Göttinger Bibliotheksschriften 6

European and International Copyright Protection – Microcopies and Databases

by Detlef Kröger

Detlef Kröger

European and International Copyright Protection – Microcopies and Databases

Göttingen 1995

Veröffentlicht mit Unterstützung der Kommission der Europäischen Union, Generaldirektion X

ISBN 3-930457-04-0

ISSN 0943-951X

To my parents

in deep gratitude

Contents

Bibliography

Ahlt, Europarecht, 1993.

(Ahlt, European Law)

Bappert, Der Titelschutz, GRUR 1949, S. 189 ff.

Bappert, Walter/Wagner, Internationales Urheberrecht, Kommentar, München/Berlin 1956.

(Bappert/Wagner, Art. ... RBC, side note... .)

von Bar, Territorialität des Warenzeichens und Erschöpfung des Verbreitungsrechts im Gemeinsamen Markt, 1977.

(von Bar, Territoriality of trademarks and exhaustion of the right of distribution in the Common Market)

von Bar, Internationales Privatrecht, Bd. 1, Allgemeiner Teil, 1989.

(v. Bar, Private International Law, vol. 1)

von Bar, Internationales Privatrecht, Bd. 2, Besonderer Teil, 1991.

(v. Bar, Private International Law, vol. 2)

Baum, Berner Konvention, Landesgesetze und internationales Privatrecht, GRUR 1932, S. 921 ff.

Baum, Die Brüsseler Konferenz zur Revision der Revidierten Berner Übereinkunft – Erlebnis und Ergebnis, GRUR 1949, S. 1 ff.

Becker, Von „Dassonville" über „Cassis" zu „Keck" - Der Begriff der Maßnahmen gleicher Wirkung in Art. 30 EG-Vertrag, EuR 1994, S. 162.

Becker, Der Gestaltungsspielraum der EG-Mitgliedstaaten im Spannungsfeld zwischen Umweltschutz und freiem Warenverkehr, Baden-Baden 1991.

(Becker, The Soverignty of EC Member States in the Tendsion between Environmental Protection and Free Movment of Goods)

Beier, Hundert Jahre Pariser Verbandsübereinkunft – Ihre Rolle in Vergangenheit, Gegenwart und Zukunft, GRUR Int. 1983, S. 339 ff.

Beier, Gewerblicher Rechtsschutz und freier Warenverkehr im europäischen Binnenmarkt und im Verkehr mit Drittstaaten, GRUR Int. 1989, S. 603 ff.

Beier/Schricker (Hrsg.), GATT or WIPO – New Ways in the International Protection of Intellectual Property, IIC–Studies Vol. 11, 1989.

Bekemos–Balodimos, Änderungen aufgrund des Vertrages über die EU in den Bereichen allgemeiner und beruflicher Bildung und Kultur Reihe Europa der Bürger W2, hrsgg. vom EP Generaldirektion Wissenschaft, Luxemburg 1992.

(Bekemos–Balodimos, Changes brought abaut by the Treaty on European Union in the Field of General and Professional Education and Culture)

Bergsma, Das Prinzip der Inländerbehandlung im internationalen und schweizerischen Urheberrecht, 1990.

(Bergsma, Treatment as a National)

Bergström,Schutzprinzipien der Berner Übereinkunft nach der Stockholmer–Pariser Fassung, GRUR Int. 1973 S. 238 ff.

Bernhardt, Verfassungsrecht und völkerrechtliche Verträge, in: Isensee/Kirchof, Handbuch des Staatsrechts, Bd. VII, § 174.

Berrisch, Der völkerrechtliche Status der Europäischen Wirtschaftsgemeinschaft im GATT, 1992.

Beyerlin, Stichwort: Menschenrechtsschutz durch UNO und KSZE, in: Lexikon des Rechts – Völkerrecht –, hrsgg. von I. Seidl–Hohenfeldern, 2. Aufl. 1992.

(Beyerlin, headword: The Protection of Human Rights via the UNO and the CSCE, in: Dictonary of Law - International Law)

Blumenwitz, Die KSZE und die Menschenrechte, 1977.

(Blumenwitz, The CSCE and human rights)

Blumenwitz, Stichwort: Deutschland seit 1945, in: Lexikon des Rechts – Völkerrecht –, hrsgg. von I. Seidl–Hohenfeldern, 2. Aufl. 1992.

Bodenhausen, G.H.C.,Pariser Verbandsübereinkunft zum Schutz des gewerblichen Eigentums, Kommentar, Köln u.a. 1971.

(Bodenhausen, PVÜ)

Böckstiegel, Die allgemeinen Grundsätze des Völkerrechts über Eigentumsentziehung, Eine Untersuchung zu Art. 1 ZP, 1963.

(Böckstiegel, The general Principles of International Law on Expropriation, an analysis of art. 1 of the first protocol, 1963)

Bothe, "Soft Law" in den Europäischen Gemeinschaften?, in: FS Schlochauer, 1981, S. 761 ff.

von Bredow, Der KSZE–Prozeß, 1992.

(von Bredow, The CSCE-proceedings)

Bruhn, Das Problem des Vervielfältigens und Verbreitens in seiner Bedeutung für Bibliotheken, UFITA 52 (1969), S. 115 ff.

Brutschke, Urheberrecht und EDV, 1972.

(Brutschke, Copyright and EDV)

Buck, Geistiges Eigentum und Völkerrecht, 1994.

(Buck, Intellectual Property and International Law)

Christians, Immaterialgüterrechte und GATT – Die Initiative zur Fortentwicklung des internationalen Schutzes geistigen Eigentums im Rahmen der Uruguay–Runde, Frankfurt a.M. u.a. 1990.

(Christians, Intangible Property Rights and GATT)

Copinger/Skone, On Copyright, Including International Copyright with the Statutes and Orders Relating the-

reto and Forms and Precedents, 12th ed., London 1980.

Collovà, Reproduction sonore et visuelle pour l`usage, Wien 1979 = RIDA 1979, S. 125 ff.

Dahm, Völkerrecht, Bd. I, 1958.

(Dahm, International Law)

Dahm/Delbrück/Wolfrum, Völkerrecht, Bd. I/1, 1989.

(Dahm/Delbrück/Wolfrum, International Law)

Davies,The Private Copying of Sound and Audio–visual Recordings, Oxford 1984.

(Davies, Private Copying)

Delp, Das Recht des geistigen Schaffens, 1993.

(Delp, Intellectual Work)

Dietz, Das Urheberrecht in Spanien und Portugal, Rechtsvergleichende Studie erstellt im Auftrag der Kommission der Europäische Gemeinschaft, 1991.

(Dietz, Copyright in Spain and Portugal)

Dietz, The Harmonisation of Copyright in Community Law, GRUR Int. 1985, S. 379 ff.

Dietz, Das Urheberrecht in der europäischen Gemeinschaft, 1978.

(Dietz, Copyright in the EC)

Dietz, in: Schricker (Hrsg.), Urheberrecht, Kommentar, Vor §§ 12 ff.

Dietz, Harmonisierung, in: Ress (Hrsg.), Entwicklung des europäischen Urheberrechts,

(Dietz, Harmonisation, in: Ress (editor), The Development of European Copyright, p. 62 ff.)

Dietz, Das Urheberpersönlichkeitsrecht vor dem Hintergrund der Harmonisierungspläne der EG–Kommission, ZUM 1993, S. 309 ff.

Dittrich, Die Stockholmer Fassung der Berner Übereinkunft, 1986.

(Dittrich, Stockholm Version)

Dock, Die internationalen Konventionen über das Urheberrecht und die allgemeine Erklärung der Menschenrechte, in: Colloque international, Droits d' auteur & de l' homme, Paris 1989.

(Dock, The International Conversations on Copyright and the Universal Decleration of Human Rights)

Drexl, Nach „GATT und WIPO": Das TRIPs-Abkommen und seine Anwendung in der Europäischen Gemeinschaft, GRUR Int. 1994, S. 777.

Drzemczewski/Meyer-Ladewig, EuGRZ 1994, S. 317 ff.

ECF (Hrsg.),Ein Netzwerk für Europa, o.J.

Ebenroth/Parche, Markenaufspaltung und nationale Markenrechte im Spanngsverhältnis zum Grundsatz des freien Warenverkehrs, GRUR Int. 1989, S. 738.

Edwards, Droit d' auteur et droits de l' homme au plan europeen, dans: Colloque international, Droits d' auteur & de l' homme, Paris 1989.

Ekrutt, Der Schutz der "editio princeps", UFITA 94 (1979), S. 45 ff.

(Ekrutt, The Protection of „editio princeps")

Ericke, "Soft Law" – Aspekte einer neuen Rechtsquelle, NJW 1989, S. 1906 ff.

Everling, Zur rechtlichen Wirkung von Beschlüssen, Entschließungen, Erklärungen und Vereinbarungen des Rates oder der Mitgliedstaaten der Europäischen Gemeinschaft, in: Gedenkschrift für Constantinesco, 1983, S. 133 ff.

Everling, Brauchen wir "Solange III" ? Zu den Forderungen nach Revision der Rechtsprechung des Bundesverfassungsgerichts, EuR 1990, S. 195 ff.

Fastenrath (Hrsg.), KSZE, Bd. 1, Dokumente der Konferenz über Sicherheit und Zusammenarbeit in Europa, 1992.

(Fastenrath, (publisher), CSCE)

Faupel, GATT und geistiges Eigentum, GRUR Int. 1990, S. 255 ff.

Feger, Die Grundrechte in den übrigen Mitgliedstaaten der EG einschließlich der Rechte der Europäischen Menschenrechtskonvention, Jura 1987, S. 6 ff.

Fikentscher, Wirtschaftsrecht, Bd. 1, 1983.

(Fikentscher, Economic Law)

Fikentscher/Lamb, Zur Anerkennung von Grundsätzen des gewerblichen Rechtsschutzes, Urheberrechts und Wettbewerbsrechts im Rahmen einer neuen Weltwirtschaftsordnung, GRUR 1987, S. 758 ff.

Flechsig/Klett, Europäische Union und europäischer Urheberschutz, ZUM 1994, S. 685.

Friedrich, Rechtsprobleme der nationalen, völkerrechtlichen und europarechtlichen Regelungen der grenzüberschreitenden Abfallverbringung, UPR 1988, S. 4 ff.

Fromm/Nordemann, Urheberrecht, Kommentar, 8. Auflage 1988.

(Fromm/Nordemann, Copyright)

Froschmeier, Rechtsvergleichende Darstellung, UFITA 23 (1957), S. 23 ff.

Frowein, Übernationale Menschenrechtsgewährleistungen und nationale Staatsgewalt, in: Isensee/Kirchof, Handbuch des Staatsrechts, Bd. VII, § 180.

(Frowein, The Guranteing of Human Rights at the Supranational level and National State Power)

Frowein, Der europäische Menschenrechtsschutz als Beginn einer europäischen Verfassungsrechtsprechung, JuS 1986, S. 845 ff.

Frowein, Federal Republic of Germany, in: Francis Jacobs (Hrsg.), The Effect of Treaties in Domestic Law, London 1987.

Frowein, Bundesverfassungsgericht und Europäische Menschenrechtskonvention, in: FS Zeidler, Bd. II, 1987, S. 1763 ff.

(Frowein, The German Federal Court and the European Convention on Human Rights, in: FS Zeidler)

Frowein/Peukert, Europäische Menschenrechtskonvention, EMRK–Kommentar, 1985.

(Frowein/Peukert, ECHR-Commentary)

von Gamm, Urheberrechtsgesetz, Kommentar, 1968.

(von Gamm, Copyright Law - Commentary)

Geiger, Grundgesetz und Völkerrecht, 2. Aufl. 1994.

(Geiger, The Basic Law and International Law)

Frowein , Kommentar zum EG-Vertrag,

Goebel/Hackemann/Scheller, Zum Begriff des Erscheinens beim Elektronischen Publizieren, GRUR 1986, S. 355 ff.

Goose, Die urheberrechtliche Beurteilung von elektronischen Mikrofilm–Datenbanken, UFITA 53, Berlin 1975.

(Goose, The Copyright Assesment of electronic and micro-film databases)

Gotzen,Gewerbliche Schutzrechte und Urheberrechte in der Rechtsprechung des Europäischen Gerichtshofs zu Art. 30–36 des EWG–Vertrages, GRUR Int. 1984, S. 146 ff.

Grabitz, Abfall im Gemeinschaftsrecht, FS Sendler, S. 443 ff.

von Gravenreuth, Juristisch relevante technische Fragen zur Beurteilung von Computer–Programmen, GRUR 1986, S. 720 ff.

Graz, Propriété intellectuelle et libre circulation des marchandises, 1988.

Groeben/Thiesing/Ehlermann, EWG-Vertrag - Kommentar, 4. Auflage, Baden-Baden 1991.

(Groeben/Thiesing/Ehlermann, EEC-Treaty

Groth,Fortschritte im KSZE–Prozeß, EA 1989, S. 95 ff.

Gummig, Der Schutz von Datenbanken vor dem Hintergrund der Harmonisierungsbemühungen der EG, ZUM 1992, S. 354 ff.

Haberstrumpf, Grundsätzliches zum Urheberrechtsschutz von Computerprogrammen nach dem Urteil des Bundesgerichtshofs vom 9. Mai 1985, GRUR 1986, S. 222 ff.

Hackemann, Information und Dokumentation aus urheberrechtlicher Sicht – Einige Anmerkungen zur gegenwärtigen und zukünftigen Rechtslage, GRUR 1982, S. 262 ff.

Hackemann, Urheberrechtlicher Schutz von Datenbanken – rechtsvergleichend und nach internationalem Recht, ZUM 1987, S. 269 ff.

Hackemann, Rechtlicher Schutz von Datenbanken, CR 1991, 305 ff.

Hahn, Europäische Kulturpolitik, 1987.

(Hahn, European Cultural Politicies)

Hefti, Regelungen für reprographische Vervielfältigungen in der EG, ZUM 1987, S. 115 ff.

Herdegen, Internationales Wirtschaftsrecht, 1993.

(Herdegen, International Business Law)

Hilf, Der Rang der Europäischen Menschenrechtskonvention im deutschen Recht, in: Mahrenholz/Hilf/Klein, Entwicklung der Menschenrechte innerhalb der Staaten des Europarates, 1987, S. 19 ff.

(Hilf, The place of the European Convention of Human Rights in German Law, in: Mahrenholz/Hilf/Klein, Development ofHuman Rights)

Hillig, Der Schutz von Datenbanken aus der Sicht des deutschen Rechts, ZUM 1992, S. 325 ff.

Hoebbel, GRUR Int. 1991, S. 933 ff. – Urteilsanmerkung.

Hoebbel, EG–Richtlinienentwurf über den Rechtsschutz von Datenbanken, CR 1993, S. 12 ff.

Hoffmann, Die Berner Übereinkunft zum Schutze von Werken der Literatur und Kunst, 1935.

(Hoffmann, BC)

Hubmann, Der Schutz von Adressenverzeichnissen gegen unerlaubte Benutzung, in: Bohlig u.a. (Hrsg.), Lohn der Leistung, S. 77–96.

Hubmann, Heinrich/Rehbinder, Manfred,Urheber– und Verlagsrecht, 7. Auflage, München 1991.

(Hubmann/Rehbinder, Copyright and Rights of Publication)

Hübenett, Zur Zulässigkeit der Vervielfältigung und Verbreitung von Datenbankausdrucken, GRUR 1992, S. 664 ff.

Iklé, Zum sachlichen Geltungsbereich der Berner Übereinkunft, UFITA Bd. 14 (1941), S. 365 ff.

(Iklé, The Pertinent Competence of Berne Convention)

Ipsen, Hans Peter, Inhalt und Grenzen gemeinschaftsrechtlicher Einwirkungen auf die Marke als Eigentum, in: Hefermehl/Ipsen/Schluep, Nationaler Markenschutz und freier Warenverkehr in der Europäischen Gemeinchaft, 1979, S. 147 ff.

Ipsen, Hans Peter, Der Kulturbereich im Zugriff der Europäischen gemeinschaft, GS Geck, 1989, S. 348 ff.

Ipsen, Knut, Völkerrecht, 1990.

(Ipsen, International Law)

Jansen, Die neue Welthandelsorganisation (World Trade Organisation - WTO), EuZW 1994, S. 333 ff.

Joliet, Geistiges Eigentum und freier Warenverkehr: Die Entwicklung der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften in den Jahren 1987 und 1988, GRUR Int. 1989, S. 177 ff.

Joos/Moufang, Neue Tendenzen im internationalen Schutz des geistigen Eigentums, GRUR Int. 1988, S. 887 ff.

Katzenberger, Urheberrecht und Dokumentation. Abstracts – Fotokopien – elektronische Datenbanken, GRUR 1973, S. 629 ff.

Katzenberger, in: Schricker (Hrsg.), Urheberrecht, Kommentar, München 1987, Vor §§ 120 ff.

Katzenberger, ZUM 1987, S. 706 – Urteilsanmerkung.

Katzenberger, Urheberrecht und Datenbanken, GRUR 1990, S. 94 ff.

Katzenberger, Internationalrechtliche Aspekte des Schutzes von Datenbanken, ZUM 1992, S. 332 ff.

Katzenberger/Kolle, Die urheberrechtliche Beurteilung computerunterstützter parlamentarischer Informations– und Dokumentationssysteme, in: Nachrichten für Dokumentation, 1972, S. 94 ff.

Khadjavi–Gontard, Der Grundsatz der Inländerbehandlung im internationalen Urheberrecht, 1977.

(Khadjavi–Gontard, The Priciple of National Treatment in International Copyright Law)

Kolle, Urheberrechtliche Probleme der Dokumentation und Information: Das Urheberrecht im Spannungsverhältnis zur Informationstechnologie und Informationspolitik, in: Steinmüller (Hrsg.), Informationsrecht und Informationspolitik, 1976, S. 238 ff.

(Kolle, Copyright Problems of Documentation and Information: Copyright in a State of Tension with Information Technologiy and Information Policy, in: Steinmüller (edit.), Information Law and Information Policy)

Kreile, Reinhold, Das Urheberrecht im Europäischen Binnenmarkt, EuZW 1993, S. 24 ff.

Kreile, Reinhold/Becker, Jürgen, Stand der Harmonisierungsbemühungen der EG auf dem Gebiet des Urheberrechts am Vorabend des Europäischen Binnenmarktes, ZUM 1992, S. 581 ff.

Kröger, Die Anwendung ds Diskriminierungsverbots auf das Urheberrecht und verwandte Schutzrechte, EuZW 1994, S. 85 ff.

(Kröger, The Application of the Prohibition Against Discrimination to Copyright and Neighbouring Rights, EuZW 1994, p. 85 ff.)

Kröger, Eigentum als Grundrecht der EU, in: Javier Barnes (ed.), Propiedad, Expropiacion y Responsabilidad - La garantia inclemnization en el derecho europeo y comparado, 1995.

(Kröger, Property as a Fundamental Right of the EU, in: Barnes, 1995)

Kröger, International copyright protection and microfilms, „Actes du colloque Droits d´auteur", Brussels, Bibliothèque Albert I, 21 octobre 1994, Archives et Bibliothèques de Belgique, D1. LXV Nr. 1-4 - 1994, S. 91 ff.

Krüger, Europäisierung des Urheberrechts: Vermieten und Verleihen von Büchern, Ton– und Bildträgern, GRUR 1990, S. 974 ff.

Leuprecht, Droit d' auteur et droits de l' homme au plan europeen, Dans: Colloque international, Droits d' auteur & de l' homme, Paris 1989.

von Lewinski, Der EG–Richtlinienvorschlag zur Harmonisierung der Schutzdauer im Urheber– und Leistungsschutzrecht, GRUR Int. 1992, S. 724 ff.

Loewenheim, in: Schricker (Hrsg.), Urheberrecht, Kommentar, München 1987, § 16, § 70, § 71, 1987.

Loewenheim, Vergütungsregelungen für das private Kopieren von Ton– und audiovisuellen Trägern der EG, ZUM 1992, S. 109 ff.

Loewenheim, GRUR 1987, S. 704 ff. – Urteilsanmerkung.

Loewenheim, Der Schutz ausübender Künstler aus anderen Mitgliedstaaten der Europäischen Gemeinschaft im deutschen Urheberrecht, GRUR Int. 1993, S. 105 ff.

Lucas, Le droit de l`informatique, Paris 1987.

Masouyè, Claude, Kommentar zur Berner Übereinkunft zum Schutz von Werken der Literatur und Kunst, Genf/München/Köln 1981.

(Masouyè, Art. ... RBC, ref. ... .)

Massart-Pierard, RMC 1986, S. 34 ff.

Maus, Die digitale Kopie von Audio– und Videoprodukten – Die Nutzung von Film und Musik im privaten Bereich und deren Behandlung im deutschen und internationalen Urheberrecht, 1991.

(Maus, digital Copies)

Meesen,Intellectual Property Rights in International Trade, JWLT 21, S. 67 ff.

Mehrings, Information und Dokumentation (IuD) – Ein Stiefkind der Urheberrechtsnovelle, GRUR 1983, S. 275 ff.

Mehrings, Der Rechtsschutz computergeschützter Fachinformationen – Unter besonderer Berücksichtigung von Datenbanken, 1990.

(Mehrings, Leagal Protection)

Mertens, Der Urheberrechtsschutz des Herausgebers historischer Texte, Aarau 1948.

(Mertens, The Copyright Pritection of a Publisher´s Historical Texts)

Mestmäcker, Schutz der ausübenden Künstler und EWG–Diskriminierungsverbot, GRUR 1993, S. 532 ff.

Mestmäcker/Schulze, Kommentar zum deutschen Urheberrecht unter Berücksichtigung des internationalen Rechts und des Gemeinschaftsrechts in den Mitgliedstaaten der EG, Stand: 13. Lieferung – September 1992.

(Mestmäcker/Schulze, Commentary on Copyright)

Michalski, Die Neuregelung des Urheberrechtsschutzes von Computerprogrammen, DB 1993, S. 1961 ff.

Middeke, Nationaler Umweltschutz und Binnenmarkt, 1993.

(Middeke, National Environmental Protection in the Internal Market)

Middeke, Der Kompetenzkonflikt umweltrelevanter Gemeinschaftsakte im Binnenmarkt, DVBl. 1993, S. 769 ff.

