„The Role of the ECJ for the Development of Copyright in the European Communities"[*]

by

Thomas DREIER[**]

---------- *Draft Version* ----------

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[**] Prof., Dr. iur., M.C.J. (New York Univ.); Director, Institute for Information Law, University of Karlsruhe, and Honorary Professor, University of Freiburg, Germany; Vice-President of ALAI.

I. Introduction

The issue. - Speaking about the development of copyright[1] in the European Union, the main focus usually is on the legislative harmonisation of substantive copyright law. Up until now, seven Directives have been proposed by the Commission and issued by the European Council and the European Parliament.[2] Already, some further action in the field of copyright has been announced by the Commission.[3] However, one hardly thinks of the role which the European Court of Justice (ECJ), the third institutional European power, has played in the development of European copyright law. A provocative question might be: did it play a role at all? Isn't it since long clear that copyright falls within the scope of the EC-Treaty? Or that the Treaty's fundamental freedoms, in particular the free movement of goods mandate a restriction of the exercise of the exclusive distribution right, which is commonly referred to as „exhaustion"? Of course, the ECJ has to interpret the legislative texts which grant community rights, the community trademark[4] and the community design[5]; moreover, both the trademark and the design Directives[6] certainly give rise to a number of questions of interpretation

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1 Hereinafter, the term „copyright" shall be used as a shorthand for both copyright and rights related to copyright on the one hand, and for copyright and droit d'auteur on the other.

2 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, O.J. No. L 122 of 17 May 1991, p. 42; Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, O.J. No. L 346 of 27 November 1992 p. 61; 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, O.J. No. L 248 of 6 October 1993, p. 15; Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J. No. L 290 of 24 November 1993 p. 9; Directive 96/9/EC of the European Parliament and of the Council on the legal protection of databases, O.J. No. L 77 of 27 March 1996, p. 20; 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, O.J. No. L 167 of 22 June 2001, p. 10; 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, O.J. No. L 272 of 13 October 2001, p. 32.

3 See *Reinbothe*, A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union, speech given at the 10th Annual Conference on International Intellectual property Law and Policy, Fordham university, April 2002, available at http://europa.eu.int/comm/internal_market/en/intprop/news/reinbothe04-04-02.htm

4 Council Regulation 40/94 of 20 December 1993 on the Community Trademark, O.J. No. L 11 of 14 January 1994, p. 1.

5 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, O.J. No. L 3 of 5 January 2002, p. 1.

6 First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, O.J. No. L 159 of 10 June 1989, p. 60; Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, O.J. No. L 289 of 28 October 1998, p. 28.

which the ECJ is called upon to decide whenever case has been referred by a national court in order to ensure the harmonised application of the texts throughout the Member States. But what is there to say about copyright?

1957: the Treaty of Rome - However, considering the state of political integration back in 1957, when the Treaty of Rome was signed, it is clear that at that time the main focus had been economic in nature. In creating the European Economic Community, the signatories of the Treaty aimed at abolishing all existing, and prevent all future, interstate trade restrictions. As the text of the article 28 (ex-article 30) of the Treaty demonstrates, at that time the free movement of goods was still hindered by quite a number of quantitative restrictions on imports and exports, which by now have ceased to be of great concern. True, in article 30 (ex-article 36), „industrial and commercial property" is mentioned as a possible source of restrictions for the free movement of goods, provided these restrictions do not arbitrarily discriminate or constitute a disguised restriction on trade between Member States. But nowhere does the Treaty speak of copyright. It seems that in 1957, there wasn't even a need to do so. Absent computers and databases, cable and satellite, at that time copyright industries where largely text and language based and hence more or less confined to national boundaries. Of course, transborder exploitation did take place to some extent, in particular in the areas of music, film or with regard to books in the German speaking countries (which extended even beyond the boundaries of the EEC). But first, in the 50es there was much less consumption of foreign copyrighted material even in these areas. Second, to the extent that there was, the matter was largely regulated by contractual arrangements amongst the parties involved and established well before the advent of the EEC. Comparing this „starting point" in 1957 with the now well established and elaborated legal rules which define the intersection of copyright and EU-law, one understands how much has since then been achieved. The institution responsible for the fact that we are where we are now is none other than the ECJ.

The role of the ECJ with regard to copyright: past and future - From this it follows that on the one hand, any description of the role of the ECJ for the development of copyright within the EU has to retrace the past case law of the Court in this area of law. This case law is mainly concerned with the interpretation of primary community law in view of copyright (III.), and it has undertaken to define the intersections of copyright and the Community policies of free movement of goods and services (III.1), the principle of non-discrimination (III.2) and of competition law (III.3), the latter certainly being in the foreground of the current debate, as the ongoing litigation in the IMS Health-case[7] demonstrates. In addition, the ECJ is increasingly called upon to interpret secondary community law (IV.). On the other hand, the subject of this paper likewise raises a number of issues which are of importance for the future role which the ECJ may take in the development of European copyright (V.). This comprises future legal issues to be decided (V.1), differences in the role of the court with regard to other IP-laws (V.2), organisatorial matters (V.3) and, finally, a look to the role of the ECJ as an arbitrator (V.4).

Legal literature. - In view of this by now means narrow field to be examined, it comes somewhat as a surprise that the role which the ECJ - and depending on the procedure in question also the Court of

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7 Order of the President of the ECJ of 11 April 2002, case C-481/01 P(R), IMS Health Inc. v. NDC Health Corp. and NDC Health GmbH & Co. KG.

First Instance (CFI) - has played, and will continue to play regarding the development of copyright within the EU, has been little examined so far. Rather, the focus is almost exclusively on the state and the development of the substantive EU law as it relates to copyright law, and to a lesser extent on the degree of harmonisation required in order to achieve the Treaty objectives, especially in view of the principle of subsidiarity.[8] There seems to be no comprehensive monograph and hardly any article which focuses on the role the ECJ as such.[9] There even isn't a definitive count of cases in which the ECJ had to deal with copyright.[10] True, it difficult to ascertain an exact number, since in some cases, issues of copyright may have been raised, but may not have been in the foreground of the decisions,[11] while in other cases the issues decided dealt with other intellectual property rights, but are still likely to have effects in the field of copyright.[12] This lack of attention of the subject so far may also be surprising for at least two additional reasons. First, it is obvious that the ECJ plays a major role in the development of other European intellectual property (IP) laws, notably of trademark law.[13] Second, the comparison with other bodies which have the role to clarify and interpret transnational copyright principles, such as the WTO panels, in some way calls for a comparison.

II. Copyright, the ECJ and the EC-Treaty

1. The ECJ and the EC-Treaty

The powers of the ECJ under the EC-Treaty. - Assessing the role of the ECJ for the development of copyright first requires to briefly recall the powers which are conferred upon the ECJ by the provisions of the EC-Treaty. According to article 220 (ex-article 164), the task of the ECJ is to ensure the proper interpretation and application of the Treaty. This means that both acts of the EU legislature and of Member States can be controlled in view of their compatibility with primary community law. In addition, the ECJ is called upon to speak authoritatively on secondary community law. While the first -

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8 See Article 5 (2) (ex-Article 3b) of the EC-Treaty.

9 However, at the EU-Conference „European Copyright Revisited", organised by the EU-Commission in Santiago de Compostella in June 2002, however, Bo *Vesterdorf*, President of the CFI, presented a paper on „The Role of Copyright and Related Rights as a Policy as compared to Other Policies", available at http://europa.eu.int/comm/internal_market/en/intprop/news/2002-06-conference-speech-vesterdorf_en.htm (citations of this paper are to the pages of the unpublished manuscript).

10 Whereas there is a core of 39 cases assembled in the database accompanying this article, other commentators count as many as 120 cases; *Rodriguez Pardo*, Highlights of the Origins of the European Union Law on Copyright, [2001] EIPR 238, at 239.

11 Such as, e.g., in the case *Dior ./. Evora*, ECR 1997, I-6013.

12 As a recent example of the latter group one may cite the case *Zino Davidoff ./. A&G*, case C-414/99, and joined cases 415 and 416/99 (*Levi Strauss*).

13 Here as well, the role of the Court is only rarely the subject of discussion; for a notable exception see *Kur*, Fifty Years of European Legal Integration - Intellectual Property, in: van Empel/van Gerven (eds.), Fifty Years of European Legal Integration, Kluwer, to be published fall 2002 (citations are to the manuscript).

compatibility with primary community law - concerns questions such as the competency of the EU legislature to enact certain Regulations and Directives, the compatibility of national legislation with the fundamental freedoms of the Treaty, and the timely implementation of Directives by Member States, the second - interpretation of secondary community law - mainly has to deal with the question of the proper implementation of Directives in national law (since in a first step, this involves ascertaining the true meaning of the text of the Directive in question). Contrary to trademark and design law, where interpreting secondary community law also concerns Community Regulations, in copyright interpretation of secondary community law is, of course, confined to Directives, since there is no community copyright,[14] but only a bundle of more or less harmonised national copyright laws. The question of how to properly interpret the legal provisions of a Directive can rise in the course of a procedure for incomplete transposition of a Directive by one of the Member States as well as in the course of any referral procedure.

Relevant competencies of the ECJ. - Amongst the competencies granted to the ECJ under the EC-Treaty, the following should be mentioned with regard to cases on copyright:

Proceedings for annulment, articles 230, 231 (ex-articles 173, 174). - A powerful competency of the ECJ is the possibility to review, and if necessary to declare void, in actions brought by a Member State, the Council or the Commission, the legality of acts adopted by the European Parliament, the Council, and of the Commission on grounds of lack of competence and of infringement of the EC-Treaty, or of any rule of law relating to its application. Although this competency has been successfully used in declaring void, e.g., the Directive on tobacco advertising,[15] it has so far not been used in order to attack the validity of any of the seven Directives harmonising in the field of copyright.[16]

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14 It shall not be a matter of discussion here whether a Community copyright - in a parallel to, or replacing, the existing national copyright laws of the Member States - would be a useful legal regime to have, and whether or not the Community would have the legal competency to enact such a Community copyright after the model of the Community trademark, the Community design and, as long envisaged, a Community patent. - For discussion of the current gaps to be filled in order to arrive at a complete harmonisation of copyright harmonisation within the EU and the steps necessary for a Community copyright, see, e.g., *Walter*, Updating/consolidation of the acquis, EU-Conference „Copyright Revisited", Santiago de Compostella, June 2002 (unpublished manuscript). For the lack of an all-englobing competency of the Community in the field of Copyright, see also *Walter/v.Lewsinki*, Europäisches Urheberrecht, Vienna 2001, Einleitung, notes 13 et seq.

