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Jean-Francois Verstrynge
Secretariat-General of the European Community

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Copyright in the European Economic Community[†]

Jean-François Verstrynge*

INTRODUCTION

In the middle of the negotiations on the Software Directive,¹ the negotiators told the following story: This is the story of a surgeon, an engineer, and a software analyst who were trying to decide whose job was the oldest, and they had a very active argument about it. They went back very far in time, to the Bible, to try to make a decision. The surgeon said, "Well, when God created Eve he took a rib from Adam to do that, and that's a surgeon's job; so my job is the oldest." The engineer looked at him and said, "No way. Even before that, God separated the waters from the earth, and that's an engineer's job. My job is the oldest." The computer software analyst looked at them and said, "No. In the beginning there was chaos. That's my job."

From time to time, when we have to harmonize complicated technical and political issues in copyright in the European Economic Community ("EEC" or "European Community" or "Community"), it really does look like chaos.

The Commission of the European Communities ("Commission") entered this area very late. There had been international harmonization for more than a century.² Many of the developed countries

[†] This speech was presented at the Fordham Conference on International Intellectual Property Law and Policy held at Fordham University School of Law on April 15-16, 1993.

* Director, Cohesion Funds, Secretariat-General of the European Community, Brussels; Leuven University, LL.B. The views expressed here are those of the author and are not necessarily the views of the Commission.

1. Council Directive of 14 May 1991 on the Legal Protection of Computer Programs, 91/250/EEC, O.J. L 122/42 (1991) [hereinafter Software Directive].

2. See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, *as last revised*, Paris, July 24, 1971, 828 U.N.T.S. 221 [hereinafter Berne Convention]; Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *as last*

had very detailed national provisions in place. The question really was: What should the Community really do in the Software Directive, especially since the EEC Treaty³ does not give jurisdiction to the Community, a priori, to deal with intellectual property and copyright, and we received jurisdiction only indirectly through the derogation of Article 36 and the Notification of the Single Act in Article 100a?

But it became quite clear in the 1970s that differences in intellectual property law, and in particular in copyright law, were going to block the internal market. In the *Coditel* cases,⁴ you have a clear copyright violation when you broadcast from one country to another; the copyright laws do block the transfer. In the *Patricia* case,⁵ the copyright is of a different duration in different Member States, and the market is blocked after the copyright is filed in one country. In the *Warner* case,⁶ it is the same thing—different regimes of rental rights were at issue and therefore the copyright blocked the market.

In 1985, when we launched the White Paper⁷ for the 1992 program, we included a certain number of measures to liberalize the internal market through the harmonization of intellectual property. Copyright is only mentioned in one sentence—in a sentence which says that we will do “the fair thing.” We did prepare to look at the copyright area.

We issued the Green Paper⁸ in 1988. The Green Paper was

revised, Stockholm, July 14, 1967, 21 U.S.T. 1583, 423 U.N.T.S. 305.

3. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958), amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

4. *S.A. Compagnie Général pour la Diffusion de la Télévision v. Ciné Vog Films*, Case 62/79, [1980] E.C.R. 881, [1981] 2 C.M.L.R. 362; *Coditel S.A. v. Ciné-Vog Films S.A.*, Case 262/81, [1982] E.C.R. 3381, [1983] 1 C.M.L.R. 49.

5. *E.M.I. Electrola GmbH v. Patricia Im-und Export*, Case 341/87, [1989] E.C.R. 79, [1989] 2 C.M.L.R. 413.

6. *Warner Bros. v. Christiansen*, Case 158/86, [1988] E.C.R. 2605, [1990] 3 C.M.L.R. 684.

7. Commission of the European Communities, *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310 final.

8. Commission of the European Communities, *Green Paper on Copyright and the*

very strongly criticized by some of our Member States—France, Italy, and Germany, more particularly—and by many of our rightsholders' organizations. It was criticized for being too economical, not cultural enough, too segmented, too impartial, and not having a global vision of a global copyright.