Möller, Die Urheberrechtsnovelle `85 – Entstehungsgeschichte und verfassungsrechtliche Grundlagen, 1986.

Möschel, NJW 1994, S. 781 - Urteilsanmerkung.

Moser, Die Europäische Menschenrechtskonvention und das bürgerliche Recht. Zum Problem der Drittwirkung von Grundrechten, Wien 1972.

(Moser, The European Convention on Rights and Civil Law)

Nordemann, Lizensierung, Erhebung und Verteilung der Einnahmen bei reprographischen Rechten, in: SGRUM 15, S. 128 ff.

Nordemann, Die Vervielfältigung zur Aufnahme in ein eigenes Archiv (§ 54 Abs. 1 Nr. 2 UrhG), in: FS Hubmann, 1985, S. 325 ff.

Nordemann, Der urheberrechtliche Schutz der Computersoftware, ZUM 1985, S. 10 ff.

Nordemann, Das Prinzip der Inländerbehandlung und der Begriff der "Werke der Literatur und Kunst" – Einige Bemerkungen zur Wechselwirkung der Art. 5 und 2 der RBÜ, GRUR Int. 1989, S. 615 ff.

Nordemann/Hertin, Die juristische Datenbank in urheber– und wettbewerbsrechtlicher Sicht, NJW 1971, S. 857 ff.

Nordemann/Scheuermann, Der Beitritt der USA zur Revidierten Berner Übereinkunft – Bericht über ein Berliner Urheberrechts–Symposium, GRUR Int. 1990, S. 945 ff.

Nordemann, Wilhelm/Vinck, Kai/Hertin, Paul, Internationales Urheberrecht und Leistungsschutzrecht der deutschsprachigen Länder unter Berücksichtigung auch der Staaten der Europäischen Gemeinschaft, Kommentar, Düsseldorf 1977.

(Nordemann/Vinck/Hertin, InternationalCopyright)

Nordemann, Wilhelm/Vinck, Kai/Hertin, Paul/ Meyer, Gerald, International Copyright and Neighbouring

Rights Law, Commentary with special emphasis on the European Community, Weinheim/New York, 1990.

(Nordemann/Vinck/Hertin/Meyer, Art. ... BC, side note... .)

Oppermann, Thomas,Europarecht, München 1991.

(Oppermann, European Law)

Partsch, Die Rechte und Freiheiten der EMRK, in: Die Grundrechte, Bd. I, 1, 1966.

(Partsch, The Rights and Freedoms of the ECHR, in: The Fundamental Rights)

Paschke, Rechtsfragen des novellierten Fotokopierrechts, GRUR 1985, S. 948 ff.

Pernice, Grundrechtsgehalte im Europäischen Gemeinschaftsrecht: ein Beitrag zum gemeinschaftsimmanenten Grundrechtsschutz durch den Europäischen Gerichtshof, Baden-Baden 1979.

(Pernice, The Content of Fundamental Rights in Community Law, 1979)

Pernice, Gemeinschaftsverfassung und Grundrechtsschutz – Grundlagen, Bestand und Perspektiven, NJW 1990, S. 2409 ff.

Peukert, Die Rechtsprechung des EGMR zur Verhältnismäßi gkeit einer Eigentumsentziehung nach zollrechtlichen Vorschriften, EuGRZ 1988, S. 509 ff.

Peukert, Zur Notwendigkeit der Beachtung des Grundsatzes des Vertrauensschutzes in der Rechtsprechung

des EGMR zu Eigentumsfragen. Anmerkungen zum EGMR–Urteil im Fall Hakensson und Sturesson gegen Schweden, EuGRZ 1992, S. 1 ff.

Poll, Die Vermietung von Videoprogrammen und der "Erschöpfungsgrundsatz unter besonderer Berücksichtigung des EG–Rechts, ZUM 1987, S. 416 ff.

Püschel, Internationales Urheberrecht, Berlin 1982.

Raczinski/Rademacher,Urheberrechtliche Probleme beim Aufbau und Betrieb einer juristischen Datenbank, GRUR 1989, S. 324 ff.

Raestad, La Convention de Berne, révisée à Rome 1928, Paris 1931.

Rau, Portugal, in: Möhring/Schulze/Ulmer/Zweigert,

(Rau, Portugal I. paragraph VII, in: Möhring/Schulze/Ulmer/Zweigert, Sources of Copyright Law, Vol. 3)

Regehr,Die völkerrechtliche Vertragspraxis der Bundesrepublik Deutschland, 1974.

(Regehr, The Treaty Practice of the German Federal Republik in International Treaty Law)

Reimer, Dietrich/Ulmer, Eugen,Die Reform der materiellrechtlichen Bestimmungen der Berner Übereinkunft, GRUR Int. 1967, S. 431 ff.

Reinbothe, Der Schutz des Urheberrechts und der Leistungsschutzrechte im Abkommensentwurf GATT/TRIPs, GRUR Int. 1992, S. 707 ff.

Reischl, Europäisches Urheberrecht und gewerblicher Rechtsschutz im Lichte der Rechtsprechung des EuGH, 1990.

(Reischel, European Copyright and the Protection of Industrial Copyright in the Light of the Case Law of the EuGH, 1990)

Rengeling, Grundrechtsschutz in der Europäischen Gemeinschaft, 1992.

(Rengeling, Protection of Fundamental Rights)

Rengeling, Gemeinschaftsrechtliche Aspekte der Abfallentsorgung in: Baur/Müller–Graff/Zuleeg (Hrsg.), Festschrift für Bodo Börner, S. 359 ff.

Ress, Die Europäische Menschenrechtskonvention und die Vertragsstaaten: Die Wirkung der Urteile des Europäischen Gerichtshofes für Menschenrechte im innerstaatlichen Recht und vor innerstaatlichen Gerichten, in: Meier (Hrsg.), Europäischer Menschenrechtsschutz, 1982, S. 227.

(Ress, The European Convention of Human Rights and the Member Staes: The effect of judgement of Human Rights in domestic Law and before domestic courts)

Ress, Die neue Kulturkompetenz der EG, DÖV 1992, S. 944 ff.

Ricketson,The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986, 1987.

Röttinger, Der Rechtsschutz von Datenbanken nach EG–Recht, ZUM 1992, S. 594 ff.

Roth, Grundfreiheiten des Gemeinsamen Marktes für kulturschaffende Tätigkeiten und kulturelle Leistungsträger, ZUM 1989, S. 101 ff.

Rudolf,Völkerrecht und deutsches Recht, 1967.

(Rudolf, International Law)

Rupp, Verstößt die unbefugte Nutzung eines urheberrechtlich gestützten Computerprogramms gegen §§ 97 ff., 106 UrhG, GRUR 1986, S. 147 ff.

Rupp, Die gewerblichen Schutzrechte im Konflikt zwischen nationalen Grundrechten und Europäischem Gemeinschaftsrecht, NJW 1976, S. 993 ff.

Sack, Die Verwirklichung des Europäischen Binnenmarktes im Bereich des gewerblichen Rechtsschutzes und Urheberrechts, in: Dichtl (Hrsg.), Schritte zum Europäischen Binnenmarkt, 2. Aufl., 1992.

(Sack, The Realisation of The Eurpoean Internal Market in The Field of Legal Production of Industrial Property and Copyright, in: Dichtl, Steps Toward a European Internal Markert)

Samson, Urheberrechtliche Fragen der Datenverarbeitung, DVR 1977, S. 201 ff.

Schack, Zur Anknüpfung des Urheberrechts im internationalen Privatrecht, Schriften zum internationalen Recht, Bd. 16, Berlin 1979.

Schack, JZ 1994, S. 43-45 -Urteilsanmerkung.

Schardt, Andreas, Das Urheberpersönlichkeitsrecht vor dem Hintergrund der Harmonisierungspläne der EG–Kommission, ZUM 1993, S. 318 ff.

Scheuing, Der Rechtsgrundlagenstreit vor dem Gerichtshof. Ein Plädoyer, FS Börner, S. 377 ff.

Schricker (Hrsg.), Urheberrecht, Kommentar, 1987.

(Schricker, Copyright Law - Commentary)

Schricker, Harmonisation of Copyright in the EEC, GRUR 1989, S. 466 ff.

Schricker, Zur Harmonisierung des Urheberrechts in der Europäischen Wirtschaftsgemeinschaft, FS Steindorff, 1990, S. 1438 ff.

(Schricker, Towards The Harmonisation of Copyright in the European Community)

Schricker, The Harmonisation of Copyright and Publishing Law in the Internal Market of the European Community, in: Becker, (editor), The Trade in Books in the European Internal Market, 1989, p. 29 ff.

Schricker, Gerhard/ Katzenberger, Paul, Die urheberrechtliche Leerkassettenvergütung – Eine Erwiderung, GRUR Int. 1985, S. 98 ff.

Schweitzer/Hummer, Europarecht, 4. Aufl., 1993.

(Schweitzer/Hummer, European Law)

Senti, GATT: allgemeines Zoll– und Handelsabkommen als System der Welthandelsordnung, 1986.

(Senti, GATT)

Singer, Das neue europäische Patentsystem, 1979.

(Singer, The New European Patent System)

Stern, Staatsrecht, Bd. I, 2. Aufl., 1984.

(Stern, Constitutional Law, vol. I)

Stewart, International Copyright an Neighboring Rights, London/Boston, 2. Auflage 1989.

(Stewart, International Copyrigh)

Stoll, The WTO: New World Trade Organisation, new World Trade Order – Results of the Uruguay Round of GATT, ZaÖRV 54/2 (1994), S. 241 ff.

Sucker, in: Groeben/Thiesing/Ehlermann, EWG–Vertrag, Kommentar, Art. 85.

Tomuschat, Deutsche Rechtsprechung in völkerrechtlichen Fragen 1958–1965, ZaöRV 28 (1968), S. 48 ff.

Tomuschat, Legal aspects of community activity in the field of culture, in: FIDE (editor), Vol. 1, 1988.

Tomuschat, Die staatsrechtliche Entscheidung für die internationale Offenheit, in: Isensee/Kirchof, Handbuch des Staatsrechts, Bd. VII, § 172.

Troller, Der Mindestschutz der Berner Übereinkunft im Verhältnis zum Schutzumfang im geltenden und geplanten schweizerischen, nationalen Urheberrecht, in: Schweizer Vereinigung für Urheberrecht

(Hrsg.), Die Berner Übereinkunft und die Schweiz, Bern, 1986, S. 143-156.

(Troller, Minimum)

Ullrich, Ausstattungsschutz im Gemeinsamen Markt, in: Schricker/Stauder (Hrsg.), Handbuch des Ausstattungsrechts, 1986.

(Ullrich, Protection of get-up in the Common Market, in: Schricker/Stauder, Handbook of Presantation Law)

Ullrich, Die gemeinschaftsrechtliche Gestaltung des Wettbewerbsrecht und das Recht des geistigen Eigentums - eine Skizze, in: Müller-Graff (Hrsg.), Europäisches Privatrecht , Baden-Badern 1993, S. 325 ff.

(Ullrich, The Arrangement of Competition Law and the Law of Intellectual Property in the Community - a sketch, in: Müller-Graff (editor), European Private Law)

Ullrich, Hanns/ Konrad, Karlheinz, Gewerblicher Rechtsschutz, in: Dauses (Hrsg.), Handbuch des EG–Wirtschaftsrechts, 1993.

(Ullrich, The Protection of Industrial Property, in: Dauses)

Ulmer, Eugen, Elektronische Datenbanken und Urheberrecht, 1971.

(Ulmer, Electronic Databases and Copyright)

Ulmer, Einspeicherung und Wiedergewinnung urheberrechtlich geschützter Werke durch Computer–Anlagen, GRUR 1971, S. 297 ff.

Ulmer,Das Folgerecht im internationalen Urheberrecht, GRUR 1974, S. 593 ff.

Ulmer, Die Immaterialgüterrechte im internationalen Privatrecht, 1975.

(Ulmer, Intangible Property Rights In International Private Law)

Ulmer, Urheberrechtliche Probleme beim Aufbau juristischer Dokumentationssysteme, DVR 1976, S. 87 ff.

Ulmer, Urheber– und Verlagsrecht, 3. Auflage, Berlin/Heidelberg/New York 1980.

(Ulmer, Copyright and Rights of Publication)

Ulmer/Reimer Die Reform der materiellrechtlichen Bestimmungen der Berner Übereinkunft, GRUR Int. 1967, S. 431 ff.

van Raden, Computergestützte juristische Informationssysteme – neue Entwicklungen, NJW 1988, S. 2451 ff.

Vaver, Die Inländerbehandlung nach der Berner Übereinkunft und dem Welturheberrechtsabkommen, GRUR Int. 1988, S. 191 ff.

Verdross/Verosta/Zemanek, Völkerrecht, 5. Aufl. 1964.

(Verdross/Verosta/Zemanek, International Law)

Verdross/Simma, Universelles Völkerrecht, 3. Auflage 1984.

(Verdross/Simma, Universal)

Vierdag,The legal nature of the rights granted by the International Convenant on Economic, Social and Cultural Rights, in: Netherlands Yearbook of International 9 (1978), S. 69 ff.

Viganò, Urheberrecht und Entwicklungsländer, 1989.

Vogler,Das Recht auf unentgeltliche Beiziehung eines Dolmetschers, EuGRZ 1979, S. 640 ff.

Wandtke, Zur kulturellen und sozialen Dimension des Urheberrechts, UFITA 123 (1993),S. 5 ff.

(Wandtke, On the Cultural and Social Dimension of Copyright)

Wellens–Borchardt, ELRev. 1989, S. 267 ff.

Weßner, Inhaltsangaben zur Kurzorientierung, in: Laisiepen/Lutterbeck/Meyer–Uhlenried (Hrsg.), Grundlagen der Information, S. 418 ff.

(Weßner, Content)

Wittmann, Kulturpolitik, in: Weidenfeld/Wessels (Hrsg.), Jahrbuch 1993/1994, S. 213 ff.

(Wittmann, Cultur Policies, in: Weidenfeld/Wessels (ed.))

von Wilmowsky, Abfallwirtschaft im Binnenmarkt, 1990.

(von Wilmowsky, Waste Management in the Internal Market)

Foreword

This study is concerned with the questition of the boundary of copyright in matters of international and especially european co-operation amongst libraries. The basis of the work is a paper written for the MWK in Hannover (Lower Saxony´s Ministry of Science and Culture) in the context of the EROMM-Project (European Register of Microform Masters). The original paper has been reworked and somewhat extended. The emphasis upon German law has been removed. The goal of this study is to give lawyers and library workers an overview of international copyright law. Solutions are offered to specific, practical problems. It would be a bonus if copyright matters were to be accorded greater consideration.

Not all the changes which took place at the time this work was being done could be considered. Of particular significance for the project however has to be the consolidation of the *term of copyright protection* brought about by Council Directive 93/98/EEC dated 29.10.1993 on the harmonisation of the term of protection of copyright and neighbouring rights. This directive grants a term of protection of 70 years after the death of the author. The first day of the first Januar after the author´s death is used as the starting point for purposes of calculating the term. For anonymous and pseudonymous works the particulars concerning the term of protection have been considered further, and according to these a shorter term of protection

can arise than was the case in Germany before. For photographs a unified term of protection of 50 years is anticipated.

Also to be pointed out is the growing consensus toward the directive on databases. According to the directive an exclusive right will be created which will be granted to all compilers of databases. The cost of building a database should be protected independently of the innovative charakter of the database. The „author" of the databases granted the right to prevent the removal or exploitation of the database along with its content or part of its content. The term of protection is 15 years and is renwable where there is further substantial investment in the database. A harmonisation of copyright applicable to the structure of databases is also created by the directive. The recently published EC-Commission *Green Book* provides further information on possible developments in copyright in the information society. The digitalised information superhighway present an almost insoluble quandary for intellectual property law, as once an „intellectual product" has been introduced to a computer network it becomes available to a very large number of users. The technical challenge to copyright is very real.

My results were partly brought together in the paper „International copyright protection and microfilms" delivered at the „Actes du colloque Droits d´auteur" (Brussels, Bibliothèque Albert I, 21 octobre 1994, Archives et Bibliothèques de Belgique, D1. LXV Nr. 1-4 - 1994, S. 91 ff.).

I would very much like to thank Dr. Schwartz and Dr. J. Hesse (LMR a.D.) for the friendly guidance and support concerning information relating to the project. Dr. Schwartz facilitated access to the content of Göttingen´s State and University library. I would also like to thank my friend Guntram Frese who was a constant source of help whenever I encountered difficulties of expression. My friend Ralf Clasen gave tremendous service in drafting the best possible typeset. Thanks are also due to Mr. Sean Middleton (London) who stoically undertook the burden of translation. The cost of translation was happily borne by the EC-Comission so that in the light of further co-operation amongst libraries there would be a study on copyright in existence. A special vote of thanks must be given to Professor Dr. Albrecht Weber, who encouraged me to undertake this work, and also to Professor Dr. Hans-Werner Rengeling, who gave me the opportunity to realise this project alongside my dissertation.

Osnabrück, October 1995

I. Introduction: The European Register of Microform Masters (EROMM), by *Dr. J. Schwartz*

The literary and scientific production of the last 150 years, which is stored in print media, is in danger of being lost because of decaying paper. Theoretically not less than 80% of present library holdings are threatened.

Microfilming remains the most widespread method of preserving printed information contained in books whose pages are brittle. In spite of new technical developments it will remain for some time to come the most common way of reformatting, ie converting information from its original paper into another format.

Conversion of printed information into microform has two decisive advantages over the option of preserving the original book:

1st – The filmed book can be duplicated as often as needed and in any shape – microform and paper. By using the technique of scanning computer files too may be produced directly from the microform.

2nd – For direct use of the microform readers and reader printers are available in every modern library. By using the microform the book itself will be protected against damage caused by handling.

In terms of cost microfilming is still expensive: a significant contribution to preserving as many books as possible can

therefore only be made if the duplicate microfilming of books can be avoided.

To coordinate the parallel filming activities of libraries a register containing information about books already filmed can serve as a useful instrument. Every single book that is to be filmed can be checked before being put under the camera to see whether or not it has been microfilmed somewhere else. Naturally this checking has to be done by every microfilming agency.

In this context the "European Register of Microform Masters" EROMM has been created as a central database which is truly international in character. Anybody who wishes to microfilm a book, may check with EROMM to find out whether its title is already on the list of filmed books. If it is, a copy of the book in question can be ordered from the agency owning the master, and funds which would otherwise have been used for microfilming can be used for reformatting other items. Acquiring a copy is far less expensive than doing the filming and related work all over again.

The EROMM project

The European Register of Microform Masters, set up as an international pilot database in January 1993 at the Bibliothèque nationale de France in Paris, had started with filing data of microform masters from four European countries (France, Great Britain, Germany, and Portugal).

The project phase of the EROMM project began in February 1991 and ended in October 1993. As a European Union project it had been financed to 60% by the Commis-

sion of the European Communities. The remaining 40% was generously contributed by the Commission on Preservation and Access, Washington D.C., which presently continues to support EROMM in setting up permanent services.

The French national library was charged with managing the project. The three other partner libraries were the British Library (London), the Instituto da Biblioteca Nacional e do Livro (Lisbon) and the Niedersächsische Staats– und Universitätsbibliothek (Göttingen).

Every partner library had to collect existing and new microform master data from its own computerised catalogue and from affiliated libraries, to convert records into the bibliographic format UNIMARC, and to send them to Paris to be filed in the EROMM. All data were merged into one database using the extended UNIMARC format as internal working format of this international pilot database. At this stage EROMM contained about 50.000 records of microfilmed items. Output has been provided during the project phase on microfiche and magnetic tape.

EROMM as a permanent service

The last months of the project in 1993 weredevoted to the task of defining the conditions under which EROMM can be run as a permanent service: funding, legal and organisational status, admitting new partners, and technical options for the use and updating of EROMM have been the main issues considered.

Among the legal questions that were examined, copyright issues relating to EROMM have been at the centre of research carried out on behalf of the German partner by Detlef Kröger of the Institute for European law at Osnabrück.

For librarians it is especially important to know about limitations set by copyright under international law when looking at electronic information interchange. Three main cases may be distinguished:

1)information filed as an item in an *index*

This is the case of a bibliographic record that gives formal description of a work (title, author, place and date of issue, publisher etc.) and does not contain more than standard classification codes and/or subject headings. The index here is represented by the database where the record is available.

2)information in form of an *abstract*

Abstracts aim at giving a very concise description of the intellectual content of a work. They may be linked to bibliographic records and filed in a database. The person who creates an abstract has to have specialised knowledge of the field of learning treated by the work in question. An abstract therefore exceeds the intellectual level necessary to produce ordinary bibliographic records.

3)*full text* of a work

Here the entire work is made accessible in digital form.

As far as EROMM is concerned case no. 1 only is of importance at present: bibliographic records describing the original work and the microform produced thereof are being exchanged among partners and may be made available to third parties. The microform on the other hand is a true picture of the original and it is easy to distribute as a duplicate. In the near future electronic media may become avaiable as support for preserving information. At that time case no. 3 will be as relevant to EROMM as is case no. 1 now.

Unhindered and low cost exchange of microform master data is a precondition to preserve a significant part of the world's printed heritage by coordinated microfilming. Subsequently the exchange of copies of works on microform will intensify. The present study, which was presented in its original form to the partners of the EROMM project in 1993, went a long way to examine all related aspects in the context of European, international, and national law. The original German language version of the study has been updated following recent developments on the European and national level.

In view of the study's importance not only for libraries cooperating with EROMM but far beyond this for a whole range of legal aspects relating to the reproduction of works protected by copyright and to document delivery it soon became obvious that an English version was required to reach a public unfamiliar with German.

I am grateful for funds contributed to support the production of the English version by Belgian, Dutch and German

partners cooperating under MICROLIB, a project funded in part by EU Directorate General X[1].

EROMM database set up at Göttingen

The SUB Göttingen has been chosen to host the EROMM database and provide related services. Libraries that wish to use EROMM data online are given their own user ID and password. Access is made by way of X.25 or Internet. At the same time records of all works microfilmed by them are sent at short intervals to the agency charged with collecting and converting microform master records into UNIMARC at the regional or national level. From there they are delivered to EROMM. In addition all EROMM partners are entitled to obtain all records on magnetic tape. A first CD-ROM edition will be available soon.