15 Directive 98/43/EC of the European Parliament and Council dated July 6, 1998, on the approximation of the laws, regulations and administrative provisions of the Member States relating to advertising and sponsorship of tobacco products, O.J. No. L 213 of 30 July 1998, p.9; see ECJ, Germany ./. European Parliament and Council, case C-376/98, ECR 2000, I-8419. - Contrary, the ECJ has refused to invalidate the Biotechnology Directive, see, *Netherlands./.Commission and Council*, case C-377/98, ECR 2001, I-7079.

16 In legal literature, however, the validity on the grounds of lack of Community competency has at times been discussed/postulated; see, e.g., *Hugenholtz*, 2000 EIPR, 499, at 501 with regard to the Information Society Directive (arguing that regarding the limitations „the Directive has little or nothing to offer in terms of legal security"). But the competency question might arise with regard to future Directives which might attempt to fill in the harmonisation „gaps" left so far by the presently enacted Directives, as well as a Regulation creating a Community Copyright; see also below, V.1.

Treaty violation procedure, articles 226 - 228 (ex-articles 169 - 171). - If the Commission or a Member State is of the opinion that another Member State has failed to fulfil an obligation under this Treaty - which includes the failure to implement Directives adopted by the implementation date prescribed in the respective Directive, or any incomplete implementation of the provisions of a Directive into national law - the ECJ in a first step can require the respective Member State 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. In addition, under the jurisprudence of *Francovich*,[17] individuals can claim compensation for failure to timely implement the provisions of a Directive.

Preliminary rulings, article 234 (ex-article 177). - Most important, the ECJ has exclusive jurisdiction[18] if, in the course of a proceeding in a court of a Member State, a question of interpretation of the EC-Treaty or the validity and interpretation of acts of the institutions of the Community may, or has to be, brought before the ECJ.[19] In these cases, the ruling of the ECJ is only „preliminary", i.e., the ECJ does not decide the case in which the question arises itself; rather, this decision is left to the national court of the Member State which has referred the question to the ECJ. Consequently, the Court is not in a position to interpret authoritatively the copyright rules directly applicable in any copyright litigation amongst private parties, nor may it assess their conformity with Community law. Rather, the Court is only called upon to interpret primary and/or secondary Community law.[20] Of course, the difference may be minimal, since interpreting Community law often determines the interpretation to be given to national law in order to be in compliance with primary and/or secondary Community law, but in theory, the difference is there.

Appeal of law to decisions by the Court of First Instance (CFI). - Furthermore, the ECJ acts as the competent body for an appeal of law against decisions rendered by the CFI, which currently has jurisdiction to rule at first instance on all actions for annulment, for failure to act and for damages brought by natural or legal persons against the Community. This is notably the case when the CFI has to review decisions made by the Commission in competition law cases.[21]

Some statistics. - Counting the different procedures which gave rise to the copyright cases of the ECJ, it becomes apparent that the great majority has been initiated by the procedure for a preliminary

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17 *Francovich et al. ./.* Italian Republic, cases C-6/90 and 9/90, ECR 1991, I-5357; subsequent judgements are cited by *Walter/v.Lewsinki*, Europäisches Urheberrecht, op. cit., Einleitung, footnote 105.

18 See article 225 (1) sentence 2.

19 A question may be brought before the ECJ if the national court considers that a decision on the question is necessary to enable it to give judgment, and it has to be brought before the ECJ in a case pending before a national court against whose decisions there is no judicial remedy under national law.

20 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH* and *Leif Emanuel Kraul v EMI Electrola GmbH*, joined cases C-92/92 and C-326/92, ECR 1993, I-5145, para 13, citing to the judgment in joined cases 91/83 and 127/83 *Heineken Brouwerijen ./. Inspecteurs der Vennootschapsbelasting, Amsterdam and Utrechts*, ECR 1984, 3435, para. 10.

21 See Article 225 (ex-article 168a) of the EC-Treaty.

ruling, whereas infringement procedures only play a minor role. In addition, it should be noted that a considerable number of cases is concerned with competition law aspects of copyright. It might indeed be interesting to make a precise count.

Other points of importance. - Apart from the competencies just mentioned, there is a series of additional points which merits attention in determining the role of the Court under the Treaty.

Sociological aspects. - First, attention should be drawn to the sociological aspects of the composition of the Court,[22] i.e. the selection process, the personalities and the respective backgrounds of the judges. This can only briefly be touched upon here. Suffice it to say that the factors just mentioned may well be considered material to the role exercised by the Court in general and - if one considers that in general, the judges do not have a specialised IP background - in copyright. In addition, while it is true that the interior mechanism of decision-making amongst judges coming from different legal traditions - one has to include the advocates-general as well[23] - is certainly a complex one which ensures that no legal tradition of a single Member State prevails, it may nevertheless be said that the judgements follow more closely the French style of reasoning rather than the German way of meticulous deduction, or the English way of thorough discussion of all arguments pro and contra.

Interpretation rules. - This also has its effect on the interpretation rules applied by the ECJ. Again, some rudimentary remarks will have to suffice.[24] In general, it may be said that the ECJ follows a verbatim, a systematic and a teleological interpretation. In theory, the verbatim interpretation requires that all language versions have to be considered equally well. Most important, however, the interpretation has to be autonomous, i.e. community law notions have to interpreted out of themselves and they can take on a meaning different from any meaning they might have in national law. As far as the systematic interpretation is concerned, it should be noted that any provision of community law will be interpreted in the light of all other community law; here, contrary to some Member States' interpretation principles, the ECJ also considers what has been said in the recitals of Directives. Moreover, as far as the relationship between community law and international public law is concerned, it should be noted that in view of the higher rank of international agreements concluded by the Community, the ECJ has recognized the principle that secondary community law has to be interpreted in the light and the spirit of public international law.[25] As far as copyright is concerned, this may be of importance as far as the TRIPS-Agreement is concerned. On the one hand, before long the ECJ will certainly have its say on the interpretation and scope of the famous three-step-test[26], which is of great

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22 See article 222 of the Treaty.

23 See articles 222, 223 of the Treaty.

24 For a comprehensive overview see, e.g., *Walter/v.Lewinski*, Europäisches Urheberrecht, op. cit., Einleitung, notes 34 et seq.

25 See *Commission ./. Federal Republic of Germany*, case C-61/94, ECR 1996, I-3989.

26 Article 13 TRIPS. - For an interpretation attempt in literature see, e.g., *Lucas*, Le „triple test" de l'article 13 de l'Accord ADPIC à la lumière du rapport du Groupe spécial de l'OMC „Etats-Unies - Arctivle 110-5 de la Loi sur le droit d'auteur", in: Festschrift für Adolf Dietz, Munich 2001, p. 423. - See also below, V.1.

importance in defining the exact contours of the exclusive rights in the digital and networked information society. On the other hand, the interpretation of Directives in the light of the TRIPS-Agreement will make the disputed question of direct applicability of the TRIPS-provisions within the Community a less poignant one.[27] Regarding the teleological interpretation, it is worth mentioning that the ECJ refers to the so-called *effet utile*, which means that amongst several possible interpretations the one will prevail which best guarantees the practical effect of existing community law. In this respect, the ECJ has developed a series of „principles" which complement the aims of the EC-Treaty, such as the principle of effective legal protection, of material non-discrimination of EU-nationals and of legal security, to name just a few. Finally, the ECJ applies the historical interpretation when it comes to interpreting secondary - but not primary - community law to the extent the preparatory documents have been made publicly accessible.[28] Of course, a much more thorough analysis would be called for if one were to assess the role of these interpretation rules for the development of the case law of the ECJ in the field of copyright.

Interpretation rules directed at Member States. - Moreover, the ECJ has developed certain principles and interpretation rules which affect the application of the law in the individual Member States. One such rule is the principle that national law has to be interpreted so that it best complies with community law, both primary and secondary. In practice, if properly followed this principle helps keeping many potential cases away from the ECJ, since interpreting the national rule in the light of community law in many instances avoids a discrepancy and hence a question to be referred for a preliminary ruling to the ECJ. Moreover, the principle establishes a close „link" between national law and community law: first, to the extent community law directly regulates a particular problem - or at least has an influence on the legal treatment of a particular legal problem - in a Member State, it ensures that the national solution to be found is in conformity with the community standard, and hence with the law in other Member States as well. Second, since the interpretation of national law depends on the interpretation of community law, the ECJ, although only being called upon to interpret community law, in addition at least indirectly influences the meaning to be given to national law. Hence, this influence of the jurisprudence of the ECJ on the interpretation of national law goes beyond the cases where Directives which haven't been implemented are directly applicable between an EU-citizen and a Member State,[29] or have at least direct effect amongst private parties.[30] In sum, one may conclude that these general rules which have not been developed especially in the field of copyright, nevertheless have a decisive harmonising influence in the field of copyright as well.

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27 *Walter/v.Lewinski*, op. cit., Einleitung, note 36.

28 See Article 255 of the EC-Treaty, and following Regulation (EC)No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, O.J. No. L 145 of 31 May 2001, p. 43.

29 See, e.g., *von Colson and Kamann ./. North-Rhine Westphalia*, case 14/83, ECR 1984, 1891 and *Foster et al .I. British Gas*, case C-188/89, ECR 1990, I-3313.