It is true that in the Green Paper we have selected those topics for harmonization where, in our view, it looked like there was the biggest need for harmonization. These were areas where technology had advanced since the last revision of the Berne Convention.⁹ These were areas where technology could threaten copyrights, through copying and piracy. We thought that we could leave the rest less harmonized because the national regimes were to a certain extent similar.

This, as it turned out, was not possible. The Commission was under pressure from some Member States, from the European Parliament ("Parliament"), and from interested circles to change its approach. We did change our approach when we presented the new program of action for 1991 and 1992. It addressed the previous issues but was much more focused on a global approach.

The negotiation on the Software Directive¹⁰ was especially complicated because the key problem—reverse engineering—had not been properly investigated by the Commission and was not properly presented by industry in the hearing after the Green Paper. Industry told us it was not an important problem. When we tried to harmonize by leaving this problem on the side, it turned out that this was impossible and we had to lay down a very specific derogation on reverse engineering.

It is very strange that the Community, which was the last institution to enter the copyright field, turned out to be the one which had to do the most advanced legislative job. There had been no reverse engineering provision in any legislation in the world; there had been no case law in America or anywhere else on reverse engi-

Challenge of Technology, COM(88)172 final [hereinafter Green Paper].

9. Berne Convention, *supra* note 2.

10. Software Directive, *supra* note 1.

neering at the time. Now we have the *Sega* case.¹¹ There was no solution in our Member States' laws, and we couldn't make industry agree on what solution there should be on reverse engineering. So, as the last entrant in this field, we turned out to be the most advanced legislator—and I can assure you that the negotiation on reverse engineering was very complicated.

A. *Software Directive*

The Software Directive¹² was adopted in May 1991. Most of our Member States have now transposed it or are on the verge of transposing it. A few Member States are going to be late—Spain, Portugal, and Belgium—but we do not believe that there will be major difficulties with the implementation of the Software Directive, except one. The problem is in the United Kingdom, where the government would like to maintain the fair dealing derogation in its law with regard to software. This, of course, we cannot have.

The Software Directive has listed exhaustively the derogations for copyrights, which include copy and error correction and reverse engineering. A fair dealing derogation in the Software Directive is unacceptable. If the United Kingdom doesn't change its position, I think the Commission will have to take the United Kingdom to court on that point. We told them before the Software Directive was adopted that this was our position.

B. *Rental Directive*

The Rental Directive¹³ is, from the corporate point of view, not such an important Directive; it's a very small part of copyright protection. But the Rental Directive has a misleading title because, in fact, it is a Directive which has several parts, one of which relates to rental rights. But the second chapter of the Rental Directive fully harmonizes all neighboring rights in Europe.¹⁴

11. *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

12. Software Directive, *supra* note 1.

13. Council Directive of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 92/100/EEC, O.J. L 346/61 (1992) [hereinafter Rental Directive].

14. *Id.* arts. 6-10.

In most of our countries, we have a system, not known in the United States, which gives statutory rights to performing artists, phonogram producers, and broadcasters. For the fight against piracy, the position of these rightsholders, in the music sector especially but also in the movie sector, is important. We have a situation where these rights were developed at an unequal level. They were even missing in some of our countries because not all of our countries have ratified the Rome Convention.¹⁵ We wanted to fill all these gaps.

We took the highest level of protection of neighboring rights we could find, given its exclusive form, and we proposed to harmonize neighboring rights for artists, phonogram producers, and broadcasters—and at a later point, we added film producers to that—totally. We succeeded in the sense that we have given rightsholders durational rights, reproduction rights, and distribution rights, including importation, with the normal exhaustion of these rights in the European Community but not with exhaustion outside of the EEC.¹⁶

We have ruled on the broadcasting right. We have also included something on communications in total, and, of course, rentals. This means that for all these neighboring rights there is now total harmonization in the Community. This was not so controversial inside the EEC. Even the United Kingdom and Ireland, which didn't know too much about neighboring rights, accepted that approach quite easily.