---

1. Lower Saxony's ministry of science and culture had taken the initiative to bring together experts from libraries and archives as well as publishers and specialists from the private sector to examine question of preservation by reformatting. Besides a series of three conferences MICROLIB presented a good opportunity to develop or start practical cooperation on a coordinated approach among institutions in different European countries. The five main partners involved were: Niedersächsisches Ministerium für Wissenschaft und Kultur (Hannover, project management), Bibliothèque Royale Albert Ier (Brussels), Pica Centrum voor Bibliotheekautomatisering (Leiden), Kultusministerium des Landes Sachsen–Anhalt (Magdeburg), and Thüringer Ministerium für Wissenschaft und Kultur (Erfurt). The conference proceedings have been published as vol. 7 of the series Göttinger Bibliotheksschriften as *Bestandserhaltung durch Konversion: Mikroverfilmung und alternative Technologien / Preservation by reformatting: microfilming and alternative technology* (Göttingen 1995), ISBN 3–930457–05–9.

Adding to the original four founding members new partners from Belgium, Denmark, The Netherlands and Switzerland have joined the EROMM group. The total number of records filed is now well above 300.000. When all the present partners will have sent their available data and with new partners joining some 400.000 records will soon be completed.

I thank Detlef Kröger for his unfailing engagement and deep interest when doing his research and for updating it several times following new legislation before it went to press. Viewing the positive development of enlarging international cooperation for preserving endangered library holdings I am glad that the present analysis of legal aspects can serve as reference to all who are involved.

II. International Law And Authors' Rights

The standard of authors' rights in international law will be analysed in the present section. On the one hand the provisions to be discussed provide an influential basis for the international traffic in cultural information to which the project being striven for remains open, and on the other hand provides a "source of recognition"[2] for the protection of fundamental rights at the level of the European Community.

In its endeavours to make the protection of fundamental rights a reality at the Community level the ECJ takes inspiration from, amongst others,[3] international treaties on the protection of human rights and also from "soft law".[4] In its judgment in "Nold" the ECJ makes express reference for the first time to "international treaties for the protection of human rights, in the signing of which the Member states participated or to which they have since acceded".[5] Express reference to "soft law"[6] as a source is to be found in the "Hauer"[7] judgment.

---

2. Cf. *Rengeling*, Protection of Fundamental Rights, p. 184.
3. See below for further sources.
4. *Pernice*, NJW 1990, p. 2409 (2413); *Rengeling*, Protection of Fundamental Rights, p. 179 ff; *Oppermann*, European Law, side note 413; *Feger*, Jura 1987, p. 6 ff.
5. ECJ 1974, 491 (507) – Nold, Case. 13.
6. Cf.*Pernice*, NJW 1990, p. 2409 (2415) for a more detailed consideration of the relevance of "soft law" in Community Law. See also *Rengeling*, Protection of Fundamental Rights, p. 183; *Bothe*, in: FS Schlochauer, 1981, p. 761 ff.; *Everling*, in: GS f. Constantinesco, 1983, p. 133 ff.; *Wellens–Borchardt*, ELRev. 1989, p. 267 ff.; *Ericke*, NJW 1989, p. 1906 ff.; *Everling*, EuR 1990, p. 195 (219).

Upon examination of later international agreements, which include the Member states of the Community, it is valid under both these aspects to highlight the minimum standard. This latter point is of relevance to the project. By way of contrast the conflict of laws element of international copyright is not discussed.[8]

1. The Berne Convention

Alongside the Universal Copyright Convention the Berne Convention for the Protection of Literary and Artistic Works of 9th September 1886 with its successive drafts[9] represents the most significant international instrument for the protection of the rights of the author. The Revised Berne Convention (RBC) is of particular significance for "European Copyright". On the one hand reference is repeatedly made to the RBC in many directives (and directive–proposals) and on the other hand there exists the proposal for a decision of the Council concerning the

---

7 ECJ 1979, 3727 (3745) – Hauer, Case 15; but also ECJ 1986, 1651 (1682) – Johnston, Case 18. The reference point was the "soft law" of the Community legal order.

8. Cf. on this point *Hubmann/Rehbinder*, Copyright and Rights of Publication, p. 69 ff.; *v. Bar*, Private International Law Vol 2; *ibid.*, Territoriality of trademarks and the exhaustion of the right of distribution in the Common Market; – particularly for further substantiation.

9. Completed in Paris on the 4th May 1896, revised in Berlin on the 13th November 1908, supplemented in Berne on 20th March 1914 and revised in Rome on the 2nd June 1928, in Brussels on 26th June 1948, in Stockholm on 14th July 1967 and in Paris on the 24th July 1971(Federal Law Gazette. 1973 II, p. 1071) and altered on the 2nd October 1979 (Federal Law Gazette 1984 II, p. 81).

entry of the Member states to the Berne Convention in its Paris Version of 24th July 1971.[10]

The creation of the Berne Convention was preceded by the call of authors such as *Victor Hugo* and *Emil Zola* who supported the setting up of international treaties to protect the rights of authors.[11] Germany, France, Great Britain, Ireland, Haiti, Italy, Liberia, Switzerland and Tunisia were the founding members of the Berne Convention. The Assembly of Delegates (Art. 22 RBC), the Executive Committee (Art. 23 RBC) and the International Office (Art. 24) together make up the organs of the Organisation. According to its legal nature the present version, namely the RBC[12], is a treaty of international law many pages long. The states which are party to the treaty have acceded to a union of states having legal personality for the protection of the rights of the author (Art. 1).[13]

A particular historical anomaly must be pointed out. The statesstates party have acceded to different versions. By way of example Argentina, South Africa and until 1989 the

---

10. Commission proposal, Official Bulletin C 24 of 31.1.1991, COM (90) 582 and Bull. EC 12 – 1990, figure. 1.3.169; position adopted by the WSA, Official Bulletin C 269 of 14.10.1991 and Bull. EC 7/8 – 1991, fig. 1.2.79; position adopted by the European Parliament in first reading, Official Bulletin C 326 of 16.12.1991 and Bull. EC 11 – 1991; Acceptance of an altered proposal via the Commission of 14th February, Official Bulletin C 57 of 4.3.1992 and COM (92) 10.
11 *Raestad*, Le Convention de Berne, Paris 1931, p. 9.
12. In the altered draft of 2nd October 1979 (Federal Law Gazette 1984 II, p. 81).
13. Cf. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 11 III 1 (p. 73).

UK acceded to the Brussels version whereas Roumania, Iceland and Canada acceded to the Rome version. Because there is no obligation to accede to the most recent version Art. 32 RBC governs the relationship of the various versions of the Convention.[14]

As of 1.1.1990 84 Member states were party to the Convention.[15] The entryof the USA on 1.3.1989 has to be seen as one of the most significant accessions to the Convention.[16] China's membership became effective as of the 15th October 1992. On the 12th June 1992 Slovenia declared that the RBC in its Paris version was to have continued effect upon its national territory.[17] At the time of writing the successor states to the former Soviet Union have yet to join.[18] Nevertheless the number of states party to the Convention is large.[19] Amongst the states which are presently participating in the project Germany, France, Portugal and the UK have acceded to the current Paris version.

---

14. Cf. *Nordemann/Vinck/Hertin/Meyer*, Art. 32 BC, side note 1; *Maus*, digital copies, p. 119 f.
15. According to GRUR Int. 1990, p. 316.
16. On this point cf. *Nordemann/Scheuermann*, GRUR Int 1990, p. 945. Recent entrants (ie post 1.1.1992) include the following states: Bolivia (4.11 1993), Bosnia–Herzegovina (6.3.1992 – entry is subject to the preservation of rights over translation), El Salvador (13.2.1994), Zambia (7.3. 1993), Jamaica (1.1 1994), Namibia (24.12.1993), Nigeria (14.9.1993). St. Lucia (24.8.1993), Switzerland (25.9.1993) and the Czech Republic (1 1 1993).
17. Cf *Delp*, Geistiges Schaffen, p. 253 (at side note 322).
18. Cf *Delp*, Geistiges Schaffen, p. 253 (at side note 323).

The RBC is of increasing interest to the European Community because efforts are presently being made to have the Convention serve as the basis for the harmonisation of copyright laws within the Community. The accession of all Member states to the current version is as much up for consideration as is the accession of the Community in its entirety.[20]

a) Rights From the RBC

The rapid technological development especially in the fields of copying, of the display of private sound and pictorial recordings, of cable and satellite television and the commercial exploitation of protected works in computers and in computer programmes themselves means that ever greater demands are being made for their legal registration. In connection with the project the important question which is raised concerns the rights of the author in

---

19 According to GRUR Int. 1992, p. 380 as of 1.1 1992. the following states had acceded to the Paris version of the RBC: Argentina, Australia, Austria, Bahamas, Barbados, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Central African Republic, Chile, Columbia, Congo, Costa Rica, Cyprus, Denmark, Ecuador, Egypt, Finland, *France*, Gabon, *Germany*, Ghana, Greece, Guatemala, Guinea, Guinea–Bissau, Hungary, Honduras, India, Ireland, Italy, Ivory Coast, Japan, Lesotho, Liberia, Libya, Luxembourg, Malawi, Malaysia, Mali, Malta, Morocco, Mauretania, Mauritius, Mexico, Monaco, Netherlands, Niger, Norway, Paraguay, Peru, Phillipines, Poland, Portugal, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Surinam, Sweden, Thailand, Togo, Trinidad and Tobago, Tunisia, Uruguay, *UK*, USA, Vatican City, Venezuala, Zambia, Zimbabwe and Zaire. The states which are in italics are participants in the project.

20. On this point see below.

respect of the admission of his title and, via microtechnology, the reproduction of the author's work. The RBC provides legal rules and rights of minimum protection for the solution of this problem. It is necessary to consider these.

aa) Treatment as a National

One of the basic principles of Berne Convention is the principle against discrimination. This principle stems from the concept of preventing discrimation against both the the rights and intangible property interests of foreigners. The basic principle concerning treatment as a national is laid down in Art. 5 para. 1. It reads as follows:

> "For the works protected by this Convention, the authors enjoy in all countries of the Union, excluding the country of origin of the work, the rights which the relevant laws presently grant to national authors or will grant hereafter, as well as the rights specially granted by this Convention."

It is by this comparability clause that international copyright protection is granted. By way of example, as a result of of Art. 2 para. 1 of the Paris Convention for the Protection of Industrial Property[21] and of Art. II of the Universal Copyright Convention this basic principle has become part of this Convention. It is because both foreigners and nationals are treated equally that one can speak of the principle of assimilation.[22] According to this principle foreign

---

21 Cf. *Bodenhausen,* Paris Convention for the Protection of Industrial Property, p. 25

22. *Christians,* Intangible Property Rights and GATT, p. 110.

authors enjoy in countries the same level of protection which these countries grant to their own national authors. Included within this protection are all the individual rights which the author has in his own work.[23]

The clause in Art. 5 para. 1 of the Berne Convention, "for the works protected by this Convention" was introduced by the Paris version. In this way the protection afforded is linked to the definition of a work in Art. 2 para. 1 of the RBC.[24]

As is expressly emphasised by Art. 5 para. 2 of the RBC the protection afforded is in no way linked to the carrying out of formalities of any nature. In accordance with Art. 5 para. 2 the extent of protection follows the legal rules of the country in which it is claimed.[25]

From a conflict of laws perspective the territoriality principle is given recognition, because the protection of the intellectual property of foreigners accords with the law of the country offering protection.[26] By way of exception and as Art. 5 para. 1 of the RBC points out, this basic principle is overridden by the inclusion of "special laws", which should apply in all countries which are a party to the Convention. Beyond this the national legislature has a wide discretion in setting its own laws.

---

23. *Bergsma,* Treatment as Nationals, p. 75 f.
24. See also II. 1. a) bb). Cf *Franz,* Difining a Work, p. 113 ff., also *Vaver,* GRUR Int., S. 191 (195 ff.)
25. Cf. BGH , NJW 1992, p. 2824 - Alf
26. *Beier,* GRUR Int. 1983, p. 339 (342).

In this way countries whose legal, economic and social standards vary greatly are, by reference to the "special laws" referred to in Art. 5 para. 1, allowed to join regardless of the level of protection which they offer. This has contributed to a wide extension of the Berne Convention. On the other hand however, it has to be conceded that this extension has been at the expense of a uniformly high level of protection.

According to Art. 5 para. 4 of the RBC the country of origin of a published work is the country in which the work is first published. Should the work be published simultaneously in more than one country party to the Convention then the country with the shortest duration of protection is treated as the country of origin.

According to Art. 3 RBC the protection exists fundamentally for works of the Convention countries. However, in the light of Art. 3 para. 1 litt b) of the RBC the works of authors who are non-nationals of countries party to the Convention are protected should the work first appear in a country party to the Convention or at least be published simultaneously in a country party to the Convention. In this way the place where the work is first published plays a decisive role by way of linkage. Art. 3 para. 2 of the RBC affords to those authors who have their usual place of residence in a country party to the Convention, the same rights as is afforded to nationals of that country.[27] Thus the protection of the work is indepent ofthe nationality of the author.[28]

---

27 Cf. *Bergsma*, Treatment as Nationals, p. 56 f

28. Cf. *Bergsma*, Treatment as Nationals, p. 50 ff

bb) The "work" term

(1) General Area of Applicability

The RBC principally covers "literary and artistic works." This particular formulation which appears in Art. 1 RBC is defined in greater detail in Art. 2 RBC. From this various works of relevance for the project are emphasised. In the context of this analysis it is worth asking which works are in fact protected by the Convention. Furthermore there is also the issue of whether there are other rights linked to the Convention which are to be taken into account in the context of the project. There is no exhaustive definition in Art. 2 para. 1 RBC.[29] An extensive consideration is permissible of what is intended under the category of "books, brochures and other literary works"– an express category to be found in Art. 2 para. 1 of the RBC. The more comprehensive provision of the term "written work" should serve as a starting point. This latter is defined as "a specific thought content which has been created via the medium of language and has been recorded in some way"[30] and thereby allows further interpretation.

Written works which have been recorded in different ways can be covered by the term as found in Art. 2 para. 1 RBC[31]: books, brochures, books in braille etc. Written works recorded on microfilm or on CD satisfy these requirements. The copied version of a written work is also

---

29. Cf *Masouye*, Art. 2 RBC, ref 2.7
30. *Bappert/Wagner*, Art. 2 RBC, side note 3 (p.52).
31. Cf the formula proposed by *Bappert/Wagner*, Art. 2 RBC, side note. 3 (p. 52).

covered by the term and thus its legal protection must be considered.

In Art. 2 para. 2 RBC it is left to the legislatures of the states party to the Convention to make the protection of literary and artistic works dependent upon such works being "fixed in some *material form*."[32]

In addition to the categories specified in Art. 2 para. 1 RBC there exist special provisions for further categories according to the following paragraphs. These paragraphs differ in that some of them allow states party to the Convention to designate works as such (paragraphs 2, 4 and 7), others which allow derivative rights (paragraphs 3 and 5) and finally paragraph 8 which expressly excludes protection.

It has to be borne in mind that according to Art. 2 para. 4 RBC the legislatures of states party to the Convention retain the right to protect official texts of a legislative, administration and legal nature as well as official translations of such texts. According to Art. 2 para. 8 protection is not given to "news of the day or to miscellaneous facts having the character of *mere items of press information*."[33]

(2) Recognition in States Party to the Convention

It remains to consider the cases in which the principal theme is the recognition of the work in a particular country

---

32. Author's own emphasis.
33. Author's own emphasis. On these specific points see *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2bis BC side note 5 (p. 47).

of protection.[34] In this regard the principle of assimilation is of central importance. For those instances where the requirements to qualify as a work are higher than in the country of the work's origin, then those more stringent demands must be satisfied in order that the work acquire protection. The example of the protection of titles makes this clear. A protected title of an Italian work which is protected according to Art. 100 of the Italian Copyright Law can only make claims to a comparable level of protection in a German–speaking country if and when it corresponds to the more stringent demands of these (ie German–speaking) countries for recognition as a work.[35]

Should on the other hand the country of protection offer a more generous level of copyright protection than the country of origin then the author can simply make claim to the level of protection as offered by the provisions of his country of residence. As far as the protection of computer programmes is concerned this means that the country of origin is free to protect such computer programmes as works. The absence of any rule in Art. 2 RBC means that a minimum guarantee is not given. If a national rule is effected then every author is entitled to claim this protection.

Finally if specific products are treated in a country of protection as if they were works without having properly qualified to be treated as such, then according to the RBC they

---

34. Cf the representation of *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2bis BC side note 3 (p.45 f).
35. This example is given by *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2bis BC side note 3 (p. 45)

remain without protection. This point can be traced back to the fact the the RBC does not guarantee specific rights as such but rather that they are essentially linked to the term work. The same applies also for the claim to be treated as a national.

The *ius conventionis* is used in the following instances: an author can appeal directly to the Convention where in a protecting country what is a work according to the RBC is generally not being protected. The same applies where the protecting country protects the work not via copyright but rather via some other statute, an example could be by way of statute on unfair competition. Here too the author is entitled to rely directly on the *ius conventionis*.[36]

(3) Special Cases of Relevance

(a) Derivative Works

In Art. 2 paras. 3 and 5 RBC references are made to works which pertain not to the original work but rather to *derivative forms* of the original. Art. 2 para. 3 RBC extends to translations, adaptations and other alterations the same protection as is enjoyed by original works. Art. 2 para. 5 RBC is in the following terms:

> "Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected

36. In the Brussels or Paris version of the RBC.

> as such, without prejudice to the copyright in each of the works forming part of such collections."

A special case is the so–called editio princeps.[37] This does not so much concern the creation of a work itself but much more the manufacture and reproduction of an old text.[38] Comparable with this are editions of more recent scientific works which are no longer subject to copyright.[39]

This will be relevant via the extended protection offered in paragraphs 3 and 5 especially in the operation of such works in the context of the project. This far reaching protection in Art. 2 paras. 3 and 5 must be understood in the context that it refers to a "work" as understood by the RBC.[40] The necessity of satisfying the characteristic properties of a work arises from the Documents of the Brussels Conference 1994[41], where it is written:

> "The Conference has deemed it unnecessary to make special mention that these works (which are listed in Art. 2) must represent an intellectual creation because when we speak of works of literature and art this is already a technical

---

37 Cf generally on this point: *Mertens*, J., The Copyright Protection of a Publisher's Historical Texts, Aarau 1948; the key word editio princeps in *Pinner*, World Copyright II, p. 562 ff.; *Ekrutt*, The Protection of "editio princeps", UFITA 84 (1979), 45.

38. Cf *Bappert/Wagner*, Art. 2 RBC, side note 7 (p. 53).

39. *Hubmann/Rehbinder* – Copyright and Rights of Publication, § 22 2 (p. 135)

40. Cf *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2 bis BC, side note 4 (p. 47).

41 Cited according to *Nordemann/Vinck/Hertin/Meyer*, Art. 2 /2 bis BC, side note 1.

> term which indicates that it is a personal creation, or better expressed, an intellectual creation in the field of literature and of the arts."

The special connection with the term work is confirmed in Art. 2 para. 5 RBC via the formulation "by reason of the selection and arrangement of their contents, constitute *intellectual creations*."[42]

If the term work were to be interpreted strictly the characteristic of intellectual property would be missing from many texts as copyright does not relate to simply edited text.[43]

Annotated editions, which are based upon a special scientific endeavour, must be excluded from the above. In thiscategory it is not simply a matter of repeating the text as such but rather in addition the publisher makes additions, fills gaps, reorders the text etc.[44] It is to be observed that the academicmachinery applied, itself represents a personal intellectual creation. As far as the protection of copyright is concerned such academic machinery comes in for independent consideration via the further provisions of the Convention.[45] In this way the protection offered by the Convention remains predominantly limited to copyright.

---

42. Author's own emphasis.
43. *Ulmer*, Copyright and Rights of Publication, § 14 (p. 88).
44. Cf. *Bappert/Wagner*, Art. 2, side note 7 (p. 53), which attribute protection to the editio princeps. Against this the contrary observation offered appears preferable.
45. Cf. *Ulmer*, Copyright and Rights of Publication, § 22 2 (p. 135).

By way of contrast *German copyright law* assumes that a scientific edition represents primarily a significant scientific achievement and therefore editions of texts not covered by copyright are, according to § 70 German Copyright Act, "protected if they represent the result of a scientific effort and if they are distinguishable in substance from previous editions of the works or texts."[46] Editions of lesser works lacking in scientific benefit are granted special related rights according to § 71 German Copyright Act. In this regard it is a particular requirement that the work has not yet appeared.[47] According to § 70 para. 3 and § 71 para. 3 German Copyright Act the term of protection is only 25 years.

(b) Protection of Title

It is debatable whether the title which the author gives to his work is governed by the scope of the RBC and thereby enjoys protection. However it is certain that an unauthorised use of the title affects the interests of the author. According to what has already been said the title of a work only enjoys protection if it is itself a work as understood by the RBC or – and this next point is based upon the application of the principle of national treatment– if the title enjoys the protection of copyright in the particular countries concerned. The qualification that a title has to be a "work" as understood by the RBC is a consequence of the

---

46. Cf. also the commentary of *Loewenheim*, in: Schricker, Copyright Law, § 70, p. 845 ff

47 For more on this point see *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 54 I (p. 260) and *Loewenheim*, in Schricker, Copyright Law, § 71, p. 849.

express formulation "literary and artistic *works*" to be found in Arts.1 and 2 RBC.[48]

The title represents a work or part of a work "if it expresses the individual spirit in a phase of its development,....and not, if it contains perhaps only a single, original thought."[49] The protection of title draws a distinction between an external protection, by which is meant the use of the title for another work, and an internal protection, which concerns the interests of the author to determine content and to prevent changes thereto. The protection of title externally is achieved in German law primarily via competition law[50] and where appropriate also by trademark law.[51] Copyright protection also comes in for consideration.[52] Because the original title is rarely a harmonious linguistic construction, as it only represents a symbol of the work, it is only on rare occasions that the title is itself the subject of copyright.[53]

The internal protection of the title is connected with the rights of personality.[54] The very minimum of this element

48. Cf *Bappert/Wagner*, Art. 2 side note 5 (p. 53).
49. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 1 (p. 255).
50. §§ 16 and 1 Copyright Competition Act. (§ check out UWG).
51 Cf. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 2,3,4 (p. 256 ff.); *Ulmer*, Copyright and Rights of Publication, § 31, p. 174 ff.
52. Cf. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 1 (p. 255), *Ulmer*, Copyright and Rights of Publication, § 31 III (p. 173) for further reference.
53. Cf. *Ulmer*, Copyright and Rights of Publication, § 31 III (p. 173) For exceptions see p. 173 f , *Bappert*, GRUR 1949, p. 189 (190), *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 1 (p. 255).

of the author's rights is to be able to oppose any unreasonable expression which would endanger the author's reputation.[55] Furthermore the right of the author to watch over the link between title and work is to be observed.[56]

§ 39 German Copyright Act asserts that the possessor of a right to use a work may not alter fundamentally the work, its title or its copyright description.