30 See *Marleasing ./. Comercial Internacional de Alimentación*, case C-106/89, ECR 1990, I-4135 and *Paola Faccini Dora ./. Recreb*, case C-91/92, ECR 1994, I-3325.

2. The EC-Treaty and Copyright

Internal competency. - As already said, „copyright" as such is not a notion, nor policy explicitly mentioned in the EC-Treaty. Consequently, like for all other intellectual property rights, the EC-Treaty does not contain an all-englobing internal competency norm regarding the field of copyright.[31] Rather, any legislative measure has to rely on the general competencies laid down in articles 47 (2) (ex-article 57 (2)), 55 (ex-article 66) and - dating back to the Single European Act of 1987 - in particular in article 95 (ex-article 100a), i.e. for the purpose of coordinating Member States' legislative provisions concerning the free movement of services, and of ensuring the establishment and functioning of the internal market. Moreover, since Maastricht, the community legislature has to strictly adhere to the principle of subsidiarity as formulated in article 5 (2) (ex-article 3b (2)) of the Treaty. Although it certainly can not always be unequivocally ascertained whether or not a certain harmonisation measure in the field of copyright affects the internal market,[32] the ECJ so far did not have to consider the competency of the EU-legislature with regard to copyright. The reason for this may be that the Directives were by and large supported by a broad consensus of the parties concerned. Moreover, it should be noted that at times the ECJ, in accepting certain restrictions to the free movement of goods and services as justified by intellectual property rules of the Member States, has incited the Commission to start the harmonisation process as regards limited areas of copyright.[33]

External competency. - It should only briefly be recalled that the question of the external competency of the EU in the field of intellectual property - and hence copyright - has been addressed in the famous Opinion 1/94 of 14 November 1994, in which the ECJ concluded to the joined competency of the EC and its Member States to conclude the WTO/TRIPS agreement.[34] In this respect, it should be noted that subsequently, the Treaty of Amsterdam added a new paragraph 5 to article 133, which opens up the possibility to confer to the Community the authority of negotiating and concluding international agreements on intellectual property even where the Community is not as such competent to do so. However, this Competency may only be opened up by the Council, i.e. by a common decision of the Member States.

Copyright and policies of the Treaty. - More important, however, has been the fact that beginning in the early 80ies, the Court eliminated doubts that copyright might not be covered by the Treaty. Already, in the earlier case *Deutsche Grammophon v. Metro,*[35] where the Court confirmed its distinction between the „existence" and the „exercise" of an intellectual property right as first

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31 For the external competency of the Community see immediately below.

32 To mention just an example, in the satellite and cable Directive the view was taken that simultaneous cable retransmission within a Member State does have no transborder effect, although it affects foreign right holders as well.

33 See, e.g., *EMI Electrola ./. Patricia Im- und Export et al.*, case C-341/87, ECR 1989, 79, para. 11.

34 ECJ, Opinion 1/94, ECR 1994, I-5267, opinion sought, pursuant to Article 300 (6) (ex-article 228 (6)) of the Treaty.

35 *Deutsche Grammophon ./. Metro SB,* case 78/70, ECR 1971, 487.

formulated in the case *Consten and Grundig*,[36] it examined the conflict between the principle of free movement of goods and the neighboring right of phonograms. In 1980, in the *Coditel*-case[37], copyright was first discussed within the exception on the basis of an intellectual property right to the principle of free movement of services, and in *Musik-Vertrieb Membran ./. GEMA*[38] the Court for the first time then explicitly mentioned copyright in formulating that „industrial and commercial property" included „the protection conferred by copyright, especially when exploited commercially in the form of licenses capable of affecting distribution in the various Member States of goods incorporating the protected literary or artistic work."[39] Similarly, in *Phil Collins*[40] the Court held that „copyright and related rights fall, by reason in particular of their effects on intra-Community trade in goods and services", within the scope of application of the Treaty as far as the principle of non-discrimination is concerned. This having been ascertained, the further development could then focus on the relationship between the exclusive rights conferred by copyright and the policies laid down in the Treaty. Only after these at times conflicting aims of primary community law had been tackled (see part III.), did the Court have to deal with the first questions regarding the interpretation of secondary community law (see IV.).

III. The ECJ, Copyright and Primary Community Law

1. Copyright and free movement of goods and services

The conflict. - As is well known, the first problem to arise in the „copyright history" of the ECJ has been the tension, or conflict, between the principle of free movement of goods and services on the one hand, and the territorial exclusivity conferred upon rightholders by Member States' national copyright laws on the other. Legally speaking, the problem is that the principle of free movement essentially requires a single internal market without commercial borders, whereas the national nature of Member States' copyright already as such allows for a territorial segmentation of the Community territory. But there also is an economic side to this conflict. In practice, in may instances, this internal market, postulated by the political will of the Member States and by the EC Treaty, often just is not a single market as far as the marketing of copyrighted material is concerned. There are language barriers which are particularly felt not only in the literary field, but likewise as far as cinematographic works and - admittedly to a lesser extent - musical works are concerned. Before the advent of transborder cable and later satellite television and, of course, now the internet, transborder public performance hardly took place at all or could, for the purposes of copyright, be neglected as mere technical „overspill".

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36 *Consten and Grundig ./. Commission EEC*, joined cases 56/64 and 58/64, ECR 1966, 299.

37 *Coditel ./. Ciné Vog Films*, Case 62/79, ECR 1980, 881.

38 *Musik-Vertrieb Membran GmbH ./. GEMA*, joined cases 55/80 and 57/80, ECR 1981, 147.

39 Ibid., para 8.

40 *Collins and Patricia Im- und Export ./. Imtrat and EMI Electrola*, joined cases C-92 and 326/92, ECR 1993, I-5145.

Due to this historical development, however, dealing in copyrights and in copyrighted works still is by and large very much a national and not a European activity. To a great extent, markets are still national, if not regional or even local. In addition, most of the commercial players involved are small and medium size enterprises who cannot afford to be present on a Community-wide level. It might indeed be interesting to get some more statistical data concerning this phenomenon.

The solution in the EC-Treaty. - Due to the fact that the Treaty guarantees legal protection to intellectual property rights, as property rights, by article 295 (ex-article 222), this tension cannot simply be solved in favor of the freedoms of movement of goods and services. Obviously, the Treaty does not overlook this tension, since in article 30 (ex-article 36) it provides that the principle of freedom of movement of goods does „not preclude prohibitions .. on imports, exports or goods in transit justified on grounds of ... the protection of industrial and commercial property", provided such prohibitions or restrictions do not arbitrarily discriminate or contain a disguised restriction on trade between Member States. Wisely, the „justified" leaves sufficient flexibility to further define the relationship between the freedoms on the one hand, and the effects of the exclusivity of intellectual property rights on the other. Clearly, the Treaty has entrusted the ECJ with this definition task.

Exhaustion of the distribution right. - The first decisive step in doing so has without doubt been the formulation of the principle of exhaustion of the distribution rights with regard to material copies of a copyrighted work throughout the Community, once such copies have been lawfully marketed in one Member State either by the owner himself or with his consent.[41] The main reason for the prevalence of the principle of free movement of goods in such cases is that the rightowner, at the point in time of first marketing any particular copy, can make sure, by way of price fixing that he or she receives a payment of royalties which adequately compensates for the use value of that particular copy. In view of these circumstances, an infringement upon the free movement of goods does not seem to be justified by the existence of the exclusive distribution rights conferred upon the rightholder by national copyright legislation.[42] This principle is now well established, and it has even found its way into the legislative language of some of the Member States' national copyright laws.[43] An interesting addition came to it after the rental and lending Directive had been enacted. First, in *Metronome Musik*[44] the ECJ held that the non-exhaustion of the distribution right as far as the rental right is concerned is not in violation of the EC Treaty, since the „the release into circulation of a sound recording cannot, by definition, render lawful other forms of exploitation of the protected work, such as rental, which are of a different

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41 *Deutsche Grammophon ./. Metro SB*, case 78/70, ECR 1971, 487; *Musik-Vertrieb Membran GmbH et al ./. GEMA*, joined cases 55 and 57/80, ECR 1981, 147. - For the question under what circumstances „consent" may be found, see below, V.2.

42 In the *GEMA*-case, the ECJ has come to this conclusion even wherein the UK the then applicable Copyright Act 1956 had the effect of instituting a statutory licence in return for the payment of reduced royalty rate, and consequently denied the German collecting society to claim the royalty difference to the rate applicable in the Member State in which the work was ultimately sold.

43 See, e.g., § 17 (2) of the German Copyright Act.

44 *Metronome Musik ./. Music Point Hokamp*, case C-200/96, ECR 1998, I-1953.

nature from sale or any other lawful form of distribution." Second, in *Laserdisken*[45] the ECJ clarified that that the rental right was not exhausted after a first rental, since the rental right „would be rendered worthless if it were held to be exhausted as soon as the object was first offered for rental."

No exhaustion of the public communication right. - The ECJ in *Lasedisken* was thus treating rental rights in pretty much the same way as it treats public communication rights. Contrary to the exhaustion of the distribution right, no general exhaustion is mandated with regard to the public communication of a copyrighted work, since, as the ECJ in its *Coditel I*-decision[46] put it, public communications of a work „may be infinitely repeated" so that rightholders „have a legitimate interest in calculating the fees ... on the basis of the actual or probable number of performances" and that „the right of a copyright owner and his assigns to require fees for any showing of a film is part of the essential function of copyright in this type of literary and artistic work ". It is interesting to note, however, that the language of the decision left it open that the outcome might be different in cases where the original contract already provides for a remuneration for each and any public communication. Of course, one may ask whether such situations are conceivable, except where the contract in question transfers all world-wide exclusive rights so that a conflict of interests between different rightholders in different countries may not arise, but it should be mentioned that the holding of the ECJ has by now been interpreted by the Community legislator as a general rule without exceptions.[47] Anyhow, it may be seen as an interesting example of the model role which decisions of the ECJ have for the lawmaking process.