More controversial was the rental provision itself because we had a situation in the Community where some of our countries have exclusive rental rights—the rightsholder can decide whether or not he permits rental. But some other countries, like Germany, have limited rights where the government lays down the price of the rental, more or less, and anybody who pays that price can rent. Of course, in this type of system, the rightsholder loses control of

15. International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, Rome, 496 U.N.T.S. 43 [hereinafter Rome Convention].

16. Rental Directive, *supra* note 13, arts. 6-12.

the exploitation. For example, if he wants to push sales rather than rental, he can't do so because people can rent the copyrighted work by just paying the price.

It took us quite a while to push Germany out of that position. The Netherlands also had that position, although they had only a draft law and not an enacted law. But it took us quite a while to push Germany out of this position, to go back to the stronger form of copyright protection, which is the exclusive rental right. But we got there.

We got there by including equitable remuneration in the Rental Directive. This is what created a lot of controversy: The Directive said that, of course, there is an exclusive right for rental, but that once you use this right to authorize rental, you have to give equitable remuneration to all previous rightsholders.¹⁷

The question then becomes: What is equitable remuneration? We have refrained from laying that down exactly in the Directive and left it open for collective negotiation.

We have also refrained in this Directive from dealing with the issue of whether or not our Member States would give national treatment for the rental right. They are free to choose.

But now you have to understand the specific feature of Community law, which is that when the Community legislates domestically on something, it acquires the jurisdiction to deal with the same issue internationally. So, although our Member States are free under the Rental Directive to choose national treatment or not, when we go into future negotiations for the General Agreements on Tariffs and Trade ("GATT") or with the World Intellectual Property Organization ("WIPO") or any other multilateral negotiation, it is the Community which will be making the decision and not the Member States. We clearly indicated in the GATT negotiations, and also with WIPO, that as far as rental is concerned, we could accept national treatment.

In the WIPO documents, and indeed in the draft GATT Agreement On Trade-Related Aspects of Intellectual Property Rights

17. *Id.* art. 4.

("GATT TRIPS text"),¹⁸ there is a provision regarding the rental right. It is not complete because it leaves rental rights in a less protected position. But nevertheless, there is a provision on rentals in the GATT TRIPS text. So we have here an advance above the Berne Convention level of protection both in the EEC and presumably, when the GATT TRIPS text is accepted, in GATT.

The deadline for transposing the Rental Directive has not elapsed. The deadline is July 1994 and for one particular provision, July 1997.¹⁹

There is one particular point I think I have to go into because it is complicated. It involves cinematographic works. As in WIPO, we have in the EEC the difficulty of two different copyright regimes: a continental one, which focuses on the physical person and on creation; and the Anglo-Saxon one, which focuses more on exploitation and the rights of the producers. Thus, we have the same difficulty inside the Community as we have internationally.

We have tried to bridge these differences in certain ways. One way is to give parallel rights to the rightsholders, the authors or artists, and to producers by including the producers in the category of neighboring rights and making the rights equal on both sides. We did this in particular for phonogram producers and also for film producers.²⁰ The film producers did not like it too much.

The net effect of this is, nevertheless, that if you have parallel exclusive rights, you can only exploit them if there are contracts between these various rightsholders. You cannot rent a movie unless the copyright holder gives you the okay; nor can you rent a movie unless the film producer gives you the okay. And so, creating parallel rights has at least the effect of forcing these rightsholders to talk to each other and to agree with each other.

Moreover, we included in the Rental Directive a rather compli-

18. Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/FA (Dec. 20, 1991), Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade In Counterfeit Goods (Annex III).

19. Rental Directive, *supra* note 13, art. 13.

20. *Id.* art. 2.

cated system for presumptions of transfer of these rights whenever a contract has been concluded. It is a nonrebuttable transfer except on one point: it's a free market.²¹

But we tried to build the regime in such a way that it would achieve several objectives: (1) increase the level of protection and provide strong support of rights; and (2) at least to a certain extent, bridge the differences between the continental and the Anglo-Saxon regimes.