In other states party to the Convention the protection of the title is linked to the title itself being a work. This prerequisite of copyright is mostly taken into account when applying the principle of treatment as a national.[57]

For the project this means:

The protection of the internal element of title is not disturbed where the title is added to a list of titles (title register), because it is clearly not intended either to change the title or to disturb the link between the title and the work.

The protection of the external element of title can remain generally unconsidered because it is only on the rarest occasions that the title will represent a "work". In addition to this it is noteworthy that the protection of title is linked now and again to particular (shortened) *terms of protection*. In instances where the term of protection has expired

---

54. *Hubmann/Rehbinder*, Copyright and Rights of Publication , § 53 III 1 (p. 256), *Ulmer*, Copyright and Rights of Publication, § 31 (p. 172)
55. Cf *Ulmer*, Copyright and Rights of Publication, § 31 III (p. 173)
56. *Ulmer*, Copyright and Rights of Publication, § 31 (p. 172)
57 Cf. *Bappert/Wagner*, Art. 2 side note 5 (p. 52), for further comment.

the work together with the title becomes common property. As far as the use of the title is concerned this means that it can be used when printing the work.[58] The problem of the protection of title is not so pressing in such cases.

It is the case that as long as the old work is still in circulation the title is protected against its being used for a new work. If this were not so public confusion would be unavoidable.[59] As soon as the old work is out of circulation the title can be used, and furthermore used as the basis of copyright in another work.[60]

In summary as far as protection of title is concerned it can be stated that a use of the title with reference to the work is possible via its adoption onto a title register without thereby affecting any protective rights existing in respect of the title. The protection of the title is guaranteed in so far as a use of the particular title is not anticipated for another work. In this way the external protection of title is guaranteed. On the other hand the author's interests to prevent changes and misuse are granted and this satisfies the internal protection of title.

---

58. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 2 d) (p. 258).
59. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 53 III 2 d) (p. 258); Munich Higher Regional Court UFITA 21, 1956, 81
60. Cf Munich Higher Regional Court UFITA 20, 1955, 208 – "On the Beautiful Blue Danube;" Munich Higher Regional Court UFITA 21, 1956, 81 – "At the well before the gate"

(c) The Protection of Databases

The protection of databases is a much more troublesome area. This is as much so for international law as it is for the individual states party to the Convention.[61] There is no express provision in the RBC for the protection of databases. It appears possible to describe databases as "collections" in the sense of Art. 2 para. 5 of the RBC as referred to already.[62] In order to be able to be understood as "works", these *collective works* must, according to Art. 2 para. 5 RBC, "constitute intellectual creations by reason of the selection and arrangement of their content." In a comparable way databases are understood in German academic writings as collective works according to § 4 German Copyright Act – but also as "written works" according to § 2 para. 1 Nr. 1 German Copyright Act. And here too the question is raised whether a personal intellectual creation is present and above all what demands are to be set in this regard.[63]

According to the commentary of *Masouye*, which does not make express reference to databases, there has to be a creative element present and this is not satisfied when only a simple listing of works or parts of works is present. Such a simple listing lacks a personal contribution.[64]

Only an obviously negative selection will be able to be carried on under such a heading. Meanwhile the problem of dealing with databases is more difficult.

---

61 For further on this point see below.
62. See also *Katzenberger*, ZUM 1992, p. 332 (333).
63. See below for further details on this point.
64. *Masouye*, Art. 2 para. 5 RBC, reference 2.19

With the registration of newer technical possibilities which are not subject to any express provision, the familiar problem arises whether *the interpretation of the terms in the Convention* follows exclusively according to national provisions and courts,[65] or whether the terms are to have the meaning as laid down in the Convention.[66]

If the former version were to be used then a more exact consideration would be pointless, because it would depend upon the particular national rule having to be analysed. In relation to the protection of databases it would also depend upon the provisions in the participating states party to the Convention. As to the second option a more exact consideration would be useful because an answer could arise with regard to the possibility of protection stemming from the Convention.

Reference must be made immediately to one point in the discussion. An interpretation especially as to whether the term "work" as understood in the Convention has been satisfied must not under any circumstances be confused with the idea of maximum protection,[67] which emerges from this interpretation. In view of Art. 19 RBC such an interpretation has to be rejected.[68] It is much more the case that a minimum protection is at point.

The *formal* opinion, namely that the RBC is only to be applied as a body of rules according to which aliens are

---

65. This is the view of *Nordemann*, GRUR Int. 1989, p. 615; *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2 bis BC, side note 1,3.
66. This is the view of *Vaver*, GRUR Int. 1988, p. 191 (199)
67 See *Vaver* GRUR Int. 1988, p. 191 ff.
68. Cf. on this point *Nordemann*, GRUR Int. 1989, 615 ff

not to be treated differently fromnationals of the country concerned, is fundamentally in accord with this.[69] Yet the consequence which can be drawn from this, that every interpretation can only enjoy success in a national context,[70] goes too far.

In the years following the establishment of the Berne Convention the question whether a State party to the Convention could refuse the protection of a category appearing in the Berne Convention was represented as being a purely hypothetical question because a work was only covered by the Convention if all countries, on the basis of their own national laws, agreed.[71] Yet given the multiplicity of states party to the Convention and the prospect of additional members – one has only to think of the territory of the former USSR – the situation, function and status of the Convention has become something altogether different.

The adoption of minimum rights, which should reach a certain standard, is observable. It appears justified not to surrender entirely the interpretation to national preferences, but to interpret the meaning of the terms in the Convention – watertight in terms of international law – from the perspective of the Convention itself. In this regard *Eugen Ulmer* talks of an interpretation "in the light of the object and purpose of the Treaty"[72] and also "where

---

69. Cf. also German Federal Court, GRUR 1973, p. 49 (50 f.); German Federal Court, GRUR 1975, p. 361 (363 f.).
70. *Ikle*, The Pertinent Competence of the Berne Convention, UFITA Vol. 14 (1941), p. 365 ff. (370 f.).
71. Cf. *Ikle*, The Pertinent Competence of the Berne Convention, UFITA Vol. 14 (1941), p. 365 (371).

the Convention uses legal terms, which are characteristic of the separate legal systems but are terms which in the various national legal systems mean different things."[73]

An interpretation of the Convention which is so "internally based" can set certain minimum standards of protection in most cases. Furthermore the states retain an area of legislative discretion which is of significance for the principle of treatment as a national (the national principle) for foreign authors. This is also consistent with Art. 5 para. 2 sentence 2 of the RBC. This provision leaves the extent of protection along with the legal remedies granted to the author exclusively to the national legislature, nevertheless only "insofar that this Convention has made no other provision." On the basis of this retention and the transfer of the extent of protection it is made clear that the provisions of the RBC can have their own meaning as against the national legislature.

In relation to the question originally posed, whether databases can be regarded as collective works in the context of Art. 2 para. 5 RBC, it is clearly correctthat an interpretation of the Convention which is "internally based" can be looked into (or be postponed).

Databases includes *collections* of all sorts of material in electronic form such as numbers, dates, facts, texts, pictures and sounds.[74] Whether the information taken up into

---

72. With reference to Art. 31 WVRK: *Ulmer*, GRUR 1974, p. 593 (597).
73. *Ulmer*, GRUR 1974, p. 593 (597).

the database exists in classical form in encyclopaediae, anthologies, documents etc or in an electronic database .

Art. 2 para. 5 RBC talks of collections of "literary and artistic works". This formulation has no exclusive significance as on the one hand the expression "literary and artistic works" is according to Art. 1 and 2 used in the RBC as a comprehensive heading for entire categories of works and on the other hand in this context there must be no difference between the content of databases and other collections.

The decisive characteristic for a collection's classification as a work is, as mentioned above, that the selection and arrangement of their contents constitute intellectual creations.[75] Because it could be stated up to now that databases can be treated essentially as non–electronic collections, the same also applies here. This means that whenever databases from their nature undoubtedly represent an intellectual creation, they are then covered by the work term in the RBC. The necessary intellectual creativity exists in the selection and arrangement of the material in the database, whereas the material on its own does not have to be copyright. This means furthermore that its character as a collective work depends upon the arrangement

---

74. *Hillig*, ZUM 1992, p. 325; *Hackemann*, CR 1991, 305; *Mehrings*, Legal Protection, p. 59 ff for further reference., also Art. 1 para. 1 of the EC–Directive.
75. § 4 German Copyright Act talks of "those (things) which on account of selection and arrangement are a personal intellectual creation"

of the collected material and not upon the technical "know–how" of the particular programme being used.

The multi–layered argument in Germany on databases indicates that it is difficult to say exactly when the degree of arrangement exists so as to satisfy the requirement of intellectual creativity. As we are only concerned here with the stating of a minimum standard of protection the argument on databases will not be entered into here. If databases are considered – as could be expounded – in the same way as collective works then a personal intellectual creation is present if the material at hand is collected, sifted and compiled according to *individual* categories of classification.[76] This particular formula appears permissible because it uses for collections the subjectively–creative character, which is required for "works" generally, and furthermore at the same time it leaves open the existing discretion of the states party to the Convention to make their own formulations.

Despite the various formulations of the states party to the Convention an individual creative achievement in the selection of the content is required by German and French copyright law,[77] whereas in British law "skill and labour" suffice.[78] The US Supreme Court has also recognised a creative achievement as the prerequisite for the protection

---

76. The German Federal Court used this helpful formula. See GRUR 1982, p.37 (39) – WK – papers.
77. Cf. *Lucas*, Le droit de l'informatique, Paris 1987, p. 296 ff., 300 f.; Cour de Cassation, J.C.P. 1984 II 20189 – Microfor/Le Monde – cited according to Katzenberger, ZUM 1992, p. 332 (333)

of telephone directories, which are comparable to databases.[79]

With reference to the project it has to be emphasised that a title register does not exhibit these individual categories of classification, because a third party could also have recorded this documentation which records the title of the microform–copy.

Fot those cases where the minimum protection of the RBC does not apply there still exists the possibility of protection via the principle of treatment as a national.[80] In addition the international private law aspects of the protection of databases are to be observed.[81] Should a database satisfy the above mentioned criteria, thereby affirming its suitability for copyright protection according to the RBC, the question then arises as to when a database has arisen. According to the majority view it suffices that a copy is kept ready for online call up. This applies for the RBC in the same way as it does for German copyright.[82] The Universal Copyright Convention differs in that Art. VI thereof demands that the work can be sensed directly with the eye.[83]

---

78. *Copinger/Skone*, On Copyright, 12th ed., London 1980, p. 46 ff. (Side note 121 ff.) – cited according to *Katzenberger*, ZUM 1992, 332 (333).
79. U.S. Supreme Court, GRUR Int. 1991, p. 393 ff – white pages, with comments from *Hoebbel*.
80. Cf. for this reason the commentaries on german copyright which refer to databases.
81. Cf on this point *Katzenberger*, ZUM 1992, p. 332 (333 ff.) for further substantiation.
82. *Katzenberger*, ZUM 1992, p. 332 (336); *Goebel/Hackemann/Scheller*, GRUR 1986, p. 355 (356 ff., 360 f.)

cc) Minumum Rights of Protection

Art. 5 para. 1 RBC determines that special rights (droits speciales) are granted to authors according to the Convention. Authors in states party to the Convention should be able to rely*directly* on these rights.[84] In general these "special rights" are characterised as "minimum rights of protection", "special rights" or "basic rights".[85] It is the intention of rights of minimum protection to ground a unified – minimum – standard of protection in states party to the Convention. At the same time the hope of a continuously expanding worldwide level of protection is bound up with this. It can be said that only a unified set of rules concerning the treatment of foreigners and not a substantial law of copyright for the Convention states has been created, because *de lege conventionis* and the minimum rights of protection protect the rights of foreigners only.[86]

Having pointed out above which criteria have to be satisfied for the work term, the prerequisite for protection according to the RBC, it remains to consider the minimum rights of protection which are meaningful for the project. They represent a minimum standard beyond national guarantees which have to be taken into account.

---

83. *Goebel/Hackemann/Scheller*, GRUR 1986, p. 355 (361).
84. *Bergsma*, Treatment as a National, p.79.
85. Cf. *Bappert/Wagner*, Art 4 RBC, side note 28; *Troller*, Minimum Protection, p. 147
86. Cf. *Ulmer*, Copyright and Rights of Publication, § 14 IV (p. 91 f.); *Maus*, digital copies, p. 121; *Nordemann/Vinck/Hertin*, International Copyright, Intro. side notes 23 and 32.

The naming of "special rights" as minimum rights of protection (minimum rights) illustrates that the author can rely on them as a base level of protection. The "iures conventionis" grant to the author in states party to the Convention outside the country of origin a general minimum protection to which he can make special appeal should the protection offered by the principle of national treatment not suffice. In contrast the issue as to maximum rights has been settled since the Stockholm Conference.[87]

The relationship between the principle of national treatment and rights of minimum protection can be described as a relationship of rule and exception. Cases where the principle finds application are those where national law offers a higher level of protection than the minimum rights and where the minimum rights and respectively the definitions of the legal terms used do not specify mandatory protection via the Convention.[88] This last applies to the definitions of the terms used for authors[89] and for a protected work.[90]

Art. 19 allows for rules which are more "copyright–friendly" to be applied:

> "The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union."

---

87 See *Nordemann/Vinck/Hertin/Meyer*, Art. 5 BC, side note 4.

88. Cf. *Maus*, digital copies, p. 121

89. See *Maus*, digital copies, p. 124 f. for further substantiation.

90. For the term "work" see above. See also *Nordemnann*, GRUR Int. 1989, p.615 ff

In this way the author has the right to choose whether he wants to base his claim on national rights or upon the rules of the Convention.[91] It is thus via the minimum rights provisions that a departure from the national principle is made possible.[92] According to general opinion the principle of exclusivity applies with regard to the minimum rights of protection. This is not expressly stated as a principle by the RBC, and yet by way of example Art. 9 para. 1 contains the formulation: "the exclusive right". To this extent a general application appears permissible.[93]

By way of contrast the application of the "ius conventionis" cannot be relied on directly by nationals. The national legislature will in most cases have an interest in ensuring that its nationals are not placed in a position inferior[94] to that of foreigners protected by the Convention.

The requirement in Art. 2 para. 6 RBC that the works appearing in the Convention catalogue enjoy the protection in all states party to the Convention is valid as a minimum right. This is especially so for those cases in which the *lex loci protectionis* does not protect specific named works in the RBC.[95] In any case via Art. 2 para. 2 RBC the

---

91 Cf *Bergsma*, Treatment as a National, p. 80; *Bappert/Wagner*, Art. 4 RBC, side note 29; *Nordemann/Vinck/Hertin/Meyer*, Art. 5 BC, side note 3.

92. *Reimer/Ulmer*, Reform of the Substantive Law Provisions of the Berne Convention, GRUR Int. 1967, p. 431 (433); *Khadjavi–Gontard*, The Principle of National Treatment in International Copyright Law, 1977, p. 81; *Nordemann/Vinck/Hertin*, Art. 2 BC, side note 6; *Bergsma*, Treatment as a National, p. 80.

93. Cf. *Maus*, digital copies, p. 122 f.

94. Cf *Nordemann/Vinck/Hertin*, International Copyright Law, Intro. side note 32.

states party to the Convention are entitled to give protection independent of whether the work has been fixed in a material form.

The standard of minimum rights has been progressively extended at successive revision conferences. In essence it concerns rights of translation, rights of adaptation, of recitation, of performance, of transmission as well as filming rights, the moral rights of the author and the rights over the reproduction of the work. A systematic development of "special rights" in the context of the Convention does not exist.[96]

It is stated in the second sentence of Art. 5 para. 2 that "the *extent* of protection, as well as the *means of redress* afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."[97] This is so "in so far as this Convention does not provide otherwise." This is to be observed in the measurement and execution of the minimum rights of protection.

The following considers how far the minimum rights of protection are of significance for the project.

---

95. *Khadjavi–Gontard*, Principle of Treatment as a National in International Copyright Law, p. 81; *Nordemann/Vinck/Hertin/Meyer*, Art. 2/2bis BC, side note 2 (p. 44); *Reimer/Ulmer*, GRUR Int. 1967, p. 431 (433).

96. According to *Ulmer*, Copyright and Rights of Publication, § 14 (p. 92).

97 Author's own emphasis.

(1) Rights of Adaptation

The right to authorise adaptations is one of the exclusive rights of the author governed by the RBC. Art. 12 RBC is as follows[98]:

> "Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works."

This provision is directed against each and every alteration of the work regardless of the quality of the alteration. The borderline between an adaptation and a "fair use" is to be decided in each case by the country of protection – compare the second sentence of Art. 5 para. 2 RBC.[99] An alteration taking the form of a shortening must be considered as permissible by way of exception. This is impliedly expressed in Art. 10bis para. 2 RBC and is inherently the rule in Art. 2bis, Art. 9 para. 2 and Art. 10 para. 1 RBC. Likewise the author's alterations, which become necessary via the authorised use of the work, must be accepted. The correction of obvious mistakes is also an exception to the general rule.[100]

As far as the project is concerned this means that by the reproduction of a work, alterations, modifications etc must not occur. A shortening of the work in this context must not

---

98. Cf. § 3 German Copyright Act.
99. *Nordemann/Vinck/Hertin/Meyer*, Art. 12 BC, side note 1 (p. 132) – for further substantiation.
100. For further on this point see *Nordemann/Vinck/Hertin/Meyer*, Art. 12 BC, side note 2 (p. 133).

happen provided there are no compelling reasons (eg the destruction of parts of the original) or otherwise material grounds for this. The removal of obvious mistakes in the text is allowable when laying down a bibliographic title register and also when making a copy.

In addition the question arises whether short summaries of content, whether or not released by the author, or sueseqwently adapted, can be added to a bibliographical notice. An independent summary does not raise major problems because here there is no visible adaptation of the work. The use of the author's summaries is unproblematic as long as this is made clear by way of citation. No alteration of the work is visible here as well because the work as such is not affected. It is much more the case of the citation of a short excerpt.[101]

(2) Rights over Translations

The right to authorise translations is found in Art. 8 RBC:

> "Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works."

The right of the author to authorise translations is a further minimum right granted by the Convention.[102] In the face of the exploitation of translations Art. 11 para. 2 RBC contains an additional guarantee in respect of dramatic or

---

101 Observe also the right to make copies of the work.

102. Cf. § 3 (first sentence) of the German Copyright Act.

musical works and so too does Art. 11ter para. 2 RBC which concerns the public performance and the public broadcasting of works.

In the context of the project it does not appear likely that this element of copyright will be affected.[103]

(3) Rights over the Reproduction of the Work

The problem exists whether the reproduction of a work and its dissemination in the context of the project affects the right of the author to authorise the reproduction of his work.

The right of the author over the reproduction of his work was introduced at the Stockholm Revision Conference (1967) as a minimum right. Prior to this there existed only a partial recognition of this right in respect of certain types of work in specific rules. This partial recognition could be found in Arts. 8, 9 paras. 1, 12–14, 16 of the Brussels version. Art. 13 RBC of the Brussels version referred by way of example to the mechanical reproduction of musical works and Art. 14 para. 1 of the Brussels version referred to film rights. On the other hand there was agreement that a recognition of rights of reproduction – prior to their express introduction – could be drawn from Art. 2 RBC.[104] A contributory factor for this was that all the states which acceded to the Berne Convention of 1886 absorbed into their national laws the statute on reproduction, so that the

---

103. For more detailed information on Art. 8 see *Nordemann/Vinck/Hertin/Meyer*, Art. 8 BC, side note 2 ff (p. 98 ff).

principle of treatment as a national helped this right (ie the right to authorise reproductions of a work) find expression.

(a) Art. 9 Para. 1 RBC: Reproduction

The right to authorise reproductions of a work is expressly governed by Art. 9 para. 1 RBC. This has been the case since the revised constitution following from the Stockholm Conference. It is expressed as follows:

> "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form."

According to this provision the author has the exclusive right to authorise the reproduction of his work regardless of the manner or form in which it is carried out.[105]

It is not fully clear what exactly is meant by *reproduction* in the sense of Art. 9 RBC.[106] Thence the question is raised as to the requirements of form necessary for a reproduction. An actual problem exists in regard to the possibilities

---

104. Cf. especially the programme of the Brussels Convention (Doc. Prel. Brussels, p. 58), *Renault* in general rapport of Berlin 1908 (cited by *Baum*, GRUR 1949, p. 1, 32) and: *Bappert/Wagner*, Art. 10 RBC, side note 1; *Nordemann/Vinck/Hertin*, International Copyright, Art. 9 RBC, side note – with reference to Arts. 7, 10, 12 RBC as a grounding point for a global right of reproduction; unchanged in *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC side note 1

105. Cf further on this: *Schricker/Katzenberger*, GRUR Int. 1985, p.98; *Nordemann/Vinck/Hertin* Art 9 RBC side note 1, *Maus*, digital copies, p. 127

106. Cf *Rickeston*, reference 810, *Maus*, digital copies, p. 130.

of the electronic saving of data in computer technology.[107] In the context of the project it has to be made clear what exactly the requirements are for a reproduction. Thus reproduction has to be distinguished from duplication.

The term "reproduction" is defined as the manufacture of an identical additional copy of the work.[108] As the decisive point it remains to clarify whether the reproduction requires the prior fixing of the work in material form and what the properties are which the copy must possess.

The wording of Art. 9 para. 1 RBC says: "in any manner of form (ie. of reproduction.)" From this wording the conclusion is drawn that the method of reproduction is irrelevant. Art. 9 para. 3 RBC is as follows:

> "(3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention."