Criteria for solving the tension. - Another, much more difficult question is how to formulate general criteria according to which the tension between the principle of free movement of goods and services on the one hand, and exclusive copyrights on the other can be solved. In a way, this problem is rather similar to the one of solving the tension between exclusive rights and the principle of freedom of competition.[48] For a long time, the ECJ stood by its distinction between infringements upon the free movement resulting from the „existence" or „essential function" of an exclusive right, rather than from the way such an exclusive right granted by copyright had been exercised, such as in the quote from the *Coditel*-decision just made. Of course, these are just formulations which try to capture the essence of the two situations which merit a different balance of interests involved. But they cannot hide the fact that it is a question of balance after all, which is as such well placed in the hands of a court. It is not the place here to retrace the development of this distinction in detail; rather, one remark will have to suffice. In retrospect, the *GEMA*-decision - together with the contemporaneous *Merck*-decision[49] in

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45 *Foreningen af danske Videogramdistributører ./. Laserdisken*, case C-61/97, ECR 1998, I-5171.

46 *Coditel ./. Ciné Vog Films*, Case 62/79, ECR 1980, 881, paras. 13 and 14.

47 See article Art. 3 (3) of the Information Society Directive, and already before, article 1 (4) of the Rental and Lending Directive.

48 See below, III.3.

49 *Merck ./. Stephar and Exler*, case 187/80, ECR1981, 2063.

respect of patents - has been described as the „zenith of the consent-to-marketing approach“[50] to the exhaustion of industrial property rights. Whether this is true or not may be open to discussion. At any rate, some seven years later, the ECJ has not been afraid of accepting infringements upon the free movement of goods and services, such as, notably in the two cases *Warner Brothers ./. Christiansen*[51] and *EMI Electrola ./. Patricia*,[52] which later on to the harmonising Directive on rental and lending rights and on the term Directive. Also, the decision *Ministère Public ./. Tournier*[53] - where 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, was considered not in violation of the free movement of goods - may be seen as no longer going into the same direction as the *GEMA*-decision almost a decade earlier. Again, it might be interesting to examine in more detail to what extent these later decisions reflect a more rightholder-friendly attitude, or a different attitude of the ECJ of how to best implement and accommodate the Treaty policies.

A special case: the question of international exhaustion. - Another question, of much greater importance was the question to what extent Community law leaves it open to Member States to adopt the principle of international exhaustion, or whether, quite to the contrary, Member States are barred from doing so. As it is well known, article 6 TRIPS leaves the matter undecided, at least as far as dispute settlement proceedings are concerned. The reason that no agreement could be achieved at the end of the Uruguay-round may be seen in the fact that the TRIPS-rationale and the rationale underlying exclusive intellectual property rights, while sharing the same goal, are fundamentally opposed. Although they both aim at increasing trade, innovation and welfare, the free-trade rules try to achieve this end by removing national barriers, whereas intellectual property rights rely on national barriers, in order to achieve the common goal.[54] In trademark law, the matter was only recently decided by the ECJ.[55] In copyright, however, the ECJ had already ruled in 1982 that exhaustion is not mandated in a case of importation of a third country, even where this third country was linked by an agreement which used language similar to the one guaranteeing the freedom of movement of goods, since the such an agreement did not aim at „unit[ing] national markets into a single market reproducing as closely as

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50 *Vesterdorf*, „The Role of Copyright and Related Rights as a Policy as compared to Other Policies”, available at http://europa.eu.int/comm/internal_market/en/intprop/news/2002-06-conference-speech-vesterdorf_en.htm - Already in the GEMA-case, the Advocate General *Warner* arrived at the contrary conclusion.

51 *Warner Brothers ./. Christiansen*, case 158/86, ECR 1988, 2605 (prohibition of renting on the basis of national rental right upheld).

52 *EMI Electrola ./. Patricia Im- und Export et al.*, case C-341/87, ECR 1989, 79 (prohibition of distribution on the basis of longer national term of protection upheld).

53 *Ministère Public ./. Tournier*, case C-395/87, ECR 1998, 2521, in particular paras. 12 and 13.

54 See, e.g., *Ullrich*, Technology Protection According to TRIPs: Principles and Problems, in: Beier/Schricker (eds.), From GATT to TRIPs, Weinheim 1996, p. 357.

55 Silhouette International Schmied ./. Hartlauer Handelsgesellschaft, case C-355/96, ECR 1998, I-4799.

possible the conditions of a domestic market"[56]. Today, article 4 (2) of the Information Society Directive contains an explicit legislative prohibition regarding the international exhaustion.

2. Copyright and the principle of non-discrimination

Principle of non-discrimination. - The application of the principle of non-discrimination on grounds of nationality laid down in what is now Article 12 of the EC-Treaty (formerly Article 6 and before this Article 7) to copyright may seem to be a side issue. Yet, the *Phil Collins*-decision[57] appears to be another decisive - and determined - step forward in the process of „rounding up" the body of Community law regulating copyright and of integrating the common market. In retrospect, two points seem rather surprising. First, the fact that although the principle of non-discrimination has been laid down in the EC-Treaty already at its inception in 1957, it took some 36 years before the issue of its application to copyright matters was first decided by the ECJ. Second, from today's perspective it seems beyond reasonable doubt that the principle of non-discrimination does indeed apply to copyright.

Application of the principle of non-discrimination to copyright? - However, at the time *Phil Collins* was litigated, it was not quite clear yet whether the requirement of non-discrimination also applied to copyright. At least some commentators[58] have sustained that this is not the case, arguing that copyright, especially in view of its personal nature and the granting of moral rights, did not form part of the subject matter regulated by the EC-Treaty and that therefore article 12 did not apply.[59] The ECJ did not follow this argumentation. After having pointed out that „the commercial exploitation of copyright is a source of remuneration for the owner", that „[f]rom this point of view, the commercial exploitation of copyright raises the same problems as does the commercial exploitation of any other industrial and commercial property right" and that as such „the exclusive rights conferred by literary and artistic property ... affect trade in goods and services and also competitive relationships within the Community"[60], the ECJ made it clear with relatively short and clear-cut words that „copyright and related rights, which by reason in particular of their effects on intra-Community trade in goods and

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56 *Polydor ./. Harlequin*, case 270/80, ECR 1982, 329.

57 *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH* and *Leif Emanuel Kraul v EMI Electrola GmbH*, joined cases C-92/92 and C-326/92, ECR 1993, I-5145.

58 See, e.g., *Loewenheim*, GRUR Int. 1993, 105, 108 et seq. - In particular, the defendants had based their argument of non-application of then Article 7 (now article 12) to copyright on the fact that „at the material time ... copyright and related rights were not, in the absence of Community rules or harmonization measures, governed by Community law", and hence were governed by then article 222 (now article 295 of the EC-Treaty).

59 Article 12 of the EC-Treaty requires non-discrimination „within the scope of application of this Treaty".

60 Ibid., paras. 21 und 22.

services, fall within the scope of application of the Treaty, are necessarily subject to the general principle of non-discrimination ..., without there even being any need to connect them with the specific provisions of Articles 30, 36, 59 and 66 of the Treaty."[61]

Direct effect. - In addition - and this is sometimes forgotten - the ECJ held that the principle of non-discrimination on grounds of nationality has direct effect, i.e. that it may be „directly relied upon before a national court by an author or performer from another Member State, ... in order to claim the benefit of protection reserved to national authors and performers."[62]

Discrimination within the meaning of Article 12 of the EC-Treaty. - The remaining issue then is what national legislation amounts to a discrimination within the meaning of the first paragraph of Article 12 of the EC-Treaty? In the words of the ECJ, the prohibition of "any discrimination on the grounds of nationality" requires that „persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member State concerned"[63], and hence „precludes a Member State from making the grant of an exclusive right subject to the requirement that the person concerned be a national of that State."

Phil Collins. - Applied to the facts of the *Phil Collins*-case[64] it was held that the principle of non-discrimination prevents Member States „from denying to authors and performers from other Member States, and those claiming under them, the right, accorded by that legislation to the nationals of that State, to prohibit the marketing in its national territory of a phonogram manufactured without their consent, where the performance was given outside its national territory." Consequently, the provisions of the German Copyright Act (Urheberrechtsgesetz; „UrhG") which protected German nationals irrespective of the place where their performance recorded had taken place, whereas foreign nationals were only protected for performances made in Germany and records first published in Germany, or performances and recordings covered by the Rome Convention.[65] In addition, the decision made clear that the principle of non-discrimination has retroactive effect, i.e., it applies even to facts which took place at a time when the other Member State was not yet a Member of the EU (the joint case of *EMI Electrola* dealt with a living artist whose performance had taken place before the United Kingdom had joined the EU in 1973).

Ricordi. - The German legislator brought its national law in line with the requirements of the EC-

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61 Ibid., para. 27.

62 Ibid., para. 35.

63 In this respect, the ECJ could rely on earlier case law regarding Article 7 (now Article 12); see judgment in *Cowan v Trésor Public*, case 186/87, ECR 1989, 195, para. 10.

64 The *Phil Collins*-case related to the marketing, in Germany, of a compact disk containing the recording, made without the singer' s consent, of a concert given in the United States. The joint case C-326/92 - *EMI Electrola* related to the marketing, in Germany, of phonograms containing recordings of shows given in Great Britain by Cliff Richard, a singer of British nationality, in 1958 and 1959.

65 §§ 125 (1), (2), (3) and (5) UrhG.