This bridge was done on the substance of the exploitation rights. Of course, if you come to a situation where it's a different person who is the rightsholder of the same right, you have a problem: you're still stuck with the situation where the market is blocked because one person has the right in one country and an additional person has the right in a different country. This is the case with cinematographic works. We couldn't finish the harmonization of rentals without delving into that extremely controversial question.

We took a compromise position, saying that the principal director of a film would be the author; so we chose basically the continental regime. But we left open a door for the Member States to indicate additional persons as co-author, so that the United Kingdom and Ireland could maintain a film producer in the category of "co-author" next to the film director.²²

C. Database Directive

In the Database Directive²³ we have made a proposal for a dual system. The first layer of the system is copyright, and it basically gives protection in electronic databases under the regime of Article 2(5) of the Berne Convention.²⁴ However, we have strengthened it in that we have the regime of Article 2(5), but also protect databases if the content of the databases are not copyrightable through a sui generis regime. But for the rest, we use essentially the crite-

21. *Id.* art. 2(7).

22. *Id.* art. 2(2).

23. Proposal for a Council Directive on the Legal Protection of Databases, COM(92)24 final—SYN 393.

24. Berne Convention, *supra* note 2, art. 2(5).

ria of the Berne Convention, Article 2(5). The difference of language between the French and the English versions of Berne were ironed out by saying clearly in the Directive that it was the "selection or arrangement" which was protected by copyright.

There are very complicated issues involved in the Database Directive. Because it's new and the Council of Ministers ("Council") is very busy with the other directives, there has only been a preliminary discussion in Parliament and in the Council, and I cannot really say at this moment where it is going.

But it is a very important Directive because it is clear that, with the international harmonization of copyrights for books, for music, for movies, for many other things, most of the exploitation in the future will be in electronic form. Thus, it is a Directive which will have a very serious impact in the future and not just for the databases.

D. Term Directive

Another proposal, which was not in the Green Book, but we nevertheless filed, is the proposed Directive on duration of copyright protection.²⁵ We have a very confused situation in the EEC as far as duration of copyright and neighboring rights is concerned. The Berne and the Rome Conventions lay down minimums: Berne is fifty years after the death of the author; Rome is twenty years after publication. Our Member States have used this freedom about these conventions to have all sorts of regimes. In Germany, it is life plus seventy years; in France, it's life plus fifty years; in Spain, it's life plus sixty. It is a totally chaotic situation.

Plus, on the neighboring rights, the duration varies. There is even a strange situation in Italy, where on certain neighboring rights they have totally different provisions in force at the same time depending on what statute you choose.

When these rights expire in one country sales from that country are blocked in countries where the rights are of longer duration. So we said, "We can't have this." It's not so much that we wanted

25. Amended Proposal for a Council Directive Harmonizing the Term of Protection of Copyright and Certain Related Rights, COM(92)602 final—SYN 395.

to prolong the copyright, but if we chose to shorten copyright, we run into problems of acquired rights under the case law of the European Court of Justice. Thus, we chose to escape those problems and to take the highest point. This means seventy years after the death of the author for everybody on copyright and fifty years after publication for everybody on neighboring rights.

Here again, Germany was resisting because it had twenty-five years of protection for phonogram producers. It took us quite a while to convince them to adopt this position.

The proposed Term Directive is not yet adopted, but it was in a very advanced stage in the discussion in the Council a couple of weeks ago. I believe that it is going to be adopted in June of 1993. We have come to the position where the last points will have to be ironed out.²⁶

As to authorship, there seems to be a compromise which is promoted by certain countries which would say that it would be the life of the principal director plus seventy years. This is a regime which no Member State has at the present time in the Community. (It was included in the recent Swiss law.) It seems to have some chance to be passed. Of course, the United Kingdom and Ireland would be in a position of keeping producers as co-authors during the duration of protection for the copyright and for the life of the cinematographic work. So I think that has a good chance of passing.

My last point is the question of whether some works can come back from the public domain. It's clear that if one work is still protected in one country but has lapsed in other countries, it would have to be protected in all countries as if the longest duration had been in force. In countries where the Commission originally proposed it, there is now seemingly an agreement that we will bring these works back from the public domain. We will leave the Member States to deal with the acquired rights.

