Concise
European Copyright Law

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Edited by:

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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.

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INTRODUCTION

1. General. Before the international Conventions that deal exclusively with copyright and neighbouring rights are discussed and the EU Directives in the area of copyright individually commented upon, some introductory remarks are called for in order to present a more complete picture of copyright law within the EU. **(a) No Community copyright.** First and foremost, it should be noted that contrary to trademark and design law, where there is a Community trademark and a Community design right, EU law has not produced a Community-wide copyright. Rather, based on the national principle of territoriality, each of the EU. Member States has its own national copyright law. **(b) Legislative competency of the EU in the field of copyright.** The EU does not have a direct competency in the field of copyright. Rather, it has based the Directives on the EC Treaty provisions which enable it to coordinate Member States' laws with regard to the free movement of goods and services (arts. 45, 47(2) and 55), and, in particular, to establish the internal market (art. 95).

2. International law. In addition, the EU and its Member States are bound by the framework of international copyright law Conventions and Treaties. Apart from the TRIPS Agreement, these international Conventions in the area of copyright are mainly the Berne Convention (for works) and the Rome Convention (for performing artists, phonogram producers and broadcasting organisations). In 1996, two WIPO Treaties were adopted (WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)), to which the EU will accede once all of its 25 Member States have implemented the Information Society Directive.

3. The existing acquis communautaire in the area of copyright. (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 right holders 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 (ex arts. 30 and 36), the ECJ has established the principle of Community-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 an exclusive public communication right (*Coditel I* (ECJ)). Additionally, in the absence of EU-wide harmonization the ECJ has in two cases accepted the infringement of the freedom of movement of goods that resulted from existing differences in national copyright laws (*Christiansen* (ECJ): prohibition of renting on the basis of national rental right upheld, and *Patricia* (ECJ): prohibition of distribution on the basis of longer national term of protection upheld; see also *Tournier* (ECJ), upholding payment of an additional fee for the public performance of musical works by means of sound recordings imported from another Member State, where copy-

right royalties had already been paid). **(b) Harmonizing strategy.** On the basis of several policy papers (Green Paper on Copyright and the Challenge of Technology, 1988; Working Programme of the Commission in the Field of Copyright and Neighbouring Rights, 1992; Green Paper on Copyright and Related Rights in the Information Society, 1995 and Follow-Up to the Green Paper on Copyright an Related Rights in the Information Society, 1996), the EU has reacted to this line of case law and harmonized Member States' national copyright laws by way of several Directives. Apart from harmonizing the protection for certain subject matter – notably computer programs and databases – the aim was to remove existing differences which adversely affected the functioning of the single market to a substantial degree, and to prevent new differences from arising. At the same time, a high level of protection should be maintained in order to protect investment and encourage innovation. **(c) Existing copyright Directives.** Up until now, the EU has enacted the following seven copyright Directives: Computer Programs Directive; Rental Right Directive; Term Directive; Satellite and Cable Directive; Database Directive; Information Society Directive; and Resale Right Directive. In addition, the Enforcement Directive, which deals with the enforcement of intellectual property rights in general, also covers the enforcement of copyrights.

4. Areas of copyright not yet covered by the acquis communautaire. (a) Additional need for harmonization. Although other areas of copyright remain unharmonized, the Commission currently is of the opinion that in practice there are no indications of any problems with regard to the internal market. Consequently, with the exception of the points of attachment (i.e. the criteria used to determine the beneficiaries of protection in the field of related rights which, in addition to their impact on the internal market, are relevant to the adhesion of the Community and its Member States to the WPPT), the Commission does not at present envisage further harmonization measures. Rather, it plans to make some minor adjustments to the existing Directives in order to improve the operation and coherence of the acquis communautaire in the field of copyright (Working paper on the review of the EC legal framework in the field of copyright and related rights, 2004). However, it should be noted that at present, the Commission seems to prefer Recommendations in order to achieve further harmonization (arts. 211, 249 EC Treaty; see Online Music Recommendation). On the one hand, Recommendations are quicker to adopt than Directives and can be made whenever the Commission considers it necessary, at the expense, however, of bypassing the Member States. On the other hand, Recommendations are not binding, although in practice they might incite self-regulation by the parties affected. **(b) Collecting societies.** The collective management of rights is well established in all Member States. The role of collecting societies for the administration of copyright has been expressly recognized in at least one Directive (arts. 3(2), (4) and 9 Satellite and Cable Directive). In addition, the activities of collecting societies are subject to EU

competition law (arts. 81 and 82 EC Treaty, ex arts. 95, 96). In general, the ECJ has so far been rather sympathetic to the essential elements of collective management of rights by collecting societies, although it did not regard collecting societies as 'undertakings entrusted with the operation of services of economic interest' benefiting from the special regime laid down in article 86(2) EC Treaty (ex art. 90 (2)). However, the ECJ has corrected some unjustified anomalies which resulted from the societies' monopoly situation (regarding for the relationship to users see *SABAM II* (ECJ) and *GVL* (ECJ), and regarding the relationship amongst societies see *Tournier* (ECJ)). In contrast, the Commission now has made a Recommendation in order to break up the existing system of transborder rights management in the field of online-music licensing by collecting societies, which is presently based on national monopolies and so-called sister-agreements (Online Music Recommendation).