Treaty regarding the conditions for protection; indeed, a newly added § 120 (2) No. 2 UrhG granted EU-nationals as well as nationals of EEA-Member States equal legal status as German nationals.[66] But the question still had to answered under what circumstances discrimination because of nationality may be found when Member States make use of the so-called comparison of terms, i.e. the option allowed for by article 7 (8) of the Berne Convention to deviate from the national treatment principle[67] and protect foreign nationals only for a term as fixed in the country of origin of the work in question.[68] Although it is unquestionable that no discrimination is allowed towards living authors from other EU-Member States, the question is whether the same is true with regard to authors who died before the EC-Treaty came into effect?[69] In its most recent decision of June this year,[70] the ECJ first made clear that - although article 12 of the EC Treaty is not concerned with disparities in treatment which result from divergences existing between the laws of the various Member States, so long as those laws affect all the persons subject to them without direct or indirect regard to nationality[71] - the comparison of terms is not a question of the origin of the work (as had been claimed by the opera house), but of the nationality of its author. Second, the ECJ simply held that the prohibition of discrimination is also applicable to the protection of copyright in cases where the author had died when the EEC Treaty entered into force in the Member State of which he was a national, since, as already stated in *Phil Collins*, copyright may be relied upon not only by an author, but also by those claiming rights under him.[72]

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66 This provision was introduced by the 3. Law Amending the German Copyright Act of 23.6.1995 (BGBl. I, 842).

67 Art. 5 (1) Berne Convention.

68 It should be noted that as an exception provided by the Berne Convention, the comparison of terms is likewise in Conformity with both the national treatment required by article 3 (1) and with the most-favoured-nation requirement laid down in article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

69 This was the case of the Italian composer Puccini, who died in 1924 and who, under Italian Law, enjoyed 56 years of protection post mortem auctoris (p.m.a.). Consequently, in Italy the copyright in his opera „La Bohème“ ran out in 1980, whereas under German law, which already at that time granted life plus 70 years of protection, it only ran out at the end of 1994. Since Germany had never made a reservation not to apply the comparison of terms, a German opera house claimed that Puccini's „La Bohème“ was copyright-free in Germany in the seasons of 1993/94 and 1994/95.

70 Judgement of the ECJ of 6 June 2002, Case C-360/00 - *Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH.*

71 In addition, the ECJ stated that „since Article 7(8) of the Berne Convention permits the Federal Republic of Germany to extend to the rights of a foreign author the 70-year term of protection prescribed by German law, the mechanism of comparison of the terms of protection provided for in that provision cannot justify the difference of treatment as regards the term of protection ... between the rights of a German author and those of an author who is a national of another Member State“; ibid., para. 33.

72 *Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH*,, paras. 25 and 26.

3. Copyright and competition law

A difficult relationship. - Next to the freedom of movement of goods and services, the relationship between the limited kind of monopoly granted by intellectual property rights one the one hand, and competition law on the other, has always been a difficult issue. The reason is that copyright grants its owner a legal exclusive right, enabling rightholders to exclude others from certain uses of the protected work, whereas competition law aims at keeping competition relatively free from monopolies and abuses of dominant market positions. Quite like just described with regard to the dichotomy between free trade and exclusive rights, both sets of law serve the same end by different, if not opposing means. Whereas competition law undertakes to further competition, innovation and consumer benefit by restricting exclusive behavior of market participants, intellectual property laws, and hence copyright, try to further competition, innovation and consumer benefit by way of granting exclusive rights. It is easy to understand that it becomes more difficult to reconcile the two sets of rules the greater the exclusive effect of an intellectual property right is, be it by law or because of factual circumstances. Hence, the fact that patent law grants a greater monopoly than copyright may explain why the first cases brought to the attention of the ECJ arose mainly in the field of industrial property law. In addition, in general as far as non-functional copyrighted works are concerned, there is a certain degree of substitutability which makes the problem less acute. This probably explains why one group of cases in copyright has to deal with collecting societies, and the other with what might be described as sole-source products.

The role of the Court. - It is with regard to the IP/competition law relationship that the ECJ has developed its supposed, and subsequently much critizised, distinction between the „existence" and the „exercise" of an intellectual property right.[73] The fundamental idea is that while certain ways of using intellectual property rights can indeed violate competition law rules both as regards anticompetitive restrictions and abuses of a dominant market position, the mere use of an intellectual property right as granted by the legislature does as such not enter into conflict with competition law. Thus, in the early copyright case *Coditel II*,[74] the ECJ stated that „[a]lthough copyright in a film and the right deriving from it , namely that of exhibiting the film, are not, therefore, as such subject to the prohibitions contained in article 85, the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market." This distinction may work relatively well with regard to anticompetitive restrictions which have their origin in the way in which certain intellectual property rights are exercised. But as the quotation already indicates, it is indeed much less clear with regard to cases in which a restriction of competition is found which is merely based on the „existence" of copyright, in particular in cases where there is a factual monopoly situation. No wonder that it is here that the ECJ still has most difficulties with the dogmatic foundation of this dividing line,[75] if ever

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73 See *Consten and Grundig*, joined cases 56/64 and 58/64, ECR 1966, 299.

74 *Coditel / Ciné-Vog Films*, case 262/81, ECR 1982, 3381.

75 This may explain why some commentators have considered Magill as an application of the 'essential facilities' doctrine, an interpretation which in the light of *Bronner*, case C-7/97, ECR 1998, I-7791, however,

any legal theory will furnish a satisfactory answer to the problems involved.[76]

Competition law and collecting societies. - As described, the first group of cases where the existence/exercise dichotomy is less clear is the area of collective licensing by collecting societies. Without going into much detail, here, of the traditional system of pan-European sister-agreements amongst, in particular, the musical collecting societies, it can be said that on the one hand, 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) (ex-article 90 (2)).[77] But at the same time, the ECJ has corrected some unjustified anomalies which resulted from this monopoly situation.[78] Anticompetitive behavior can occur vis-à-vis the authors, in dealings with other collecting societies and vis-à-vis the user of copyrighted material. Indeed, at several instances, the ECJ had to examine all three of these relationships.[79]

Competition law and sole source products. - As stated, the second group of cases currently achieving most of the attention, where the relationship between copyright and competition law becomes problematic is characterised by the exercise of rights in what may be called sole-source products. Such sole-source products are to a large degree technical in nature, such as hardware and software interface specifications and industry standards, or at least in some sense functional, such as the „1860 brick structure" in the *IMS*-case.[80] But they can also be non-technical and non-functional, as the tv-program information in the *Magill*-case[81] has demonstrated. The common characteristic of all cases of this category seems to be that the information which is contained in only one product protected by copyright is needed either to create compatible or value-added products for different

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seems less convincing.

76 See also *Kur*, Fifty Years of European Legal Integration, at 24.

77 See *BRT ./. SABAM II*, case 127/73, ECR 1973, 313, and *GVL ./. Commission*, case 7/82, ECR 1983, 483.

78 For a short, yet rather comprehensive overview see *Drijber*, European competition law aspects of copyright collecting societies, in: Cohen Jehoram et al, Collective Administration of Copyrights in Europe, Deventer 1995, p. 67

79 For the relationship vis-à-vis the user see both See *BRT ./. SABAM II*, case 127/73, ECR 1973, 313, and *GVL ./. Commission*, case 7/82, ECR 1983, 483, and for the relationship amongst societies *Ministère Public ./. Tournier*, case 395/87, ECR 2521, which also concerns the relationship towards users.

80 *NDC Health Corporation and NDC Health ./. IMS Health Inc. and Commission*, case C-481/01 P(R), and before the two orders of the CFI and its President, T-184/01 R_2 of 26 October 2001, and T-184/01 R_1 of 10 August 2001. The Commission had considered the refusal to grant licenses in the supposedly copyrighted structure which divided the sales area as amounting to a misuse of a dominant position and had ordered as an interim measure that IMS Health had to grant licenses on request and on a non-discriminatory basis. The order of the interim measure was subsequently suspended The appeal of IMS Health against the Commission decision is still pending before the CFI.

81 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission*, joined cases C-241/91 P and C-242/91 P, ECR 1995, I-743

markets (which may or may not have been entered by the producer of the first product), or even identical products to compete with the producer of the primary product on the same market. In limited areas, such problems have been addressed by the legislature. This has been the case with the decompilation provisions of the computer program Directive[82] and the compulsary license proposed for sole source information contained in the first draft of the database directive. In the few other cases the ECJ had to decide so far, the Court seems to have followed a rather cautious approach with regard to the IP/competition law relationship. Thus, the mere exercise of an intellectual property right granted to the rightholder by national legislation does in itself amount to an anticompetitive act. Rather, additional circumstances - such as, e.g., the abuse of a dominant market position or a situation in which a rightholder fails to satisfy an apparent and serious market demand - will have to be found in order to justify the application of competition law in such cases. At least up until now, the ECJ has never held that such additional circumstances exist when the only action by the rightholder has been to refuse to license its exclusive rights in order to preclude competition in the *same* market to which the product belongs, as this appears to be the very core of the existence of the right. In addition, where the refusal to license effects *another* market, the effect must be to preclude the emergence of another product entirely, not simply to limit the competitiveness of a product in some lesser way.[83]

4. Other cases relevant for copyright

Non-compliance with duty to implement Directives already in force. - Other cases relevant in the field of copyright law mainly concern non-compliance of Member States to implement Directives adopted after the implementation period has expired. Such failure to implement may be total or partial.[84] An example in which the ECJ had to rule in an action brought by the Commission under article 226 (ex-article 169) of the Treaty was the failure of Ireland to implement the database Directive 96/9/EC.[85] Most recently, the Commission has taken the decision to refer Belgium to the ECJ for failure to implement the lending right provisions of the rental and lending rights Directive.[86] It seems that in general such procedures do not give rise to particularly difficult legal questions.

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82 Article 6 of the Directive 91/250/EEC on the legal protection of computer programs.

83 See in particular the Magill-decision, *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) ./. Commission*, joined cases C-241/92 and 242/92, ECR 1992, I-743, and, for other intellectual property laws *CICRA and Maxicar/Renault*, case C-57/87, ECR 1988, 6039, and Volvo ./. Veng, case C-238/87, ECR 1988, 6211.

84 Details of current infringement proceedings against all Member States are available at http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm

85 *Commission ./. Ireland*, case C-370/99, ECR 2001, I-297.