26. [Eds. note: The Term Directive was adopted by the Council of Ministers in final form on October 29, 1993 (unpublished text on file with the *Fordham Intellectual Property, Media & Entertainment Law Journal*)].

E. *Satellite and Cable Directive*

Another proposed Directive which has been rather controversial is on satellite and cable.²⁷ As you know, here again there are two chapters in this Directive: one deals with satellite, the other deals with cable.

For satellite, we have proposed a sort of integrated Community right so that you will clear copyright at the point of emission—there is a dispute about how you define “emission”—but once you have cleared copyright there for the whole zone of imprint, then you cannot use the copyright or neighboring rights to block the broadcast of this particular work. For cable, where they pick up the signal and retransmit it, we have made that subject to payment and to collective negotiations. There have been some last-minute, minor detail changes in the text. I don’t have the final text to give you because it hasn’t emerged in time for this conference.

The combination of these various Directives—software, rental and neighboring rights, duration, and satellite—forms a package in that they are the architecture of our system. We could very well, if need be, stop the system here, stop the harmonization here, and it would be a functional regime—provided all of our Member States would ratify the proposed Directives.

We were not successful in that domestically, but we have included it in the agreement between the EEC and the European Free Trade Association (“EFTA”), and we hope that agreement will come into force at the end of this year. Although Spain has blocked it for the moment, we think that it will be implemented.

F. *Home-copying Directive*

We have not been able to deliver on our promise to present a private copying proposal. We promised that there would be one at the end of 1991. We made a very serious attempt at the end of 1992 and failed.

27. Amended Proposal for a Council Directive on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, COM(92)526 final—SYN 358. [Eds. note: The Directive was adopted by the Council of Ministers in final form on September 27, 1993 as Council Directive No. 93/83, O.J. L 248/15 (1993).]

Private copying has always been very controversial since the Green Book. There are different opinions. Some Member States are opposed to it. We tested the waters in the Council several times. We believe that there is a majority in the Council in favor of this harmonization. But there is a dispute going on in the Community clearly, and in the Commission also, about how to deal with the rights of third-country rightsholders and private copies. It is on this point that we have not reached agreement in the Commission, and for the moment there is no proposal.

This is unfortunate. It is unfortunate because it will mean that, for the time being, the Community will not have this higher level of protection against private copying where private copying and the technologies that go into private copying are increasing and the losses which all rightsholders incur—all rightsholders, authors and phonogram producers and artists, everyone—are increasing.

I think that there is a very serious danger that the Community will copy the latest American and Japanese positions that there will be protection against private copying only in certain respects. This will mean a *de facto* reduction of the rightsholders' protection.

We have had hearings on many other issues of copyright, including program fees and moral rights. All of these issues are blocked for the moment because the private copying problem has not been disentangled. Since we did not promise in the working program for 1991–1992 to make proposals—we only promised to have hearings—it is for the new Commission to decide whether to propose a private copying position. That decision has not been made since, for the moment, the service of the Commission is being reorganized, and there is a new Commissioner and a new Director-General. There is no decision expected for some time in the Commission.

G. European Economic Area and Similar Agreements

The last point which I want to make is that this program of harmonization does not concern only the twelve countries of the EEC. The agreement that we have signed with the EFTA countries has a rule that the EFTA countries have to take over the harmonization of the Community in the greatest detail.

So, for example, if we have a Software Directive, Sweden, Norway, Finland, and Austria have to adopt the Software Directive, too. They have to get rid of the rules on private copying and adopt the Software Directive, or they have to get rid of international exhaustion in Finland and Norway. This has been agreed. In the future, when the satellite, or duration, or whatever other Directives come into force, the mechanism is that they have to adopt the Community legislation.

They have one escape clause against this, but the escape clause is at the price that we block access of our markets to the EFTA countries if they don't adopt a given piece of Community legislation. This is an extremely high price to pay and this gives an incentive to the EFTA countries.