This is righthly regarded as superfluous.[109]

Against this literal view it is argued that a more exact interpretation of the term is necessary in the light of the most recent technical developments in the computer field.[110] Because the term "reproduction" in this context is not fully clear the conclusion is made that, just as with the term "treatment as a national", so too here the formulation of

---

107 Cf. *Maus*, digital copies, p. 130; *Ricketson*, RBC, note 8.10.

108. *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 2.

109. According to *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 2

110. *Ricketson*, Art. 9 RBC, point. 8.10; *Maus*, digital copies, p. 130.

the term "reproduction" should be determined by national legislatures.[111]

Should this last formulation come to pass then as far as Germany is concerned the regulation in § 16 German Copyright Act would be of importance for giving substance to the term reproduction. The formulation and the corresponding protection in other states party to the Convention could be different, and offer less protection. But it is the intention of a minimum standard to create a unified standard of protection. To the extent that the question can be clarified according to a term from the Convention itself then this intent goes too far.[112] In this regard two issues have to be separated: the first is the form the document must have before there can be said to be a reproduction and the second is e as to the properties of the copy.

The differing linguistic version could be the common link the various views. Whereas in the German version reference is made to "Vervielfältigung", the English and French texts make use of the term "reproduction". According to Art. 37 para. 1 c. RBC the french text takes precedence in instances of conflict. From the term "reproduction" it can be concluded that a "production" must already have existed in a permanent form, from which a reproduction is possible by means of a photocopy or other form of reproduction.[113] This distinction becomes clear and meaningful when looking at the first recording of

---

111 *Ricketson*, Art. 9 RBC, point. 8.11

112. Cf the efforts of *Maus*, digital copies, p. 130 f.

113. According to *Maus*, digital copies, p. 130 f , *Stewart*, International Copyright, point 5.38.

a performance of a work. But Art. 9 para. 3 RBC makes this case clear in that the recording is put on the same footing as a reproduction.

As far as the project is concerned it is unproblematic to establish that *qua* reproduction books understandably have a sufficiently permanent form. Any additional copying is always to be seen in connection with the basic reproduction.

The further question as to what amounts to a copy is it is suggested covered firstly by the wording already referred to above and secondly via the circumstances of the rule. The wording, that it does not depend upon the method of the reproduction, is binding in international law. The following rule is applied: provided a clear and unambiguous meaning arises from the context of the contractual text, a departure from the actual wording can only be contemplated when not to do so would lead to an absurdity.[114] The World Intellectual Property Organisation has taken the position to the benefit of the Vienna Convention on the Law of Treaties.[115]

The customary international law contained in Arts. 31 and 32 of the Vienna Convention on the Law of Treaties views the grammatical, systematic and teleological inter-

---

114. Cf. *Verdross/Simma*, Universal, p. 137; *Froschmeier*, UFITA 23 (1957), p. 58; *Maus*, digital copies, p. 128.
115. WIPO document CE/MPC/I/2–III: Draft Model Provisions for Legislation in the Field of Copyright, Memorandum prepared by the International Bureau of the WIPO for the Committee of Experts on Model Provisions for the Legislation in the Field of Copyright, p.2, General Remarks, figure 4.

pretations as having equal footing as complemented by the fundamental principle of good faith (particularly Art. 31 para. 1 Vienna Convention on the Law of Treaties). According to Art. 32 the historical interpretation is a supplementary criterion. If the wording of the provision is unambiguous, then it must be the goal of an interpretation to serve the purpose of the Convention. It is the latter's purpose to ensure the efficient protection of works and on the other hand to make "the creation" accessible to as wide a public as possible.[116] Whereas the purpose of the efficient protection is visible in Art. 9 para. 1 RBC para. 2 enables exceptions to be created for the benefit of the common good. Exclusion via the narrowing of the term "reproduction" is not permissible. The inclusion of the newest methods of reproduction within the "area of protection" follows on this basis.

The rule in Art. 9 para. 3 RBC is also sufficiently determined. Furthermore the circumstances of the rule admit of an even–layered conclusion. At the Stockholm Revision Conference requests for a more precise definition of the term reproduction, eg the adoption of the French rule, were rejected as superfluous, because the term was believed to be *unambiguous* in its meaning.[117] Reproduction in the context of the RBC is, as in German law according to § 16 Copyright Act, every physical arrangement of the work, including *every reproduction* in one or several works, which is intended to make the work perceptible to the human senses in any direct or indirect way.[118] This under-

116. Cf *Maus*, digital copies, p.129 for further substantiation.
117 Cf *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (443)

standing of the term reproduction is also found in other German speaking countries: § 15 para. 1 Austrian Copyright Act, § 12 para. 1 Nr. 1 Swiss Copyright Act. It should also be remembered that agreement as to the recognition of rights over the reproduction of a work existed prior to the explicit rule in Art. 9 of the RBC. This was so because most of the states party to the original Convention recognised this right. Thus one can confidently speak of a general consensus in relation to rights of reproduction over a work.

All procedures concerning rights of reproduction are covered by Art. 9 para. 1 RBC: e.g. graphical reproduction, general printing techniques, photocopying, Xerox as well as records, cassettes, magnetic tapes, films, microfilms, mechanical or magnetic recording, also the reproduction in another literary form (demarcation to adaptation), and furthermore every saving of a work on a magnetic disc.[119]

As for the project this means that the usual practice of a library to make an identical copy requires a corresponding permission to the extent that the exclusive rights of the

---

118. Official reasoning BT– printed papers IV/270, p. 47; cf. also BGHZ 17, 266 (269 f.): (Official Collection of the Decisions of the Federal Court in Civil Matters). – Grundig–Reporter; German Federal Court, GRUR 1982, 102 (103) – Master Volumes; German Federal Court, GRUR 1983, 28 (29) – The making of press reports and the reproduction of works of art II; further Decisions of the Imperial Court 107, 277 (279) – Gottfried Keller; in detail on this point: *Loewenheim*, in: Schricker, Copyright, § 16 side note 2; *Ulmer*, Copyright and Rights of Publication, § 45 (p. 231).

119. Cf. on this point *Masouye*, Art. 9 RBC, point 9.2.

author over the reproduction of the work are affected as above or in a comparable way. Art. 9 para. 2 RBC creates exceptions to this basic principle.

It is certainly to be considered whether *information and documentation* is to be regarded as a copy in the sense of Art. 9 para. 1 RBC.[120] The term reproduction is, as has been pointed out already, comprehensive so that a copy is covered by make up and form and not by taking account of the purpose of the copy. It cannot be overemphasised that the RBC draws no distinction between reasons for the reproductionreproduction, whether it be private or commercial, whether it be for internal consumption or for the purpose of publication and regardless of the technical means used or the number of copies made.[121] It is correct to regard the saving of a work in a database as a reproduction.

The *input* of data can amount to a reproduction.[122] The prerequisite for this is always that the work term of the RBC has been satisfied.[123] Therefore the saving on disc of bibliographic details and mere headings amounts at most to a reproduction of material which is not subject to copyright.[124] Should the saving of data (information) concern works in the sense of the RBC, it is to be assumed that the input of the material onto the medium of storage (microfilm, computer etc) raises the issue of copyright.[125] Thus it is to emphasise that via the arrangement of the data in a saved form a physical anchoring takes place, which directly allows the saved information to be perceptible to the human senses.[126]

The distribution of copyright protected data is a reproduction in every case where a physical anchoring in the form of a copy or the saving of the information in a database results. By way of contrast distribution onto a screen does not represent a physical reproduction and is thus not to be regarded as a copy.[127]

For the project it is to be observed that the saving of works is a reproduction. Rendering this visible on a screen or reading apparatus is in this context irrelevant.

---

120. The copyright issue of "the position of conveying information", to which, in the classical view the libraries were a part, was considered in Germany in some detail in the 1970s: *Brutschke*, Copyright and EDV, Munich 1972; *Goose*, The Copyright Assessment of electronic and micro–film databases, UFITA, vol 53, Berlin 1975; *Katzenberger/Kolle*, The Copyright Assessment of Computer–Supported Parliamentary Information and DocumentationSystems, in News for Documentation 1972, p. 94 – 104; *Katzenberger*, Copyright and Documentation. Abstracts – Photocopies – Electronic databases, GRUR 1973, p. 629–640; *Kolle*, Copyright Problems of Documentation and Information: Copyright in a State of Tension with Information Technology and Information Policy, in: Steinmüller (edit.), Information Law and Information Policy, Munich 1976, p. 238 – 265; *Samson*, Copyright Issues of Data Processing, DVR 1977, p. 201–210; *Ulmer*, Copyright Problems in the Construction of Legal Documentation Systems, DVR 1976, p. 87 – 98; *ibid*, Electronic Databases and Copyright, Munich 1971; *ibid*, The Saving and Recovery of Copyright Protected Works via Computers, GRUR 1971, p. 297–303. Further: *Hackemann*, Information and Documentation from the Copyright Perspective – several observations on the present and future legal position, GRUR 1982, p. 262–273; *Mehrings*, Information and Documentation (IuD) – A Stepchild of the Copyright Amendment?, GRUR 1983, p. 275 – 290.

A particular problem within the field of data processing is the drawing up of a text of documentation which should be taken up into the database. The question is then at what point in time can a reproduction be said to exist. Distinction has to be drawn between Full text, abstract and index procedures.[128] It is the case that a full text copy of the original amounts to a reproduction because the complete original text is there.[129] The same applies for the adoption of parts or the adaptation of the original text because here too a reproduction is to be seen.[130] Compressed summaries are to be viewed as abstracts. A breach of copyright exists if the summary, which has been drawn up by the author himself, is adopted into the docu-

---

121. Cf. *Nordemann*, SGRUM 15, p. 128 (128); *Maus*, digital copies, p. 131.
122. Given the similarity of § 16 German Copyright Act to Art. 9 RBC cf: *Vinck*, in: Fromm/Nordemann, Copyright, § 16 side note. 1, *Hubmann/Rehbinder*, Copyright – and Rights of Publication, § 25 I (p. 131); *Ulmer*, Copyright and Rights of Publication, § 45 IV (p.232); *ibid.*, Electronic Databases and Copyright, p. 36; *ibid.*, GRUR 1971, 297 (300 f.); *v. Gravenreuth*, GRUR 1986, p. 720 (722); *Rupp*, GRUR 1986, p. 147 (148).
123. See above.
124. Cf Art. 2 para. 4 RBC and §5 German Copyright Act.
125. See *Ulmer*, Copyright and Rights of Publication, § 45 IV (p. 232).
126. *Katzenberger*, GRUR 1973, p. 629 (632); *Ulmer*, Electronic Databases and Copyright, p. 48.
127. *Loewenheim*, in: Schricker, Copyright, § 16 side note 9 (p. 292), *Ulmer*, Electronic Databases and Copyright, p. 51 f; *Katzenberger*, GRUR 1973, p. 629 (632).
128. Cf *Ulmer*, Copyright and Rights of Publication, § 45 IV (p. 232); *Loewenheim*, in: Schricker, Copyright, § 16 side note 10.
129. *Ulmer*, Copyright and Rights of Publication, § 45 IV (p. 232); *Loewenheim*, in: Schricker, Copyright, § 16 side note 10.

mentation, because this represents a reproduction.[131] A breach of copyright also occurs where a summary is intended to replace the reading of a work.[132] By way of contrast there is no reproduction where an element from the documentary source is drawn up in its own words and this text does not displace the reading of the work.[133] The indexing process is unproblematic. By indexing is meant simply that only headwords are taken from the original text. There is no question here of a reproduction.[134]

With particular reference to filming it remains to be said that this is seen either as a reproduction within the meaning of Art. 9 paras. 1 and 3 RBC or as an adaptation according to Art. 12 RBC. Because the project is not aimed at changes of relevant form, the aforesaid is without restriction valid as reproduction.

Whenever copyright is infringed or disturbed by copying the possibility exists that an agreement with the author has been affected. Because Art. 9 RBC concerns exclusive rights, as referred to above, the author can only make available to a third person a right of use. A direct transfer

---

130. Cf. *Loewenheim*, in: Schricker, Copyright, § 16 side note 10; *Ulmer*, Electronic Databases and Copyright, p. 44; *Ulmer*, GRUR 1971, 297 (298); *Mehrings*, GRUR 1983, 275 (284 passim).
131. Cf. *Ulmer*, GRUR 1971, p. 297 (298); *Mehrings*, GRUR 1983, p. 275 (282); *Loewenheim*, in: Schricker, Copyright, § 16 side note 10.
132. *Ulmer*, Copyright and Rights of Publication, § 45 IV (p. 232).
133. Cf. *Hackemann*, GRUR 1982, p. 262 (267); *Loewenheim*, in: Schricker, Copyright, § 16 side note 10.
134. *Loewenheim*, in: Schricker, Copyright, § 16 side note 10; *Katzenberger*, GRUR 1973, p. 629 (631).

of rights to reproduce the work is impossible.[135] Finally it remains to point out the exception within Art. 9 para. 2 RBC which makes an infringement of copyright possible under certain conditions.

(b) Art. 9 Para. 2 RBC: The Preservation of a National Right to Authorise Reproduction and the Limits to this Right

Of considerable significance is the legislative discretion granted to states party to the Convention in special cases. Thus Art. 9 para. 2 provides:

> "(2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

The discretion of national parliaments to create exceptions to the exclusive right of the author came into being after negotiations to find an adequate regulation. It proved difficult to find a formulation which covered all possible groups of cases belonging to the so–called "small exceptions", without the exclusive right of the author as a guaranteed minimum of protection being thereby affected.[136] On account of the rather open nature of the regulation it is also possible to include modern methods of reproduction such as sound and picture recording. The following call for

---

135. *Vinck*. in: Fromm/Nordemann, Copyright, § 16 side note 3.

consideration by way of exception: reproduction for private and personal use, for the purposes of the courts and police or for the administrative authorities, the reproduction of public speeches and lectures, the freedom to cite and to borrow, the reproduction of building structures in public places via drawing or photography, statutory licenses and compulsory licences etc.[137]

The discretion of the national legislature in relation to provisions for creating exceptions is linked to three preconditions: firstly the exception exists only "in certain special cases", secondly "the normal exploitation of the work" must not be interfered with and thirdly "the legitimate interests of the author must not be unreasonably prejudiced." Where a national law infringes Art. 9 para. 2 RBC the author can reley on Art. 9 RBC.

It is questionable whether a regulation of a State party to the Convention, which in the context of the project allows a reproduction in any way, is to be brought into line with the requirements of Art. 9 para. 2 RBC. Or from the alternative perspective: how much discretion does Art. 9 para. 2 RBC grant to a regulation of a State in the context of the project?[138] Thus knowledge can be gained of the interna-

---

136. Cf. *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (444); *Dittrich*, Stockholm version, p. 24 f. (footnote 20); *Bergström* report number 84; *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 3; *Masouye*, Commentary, Art. 9 para. 2 RBC at footnote 9.6; *Ricketson*, RBC, at footnote 8.10, *Maus*, digital copies, p. 132.
137. Cf. on this point Art. 2bis, 10bis, 11bis paras. 2 and 3 and 13 RBC; *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (443 f.).

tional standard ie the standard as applied to the states party to the Convention.[139]

It is the essence of the *first requirement* that only "in certain special cases" is the national discretion to create exceptions admissible.[140] An original suggestion of the Stockholm Revision Conference (1967) envisaged a narrower draft according to which a regulation allowing exceptions would only be admissible in relation to reproduction for purely private use, for the purposes of the legislature and administration and in specific special cases.[141] Given the existence of a general draft national legislatures were not provided with specific powers which would have governed the instances of a possible limitation of the absolute right of reproduction.[142]

Already on account of the proposed narrower version it is clearthat private use, as the principal example of the use of Art. 9 para. 2 RBC, is covered.[143] Because Art. 9 para. 2 RBC does not list specific cases it is only on a case by

---

138. This question relates to the discretion of individual states to determine their own provisions. This is necessary due to the as yet undetermined localisation.
139. The German exception to the rule created by §§ 53, 54 German Copyright Act is considered below.
140. *Maus*, digital copies, p. 134; *Ricketson*, RBC, at footnote 9.6.
141 Cf. WIPO Records of the Intellectual Property Conference of Stockholm, Geneva 1971, p. 112 f., *Dittrich*, Stockholm draft, p. 24; *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (444); *Ricketson*, RBC, footnote, 9.7; *Maus*, digital copies, p. 134 f.
142. Cf. *Collova*, RIDA 1979, p. 125 (127); *Maus*, digital copies, p. 135
143. *Stewart*, International Copyright, footnote 5.39; *Maus*, digital copies, p. 135; *Ricketson*, RBC, footnote 9 11

case analysis that further "special cases" come in for consideration.

A reproduction by a library can be such a special case because in such cases a very specific public purpose can be followed.

In his academic writings *Ricketson* uses two criteria for specifying "certain special cases": namely ascertainability and "special".[144] With a special rule for reproduction in the context of the function of libraries one can speak of an ascertainability of this ("special") rule. By "special" *Ricketson* means that the national rule requires some form of public interest as justification or as *Ricketson* himself expresses it: ("some clear reason of public policy or some other exceptional circumstance.")[145]

Because the preservation from decay of threatened works as well as the lending undertaken by libraries according to their function is in the public interest and thereby serves the common good this narrow criterion is satisfied.

According to Art. 9 para. 2 RBC the reproduction must not interference with the normal exploitation of the work. Under normal exploitation is understood the possibility of the author under usual circumstances obtaining a financial yield from his work. And by "normal" is meant "every type of exploitation which is normally used as such by the possessor of the right in order to acquire a financial yield from the work."[146] In the forefront is the guaranteeing of the

144. *Ricketson*, RBC, footnote 9.6.
145. Cf. also *Collova*, RIDA 1979, p. 125 (127), who talks of "conditions limitatives."

economic interests of the author. It is the copying of literary works via bookprinting or the manufacture of a new edition via photomechanical reproduction, and not the simple making of individual photocopies, which isregarded as examples of interference with normal exploitation.[147] There is no exhaustive definition of "normal exploitation".

The normal exploitation of a work is on the one hand open to changes in completion and on the other hand is fixed to the typical forms of exploitation. This means that uses which lie outside the typical exploitation are not covered. It is possible that the field covered by the second alternative – "legitimate interests" – includes further uses and that it is only allowed if it does not lead to unreasonable damage.

Only the typical economic forms of exploitation are meant under the term normal exploitation. An infringement can only be seen in a not inconsiderable ousting of these forms of exploitation.

It is questionable whether a reproduction, which serves either to preserve the original or as part of the loaning function of the library, interferes with the normal exploitation of the work. The typical or normal exploitation of books in the economic sense is their sale. This is not directly affected by the project because the sale of such books is neither replaced nor extensively ousted. Thus this does not represent an interference with the usual exploitation of the work.

---

146. *Maus*, digital copies, p. 137
147 Cf *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (444)

The third precondition contained in Art. 9 para. 2 2. RBC does not allow of *the unreasonable infringement of the legitimate interests of the author.* A more exact definition of this term is not provided by the conference documents. The risk that the elasticity of interpretation of Art. 9 para. 2 RBC could lead to national differences in interpretation and a lack of conformity with the Convention was a real one because tf temporary validity.[148]

The wording of the rule invites consideration in two respects: The legitimate interests of the author and unreasonable prejudices to those interests. The term "legitimate interests" is given scant consideration. This is so because an exemption provision (ie Art 9 para. 2) will in most cases infringe the legitimate interests of the author. This is accurately shown by the example that the completion of a single copied page can replace the necessity of purchasing a copy of the work, and consequently the author loses payment.[149] The example shows that if the economic interest of the author is regarded as legitimate then most of the exemption provisions represent an infringement upon the rights of the author. The idea of a weighing–up as to whether there is an infringement of the legitimate interests of another is linked more to the second precondition, namely that of reasonableness. And thus the primary issue is what is meant by the term reasonableness. A point of translation arises at this juncture. In the ori-

148. Cf. *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (444).
149. Cf. *Masouye*, Art. 9 para. 2 RBC footnote 9.8; *Stewart*, International Copyright, footnote 5.39; *Maus*, digital copies, p. 138 f.

ginal English draft at the corresponding point in the text the following is written:

"does not *unreasonably prejudice* the legitimate interests of the author".[150] The translation of these words and in particular of "unreasonably prejudice" into French caused great difficulties. The word "deraisonnable" was not regarded as suitable. In the absence of an exact French equivalent, unity was finally reached on the following:

> "ni ne cause un *prejucice injustifie* aux interets legitimes de l'auteur".[151]

The German word "unzumutbar" is used for the English word "unreasonable". This particular translation is attributable to the suggestion of the Czechoslovak delegate *Dr. Strnad*.[152] "Unreasonable prejudice" is not translated as "unzumutbare Benachteiligung" but freely as "noch die berechtigten Interesse des Urhebers unzumutbar verletzt".[153] As a consequence it can be added to the requirement of "legitimate interests" that an interpretation based upon the various translations leads to the result that unreasonableness is the decisive criterion.

---

150. Cited from *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 3; the author's own emphasis. According to *Dittrich*, from the Stockholm version p. 24 (footnote 29) this particular formulation is attributable to a motion put forward by the UK and Northern Ireland.
151 Author's own emphasis.
152. *Ulmer/Reimer*, GRUR Int. 1967, p. 431 (444, footnote 32); *Dittrich*, Stockholm version, p.24 f (footnote 20)
153. Cf. *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 3.

There is as yet no firm definition of this open term which enjoys the support of the Convention. In the context of a blanket clause the use of such open terms is common. This is in accordance with the intent of granting a discretion to the national legislature to cover as many cases as possible. This discretion is to be considered when turning to the legality of legislative rules. More extensive efforts towards putting this into concrete terms can illustrate characteristics of a minimum standard.