86 Similar proceedings initiated against Denmark, concerning distribution rights, however, have been temporarily suspend by the Commission following a constructive dialogue with the Danish authorities. For details see http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/989|0|RAPID&lg=EN&display=

Other Treaty violations in the field of Copyright. - The same is true where Member States fail to comply with other Treaty obligations in the field of Copyright, such as Ireland's violation of its duties under article 300 (7) (ex-article 228 (7)) because of failure to adhere within the prescribed period to the Paris Act of the Berne Convention.[87]

Opinions of the ECJ. - In addition, it has already be mentioned that the ECJ has given, upon request by the Commission pursuant to article 300 (6) (ex-article 228 (6)) of the Treaty, a legal opinion concerning the competence of the EC and its Member States respectively to conclude the WTO/TRIPS agreement.[88] This opinion, according to which the Community and its Member States have a joint competency in the field of intellectual property has had the effect that the Member States subsequently decided to amendment the EC Treaty by introducing the possibility for a newly added competency of the Community.[89]

IV. The ECJ, Copyright and Secondary Community Law

1. Secondary law and the need for Court interpretation

To the extent that harmonisation is progressing and Member States have come to ends with their domestic implementation procedures, it may be presumed that the activity of the ECJ might now gradually shift from the interpretation of primary Community law to the interpretation of provisions contained in secondary Community legislation.[90] However, other than in the field of trademark law, where case law interpreting secondary community legislation is about to develop, so far there are only few cases on secondary community law in the field of copyright. Why this is so, one can only speculate. An economic reason might be that at least as far as offline-marketing of copyrighted goods is concerned, exploitation of copyrights is still by and large a national affair. Legally speaking, one reason certainly is that other than in industrial property, harmonisation in the field of copyright has not resulted in a Regulation which might require interpretation. Another reason may be that as far as copyright directives are concerned, the core questions regulated are either relatively unambiguous, or leave the Member States a rather broad way for national implementation. If this is true, then it can be presumed that questions will arise at the „edges" of the rights, where disputes will be about whether a particular activity of using someone else's copyrighted material is still within or just outside of the scope of an exclusive right granted by any one of the copyright Directives. Some commentators have already pointed out that what is and what isn't allowed under the open catalogue of exceptions in Art. 5 of the Information Society Directive, may give rise to some more litigation before the ECJ.[91] This is

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87 *Commission ./. Ireland*, case C-13/00, judgment of 19 March 2002.

88 Opinion 1/94, ECR 1994, I-5267

89 See article 133 (5).

90 *Kur*, Fifty Years of European Legal Integration - Intellectual Property, in: van Empel/van Gerven (eds.), Fifty Years of European Legal Integration, Kluwer, to be published fall 2002, manuscript p.21.

91 Ibid., at 23.

particularly true if one considers the importance of the exact scope of the exceptions in the digital and networked environment for the freedom left to those who offer information value-added services. Here the cases to be brought before the ECJ and the decisions to be expected in the future will be all the more interesting since at one point in time the ECJ will have to give its interpretation of the three-step-test contained in article 13 TRIPS.

2. Case law

Butterfly. - In the *Butterfly*-decision[92], one of the two cases to be signalled here, the ECJ was called upon to interpret article 10 of the Directive 93/98/EEC harmonising the term of protection. The Court first repeated that the Directive may indeed have the effect that rights which had already expired in a Member State could revive because of the harmonisation which the Directive intended to achieve as rapidly as possible. Second, the ECJ arrived at the conclusion that the Directive contained an obligation of Member States to protect acquired rights of third parties, but that the detail of such measures is left to the discretion of the Member States. The Court thus upheld the Italian legislation which provided for a limited time in which sound-recording media may be distributed by persons who, by reason of the expiry of the rights relating to those media under the previous legislation, had been able to reproduce and market them before the revival took effect.

Egeda. - In *Egeda ./.Hoasa*[93], the only decision to be mentioned here, the ECJ in a procedure for preliminary ruling had to interpret article 1 of the 93/83/EEC cable and satellite directive[94]. The question was whether the defendant, who had installed a system for the reception of television programmes broadcast terrestrially and by satellite and their exclusive distribution to the guests occupying the rooms of the hotel was undertaking a communication to the public or cable retransmission within the meaning of Article 1 of the Directive. The ECJ found that the Directive had not harmonised the notion of the public so that the decision where the line runs between copyright-relevant communication to the public on the one hand, and copyright-free reception on the other, consequently must be decided in accordance with national law of the Member States. This is a clear indication that the Court by no means wants to deploy a harmonisation effort of its own in an area where the Community has already harmonised and where primary Community law does not mandate further harmonisation.

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92 *Butterfly Music ./. Carosello Edizioni Musicali e Discografiche (CEMED)*, case C-60/98, ECR 1999, I-3939.

93 *Egeda ./. Hoasa*, case C-293/98, ECR 2000, I-629.

94 O.J. No. L 248 of 6 October 1993, p. 15.

V. Some questions

1. Upcoming Issues

The future. - The role of the ECJ in the development of copyright is, of course, not limited to the past development. Rather, the Court will contribute to the development of copyright in the future as well. Following, only a brief account can be given of what will presumably be next on the Court's agenda, both in view of the Treaty policies already mentioned and of other issues, and what solutions we might expect.

Free movement of goods and services. - As far as the free movement of goods and services is concerned, the ECJ, if asked to do so, might clarify in the future certain open questions with regard to the notion of first „sale" (in particular, whether it includes other forms of transferring property than „sales"), and, even more likely, to what extent exhaustion can take place in the online-area, if the transfer of data replaces the transfer of a physical copy of the protected work and the recipient of the data is intended by the rightholder to make such a copy himself. True, article 3 (3) of the Information Society Directive seems to be quite clear on this point, but a subsequent buyer of such a copy might not in all cases be able to distinguish it from any physical copy made and put onto the market by the rightholder or with his consent. A further question will be who bears the burden of proof that the distribution right is exhausted in a particular case. Is it the rightholder's task as plaintiff to demonstrate that exhaustion does not limit his right, or is it up to the distributor as defendant to demonstrate that in a particular case the far-reaching exclusive distribution right is exhausted by prior acts undertaken by the rightholder or acts undertaken with his consent?[95] It seems that the answer will depend from whether the distribution right has to be seen as *limited* by exhaustion, or whether it is a broad right which only is exhausted under *exceptional* circumstances. The question is particularly difficult since in essence, it is procedural in nature. However, procedural law is not harmonised, and yet it may have an effect on the Treaty principle of freedom of movement of goods. The ECJ is called upon to decide the issue, although not in copyright but in trademark law, since the German Federal Supreme Court has already referred the matter to Luxemburg.[96] Finally, at least the dispute about international exhaustion seems to have come to an end by way of the unambiguous legislative decision rejecting it in article 4 (2) of the Information Society Directive.

Non-discrimination. - With regard to non-discrimination, it seems worth mentioning that even after the *Ricordi*-decision[97] some questions remain open regarding non-discrimination making a comparison of terms, as permitted by article 7 (8) of the Berne Convention. Although *Ricordi* has clarified that a death-date of the author before the EC-Treaty entered into force for the country of

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95 As it seems, in national trademark law, the issue has been answered differently; for the first approach (negative fact to be proven by the rightholder) see, e.g., the Austrian OGH of 15. February 2000 - BOSS-Brillen, GRUR Int. 2000, 785, and for the second approach, e,g,, the German BGH of 11 May 2000 - Stüssy, MarkenR 2000, 226 (referring decision).

96 See note above.

97 Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH, case C-360/00, of 6 June 2002.

which he or she was a national does not preclude the application of the non-discrimination principle per se. However, it still has to be answered whether the principle will also have to be applied if the shorter term was no longer running at the point in time when the home state of the author was becoming a Member of the EU. The problem will be of particular importance with regard to the upcoming enlargement of the EU. The principle of non-discrimination is part of the EU-Treaty and hence does not oblige Member States to avoid discrimination against nationals of states before those states join the EU. Does then the later EU-membership of another state retroactively preclude such discrimination? If one applied the principle of non-discrimination in such cases after the home state has joined the EU, this would invariably lead to the revival of already extinct copyright terms. If, to the contrary, one denied such a revival, then at the time of the judgement, the holders of the deceased author's rights would be treated differently from the holders of rights going back to national authors.[98] In my opinion, it is most likely that one will have to take an ex-post and not an ex-ante view. This is the only way to avoid discrimination against authors of the new Member States. Moreover, it is the only way to achieve the harmonisation intended by the Directive, which has already lead to a massive revival of terms in many of the old Member States.[99] Finally, this example highlights one of the severest limitations of the role of the ECJ for the development of copyright: the ECJ can only answer questions which national courts have asked the Court to decide. This may preclude the ECJ from speaking on certain issues; it may even prevent the Court from addressing a particular issue in its entirety.

Competition law. - Regarding the IP/competition law relationship the decision in the *IMS Health*-case[100] will certainly shed more light on the question under what circumstances, if any, the mere making use of a copyright can amount to illegal anticompetitive behaviour. It will be interesting to see whether the CFI, and later on the ECJ, will deviate from the principle adopted so far that no additional circumstances exist when the only action by the rightholder has been to refuse to license its exclusive rights in order to preclude competition in the same market to which the product belongs. However, quite like in *Magill*[101], it seems once more questionable whether the information protected by copyright in this case (the so-called „1860 brick structure") merits copyright protection at all. In view of this, the Court might once more feel tempted to prevent an „undue" monopoly by means of competition law. Another issue which might reach the Court is the question to what extent existing legislative solutions to the IP/competition law tension, such as the decompilation provisions of the

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98 In *Ricordi*, para 26, the ECJ makes a brief mention of this scenario in stating that in the case at bar, „[i]t is not disputed that the copyright concerned in the main proceedings was still producing its effects ... when the EEC Treaty entered into force"

99 See Art. 10 (2) of Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, O.J. No. L 290, of 24.11.1993, pp. 9 et seq. - Art. 10 (3) of the term Directive leaves it up to Member States to adopt the necessary provisions to protect in particular acquired rights of third parties.