We have included similar provisions, although less detailed, in the agreements we have made with Eastern European countries, in particular, with Hungary, Czechoslovakia, and Poland—which in Czechoslovakia is going to be taken over by two separate regimes, the Czechs and the Slovaks. After a certain time—five years—they will have to have the same level of protection for intellectual property, including copyrights, as in the Community. So, of course, if there is harmonization to bring the protection level up to a certain point, that will also be the case in these countries at that time.

We have included the same provisions in the agreement we have just signed with Romania and Bulgaria. We have a similar provision in the commercial agreement with the Balkan Republic. And we have the intention of using that for many other European countries, except the Balkan Countries in which we want to have an association with the Russian republics. We have now opened negotiations with Russia and we have requested the same thing. But I am personally much less convinced that we will convince Russia. The Eastern European countries have the incentive of wanting to join the EEC and are very willing to make these promises. Russia does not have this incentive. Russia has made a promise to ratify Berne, it has said that it will also oppose the requests of the EEC and of the United States to increase the level of protection over there. That is very bad for software and for the music sector.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in the context of public administration and financial management. The text highlights that records should be kept in a clear, organized, and accessible manner, ensuring that they can be easily reviewed and audited.

2. The second part of the document addresses the challenges associated with record-keeping, such as the volume of data, the complexity of the information, and the need for secure storage. It suggests that organizations should invest in robust information management systems and training to overcome these challenges. Additionally, it stresses the importance of regular data backups and security protocols to protect sensitive information from loss or unauthorized access.

3. The third part of the document focuses on the legal and regulatory requirements for record-keeping. It outlines the various laws and standards that govern the retention and disposal of records, ensuring that organizations remain compliant with applicable regulations. The text also discusses the importance of documenting the retention and disposal processes to demonstrate adherence to these requirements.

4. The fourth part of the document explores the benefits of effective record-keeping, including improved decision-making, enhanced operational efficiency, and better risk management. It notes that well-maintained records can provide valuable insights into organizational performance and help identify areas for improvement. Furthermore, it highlights that accurate records are crucial for legal defense and dispute resolution.

5. The fifth part of the document provides practical advice on how to implement a successful record-keeping strategy. It suggests that organizations should conduct a thorough assessment of their current record-keeping practices and identify areas for improvement. It also recommends developing clear policies and procedures for record management, as well as regularly reviewing and updating these policies to reflect changes in regulations and organizational needs.

6. The sixth part of the document discusses the role of technology in record-keeping. It highlights the advantages of digital record-keeping, such as increased accessibility, ease of search, and reduced risk of physical damage. However, it also notes the challenges associated with digital records, such as data migration and long-term storage. The text suggests that organizations should carefully evaluate their options and choose the most appropriate technology solutions for their needs.

7. The seventh part of the document addresses the issue of record retention and disposal. It explains that records should be retained for a specific period of time, as determined by legal and regulatory requirements. It also discusses the importance of proper disposal methods, such as shredding or secure deletion, to ensure that sensitive information is not leaked or misused. The text emphasizes that organizations should have a clear and consistent policy for record retention and disposal.

8. The eighth part of the document discusses the importance of record-keeping in the context of organizational governance and accountability. It notes that records provide a clear and objective record of organizational activities, which is essential for monitoring performance and holding individuals and departments accountable. The text suggests that organizations should use records to identify areas of weakness and implement corrective actions to improve their overall performance.

9. The ninth part of the document provides a summary of the key points discussed in the document. It reiterates the importance of accurate record-keeping and the need for organizations to invest in the necessary resources and training to ensure compliance with legal and regulatory requirements. It also emphasizes the benefits of effective record-keeping and the importance of regularly reviewing and updating record-keeping policies and procedures.

10. The tenth part of the document provides a list of references and resources for further information on record-keeping. It includes links to relevant laws, regulations, and industry best practices, as well as contact information for experts in the field. The text encourages organizations to seek professional advice if they are unsure about any aspect of record-keeping.