importance and their direct impact on copyright protection and on the exploitation of copyright and related rights-based goods and services.

And yet, despite all this, only Directive 2001/29/EC of 22 May 2001 'on the harmonisation of certain aspects of copyright and related rights in the information society' is often called 'the Copyright Directive'. This is no coincidence, because this Directive stands out and is different from all the others, though, chronologically speaking, it is only the second to last of the seven copyright directives that were enacted between 1991 and 2001. This Information Society Directive, as I prefer to call it, is indeed special for several reasons – and this because of its unique features:

- It is not, unlike the other copyright directives, a follow-up of, or based on the 1988 Green Paper and/or the 1990 Work Programme deliberations. It is rather based on two pillars or needs, namely (1) the need to adapt copyright to the new environment of what used to be called the Information Society and is nowadays referred to as the Internet environment – a new issue that only emerged in the mid 1990s and was first addressed in the Green Paper of 1995;[11] and (2) the need to implement the obligations of the two new WIPO 'Internet' Treaties, WCT and WPPT of 1996.[12] Thus:
  - the Directive adapts copyright to the new environment of the Internet – the most radical change that the copyright environment has ever witnessed; and
  - it is the only Directive in the area of copyright that implements international obligations and prepares the EU and its member states for accession to the above-mentioned WCT and WPPT.
- On substance, this Directive addresses and harmonizes all basic rights and exceptions in the area of copyright and related rights for both authors and the holders of the main related rights, and is thus the most 'horizontal' of all copyright directives.
- It is, so far, the last copyright directive with a far-reaching conceptual and horizontal approach.
- And, therefore, in the light of the enormous impact that this Directive has on copyright protection in the EU Internal Market and beyond, it is arguably the most important of all copyright directives that have been enacted to-date.

A CHOICE HAD TO BE MADE ABOUT THE DEGREE OF EU HARMONIZATION

Indeed, looking back and from today's perspective (almost 10 years after the Information Society Directive was adopted and now that both WIPO Treaties have been acceded to by the EU and its member states), this need for a decision on the degree of harmonization seems to be the only possible conclusion. But for us, who were responsible in the European

---

[11] Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final, 19 July 1995.

[12] WIPO Copyright Treaty (WCT) of 20 December 1996, and WIPO Performances and Phonograms Treaty (WPPT) of 20 December 1996.

Commission services for making ends meet, it was not all that obvious in the second half of the 1990s, if we could really meet the challenge: updating copyright protection in the EU Internal Market for the digital environment.

To be sure, some sort of a master plan or basic orientation existed already back then, and it comprised several building blocs. First, the 1995 Green Paper, served as a preparatory, consultation document that sought to translate the findings of the Bangemann Report[13] into copyright language and needs. The follow-up Communication of 1996[14] identified the main action points. But it was clear (to us) from the outset that legislation at EU level on copyright in the Information Society would have to go hand in hand with a close coordination at the international level: finding common ground and agreeing on updating the rules of the Berne Convention[15] and of the Rome Convention[16] with our main trading partners especially the USA, clearly was key for any successful and sustainable EU legislation in this area – which, to a large extent, was unknown territory to all of us. As recently as 1994, when the WTO/TRIPs Agreement was adopted as part of the Marrakesh Agreement,[17] close co-operation with the USA had proven fruitful. Consequently, the then already ongoing preparatory work on a Protocol to the Berne Convention was channelled into the negotiations on new copyright treaties designed to adapt copyright protection to the digital environment – the second building block of the Information Society Directive was about to be created.

Immediately after the two new WIPO Treaties were adopted on 20 December 1996, we started the preparatory work on the Directive. In early 1997, we organized numerous brainstorming meetings in the Copyright Unit of DG Internal Market to determine the direction to take. Together, we soon realized that we stood – again – at a crossroads: should we 'just' try to draft a proposal for a Directive to implement as quickly as possible the WIPO Treaties – limit ourselves, so to speak, to a 'copy and paste' operation that would cast the obligations of the WCT and the WPPT into an EU Directive? I have to admit, this was an appealing thought and quite a temptation, because it might have saved us time. After all, simply reiterating the results achieved in Geneva in 1996 could not have been overly controversial; at first sight at least, this looked like a fairly easy call. But, then again, as eye witnesses and active participants in the Diplomatic Conference of 1996, we knew all too well the shortcomings of the WIPO Treaties, extending from the total absence of a provision on the reproduction right and suitable exceptions thereto for digital acts such as caching and browsing, to the lack of provisions on enforcement against intermediaries. Moreover, reiterating the rules of the WCT and the WPPT with all their gaps would hardly have lived up to the ambitions and needs for a meaningful EU harmonization instrument as spelled out and claimed in the 1995 Green Paper and the 1996 Communication.

---

[13] 'Europe and the global information society. Recommendations to the European Council', 26 May 1994.

[14] Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM (96) 568 final, 20 November 1996.

[15] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

[16] International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 26 October 1961.

[17] The TRIPs Agreement (fn. 3 above) is part of the Uruguay Round Agreements signed at Marrakesh on 15 April 1994.