The difficulty when testing national legislatures exists in finding a measure in the light of the flexibility of interpretation. At the heart of the matter is anattempt to find a compromise between the interests of the author and those of the public in the use of the work.[154] Elsewhere the RBC recognises limits on the copyright of the author. Direct limits arise from Art. 10 para. 1 and Art. 13 para. 2 RBC. References to the rights of states party to the Convention are to be found in Art. 2bis, Art. 10 para. 2, Art. 11bis para. 3 and Art. 13 para. 1 RBC. Art. 8 RBC governs the reproduction of translations in states party to the Convention. It is clear from this that copyright also recognises limitations under the RBC. In general it can be said that the limits placed on copyright are intended to make possible legitimate, unhindered access by the public to cultural goods. To this extent copyright implicitly embodies a social element.[155]

As far as reasonableness is concerned it can be concluded from the above that certain limits to the rights of the

---

154. Cf. *Masouye*, Art. 9 para. 2 at footnote 9.13.
155. Cf. the official reasoning on the German Copyright Act BT – printed matter IV/270, p. 62 – as example.

author over the exploitation of his work – here the rights over the reproduction of the work – are allowed. Such limitations are justified in the public interest. The claim of the author to compensation has to be separated from this.[156]

When it comes to interpretingthe term reasonableness it cannot depend upon the damage which the author suffers on account of the reproduction (exploitation) because just about every act brings with it some form of damage.[157] The view that no "unreasonable damage" must be present[158] is not convincing, because once again a link is made with the term damage. According to a consideration such as this the unreasonableness of damage leads to a quantitative measurement. At the Stockholm Revision Conference India and Roumania argued for exclusive rights over reproduction to be reduced to a mere right to compensation. The emasculation of rights of reproduction associated with the Indian and Roumanian proposal was rejected by the vast majority of representatives at the Stockholm Revision Conference.[159] The issue of economic damage and of the corresponding claim to compensation for acts amounting to exploitation does not indicate which acts of exploitation are in themselves permissible given the social element of copyright. For this reason it is

---

156. In the official reasoning (BT– printed matter IV/270, p.9) it says by way of example to the amendment to the German copyright of 1985: "The right to be allowed to make copies of a work without the author's consent is to be distinguished from the obligation to make compensation for such copying."
157. Cf. *Masouye*, Art. 9 RBC, at footnote 9.8.
158. *Ulmer/Reimer*, GRUR Int. 1967, p. 444.
159. *Ulmer/Reimer*, GRUR Int. 1967, p. 444.

more accurate to adjust to the purpose and its compatibility with interests already referred to.

With reference to the use of libraries, archives, documentary centres etc and the employment of reproductive apparatus it is to be recorded that a contribution to the dissemination of knowledge is being achieved to an extent which is not to be underestimated.[160] The interest of the public to unhindered access to cultural goods is present here to a degree not found elsewhere. On the other hand an extensive use of methods of reproduction in this area is linked to the danger that the author's interests will be persistently infringed.[161]

From this the conclusion it follows that the activities which lie in the interest of the public must also be restricted. Private reproduction can be given here as a particularly precarious example. A diffuse, large–scale and uncontrollable use is becoming ever more likely due to new technical possibilities. An unreasonable breach of the author's right over the reproduction of his work must be seen here as well.

Furthermore the distinction has to be drawn between a copyright use and *reception.*[162] An unreasonable breach (interference) will always be present where the adoption of the ideas or cultural goods of others extends beyond the purely personal field of application or will leave an insignificant barely circulated reproduction.

---

160. Cf. *Masouye*, Art. 9 RBC, at footnote 9.12.
161. Cf. on this *Masouye*, Art. 9 RBC, at footnote 9.12.
162. Cf. on this comments by *Maus*, digital copies, p. 140.

A reception understood in this way knows itself to be bound to conflicting interests. Thus it is possible that the author can set forth a reasonable explanation why precisely this form of exploitation should be preserved for his benefit. Then permission to use the work could only be acquired via the payment of reasonable remuneration.[163] Compensation is offered to the author in those cases where detriment cannot be avoided.[164]

The context is outlined for the admissibility of a national legislative rule. The purpose of reproducing books which are threatened with decay or of providing against disaster is linked to the social interest of preserving cultural goods. That the project is organised supranationally does not alter its character in the slightest.

Each additional saving connected with the function of public libraries serves in most cases the transmission of knowledge and is for this reason in the public interest. The drawing up of a register is the precondition for co–operation at the international level and is directly connected with the question of interests as already touched on.

The admissibility of reproductions which are connected with this finds as its minimum limit an unreasonable infringement in the rights of authors. This means the reproductions must be in the service of a reception by the user. The library serves the function as go–between. Measures which the library undertakes in this regard must be *necessary* (the minimum to achieve the same end). If the work

---

163. Cf. *Nordemann/Vinck/Hertin/Meyer*, Art. 9 BC, side note 4.
164. Cf. *Davies*, Private Copying, side note 316.

of the author – as an obvious precondition, it must not be common property – is obtainable via the usual means of purchase, a reproduction by a third person for the purpose of providing access for the user is not necessary, because the work can be acquired and the rights of the author remain untouched. In so far as the original is also obtainable a circumvention of this right is forbidden.

No objection can be made against reproductions on another recording medium (eg microfiche) so as to preserve cultural goods against catastrophe. A just compromise of interests can be found in this way.

Thus the limit of a useful definitive process at this level is reached. It is to be remembered that Art. 9 para. 2 RBC represents a general theory which simply allows weighing–up of competing interests.

The national principle is used with regard to the national rules. The Stockholm Revision Conference was prepared for reform. Hitherto there were only suggestions. The proposals of the WIPO from 1988 were of most interest.[165] For the case where a reproduction for private purposes would interfere with the normal exploitation such a reproduction according to Art. 9 para. 2 RBC is not allowed without the consent of the author.[166] For those instances in which the reproduction does not affect the usual exploitation of the work but nevertheless unreasonably prejudices the interests of the author, a reproduction without the consent of the author should be permissible provided it is

---

165. WIPO Doc. CE/MPC/I/2–Ibis III.
166. Cf. also the rule in para (2) of sec.10 of the specimen draft.

accompanied by the payment of reasonable remuneration (sec 22).[167]

Finally it remains to be clarified whether the preconditions apply cumulatively or alternatively. According to the Bergström Report (Nr 85) an alternative[168] or a cumulative approach to the criteria is available. A statutory exemption provision in the sphere of reproduction is admissible when both preconditions are present. The certain special case affects neither the "normal exploitation" nor the legitimate interests of the author "unreasonably". Considered from the opposite angle it can be said that the national rule infringes the Convention if one of the requirements is missing.[169]

As a result it remains to say that the open–ended nature of the rule in Art. 9 para. 2 gives criteria for consideration in the context of a conflict of interest. In order to develop a real substantive effect this measure has to be expanded by the parliament of the particular State party to the Convention.

---

167 Cf also *Maus*, digital copying, p. 145 ff for further reference.

168. *Nordemann/Vinck/Hertin/Meyer*, Art. BC side note 3.

169. Cf *Maus*, digital copies, p. 132 f (footnote 65), which rightly refers to the different linguistic versions.

dd) Duration of Protection

Of very special significance are the terms of protection as it is these which determine the point in time at which a work ceases to be protected by copyright. Art. 7 para. 1 RBC lays down the general rule:

> "(1) The term of protection granted by this Convention shall be the life of the author and fifty years after his death."

The term of protection of works in states party to the Revised Berne Convention regularly includes the lifetime of the author and a further period which is measured from the time of the author's death. The RBC adopted this type of rule. For the term of protection *post mortem auctoris* the period of fifty years from the death of the author has been applied. This period has been applied in France since 1866.[170]

Since the Brussels Revision Conference this term of protection is to be regarded as compulsory law, which means that every State party to the Convention must guarantee this term of protection as an absolute minimum.[171]

Art. 7 para. 6 RBC expressly emphasises this minimum character:

> "(6) The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs."

---

170. Cf. *Ulmer*, Copyright and Rights of Publication, § 77 I (p. 339).
171. *Masouye*, Art. 7 RBC, at footnote 7.2.

Henceo the following terms of protection apply in the countries of the Union. A distinction is mostly drawn between the standard term of protection and terms of protection for special types of work.[172]

In *Germany*:

- 70 years for works which were not in the public domain on the 17.9.1965.
- 70 years for anonymous or pseudonymous works.[173]

In *France*:

- 56 years and 83 or 150 days for all works which were protected on 3.2.1919 and which appeared before 24.10.1920 or 31.12.1920.
- 58 years and 122 days for the works which appeared before 13.8.1941 and which were protected on 1.1.1948 .[174]
- 80 years for works of authors who died for France.
- 50 years from the appearance of anonymous, pseudonymous and posthumous works.

In *Great Britain*:

---

172. Cf *Ulmer*, Copyright and Rights of Publication, § 77 I (p. 339) Only the interesting types of work are described here. See also the remarks of *Nordemann/Vinck/Hertin/Meyer*, Art. 7 BC, side note 6 (p. 94 ff)
173. Cf § 64 German Copyright Act
174. Cf on this *Masouye*, RIDA Nr 3 (1954), p. 49 (71)

- 50 years from publication for pseudonymous, anonymous and posthumous works.
- 50 years from the end of the calendar year in which the work was made for works conceived by computer.[175]

In *Portugal*:

- According to the Decree Nr. 13725 eternal protection of the author according to Art. 15 – the eternal protection was only confirrable until 26.7.1991. (Art. 37 Nr. 2).
- from then on the term of protection terminates 50 years from the death of the author (Art. 25).
- There is a special rule where the estate of an author – in the absence of any other beneficiary – is acquired by the State and the latter neither directly uses the work for 10 years nor allows its use by a third party. In such a case the work ceases to be copyright at the end of the 10 year period (Art. 42 Nr. 2).[176]

The knowledge of national terms of protection is thus of significance because Art. 7 para. 8 RBC provides for a breach of the principle of national treatment. It reads as follows:

---

175. Cf. Copyright, Designs and Patents Act 1988.
176. Cf on this *Rau*, Portugal I. paragraph VII., p. 7 in: Möhring/Schulze/Ulmer/Zweigert, Sources of Copyright Law, Vol 3, Frankfurt am. Main., of 31.8.1970. *Dietz*, Copyright in Spain and Portugal, 1991.

> "(8) In any case, the term shall be governed by the legislation of the country where the protection is claimed; however, unless the legislation of that country otherwise provides, the term shall not exceed the term fixed in the country of origin of the work."

The comparison of the terms of protection only occurs when nothing to the contrary arises out of national law to the effect that national law can make rules for the benefit of the author.[177] A comparison of the terms of protection can take place "in any case" where the rules applicable in the country of the work's origin differ in any respect to the rules applicable in the country where protection is claimed.[178]

The term of protection of anonymous and pseudonymous works is laid down in Art. 7 para. 3 RBC:

> "(3) In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public. However, when the pseudonym adopted by the author leaves no doubt as to his identity, the term of protection shall be that provided in paragraph (1). If the author of an anonymous or pseudonymous work discloses his identity during the above–mentioned period, the term of protection shall be that

177 Cf. § 120 German Copyright Act. Also *Nordemann/Vick/Hertin/Meyer*, Art. 7 BC, side note 4.

178. *Masouye*, Art. 7 para. 8 RBC, at footnote. 7 15., *Nordemann/Vinck/Hertin/Meyer*, Art. 7 BC, side note 5.

provided in paragraph (1). The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years."

For terms of protection of works involving co–authors Art. 7bis RBC makes clear that the provisions of Art. 7 RBC are applicable if the co–authors are entitled to copyright. The death of the last surviving author is decisive in determining the end of the term of protection.

Art. 18 para. 1 RBC excludes the application of time–specific terms for works whose protection had already expired prior to the coming into force of the Convention. Furthermore according to Art. 18 para. 2 RBC the country in which protection is being claimed can exclude works from the protection of the Convention where the works were no longer subject to copyright at the time the country in which the work originated acceded to the Convention. This particular rule has virtually no significance apart from instances involving the entry of a non–convention country.[179]

Because the term of protection is Convention law which is compulsory in nature, works which are no longer covered by the term enter the public domain. This means that they can be exploited by the public because the copyright in them has been extinguished. The work can from this point in time be reproduced and disseminated by anyone – and

---

179. Cf. *Nordemann/Vinck/Hertin/Meyer*, Art. 18 BC, side note 2; but also *Bergsma*, Treatment as a National, p. 73 f.

this is also the case in the context of the project – without the consent of the author and without the obligation to pay compensation.[180] Neither the RBC nor German copyright law has taken up the idea of a cultural levy (domaine public payant).[181]

ee) Moral Rights of the Author

The moral rights of the author have to be considered. These rights were incorporated into the Berne Convention at the Rome Revision Conference of 2.6.1928. The moral rights of the author exist independently of the author's own economic rights.

Art. 6bis para. 1 RBC is in the following terms:

> "(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation."

This rule sets up a further minimum standard which also has to be taken into account in the context of the project. Art. 6bis RBC grants two rights to the author: firstly the right to claim the work as his/her own and secondly the

---

180. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 38 I (p. 185)

181 Cf *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 38 I (p. 186).

right to be able to object to any distortion, mutilation or other modification of the work.[182]

As far as the EROMM project is concerned this means that the author has the right to conserve the link between title and work. Any change to the work is impermissible.[183]

The title rights of the author require amongst other things that his name always be given with a full text recording.[184] By way of corollary the author is entitled to prevent false attribution.[185] Thus the right to the title of a work acts against third parties and especially so when the RBC allows a reproduction of the work.[186] Secondly the author is protected against interference via distortion, mutilation or other modification of the work.[187]

As in the first element so in this case no risk for the project is apparent because neither the reproduction of changes is laid out nor does the title register contemplate deviations from the classification of the work.

It is a moot point whether Art. 6bis para. 1 RBC covers the right of the author to determine the date of first *publication*.[188] Hitherto there has been no express rule governing the law of publication. However the right to determine

---

182. *Ulmer*, Copyright and Rights of Publication, § 38 I 2 (p. 208); *Schardt*, ZUM 1993, p. 318 (318, 320 f.).
183. Cf. on this point *Ulmer*, Copyright and Rights of Publication, § 31 II (p. 172 f.), who justifiedly points out that the protection of a work's title represents a product of the author's moral rights.
184. *Masouye*, Art. 6bis. 3. (p. 41).
185. Cf. *Schardt*, ZUM 1993, p. 318 (320).
186. *Masouye*, Art. 6bis. 3. (p. 41 f.).
187. Cf. on this point *Masouye*, Art. 6bis. 4. f

publication date is assumed from the very order in the system (Art. 3 para. 3, Art. 10 para. 1, Art. 10bis, Art 11, Art. 11bis, Art. 11ter).[189]

Art. 6bis para. 2 RBC can be traced to the Stockholm draft of 1967 and states the terms of protection for the moral rights of the author:

> "(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained."

What has been said above applies as much to the term of protection of the moral rights of the author as to economic rights.[190] This minimum standard allows for different terms of protection for making the moral rights of the author binding. Thus Art. 6 para. 3 and Art. 19 para. 3 of

---

188. Rejecting this is *Schardt*, ZUM 1993, p. 318 (320): affirming this view is *Dietz*, in: Schricker, Copyright Law, at §§ 12 ff side note 24.
189. This is the view of *Nordemann/Vinck/Hertin/Meyer*, Art. 6bis side note 2.
190. See dd).

the *French* statute on literary and artistic property provides for a droit moral which is "eternal". In *Great Britain* the right to name the work and the right to object to "derogatory treatment" has been made to run alongside copyright law and exists for 50 years after the death of the author. The false law against attribution is limited to 20 years after the death of the author.

In *Germany* the moral rights of the author are extinguished like the other elements of copyright 70 years after the death of the author. This is according to Art. 64 para. 1 Copyright Act.[191]

In *Portugal* according to Art. 57 No. 1 Portuguese Copyright Act the moral rights of the author passed on to the beneficiaries on the death of the author. The State protects the integrity and genuine nature of works which have passed into the public domain. It does this by Art. 57.

The second sentence of Art. 6bis para. 2 allows each country to pass its own statutory rule for the protection of the moral rights of the author his death. Thus the membership of as many countries as possible should be made possible without the legislature having to recognise the moral rights of the author to the fullest extent after the latter's death.[192] This provision goes back to the Paris Revision Conference of 24.7.1971.

Art. 6bis para. 3 RBC exists since the Rome Revision Conference of 1928 and specifies:

---

191. Cf. further *Dietz*, in: Schricker, Copyright Law, at §§ 12 side note 33.
192. *Delp*, Geistiges Schaffen, p. 250 (side note 312).

> "(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed."

This provision is unnecessary because means of redress are always governed by the law of the country where protection is claimed.[193] *Ulmer* draws the conclusion that the moral rights of the author in Art. 6bis RBC concern a fundamental rule, whose individual elements remain the preserve of national parliaments.[194] The countries of the Union are bound to their national rules, which are the precondition for the application of the rules of the RBC on the author's moral rights.

By way of contrast with this it is suggested that the essential point is that minimum rights are established[195] to which the author can make direct appeal where the national rule does not provide sufficient protection. Reference to the rule of legal protection according to national laws is to be found in Art. 5 para. 2 RBC.[196]

Because of its merely declaratory character Art. 6bis para. 3 has no negative effects upon a direct application of Art. 6bis para. 1 RBC in laying down minimum rights of protection in the countries of the Union. Given the present legal

---

193. *Nordemann/Vinck/Hertin/Meyer*, Art. 6bis BC, side note 5.
194. *Ulmer*, Copyright and Rights of Publication, § 14 V 2 (p.93), cf also *Dietz*, in: Schricker, Copyright Law, at §§ 12 ff. at side note 25.
195. Cf also *Nordemann/Vinck/Hertin/Meyer*, Art. 6bis BC, side note 1
196. Cf on this point Masouye, Art. 5 para. 2 at footnote 5.6.

position in Germany one certainly cannot assume such an application.[197]

The internal linking of the moral rights of the author according to Art. 6bis RBC to other provisions is worthy of consideration: Art. 7 para. 3, Art. 15 paras. 1 and 3 (the decision of the author concerning the intentionaly anonymous or pseudonymous appearance of his work is presumed); Art. 10 para. 3, Art. 10bis para. 1 (requirement to specify the source in the context of the freedom to cite and the freedom to compile reports); and Art. 11bis para. 2 (the defence of the moral rights of the author in the context of the admissible rule on the exercise of rights of transmission).

b) The Formal Requirements

Art. 5 para. 2 RBC specifies the required formalities:

> "(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work..."

The author who is a national of a State party to the Convention enjoys without formalities the rights which the country of protection grants to its own nationals as well as the minimum rights of the RBC.[198] Formalities are understood to be the formal and material preconditions for the existence of authors' rights.[199] These formalities are

197. Cf. *Dietz*, in: Schricker, Copyright Law, at §§ 12 ff. at side note 25.

essentially the registration with an official body and the payment of registration fees.[200] However, it is permissible, at least for the granting of rights of use, to stipulate the written form[201] as well as making the exercise of individual rights dependant upon the fact that the author yield such rights to a performing rights society.[202] Works originating in a State party to the Convention can be made subject to provisions in that state which render copyright protection and the exercise of such rights dependent upon copies of the work being deposited or entered in a register.[203]

The protection of the author arises out of Art. 3 para. 1 lit. a) RBC, which was introduced at the Berlin Conference:

> "(1) The protection of this Convention shall apply to:
>
> (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not;....."

---

198. *Nordemann/Vinck/Hertin/Meyer*, Art. 5 BC, side note 6; *Ulmer*, Copyright and Rights of Publication, § 14 II 2 (p. 87 f); *Hubmann /Rehbinder*, Copyright and Rights of Publication, § 12 III 4 c) (p. 85).
199. Cf *Baum*, GRUR 1932, p. 921 (923 ff.); *Nordemann/Vinck/Hertin/Meyer*, Art. 5 BC, side note 7.
200. Cf. *Masouye*, Art. 5 para. 2 at footnote 5.5.
201 Cf. Art. 31 para. 1 French Copyright Act.
202. *Baum*, GRUR 1932, p. 921 (929); *Nordemann/Vinck/Hertin/ Meyer*, Art. 5 BC, side note 7; for an alternative view see *Bappert/Wagner*, Art. 5 RBC, at side note 19.
203. *Ulmer*, Copyright and Rights of Publication, § 14 II 2 (p. 87 f.).

Furthermore Art. 3 governs the preconditions for the protection of authors who do not belong to a Union country:

> "(1) The protection of this Convention shall apply to:
>
> ...
>
> authors who are not nationals of one of the countries of the Union, for their work first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union.
>
> ...
>
> (4) A work shall be considered as having been published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication."

Should the conditions be satisfied then authors who are not nationals of one of the countries of the Union also enjoy the protection of the RBC.[204]

c) Legal Effect

Treaties of international law often only undertake the duty of regulating national law in a appropriate way. This applies to Art. 1 X Universal Copyright Convention and Art. 3

---

204. On publication in the sense of Art. 3 para. 3 RBC cf. BGHZ 64, 183 – August Vierzehn (14); BGH, UFITA 69, p. 173 (217) – Goldrausch. The protection of the work of a foreigner or stateless person or foreign refugee in Germany depends upon §§ 121–129 Copyright Act.

GTA. Appeal can be made to the International Court of Justice by other states party to the Treaties in so far as this is provided for. Art. 33 para. 1 RBC contains such a clause:

> "(1) Any dispute between two or more countries of the Union concerning the interpretation or application of this Convention, not settled by negotiation, may, by any one of the countries concerned, be brought before the International Court of Justice by application in conformity with the Statute of the Court, unless the countries concerned agree on some other method of settlement. The country bringing the dispute before the Court shall inform the International Bureau; the International Bureau shall bring the matter to the attention of the other countries of the Union."

This provision, which covers disputes on the interpretation and application of the Treaty between two or more states party to the Convention, was introduced at the Brussels Revision Convention of 1948 (Art. 27bis Brussels version). It was subject to further modification at the Revision Conferences of Stockholm (1967) and Paris (1971). Similar provisions are to be found in Art. 15 UCC and Art. 30 of the Treaty of Rome (1957).

Art. 33 para. 2 RBC allows of an exception:

> "(2) Each country may, at the time it signs this Act or deposits its instrument of ratification or accession, declare that it does not consider itself bound by the provisions of paragraph (1).

> With regard to any dispute between such country and any other country of the Union, the provisions of paragraph (1) shall not apply."