5. Copyright and competition law. Likewise, individual licensing by copyright holders is also subject to control by competition law. So far, 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 proprietor who is in a dominant market position may, in exceptional circumstances, involve abusive conduct, in particular, if refusal to license prevents the appearance of a new product for which there is potential consumer demand (*Magill* (ECJ)), or if the refusal is not justified and results in reserving the after-market to the copyright owner and excludes competition in a market other than the market of the original product (*IMS Health* (ECJ)). A special issue arises from the question of to what extent general competition law rules may override the special harmonized rules, such as art. 6 of the Computer Programs Directive regarding decompilation of protected computer programs (*Microsoft* (CFI)). For competition law control of the activities of collecting societies, see supra, note 4.

6. Other issues. There is a number of additional issues which a practitioner usually has to deal with in litigating a copyright case that touches upon one or more EU Member States. These issues include, but are not limited to, the following. **(a) Jurisdiction and enforcement.** Jurisdiction and enforcement of transborder disputes in the area of copyright are regulated by Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. **(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. However, so far, the rules of international private law have not been harmonized in the area of copyright. Even the rules on transborder satellite transmissions, (arts. 1 et seq. Satellite and Cable Directive) do not regulate applicable law, but merely determine in which country a transborder satellite transmission of copyrighted works takes place. Rather, these rules form part of each EU Member State's internal law and they may differ with regard to issues such as which law to apply to determine condi-

tions for protection, first ownership, transfer of rights, scope and limitations of rights, duration and remedies. However, according to art. 8(1) of the currently proposed Regulation Rome II '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 sought.' In addition, art. 10(1) of the proposal allows the parties broad freedom 'to submit non-contractual obligations other than the obligations to which art. 8 applies, to the law of their choice.' **(c) Principle of non-discrimination.** According to art. 12 EC Treaty (ex art. 6), any discrimination on grounds of nationality is prohibited. The ECJ has held that this principle also applies to intellectual property rights, including copyright and neighbouring rights (*Phil Collins* (ECJ), *Ricordi* (ECJ) and *Tod's* (ECJ)). In practice, the principle of non-discrimination bars Member States from withholding legal protection granted to their own nationals from nationals from other EU Member States, even if international Conventions subject protection to the existence of material reciprocity, such as in the case of differing terms of protection or where works of applied art are only protected by design right in one country and by copyright in another. **(d) Interpretation of Community law.** National courts are bound to give effect to Community legislation (so-called 'effet utile') by way of a community-friendly interpretation of national law. Moreover, according to art. 234 EC Treaty (ex art. 177), whenever a national court is of the opinion that a decision on the interpretation of primary or secondary Community law is necessary in order to decide a given 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 has thus the last word in interpreting both primary and secondary Community law, and in judging the conformity of national law norms with Community law. **(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 can require the Member State concerned to take the necessary measures to comply with its judgment and, if the ECJ finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it (Treaty violation procedure, arts. 226-228 (ex arts. 169-171)). In addition, Member States can 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.** Finally, it should be noted that newly acceding Member States are generally under an obligation to implement the existing Directives as part of the acquis communautaire in their national law, even before the final date of accession to, and full membership of, the EU. **(g) European Economic Area.** Similarly, the Member States of the European Economic Area are bound by the Directives as part of the acquis communautaire.

7. Treaties and Directives covered. (a) International Treaties. Although as a rule, the international Conventions in the field of intellectual property are commented upon in the General volume of the Concise IP commentary, Part I of this volume on copyright covers the international Conventions which exclusively deal with copyright and neighbouring rights. These international Conventions are: 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 Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the WIPO Performances and Phonograms Treaty (WPPT), and the copyright provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). **(b) Directives.** Up until now, the European legislature has enacted seven 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), and Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art (Resale Right Directive). It should be noted that Directive 2004/48/EC on the enforcement of intellectual property rights (Enforcement Directive) also has a bearing on copyright. The same is true for Council Regulation (EC) No. 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights (Regulation on Customs Action). However, since the Enforcement Directive and the Regulation on Customs Action are not limited in scope to copyright, but affect all intellectual property rights alike, they both will be covered by the General volume. **(c) Appendices.** The appendices to this volume on copyright contain a list of the Directives, a list of abbreviations, a list of references to cases and documents cited, 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

[Preamble]

The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,

Recognizing the importance of the work of the Revision Conference held at Stockholm in 1967,

Have resolved to revise the Act adopted by the Stockholm Conference, while maintaining without change Articles 1 to 20 and 22 to 26 of that Act.

Consequently, the undersigned Plenipotentiaries, having presented their full powers, recognized as in good and due form, have agreed as follows:

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. Of course, as soon as authors who were nationals of state A claimed protection abroad, for example in state B, in most instances foreign authors of state B reciprocally asked for some kind of protection in state A. 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.** However, 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. There were only a few minimum rights at the beginning, but 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 and WCT. 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