100 *NDC Health Corporation and NDC Health ./. IMS Health Inc. and Commission*, case C-481/01 P(R).

101 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP) ./. Commission*, joined cases C-241/92 and 242/92, ECR 1992, I-743.

computer program Directive[102], preclude the finding of anticompetitive behaviour of a rightholder who insists on his or her exclusive right as defined in scope by the limitation contained in Community law. In general, however, doubts have been raised „that any legal theory will furnish a satisfactory answer to the problems involved."[103]

Other policies. - A further question might be to what extent the ECJ, in solving copyright issues, will look to other Treaty policies, in particular to the cultural policy as defined in article 151 (ex-article 128) of the Treaty.[104] Expressly incorporated by the Maastricht Treaty, this policy is a relatively new addition to the EC Treaty, and it is yet unclear to what extent it might cut back the so-called „negative integration" (i.e. effects of Community law in the cultural field by policies or measures which as such are not cultural in nature, such as the freedom of movement of goods, to name just one example), and leave Member States a greater freedom to enact non-discriminating provisions in the cultural field. In this respect, it might also seem worth examining to what extent copyright itself can, in the longer term, amount to a policy of its own. Another policy which might gain momentum in the area of copyright is the protection of consumers.[105] This seems particularly true since in the digital area, access rights, the freedom to make private copies and, last but not least, access to information and to information value added-services is increasingly is becoming an issue.

Secondary community law. - Without doubt, secondary Community law will see some more procedures for failure to implement existing Directives in a timely and/or complete way. In addition, challenges of the legal competency to enact Directives, or certain provisions thereof, are not totally excluded, at least if a particular harmonisation measure is not supported by a broad consensus of the parties concerned. However, of much greater interest is the fact that before long the ECJ will have to give its own interpretation of the three-step-test in article 13 TRIPS. In my opinion, such cases are to be expected as soon as the Member States have come to terms with the implementation of the catalogue of limitations contained in article 5 of the Information Society Directive. The reason is that many of the provisions touch upon areas where existing industries - both in the field of the protected and of the unprotected sphere - will be deeply affected. An interesting issue in this respect is whether the limitations allowed under the Directive are only minimum rules (in the sense that Member States must at least grant an exclusive which is not more restricted than allowed for by the limitation), or whether each limitation of the catalogue is in itself a minimum and a maximum provision (which would in effect bar Member States from adopting a limitation of lesser scope than foreseen in the Directive, although it is perfectly alright not to adopt any of the optional limitations at all). While the former interpretation seems more logical, only the latter would help to assure at least some degree of harmonisation in area which in spite of the efforts of the Directive has left this important area largely unharmonised so far. This likewise raises the question to what extent the ECJ will measure secondary against primary Community law with respect to matters of substantive law even after harmonisation in

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102 Article 6 of the Directive 91/250/EEC on the legal protection of computer programs.

103 See *Kur*, Fifty Years of European Legal Integration, at 24.

104 See also article 3 (1) (q) of the EC Treaty.

105 See articles 3 (1) (t), 95 (3), and, in particular, article 153 (ex-article 129a) of the EC Treaty.

the field concerned has been completed, provided, of course, the particular case leaves room for interpretation of primary Community law vis-à-vis the particular rule of secondary Community law.[106] Finally, the ECJ will continue to decide cases in other areas of law which also have their bearing on copyright, such as, but not limited to, the interpretation of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.[107] But this can not be further explored here.

2. Copyright and other IP-laws

The importance of the development of other IP-laws for copyright. - Of course, the role of the ECJ for the development of copyright isn't limited to decisions in copyright cases alone. Rather, to the extent that the differences between copyright and other intellectual property rights do not affect the answer to the legal question in a particular case situation, the Court, in deciding other intellectual property law cases, each time also contributes to the development of copyright. At the same time, such cases which the ECJ has decided with regard to other intellectual property rights may also serve as trend indicators of how the Court might decide in upcoming copyright cases, or which issues are likely to be up next in copyright as well.

Some examples. - Absent a general study which would compare the structural similarities amongst different intellectual property rights in detail, some recent examples will have to suffice in order to demonstrate this point. One example are the trademark cases recently decided by the ECJ that dealt with the question when consent has been given in order to find exhaustion in re-importation scenarios.[108] These cases seem to be of equal importance for copyright. This will also be true regarding the procedure for preliminary ruling initiated by the German Federal Supreme Court in the *Stüssy*-case, where clarification is sought regarding the burden of proof when it comes to ascertaining consent and with it exhaustion of the exclusive distribution right.[109] Another example is the *Polo/Lauren*-case,[110] which concerned the interpretation of Council Regulation (EC) No 3295/94 of 22 December 1994 laying down measures to prohibit the release for free circulation, export, re-export

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106 See *Kur*, Fifty Years of European Legal Integration, at 23, who raises the question „if secondary law allows for, or even makes mandatory, the introduction of clauses into national law, which in their practical effects clash with the free movement of goods – does the Court have to accept this effect as being the consequence of the sovereign decision of EU legislature, or must precedence be given to the fundamental freedoms as laid down in the EC Treaty?"

107 O.J. No. L 12 of 16 January 2001, p. 1, in force since 1 March 2002.

108 *Sebago ./. GB-Unic*, case C-173/98, ECR 1999, I-4103; *Zino Davidoff ./. A & G Imports*, *Levi Strauss ./. Tesco Stores* and *Levi Strauss ./. Costco Wholesale*, joined Cases C-414/99 to C-416/99, ECR 2001, I-8691.

109 See Bundesgerichtshof (BGH) of 11 May 2000, GRUR 2000, 879.

110 *The Polo/Lauren Company ./. Dwidua Langgeng Pratama International Freight Forwarders*, case C-383/98, ECR 2000, I-2519.

or entry for a suspensive procedure of counterfeit and pirated goods.[111] The question essentially was whether or not this Regulation applies to goods passing through Community territory from a non-member country destined for another non-member country, even if the rightholder has his registered office outside of the Community. It is quite clear that the affirmative answer given to this question by the ECJ in a trademark case is of equal value regarding the seizure of goods in transit which infringe copyrights. It goes without saying that these two examples are merely illustrative and by no means exhaustive.

3. Organisatorial matters

Expanding the Court system? - Another interesting question, often raised in general and not only in intellectual property law, is to what extent the increase in the number of cases[112] calls for a change in the organisatorial structure of the Court, and what the resulting Court structure should look like. Indeed, as far as intellectual property law is concerned, it has often been argued that the present situation calls for serious and intense considerations regarding the establishment of a common European court structure operating below and/or on a different level than the ECJ and the CFI.[113] This is particularly true with regard to trademarks,[114] but a rise in the cases coming to the ECJ may also be expected once the Community patent law will come into force. However, it seems that copyright cases do not contribute considerably to the case load of the ECJ. Moreover, since no spectacular rise in their number is to be expected, in particular since the Court has no jurisdiction comparable to the one it has as the judicial instance to control decisions by Office of Harmonisation in the Internal Market (OHMI), the granting body of Community trademarks,[115] copyright cases likewise do not significantly contribute to the increase of the Court's case load. Hence whether, and if so how, the existing Court structure will have to be changed will be decided in view of the needs and developments in other areas of law and not in the field of copyright. If ever, copyright law might only see the effects of any such future reorganisation.

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111 O.J. 1994 No. L 341, p. 8.

112 Cf. the 19 cases pending with docket numbers of the year 1957 with the 502 cases pending before the ECJ alone with docket numbers of the year 2001.This is already considerably more than the 373 cases out of 1988, the year before the CFI was installed, a number which, however, did not decrease thereafter.

113 See, e.g., *Kur*, Fifty Years of European Legal Integration - Intellectual Property, in: van Empel/van Gerven (eds.), Fifty Years of European Legal Integration, Kluwer, to be published fall 2002, manuscript at 28, who explains that „apart from the initiatives launched in the patent field which are discussed below, it is foreseen to install, below the Court of First Instance (CFI), a specialised court reviewing trademark cases coming up from the OHIM in Alicante. The CFI would then act as a (final) appeal instance for the legal issues involved. Without such a system, it would become increasingly difficult for the CFI as well as the ECJ to cope with the numerous cases in which appeals are filed against the decisions of OHIM appeal boards."

114 For the reasons why the number of ECJ-decisions is particularly high in the field of trademark law, see *Kur*, Fifty Years of European Legal Integration, at 21.

115 The website of the ECJ lists some 12 decisions (judgements and orders) in 2002 (until July), and 38 for 2001, so far almost exclusively at the stage before the CFI.

Need for a specialised Court? - Another interesting question, however, is whether or not copyright might require, or at least benefit from, a more specialised European Court. In my opinion, there are two ways of looking at it. One way is to look at the potential benefits. The problem then is that a specialisation of the two times 15 judges presently sitting (both ECJ and CFI) hardly seems possible in view of the much greater number of areas of law which give rise to legal questions to be decided by the Court. Consequently, any specialisation would require a drastic change in the existing Court structure. Quite to the contrary, it might even be argued that it is one of the strengths of the present Court that its judges, aided by the even smaller number of advocates general - which are, of course, supported by a considerably greater number of staff - are not experts in all questions brought to their attention. Moreover, it should be noted that even at the national level not many Member States have concentrated copyright cases with a limited number of courts, although it is generally admitted that the quality of judgements handed down by a court which has at least some experience with copyright is most likely much better than the quality of judgements handed down by a court which has none. The other way of looking at the matter is take it for granted that as a rule the judges are not specialists in the field of copyright. Then, it seems preferable „to attempt reducing than further enhancing the complexity and refinement of national legal doctrines" and to convey national ideas „in a manner which can easily be grasped by persons not having grown up in one's own system, instead of using language which is hardly apt for communication outside an exclusive circle of fellow disciples."[116] Of course, this does by no means preclude efforts to ameliorate the exchange of information amongst those concerned with the process of making judicial decisions.[117] As has recently been pointed out by Justice Bornkamm, Judge of the Federal Supreme Court in Germany,[118] a simple information system amongst judges sitting on cases of appeal in the different Member States might already ensure a greater level of harmonisation and thus help keeping many cases away from the ECJ.