To seventeen countries – including the Bahamas, Bulgaria, Czechoslovakia, Egypt, East Germany, Hungary, India, Lesotho, Liberia, Libya, Malta, Mauritius, Roumania, South Africa, Thailand, Tunisia and Venezuela – have made use of the provision excluding the application of paragraph 1.[205]

The legal consequence of this exemption provision is that the Convention is *lex imperfecta* and issues of interpretation which have arisen remain unresolved until the next revision conference.[206] Paragraph 3 enables states to renounce at any time this right of exemption.

Only states are entitled to appear before the ICJ as parties. According to Art. 34 para. 1 of the statute of the ICJ only states and not individuals and organisations, even if the latter are recognised by international law, are capable of being parties.[207]

In its decisions the ICJ specifies the legal position without thereby passing judgment.[208] There is no right toenforcing judgment. Furthermore the decision is only effective inter partes (Art. 59 f. ICJ–Statute).[209] Nevertheless the *inter-*

---

205. *Nordemann/Vinck/Hertin/Meyer*, Art. 33 BC, at side note 1.
206. *Nordemann/Vinck/Hertin/Meyer*, Introduction, side note 40.
207. Cf. *Fischer*, in: Ipsen, International Law, § 60 side note 47 (p. 973).
208. Cf. *Baum*, GRUR 1949, p. 1 (42); *Bappert/Wagner*, Art. 27bis, at side note 19.3; *Nordemann/Vinck/Hertin/Meyer*, Introduction, at side note 40 c; *Masouye*, Art. 33 at footnote 33.5. (p.155).

pretation of the ius conventionis in individual cases is always a matter for the court of the Union country which grants protection.[210]

The protection of the individual is not intended to be ensured.

As has been indicated on several occasions already there exist in the RBC direct rights, which are also classifiable as Convention law in the "narrow sense". The principle of national treatment (Art. 5 RBC) and the so called minimum rights ("special rights") are examples of such rights. The moral rights of the author can also be so included.

By the *arrangement* of *"special rights"* conclusive regulations have to be distinguished from those which confer the right to make regulations in individual cases to the national legislature.[211] Examples of such conclusive regulations are the right to translate, the right to perform and the right to give a talk, as well as filming rights which are of importance for the project.[212] On the other hand a rule reserving national rights is to be found in most of the provisions of the RBC.[213] The claim of the author to protection of these rights arises from Art. 2 para. 6 RBC:

---

209. *Nordemann/Vinck/Hertin/Meyer*, Introduction, side note 40 d.
210. Cf. *Nordemann/Vinck/Hertin/Meyer*, Introduction, side note 40 f. for further evidence.
211 *Ulmer*, Copyright and Rights of Publication, § 14 v 2 (p. 93). Others distinguish the rigid, inflexible and flexible system – cf. *Hoffmann*, BC, p.12 *Nordemann/Vinck/Hertin/Meyer*, Introduction, side note 24.
212. Cf *Ulmer*, Copyright and Rights of Publication, § 14 V 2 (p. 93).
213. *Nordemann/Vinck/Hertin/Meyer*, Introduction, side note 24.

> "(6)The works mentioned in this Article shall *enjoy* protection in all countries of the Union. This protection shall operate for the benefit of the author and his successors in title."[214]

The protection of the specified works and forms of work in Art. 2 /2bis RBC iure conventiones, which means, in the case where the national legislation of the country of origin of the work or the legislature of the country in which protection is sought, does not protect some of the work,[215] was affirmed by the Brussels Revision Conference.

Differing from the previous versions in which the Union countries were simply bound to provide protection for works, this particular draft (ie the Brussels draft) intends direct protection based upon the Convention itself. This means that if specific provisions grant direct rights, then the individual can apply them directly and can pursue legal action tnforce these rights.[216]

Ratification and publication by statute is necessary in the majority of countries before direct use of an international treaty is possible. It is in this way that the treaty becomes a part of domestic law. In the Common Law countries the Conventions are treated as pure State treaties which after ratification do not have any effect upon legal claims which are governed there. For this reason the obligations have first to be satisfied via domestic laws. (So–called procedu-

---

214. With the author's own emphasis.
215. In the general report it says expressly "protection directement fondee sur la Convention elle–meme."
216. *Masouye*, Art. 2 para. 6 RBC, footnote 2.20.

res which give legal force).[217] Since the Stockholm Conference Art. 36 RBC states:

> "(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.
>
> (2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

In every case the national law of a State party to the Convention must recognise directly the minimum rights granted by the RBC for authors who are nationals of another country.[218]

In Germany the RBC in its Paris version became domestic law by ratification and publication by to the official source of federal statutes (Bundesgesetzblatt) 1974 II 165, 1069, 1079. The author protected by the RBC can make direct appeal to domestic legal provisions.[219] The Convention stands alongside internal copyright provisions.[220]

The relationship between the RBC and national law is controversial, in particular where their content conflicts.

---

217 *Masouye*, Art. 2 para. 6 RBC, footnote 2.21.
218. *Nordemann/Vinck/Hertin/Meyer*, Art. 36 BC, at side note 2
219. BGHZ 11, 135 (138).
220. *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 11 III 4 (p. 75).

It is overwhelmingly assumed that the interpretation of domestic law will be in accordance with international treaties. In instances of conflict it has been said by the German Federal Court that the more recent statute takes precedence over the older one[221] with the consequence that the compulsory law of the Convention can be displaced by national law. By way of contrast it has been written that Convention law is of a higher authority and therefore where it contains a compulsory provision it cannot be altered or displaced by the national legislature.[222] The adoption of international contract law into domestic law is often particulars controversial.[223]

The issue as to precedence of a treaty provision in domestic law represents a problem area. The issue is to be answered independently of the way the treaty has been incorporated – whether by transformation or execution. Art. 25 of the Basic Law makes no reference to the law of international treaties. It can be taken from Art. 59 para. 2 of the Basic Law that treaty law is classified as "Federal Law". There are no further references in the Basic Law to the issue of precedence.[224] From this the conclusion is

---

221. BGHZ 72, 63.
222. *Baum*, GRUR 1950, p.437– decided; further *Hubmann/Rehbinder*, Copyright and Rights of Publication, § 11 III 4 (p. 75).
223. The dispute between the doctrine of transformation and the theory of execution will not be considered here.
224. Cf. the position in France where Art. 55 of the Constitution of the Fifth Republic is in the following terms: "Treaties and pacts which have been ratified or approved according to correct procedure acquire with their publication a higher legal authority than the Acts which the signatory states have used in the treaties and pacts."

drawn that the national implementation must not stand in conflict with law of higher authority, above all with constitutional law.[225] It is not a matter of controversy, and this is assumed from constitutional tradition and practice, that a treaty ratified by parliament is binding as domestic law and as such is to be observed by all those for whom it was intended.[226]

On account of parliamentary ratification treaties of international law have the status of a statute in the form of a simple statute.There simply cannot be authority higher than that of treaty law, neither from Art. 25 of the Basic Law, linked as it is to the doctrine of pacta sunt servanda (contracts are to be fulfulled), nor from other perspectives.[227]

The principle *lex posterior derogat lex priori* is applied to the relationship between treaty law and statute law, whereby a later statute may displace earlier treaty law. As a matter of practical reality[228] an interpretation of statutes consistently with international law and the primacy of *lex specialis* [229] render the displacement of treaty law by a

---

225. Cf *Stern*, Constitutional Law, vol I, § 14 IV 4. d) d (p. 506).
226. *Bernhardt*, in: Isensee/Kirchof, Handbook of Constitutional Law, vol VII, § 174 side note 28.
227 *Bernhardt*, in: Isensee/Kirchof, Handbook of Constitutional Law, vol VII, § 174 side note 29.
228. Cf the contrary view from LG Heilbronn, EuGRZ 1991, p. 185 (186); and also *Vogler*, "The translator's gratuitous right of access", EuGRZ 1979, p. 640 (642) for further evidence.
229. Cf. on this point *Tomuschat*, German Caselaw in International Law Issues 1958–1965, ZaöRV 28 (1968), p. 48 (74 ff.) cf also the possibility of so–called non–disturbance clauses eg. in § 2 of the Aliens Act (AuslG).

later statute generally unnecessary. Viewed from another point the principle of *lex posterior* can mean that a treaty of international law which has been ratified can take precedence over a Federal Law to the contrary.[230]

The general rules – lex posterior, lex specialis etc – are applied to the working of the RBC. As a result of this in a case of unavoidable conflict there exists the possibility that treaty law which has been recognised by domestic law will be displaced by a later federal law. There are academic writings in agreement on this point although the German Federal Court is of the contrary opinion.

In respect of the *direct applicability* of treaty norms, the overwhelming view amongst the academic writersis that only those treaty provisions are adopted by domestic law, which according to their content are "directly applicable", which directly affect the legal organs of the state and those subject to them.[231] Both the Federal Court and its predecessors have seen domestic validity as a precondition for the direct applicability of such treaty norms.[232] Both courts test first of all the issue of the direct validity of a treaty provision before going on to consider the question of its direct applicability.[233] This last point is convincing

230. *Tomuschat*, in: Isensee/Kirchof, Textbook of Constitutional Law, vol VII, § 172 at side note 35; *Bernhardt*, in: Isensee/Kirchof, Textbook of Constitutional Law, vol VII, § 174 at side note 29.

231. Cf. *Geiger*, The Basic Law and International Law, § 39 II 3 a; *Rudolf*, International Law and German Law (1967), p. 173 ff.

232. In relation to the conflict of laws consider Art. 3 para. 2 p.1 EGBGB: "Provisions of international treaties, provided they have become directly applicable domestic law, take precedence over the provisions of this statute." See *v. Bar*, International Private Law, vol. 1 at side note 176 f.

because the statute ratifying the treaty refers to the entire international treaty and a meaningful interpretation cannot be linked solely to elements of the treaty.[234]

As far as the RBC is concerned this means that it can lay claim to domestic validity. It is entitled to this due to the statute which ratifies it. The direct applicability of individual provisions, and particularly here of the relevant minimum rights, can be clarified via the interpretation of the substantive rules. It will depend in particular upon whether "according to the content, purpose and make–up" of the particular treaty provision it arises that the provision in its carrying out is in need of "international and domestic Acts".[235]

On the other hand treaty provisions are possible according to which the parties to the treaty have to take domestic and in particular "predetermined" measures,[236] which indicate that an indirect applicability can be assumed. This applies also to the case, where according to domestic law a treaty provision requires an additional legal act (eg one which concerns procedure or competence) before it can be applied.[237] By way of summary it can be emphasised

---

233. RGZ 117, p. 280 (284); 117, p. 284 (285); 117, p. 204 (206), BGZ 11, p. 135 (138); 52, p. 371 (383 f.)
234. On this point see *Geiger*, Basic Law and International Law, § 39 II 3 a.
235. RGZ 117, p. 284 (285); 124, 204 (205 f.); BGHZ 11, p. 135 (138), 52, p. 371 (383 f.).
236. Cf, *Regehr*, The Treaty Practice of The German Federal Republic in International Law 1974, p. 75
237 *Geiger*, Basic Law and International Law, § 39 II 3 b; cf *Regehr*, The Treaty Practice of The German Federal Republic in International Law 1974, p. 76 f

that the principle of national treatment (the national principle) as well as minimum rights can be applied directly in Gemany.

2. Minimum Standards in International Law

In a variety of international treaties, some of which have been in existence for over a century, the protection of international property was strengthened by laying down the principle of national treatment and of certain minimum rights which served to grant direct private rights of action. Examples of the such treaties are the above mentioned RBC and the PVÜ. In this way a solution according to private international law was renounced. According to private international law the protection offered would come under the law of the country of origin of the author or of the work. In addition to this the creation of a supranational legislature, which would grant a unified form of protection for the entire territory of the Union, was rejected.[238]

The problem of private law principles in international law is that they emphasise the legal position of the individual and not that of the sovereign state. Nevertheless it must be emphasised that not only international treaties but also rules of behaviour which are partly binding which influence international economic law and the international protection of intellectual property. On the other hand – according to the views already expressed – intellectual property and the laws which govern industrial property are an important

---

238. Cf. with reference to the PVC: *Beier*, GRUR Int. 1983, p. 339 (342).

part of the economic wealth of a country and are for this reason within its area of sovereignty.[239]

a) Declarations of International Law

Several declarations of international law deal with copyright.

aa) Universal Declaration of Human Rights

The protection of the author made its way into the catalogue of human rights expressed in the Universal Declaration of Human Rights of 10th December 1948.

Art. 27 of the UDHR is in the following terms:

> "1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> 2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the *author*."[240]

The confirmation of the rights of the author in this declaration was achieved despite resistance. On the one hand copyright was regarded as unnecessary in so far as a previous text had already adopted the protection of property law. This could amount to confusion between property rights in goods and the right to property in previous non

---

239. Cf. *Fikentscher/Laub*, GRUR Int. 1987, p. 758 (761)
240. Author's own emphasis.

material elements of the creation. On the other hand from the Anglo–Saxon perspective confusion with the right to industrial property was not excluded. Finally there was also fear concerning the moral interests of the author.[241] Against this background the existing draft was chosen, a draft which emphasises the *universal significance of copyright.*

The problem of Art. 27 is that of finding a compromise between the contradictory rights which the article grants.[242] On the one hand Art. 27 grants to the user the right to participate in the cultural life of the community. On the other hand are the interests of the author in the protection of his (moral) and material interests in the work.

The achievement of a just compromise of these contradictory rights is linked with particular time specific demands. New technologies present a special challenge here.

In any case it is noteworthy that copyright is rooted in human rights. The universality of human rights requires the worldwide observation of copyright. The declaration was passed only as a recommendation without attendant powers of compulsion and for this reason could only contribute to the establishment of pertinent customary international law.[243]

---

241. Cf. *Dock*, The International Conventions on Copyright and the Universal Declaration of Human Rights, in: Colloque international, Authors' Rights and The Rights of Man, Paris 1989, p. 86.
242. Cf. Stephen *Edwards*, Authors' Rights and The Rights of Man in the European Context, in: Colloque international, Authors' Rights and Rights of Man, Paris 1989, p. 71.
243. *Ipsen*, International Law, § 44 side note 35.

According to Art. 1 No. 3, Art. 56 in association with Art. 55 lit. c UN Charter the UN pursues the protection of human rights. The means of actually protecting human right are severely restricted[244] and thus the programmatic nature of the declaration is very much to the fore.[245] Its influence in this regard on the constitutions of many countries is recognised.

The absence of an agreed system for observing human rights protection serves to emphasise the moral value of the declaration.

bb) International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights of 16th December 1966[246] recognises the rights of authors. The Convention came into force on 3rd January 1976 and is binding for 97[247] countries.[248]

Art. 15 of this covenant provides[249]:

---

244. For examples of its procedural testing cf. *Geiger*, Basic Law and International Law, § 81 I.
245. *Epping*, in: Ipsen, International Law, § 7, at side note 11
246. International Covenant on Economic, Social and Cultural Rights of 19th December 1966, Federal Law Bulletin 1973 II p. 1534 – international source: GAOR 21st Sess., Resolutions, p. 52.
247. As at 1.1 1991.
248. Cf. on this *Vierdag*, The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights, in: Netherlands Yearbook of International Law 9 (1978), p. 69 ff
249. Cf. *Meesen*, JWTL 21, p. 68; *Fikentscher*, Economic Law, vol. 1, p. 263.

"(1) The States Parties to the present Covenant recognise the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the *author.*[250]

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

(3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

(4) The States Parties to the present Covenant recognise the benefit to be derived from the encouragement and development of international contacts and co–operation in the scientific and cultural fields."

The legal effect of this Covenant is based upon Art. 2 of the same, according to which the states party to the Covenant are bound "to undertake measures, gradually and with all suitable means, and above all via legislative

---

250. Author's own emphasis.

measures, to achieve the full realisation of the rights recognised in this Covenant." (my own translation). According to Art. 16 of this Covenant (Part IV) the states have to render account by means of a report procedure the measures which they have taken and the advances they have made. These reports are then examined by the Economic and Social Council.[251]

The Covenant acquires its validity in domestic law by means of national ratification. Nevertheless the provisions of this treaty are not the same as those of the International Convention on Civil and Political Rights and the European Convention of Human Rights which are not directly applicable. The significance of the last two does not extend beyond that of the terms themselves, which require further legal acts if they are to have effect.[252]

cc) The Legal Status of Stateless Persons

Art. 14 of the Convention Relating to the Status of Stateless Persons[253] provides:

> "In respect of the protection of industrial property such as inventions, designs or models, trade marks, trade names, and of literary, arti-

---

251 Cf *Frowein*, The Guaranteeing of Human Rights at the Supranational level and National State Power, in. Isensee/Kirchof, Textbook of Constitutional Law, vol VII, § 180, side note 37; further UN Economic and Social Council Doc. E/1986/44, 20.2.1986.

252 *Geiger*, Basic Law and International Law, § 84 I

253. Convention Relating to the Status of Stateless Persons of 28th September 1954, Federal Law Bulletin. 1976 II p. 474, international source: UNTS vol. 360, p. 117

> stic and scientific works a stateless person shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the sovereign territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence."

In Germany the protection of copyright for stateless persons is governed by § 122 German Copyright Act. It says:

> "(1) Stateless persons whose habitual residence is within the territorial scope of this Act enjoy the same copyright protection for their works as is accorded to German nationals.
>
> (2) Stateless persons whose habitual residence is not within the territorial scope of this Act enjoy the same copyright protection for their works as is accorded to nationals of the foreign country in which they have their habitual residence."

Thus according to the German Copyright Act the protection granted to stateless persons is put on the same footing as that provided to the German author, without additional requirements.[254] For stateless persons with habitual residence within the area of application of the German Copyright Act the following provisions are to be observed: s. 122, para. 1; s. 124; s. 125 para. 5; s.126

---

254. For a detailed survey of the protection granted by the Copyright Act see *Katzenberger*, in: Schricker, Copyright Law, at §§ 120 side note 3 ff.

para. 3 and s.128 para. 2. For stateless authors with habitual residence in a foreign country the following provisions are of particular significance:[255] s. 122 para. 2 and s. 121.

dd) The Legal Status of Refugees

In relation to copyrigh and industrial property rights, Art. 14 of the Convention Relating to the Satus of Refugees[256] provides:

> "In respect of the protection of industrial property such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and sceintific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting State, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence."

In German copyright the legal status of foreign refugees is governed by s. 123 German Copyright Act. This section refers to s. 122 of the same Act of which mention has just been made.

---

255. Cf. further by *Katzenberger*, in: Schricker, Copyright Law, at §§ 120 ff., at side note. 2 ff – passim.
256. Convention Relating to the Status of Refugees of 28th July 1951, Federal Law Bulletin. 1953 II p. 560; international source: UNTS vol. 189, p. 150.

The conventions relating to the legal status of stateless persons and refugees respectively have found national recognition.

b) WTO and TRIP Treaties

The conclusion of the GATT Uruguay Round on the 15th April 1994 in Marrakesh[257] has brought about a fundamental change to the GATT system as it had been hitherto understood.[258] The GATT has been integrated within a new world trade organisation. The WTO Treaty has led to the setting up of an international organisation having its own legal personality (Art. VIII para. 1 WTO Treaty).

A number of different *multilateral* treaties build the essential blocks of the WTO Treaty. Entry to the *plurilateral* treaties is voluntary. The following treaties are part of this plurilateral system:

1) Treaty on Trade with Civil Air Transport Means;

2) Treaty on the Awarding of Public Contracts;

3) International Dairy Treaty;

4) Beef Treaty.

The accession of a WTO Member State to one or all of these plurilateral treaties means that for this State the treaty becomes an element of the WTO Treaty (Art. II para. 3 WTO Treaty).

---

257. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA.
258. Cf. the comments of the German Government, BT (print matter) 12/7655 (new), p. 335 ff.

The multilateral treaties which have been part of the WTO from the very beginning include the following:

1) GATT 1994;

2) GATS, the General Agreement on Trade with Services;

3) TRIPs

4) Understanding on the Settlement of Disputes;

5) Paper on the "Trade Policy Review Mechanism".

Thus the TRIP Treaty is an essential element of the WTO Treaty. It is specified in annex 1 C of the WTO Treaty and stands with equal authority alongside the Treaty on the Trade in Goods (annex 1) and the GATS (annex 1 B).

Contrary to its title as an "Agreement" it does not represent a free standing treaty of international law. The TRIP Treaty applies within the context of the WTO.[259]

aa) GATT and the Uruguay Rounds

In the context of GATT efforts were successful to secure the protection of intellectual property. It was very much in the interest of the industrialised world to achieve improved protection for intellectual property in both domestic and foreign markets.

From 1986 onwards the eighth international trade round (the so–called Uruguay Round) concerned itself with institutional reforms, the removal of trade barriers, trade in

---

259. *Drexl*, GRUR 1994, p. 777 (778)

agricultural products, the control of cross–border traffic in services as well as – trade policy issues involving intellectual property.[260]

The GATT (1947) contained an exceptional provision which related in general to contractual obligations and which touches upon the present theme in a broad way. According to Art. XX contractual provisions do not bind the contracting parties to specific trade restrictions but approximate as measures for the protection of "public customs", of life or of cultural goods or in the fight against a shortage of goods.[261] Art. XX specifies that no provision of GATT may be so interpreted "that it prevents a contracting party from drawing up or carrying out measures", which measures are intended for the protection of trademarks, patents and copyright, in so far as such measures do not infringe the treaty in general.

These protective measures may only be made if they do not "lead to an arbitrary and unjust discrimination between countries, in which the same conditions prevail, or to a veiled restriction of international trade".

This provision, which in certain ways is reminiscent of Art. 36 EC–Treaty, allows for the protection of intellectual property. In so doing it is exceptional.

---

260. Cf. *Herdegen*, International Business Law, § 7, side note 7.
261 Cf. on this *Senti*, GATT, p. 274 ff.

bb) The Results of the Treaty

As a consequence of the Uruguay Round a new version of GATT was established, a picture which is very much moulded by the WTO Treaty.

(1) Setting Up of the World Trade Organisation (WTO)

Via the WTO Treaty a new international world trade organisation (WTO)[262] was established whose goal is to solve trade disputes in the context of multilateral rather than bilateral or unilateral measures. According to Art. VIII para. 1 WTO Treaty this newly established organisation possesses its own legal personality.