4. The role of the Court as arbitrator

ECJ and WTO-panels. - Since the previous intervention has focussed on the mechanism of dispute settlements envisaged by the TRIPS-Agreement, it might indeed be worth to briefly compare the two systems. A comparison seems possible both with respect to the character of the two organisations and to the harmonisation effect which decisions they both hand down are having.

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116 *Kur*, Fifty Years of European Legal Integration - Intellectual Property, at 22, who also points out that „it will never be easy to explain to the non-specialist judges at the ECJ the full impact and background of specific questions. The risk is therefore quite inevitable that each decision, although fair and understandable in its outcome as such, may create inconsistencies for the system as a whole. "

117 These could be modelled according to the regular meeting of European patent judges and the regular meetings organised by both the European Patent Office (EPO) and the OHIM respectively. However, since no such registration authority exists in the field of copyright, the initiative would have to come from some other state or private organisation.

118 At a roundtable discussion at the EU-Symposium on „European Copyright Revisited" in Santiago de Compostella, June 2002; for the program see http://europa.eu.int/comm/internal_market/en/intprop/news/2002-06-copyright-conf-progr_en.pdf

Differences in character. - Of course, to begin with, as far as their legal character is concerned, the ECJ and the Dispute Panels under the WTO Dispute Settlement Procedure can hardly be compared with each other. After all, the ECJ is a true „court" with precisely circumscribed legal competencies, not a mere arbitration or dispute resolution body. Other than the panels which are formed on an ad hoc basis, its judges sit on a permanent basis. The Court's judgements are binding on the parties, whereas strictly speaking, the panel decisions are not. Moreover, parties in the TRIPS-dispute procedures are States, whereas the ECJ also hands down decisions in litigation amongst private parties. In addition, in procedures for a preliminary rulings, the ECJ takes part in an already ongoing judicial litigation. But in spite of these fundamental differences, there are certain similarities as well. At least, the differences may not always have such drastic effects as one might initially think. This starts with the composition of the two bodies. True, the panels, composed of well-qualified governmental and/or non-governmental individuals are formed by the Dispute Settlement Body anew each time a conflict arises, but the Appellate Body is a permanent body of seven members, not unlike the judges of the European Court. The decisions of the panel may not as such be binding, but since they become binding unless they are unanimously rejected, they are almost as good as binding. In practice, it may be said that whether or not a decision of the ECJ or of a panel will then be followed by the parties is a question of compliance with the decision and of enforcement mechanisms available rather than one of the binding nature of the decision itself. Moreover, the panels usually devote great care to the reasoning of their decisions. In the decisions we have seen so far the panelists seem to follow the anglo-american tradition of judgment-writing rather than the French one. Hence, their decisions usually contain a good deal more of argumentation than the judgements of the ECJ. In sum, it seems not unjustified to conclude that the WTO-dispute settlement system shows a certain tendency to develop into a more court-like structure than even the signatories of the WTO treaties might initially have intended.

Harmonisation effect. - Another question concerns the effect which the judgements of the ECJ on the one hand, and the decisions of the WTO-panels on the other have on the harmonisation process in the field of copyright. In view of the scarcity of panel-decisions in the field of copyright up until now, only the following can be said so far. One the one hand, it may not be overlooked that the ECJ binds Member States and their authorities, amongst them national courts, by way of Treaty interpretation. The same cannot be said of panel decisions. To cite an important example: a national court of a member State would - and most likely even could - not be bound by the interpretation which the WTO-Appelate Body has given to the three-step-test of article 13 TRIPS in the decision[119] concerning the TRIPS-conformity of article 110-5 of the U.S. Copyright Act. On the other hand, at the same time this seems to lead to a greater flexibility of the WTO-approach vis-à-vis the more formalistic judicial approach of a true court.[120] Finally, another aspect concerns the relationship between the political construction of the territories concerned, the degree of harmonisation needed and

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119 See Doc. WT/DS160/R of 15 June 2000.

120 See, e.g., *Kur*, Fifty Years of European Legal Integration - Intellectual Property, at 18: „Indeed, lack of flexibility – legal rules being cast in concrete for many years – are a problem jeopardizing the efficiency of European legal integration to no lesser degree than would the absence of sufficiently advanced harmonisation measures. With time progressing and in a rapidly changing socio-economic framework, the problems will probably become increasingly ponderous in the future".

the harmonisation which is ultimately achieved by a particular type of decision-making body. Of course, these issues can only be briefly mentioned here, and again, they might indeed serve closer attention.

VI. Concluding Remarks

The role of the court and substantive copyright law. - A first remark after this *tour d'horizon* is that the role of the Court for the development of copyright law can hardly be separated from the development of material European copyright law as such. The harmonisation activities of the Community legislature on the one hand, and the harmonising effect of Court decisions on the other, are often intertwined and it is indeed difficult to ascertain the part in the development of European copyright law which can be exclusively ascribed to the Court. This is particularly true with regard to competition law, where the Commission plays at least an equally important role. Strictly understood, the question of the „role" of the Court for the development of copyright implies the question whether the Court could have acted otherwise and what implications such different acting would have had. Here, for example, a thorough comparison of the decisions with the opinions delivered by the attorney generals might give some deeper insight, since any deviation from an opinion delivered indicates that the final decision has, after all, not been as clear-cut as it may seem in retrospect. Also, one might undertake a description of the role of the Court vis-à-vis the Community legislature, or, in cases which originate there, the Commission. Moreover, the effect which the case law of the ECJ has had outside of the Union, influencing other national or international copyright laws might be worth examining. European copyright, as shaped by the decisions of the ECJ, certainly forms part of the *acquis communautaire* and hence has to be adopted by all new Members of the EU. But this harmonising effect is not really the result of the activity of the Court, but rather of the political will of the Community. Nevertheless, although we are striving towards globalisation, regional harmonsiation does not lose its importance; rather, the more convincing solutions are being developed at the regional level, the more likely such solutions are to be adopted elsewhere.

Main influences. - In certain points the decisive influence of the Court may nevertheless be quite clearly recognised. First, in the early years - but also as late as in the non-discrimination cases - the Court has taken the marked approach that copyright is indeed subject to the Treaty and that the cultural character of many copyright creations and products do not alter their quality as goods and services. Once seized, the ECJ thus greatly helped to support the European economic integration and the political will to shape the common market. Second, in applying the principles of the Treaty, such as the rules of freedom of movement of goods and of non-discrimination to copyright, it was the Court which has given shape to the actual state of European copyright law. Third, the development of the principle such as *effet utile* and Community-friendly interpretation of national law have undoubtedly helped a lot towards harmonisation, also in the field of copyright law. Moreover, in some of its decisions, the ECJ has deliberately pushed the efforts of the European legislature by pointing out that the Court was unable to react against existing impediments for cross border trade, as long as the area remained unharmonised.[121] And more generally speaking, it may be said that in times where copyright

121 *Kur*, Fifty Years of European Legal Integration, at 21.

legislation is largely pushed by powerful private interests and lobby groups, the ECJ, as a true judicial body, may serve as a correcting factor and hence safeguard interests which otherwise might get lost, its activity of course being limited to the cases which are brought to its attention, and to the issues which are submitted for clarification.

Final remarks. - May be in reaction to this limited control function, and because of a desire to seize the opportunity, the Court sometimes seems to assume the role of a supervisor of national legislation without openly declaring it, and without having been expressly asked to do so. This, however, can hardly be critisized as long as the Court exercises self-restraint in correcting only excesses by national legislatures.[122] After all, national courts of the Member States can to a certain degree avoid referring questions to the ECJ, if the national judges no longer trust the ECJ or have lost confidence in its judges. In my opinion, as far as copyright is concerned, no such development can presently be ascertained and the copyright decisions have so far greatly contributed to clarify the legal issues raised.[123] True, like any other court, the ECJ also is not totally free from general legal, economic and political trends. In copyright, commentators have ascertained at least one major shift in the attitude of the Court, when - beginning in the 80s - it was willing to give greater weight to the copyright interests vis-à-vis the freedom of movement of goods than it had done so in the earlier cases.[124] Whether another such re-positioning lies ahead we will see once the Court will hand down its final decision in the *IMS*-case.[125] At the same time, the Court has demonstrated more than once that it is able to reconcile the legal framework with what is politically and economically sound. Finally, as *Annette Kur* has put it in a recent article, „[i]t is a truism that to harmonise the law in the books is but the first step in a long and at times rather stony path towards truly harmonised practice. Law lives through those who apply it. A key role is therefore performed by authorities, courts and judges administering the rules incorporating the new European solutions."

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122 *Kur*, Fifty Years of European Legal Integration, at 25.

123 This may have been different regarding both trademark law where it has been said that „most ECJ decisions ..., while giving the requested answer to the questions posed by the referring court, give rise to at least as many novel questions for the national judiciary to deal with;" also, before *Keck and Mithouard*, "in the field of advertising and marketing measures, ...the ECJ, in consequence of the broad interpretation given to measures having equivalent effect in the sense of Art. 28 in the *Dassonville* (C-8/74, 1974 ECR 837) and *Cassis de Dijon* (C-120/78, 1979 ECR 6349) decisions, was flooded with cases where national entrepreneurs wanted to get rid of national marketing rules restricting their business practices;" see *Kur*, Fifty Years of European Legal Integration, at 22.

124 See above, III.1. - Similar changes have been said to have taken place in other intellectual property areas, beginning, e.g., with the case of *Keck and Mithouard*, case 267/91, ECR1993, I-6097 or *CNL-SUCAL ./. HAG (HAG II)*, case 10/89, ERC 1990, I-3711.

125 *NDC Health Corporation and NDC Health ./. IMS Health Inc. and Commission*, case C-481/01 P(R).