Prior to this the setting up of an international trade organisation had failed at the Havana Conference of 1947 (Havana Charta) as well as at the GATT Revision Conference of 1955.[263] Under the influential participation of delegations from Canada, Mexico and the European Community the text of the founding treaty was tackled in the second half of 1991. The treaty was to come into force on the 1st January 1995. This date was a political goal and not one of binding law. Nevertheless the consent of the necessary number of members, namely a minimum of 125 states, could be achieved. The setting up of the WTO envisages the Conference of Ministers as its highest organ. This Conference consists of representatives from all Member states. It is via the Conference of Ministers

---

262. Cf. on this *Jansen*, EuZW 1994, p. 333 ff.
263. Cf. on this *Jansen*, EuZW 1994, p. 333 (334)

that organisational continuity is guaranteed. It meets every two years and carries out all the tasks of the WTO. Below the level of the Conference of Ministers is the General Council which performs the tasks of the WTO in the period between the biennial meetings of the Conference of Ministers. Under the guidance of the General Council are Councils which are active in specific spheres: thus there are Councils responsible for trade in goods, for trade in services and for trade related aspects of intellectual property. ("Councils for TRIPs").

Furthermore the Conference of Ministers has established separate committees. There is a Committee for Trade and Development, a Committee for Payments Restrictions and a Committee for Budget, Finance and Administration. In addition to this, committees can be established to look into specific issues.

For purposes of organisational leadership a secretariat has been created whose chief executive is determined by the Conference of Ministers. Given the difficulties in naming the first chief executive[264] it became necessary to raise the number of deputy chief executives from three to four.

Agreement should be reached by consensus whenever possible. The WTO expressly adopts the procedure (Art. IX para. 1 WTO Treaty) used hitherto by GATT (1947). A resolution is possible via the Conference of Ministers or

---

264. On the 24th March 1995 the former italian trade minister *Renato Ruggiero* was formally named (Frankfurter Allgemeine Zeitung, 24th March 1995).

the General Council by a majority of votes cast, in so far as nothing to the contrary is intended either in these treaties or in the relevant multilateral trade agreement. (Art. IX para. 1 WTO Treaty). More detailed provisions regarding voting procedures are to be found in Art. X WTO Treaty.

(2) The Mechanism of Dispute Resolution

The task of dispute resolution has been allocated to the Council as a "Dispute Settlement Body". For this purpose it can establish rules of procedure and elect a chairman. Dispute resolution is characterised on the one hand by efforts to find a political consensus. Recommendations and decisions of the Dispute Settlement Body should serve as a satisfactory means of resolving the dispute. Extensive provisions on consultation, good offices and mediation have been drawn up. On the other hand the procedure is characterised by legal elements. In this way "security and predictability" should be achieved. The discretion of the panel has been usefully limited to a legally creative exercise on account of the application of rules of interpretation drawn from international law.

The panel procedure is of great significance. A panel is set up at the request of a party to a dispute. It has the task of carrying out an objective test and of supporting the Dispute Settlement Body. The procedure has a fixed time–scale and follows fixed written rules. Finally the report of the panel is adopted by the Dispute Settlement Body.

Appeal to a "Standing Appellate Body" is envisaged. Its report must be adopted by the General Council.

An executive procedure is also envisaged to ensure that the recommendations and decisions of the Dispute Settlement Body are carried out. Should a State fail to meet its commitments on time in cases where the parties to a dispute have agreed upon a deadline, then compensation is available. Where the parties fail to agree upon a deadline then suspension is available. This latter penalty should follow as far as possible in the same trade sector and with the consent of the Dispute Settlement Body. The extent of the penalty should correspond to the damage caused. Unilateral trade sanctions outside this system should be avoided. To this extent one can refer to the primacy of multilateral dispute resolution.[265]

The functional capacity and effectiveness of the multilateral trade system is watched over by the regular reporting procedure of the "Trade Policy Review Mechanism" (TPRM). This task falls to the General Council. The Conference of Ministers is the debating organ.

cc) Development and Content of the TRIP Treaty

The protection of intellectual property under the WIPO and individual organisations such as the PVC, RBC etc has been significantly enhanced by the TRIP Treaty ("Agreement on Trade–Related Aspects of Intellectual Property Rights").[266] The incorporation of these special aspects within GATT makes the increased competence of the WTO–system clear. In this way the world economic order has been placed on a new footing.

---

265. *Stoll*, ZaöRV 54/2 (1994), p. 241 (276).
266. *Stoll*, ZaöRV 54/2 (1994), p. 241 (311).

The prior system of conventions was found to be inadequate. Because several states had not acceded to the conventions. Furthermore a number of these conventions had provided member states with considerable discretion in respect of choice of law and adjustment norms. Such discretion was of particular advantage to developing countries.[267] Finally the pre–existing systems were not regarded as capable of sufficient reform.[268] This was especially so for the procedure of execution, which was provided by special recourse to the ICJ as per Art. 33 RBC or Art. 28 PVC but which could not prove its worth.[269]

According to the preamble the TRIP Treaty contains seven parts:

- General Provisions and Basic Principles (Part I),
- Standards Concerning the Availability, Scope and Use of Intellectual Property Rights (Part II),
- Enforcement of Intellectual Property Rights (Part III),
- Acquisition and Maintenance of Intellectual Property Rights and related inter partes procedures (Part IV),
- Dispute Prevention and Settlement (Part V),
- Transitional Arrangements (Part VI),

---

267. Comments on this point by *Beier/Schricker* (edit), GATT or WIPO? New Ways in the Protection of Intellectual Property, p. 211–319 and *Stoll*, Technology Transfer – International and National Tendencies, p. 325 f and 344 ff
268. Cf *Stoll*, The WTO: New World Trade Organisation, new World Trade Order – Results of the Uruguay Round of GATT, ZaöRV 1994, p. 241 (311) – for further comment.
269 Cf. on this above.

Institutional Rules; Final Provisions (Part VII).

(1) Development

It was the goal of the negotiations to integrate the protection of intellectual property within the framework of the "new economic order." An improved protection for intellectual property abroad was striven for alongside the protection of the domestic market against imports which infringed intellectual property rights. This was to be achieved through border control measures.[270] The countries of the industrialised world were generally interested in a more effective protection because for them intellectual property represents a significant economic factor.[271]

The topic of "Trade related aspects of intellectual property rights, including trade in counterfeit goods" was a subject of negotiations at the Uruguay Round.[272]

---

270. Cf. the US perspective on this. Art. 337 Tariff Act *Newman*, The Amendment to Section 337: Increased Protection for Intellectual Property Rights, Law and Policy in International Business 20 (1989), p. 571 ff.; and on the Trade Act: *Abbott*, Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework, Vanderbilt Journal of Transnational Law 22 (1989), p. 689 (707).

271. Cf. the different proposals: Agreement on Trade Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods and an Agreement on Trade in Counterfeit and Pirated Goods, in: GATT Doc. MTN.TNC/W/35 of 26.11.1990; see also the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35 of 26.11.1990, p. 193.

The declaration in Punta del Este on Trade Related Aspects of Intellectual Property Rights (TRIPs) is as follows:

> " In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines. Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already done in the GATT. These negotiations shall be without prejudice to other complimentary initiaves that may be taken in the World Intellectual Property Organisation and elsewhere to deal with these matters."[273]

---

272. Agreement on Trade–related Aspects of intellectual Property Rights, including trade in counterfeit goods (Annex III), MTN.TNC/W/FA Page 57 ff; see *Faupel*, GRUR Int 1990, p. 255 for further comment; *Drexl*, Possibilities of Copyright Development within the GATT Framework (1990); *Cottier*, The Prospects for Intellectual Property in GATT, CMLR 28 (1991) p. 383 ff; *Stoll*, Technology Transfer – International and National Tendencies (1994), p. 324 ff; *Reinbothe* The Protection of Copyright and Performance Rights in the Treaty's Preliminary Stage GATT/TRIPs, GRUR Int. 1992, p. 705 ff; *Stoll*, ZaöRV 54/ 2 (1994), 241 (310 ff.).

The later midterm text of TRIPs has to be seen as an advancement on the declaration in Punta del Este:

> "Trade Related Aspects of intellectual property rights, including trade in counterfeit goods
>
> 1. Ministers recognise the importance of the successful conclusion of the multilateral negotiations on trade–related aspects of intellectual property rights, including trade in counterfeit goods, that were initiated by the decision of the CONTRACTING PARTIES at Punta del Este.
>
> 2. Ministers recall the relevant provisions of the Punta del Este Declaration, including the objective of strengthening the role of GATT and bringing about a wider coverage of world trade under agreed, effective and enforceable multilateral disciplines, as well as the general principles governing the negotiations set out in I.B. of the Punta del Este Declaration, notably paragraphs (iv)–(vii).
>
> 3. Ministers agree that the outcome of the negotiations is not prejudged and that these negotiations are without prejudice to the views of participants concerning the institutional aspects of the international implementation of the results of the negotiations in this area, which is to be decided pursuant to the final paragraph of the Punta del Este Declaration.

---

273. Cited according to *Faupel*, GRUR Int. 1990, p. 255, 257 FN 4.

4. Ministers agree that negotiations on this subject shall continue in the Uruguay Round and shall encompass the following issues:

(a) the applicability of the basic principles of the GATT and of relevant international intellectual property agreements or conventions;

(b) the provision of adequate standards and principles concerning the availability, scope and use of trade related intellectual property rights;

(c) the provision of effective and appropriate means for the enforcement of trade related intellectual property rights, taking into acccount differences in national legal systems;

(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments, including the applicability of GATT procedures;

(e) transitional arrangements aiming at the fullest participation in the results of negotiations.

5. Ministers agree that in the negotiations consideration will be given to concern raised by participants related to the underlying public policy objectives of their national systems for the protection of intellectual property, including development and technological objectives.

6. In respect of 4 (d) above, Ministers emphasize the importance of reducing tensions in this area by reaching strengthened commitments to

resolve disputes on trade–related intellectual property issues through multilateral procedures.

7. The negotiations shall also comprise the development of a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods.

8. The negotiations should be conducive to a mutually supportive relationship between GATT and WIPO as well as other relevant international organisations."[274]

In point 3. above the central issue of the "GATT ability" of the TRIPs Agreement is left open. Nevertheless it is decided at point 4. that this issue should be negotiated within the framework of the Uruguay Round.[275] The relationship between WIPO and GATT, refered to at point 8., is considered in greater detail elsewhere.[276]

Once more the paradox arises that the protection of intellectual property may oppose investment in technology in order to reduce the financial risks attendant upon artistic creation. In any case the protection of "intellectual property" within the framework of TRIPs does not include the

---

274. Cited according to *Faupel*, GRUR Int. 1990, p. 255, 258 FN 6.
275. For more detail see *Beier/Schricker* (edit), GATT or WIPO – New Ways in the International Protection of Intellectual Property, IIC–Studies Vol 11, Weinheim 1989; *Faupel*, GATT and Intellectual Property, GRUR Int. 1990 255 ff.
276. Cf. *Beier/Schricker* (Ed), GATT or WIPO? New Ways in the Protection of Intellectual Property IIC Studies Vol 11, p. 21 ff.; *Joos/Mourang*, GRUR Int 1988, 887 ff (895); *Faupel*, GRUR Int 1990, p. 255 ff

droit moral from the begining. This can be traced back to american influence.[277] On this point TRIPs says: "However, Parties shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom."[278]

Thus a clear contradiction to the RBC – to which the USA has acceded – arises here without the exception of Art. 6bis RBC.[279]

(2) Results of the TRIP Treaty

The European Community has achieved more or less the goals it had pursued in respect of the TRIP Treaty. The achievements include the following: new rules on the adherence of international treaties, a new dispute settlement procedure as well as extended protection of copyright, trademarks, patents and utility models. The goals of the treaty were expressly anchored in Art. 7 of the TRIP Treaty. The purpose of the treaty and the context in which intellectual property is placed finds expression here. It is

---

277. *Dietz*, ZUM 1993, p. 309 (312).
278. Art. 9 of the "Draft Agreement on Trade–Related Aspects of Intellectual Property Rights" as part of the so called Dark Papers, a compromise document of the GATT's chief executive, drawn up in December 1991, printed in World Intellectual Property Report Vol 6 Nr. 2 (February 1992), p. 42 ff (43) – cited according to *Dietz*, ZUM 1993, p. 309 (312). "Art. 6bis of that Convention" refers to Art. 6bis RBC which specifies the moral rights of the author.
279. Cf. the comments of *Reinbothe*, GRUR Int. 1992, p. 707 ff and the evaluation given by *Dietz*, ZUM 1993 p. 309 (312)– in particular, for further information.

via the protection of intellectual property that technological innovation and its dissemination are supported. This should serve the interest of producers and users. This should "result in economic and societal improvement and lead to equilibrium in both rights and duties". This particularly extensive article is an expression of the importance of protecting technological achievements whose economic significance for the industrialised world is manifest.

In the preamble to the TRIPs intellectual property rights are characterised expressly as private rights.

What was achieved can be further divided in the following way:

- an institutional framework,
- the material rules for the protection of intellectual property,
- and the individual possibilities for enforcement of rights.

(a) Institutional Framework

From an organisational viewpoint the protection of intellectual property as per the TRIP Treaty is integrated within the WTO. Art. 68 (Part VII) TRIP Treaty envisages the setting up of a council for trade-related aspects of intellectual property rights (Council for TRIPs.) This council has the task of supervising the effectiveness of the treaty and the carrying out of the obligations which arise therefrom. Further it should grant members the opportunity of consultation on matters connected with trade–related aspects of

intellectual property rights as well as support within the context of dispute settlement. In this regard the council can require consultation and information. Art. 73 TRIP Treaty contains the provisions which allow for exceptions when the information demanded bears upon national security.

(b) Actual Standards of Protection

The TRIP Treaty contains its own rules for the protection of intellectual property.

The term "intellectual property" is governed in Art.1 para. 2 of the treaty. According to this provision the following types of intellectual property are covered:

1. Copyright and neighbouring protective rights,
2. Trademarks,
3. Geographical Indications,
4. Industrial Designs,
5. Patents,
6. Layout–designs of integrated circuits,[280]
7. Protection of Undisclosed Information.

(aa) Fundamental Rules

The TRIP Treaty contains the well known principle of national treatment which is found in other conventions on intellectual property. Within the TRIP Treaty it is to be

---

280. Cf. Art. 2 para. 2 TRIP–Treaty.

found in article 3. This principle applies to nationals of other member states. The treatment of nationals of other member states should be "no less favourable" than that applicable to nationals of the country concerned. Matters "affecting the availability, the acquisition, the extent, the maintenance and the enforcement of rights" come under the protection of intellectual property.

The protection of integrated circuits is admitted by way of exception. For practicing artists, manufactures of sound carriers and broadcasting concerns this principle is limited to the rights intended by the TRIP Treaty.

Exceptions affecting legal and administrative procedures are only admitted according to Art. 3 para. 2 TRIP Treaty "if these exceptions are possible to ensure the adherence of laws and other rules which are not at variance with the provisions of this treaty and if these practices are not applied in any way that would create a veiled trade restriction."

The principle of *most favoured status* to be found in Art. 4 is a further basic norm of the treaty. According to this principle advantages, privileges, special rights and exemptions, which are granted to nationals of one member state, are likewise to be made available to nationals of all other member states.

The TRIP Treaty has a view on the issue of the termenation of rights. This is to be found in Art. 6. According to this article this treaty, subject to Art. 3 (national treatment) and Art. 4 (most favoured status), must not be taken into

account in the context of dispute settlement involving the exhaustion of intellectual property rights.

(bb) Relationship to previous Treaties

The Swiss suggestion[281] to refer to already existing law emanating from the various conventions did not prevail as it was decided to adopt additional material provisions. It was the USA in particular which advocated such an approach. Nevertheless in addition to the new standards there is a close linkage with the pre–existing conventions.[282] According to Art. 2 para. 1 TRIP Treaty the Member states are bound to articles 1 to 12 of the Paris Convention of 1967. In regard to copyright and neighbouring rights Art. 9 TRIP Treaty lays down that the Member states must comply with articles 1 to 21 of the Berne Convention (1971). Expressly excluded from this is Art. 6bis which deals with the moral rights of the author. It is emphasised in Art. 9 para. 2 TRIP Treaty that copyright protection does not cover forms of expression, ideas, procedures, working methods or mathematical concepts as such.

---

281 Cf *Abbott*, p. 717

282 When the TRIP–Treaty refers to the "Paris Convention (1967)" this means the Stockholm Act of this Convention of 14 July 1967; "Berne Convention (1971)" refers to the Paris Act of this Convention of 24 July 1971 "Rome Convention" refers to the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, adopted at Rome on 26 October 1961 "Treaty on Intellectual Property in respect of Integrated Circuits" (IPIC Treaty) refers to the Treaty on Intellectual Property in Respect of Integrated Circuits, adopted at Washington on 26 May 1989.

According to Art. 15 para. 2 TRIP Treaty which concerns trademarks, member states are bound by the Paris Convention (1967).

With regard to geographical indications it is clear from Art. 22 para. 2 TRIP Treaty that each use signifying an unfair competitive practice in the sense of Art. 10bis of the Paris Convention is inadmissable and/or invalid.

Art. 35 TRIP Treaty establishes a link with the Washington Treaty for the Protection of Semiconductors. Viewed broadly the law as laid down in the various conventions is overlaid by the substantive and procedural rules of the TRIP Treaty, with the latter enjoying primacy, and there exists a link via the quoting of particular provisions.

(cc) National Law

Contrary to the prior law of the conventions it remains to say that several prerequisites of protection were themselves crystalised in the TRIP Treaty and are no longer left to national discretion. This is particularly so for the prerequisites determining whether or not certain items are capable of copyright protection. Goods affected include computer programmes (Art. 10 para. 1), databases (Art. 10 para. 2) and the rules on loaning (Art. 11). Because these standardisations add to the Berne Convention, where there are no rules of this sort in these fields, they are known as the "Berne–plus" elements.[283]

According to Art. 1 para. 1 TRIP Treaty the members are bound to apply the rules of the treaty. Thus they are free to

283. Cf. *Reinbothe*, GRUR. Int. 1992, p. 705 (709 ff.).

grant protection but this must not contradict the treaty. Member states are essentially free to carry out the provisions of the TRIP Treaty. The duty to observe the national principle, the principle of most favoured status and the specified rights of the possessor of protected privileges are directly applicable.[284]

(dd) "Standards Concerning the Availability, Scope and Use of Intellectual Property Rights", here: Copyright and Neighbouring Rights.

According to Art. 1 para. 3 TRIP Treaty the nationals of other Member states are regarded as protected persons. These can be either natural or legal persons, "which would correspond to the criteria for access to protection according to the Paris Convention (1967), the Berne Convention (1971), the Rome Convention[285] and the treaty on the protection of intellectual property with regard to integrated circuits, if all the members of the WTO were contracting parties of this treaty." In respect of special customs territories, which are members of the WTO, the term nationals is understood to cover both natural and legal persons who have a domicil or a real and actual industrial or trade establishment in that area. This is the result of an addition to Art. 1 para. 3 TRIP Treaty.

---

284. Thoughts of the German Government, BT– print matter 12/7655 (new), p. 345.
285. The exception found in Art. 5. para. 3 and Art. 6 para. 2 Rome Convention in connection with Art. 1 para. 3 sentence 3 TRIP Treaty is to be observed.

The basic element of substantive protective standards is linked by in Art. 9 para. 1 TRIP Treaty to articles 1 to 21 of the Berne Convention (1971) and the appendix attached thereto.

The following emerges from this:

1. The term "work" to be found in Art. 2 RBC is used in the TRIP Treaty. Art. 9 para. 2 TRIP Treaty emphasises that copyright protection covers "forms of expression and not ideas, procedures, working methods or mathematical concepts as such."

2. Art. 3 RBC, which governs the prerequisites of protection (nationality, etc), is used. However Art. 1 para. 3 TRIP Treaty must be complied with.

3. The principle of national treatment from Art. 5 RBC is to be seen at Art. 3 of the TRIP Treaty.

4. Art. 6bis RBC has been expressly excluded.

5. With regard to the term of protection of Art. 7 RBC Art. 12 TRIP Treaty has its own rule of which more will be said later.

6. The following are also used:

- the right of translation from Art. 8 RBC;
- the right of reproduction from Art. 9 RBC;
- the cases of free use of the work according to Arts. 10 and 10bis;
- the right of exhibition contained in Art. 11 RBC;
- the right of transmission of Art. 11bis RBC;

- the right to recitation from Art. 11ter RBC;
- the right to adapt a work contained in Art. 12 RBC;
- the provisions governing the making of sound copies of musical works according to Art. 13 RBC;
- the rights contained in articles 14, 14bis and 14ter which protect film;
- the presumption of authorship according to Art. 15 RBC;
- the possibility of confiscation ofunauthorised manufactured goods according to Art. 16 RBC.
- the possibility of supervising the dissemination, the performance or the exhibition of works according to Art. 17 RBC;
- the provision for the retrospective effect of the treaty according to Art. 18;
- the rule on the relationship of the treaty to national laws according to Art. 19 RBC;
- the provision on the signing of special treaties according to Art. 20 RBC;
- and finally the reference to special provisions for developing countries in Art. 21 RBC.

In addition account has to be taken of the *appendix* to the RBC. This is the case according to the first sentence of Art. 1 para. 1 TRIP Treaty. For the analysis of special objects this means that the results referred to above exist

alongside the unchanged standards and also under the umbrella of the WTO.

They can be based upon the instruments of legal execution which are envisaged in this respect.

With regard to the protection of *computer programmes* Art. 10 para. 1 TRIP Treaty establishes the following clear rule:

> "(1)Computer programmes, whether in source or object code, shall beprotected as literary works under the Berne Convention (1971).

Thus the catalogue of works according to Art. 2 para. 1 RBC is supplemented to include computer programmes.

Art. 10 para. 2 TRIP Treaty has the result that copyright protection is extended to cover the *compilation of data or other material.*

> "(2) Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself."

It is clear that just as with computer programmes it was regarded as essential that the rules of the RBC be added to for compilations of data.

The wish to extend protection to cover collections and compilations is clearly recognisable from this. That it does

not depend upon the form has been taken into consideration. The protection of compilations is regarded as being separate from the protection of the data or material such compilations contain. To this extent this rule concerning data is affected in another way. And thus the main problem remains: the protection is linked to the precondition that the selection or arrangement of the content must itself be an "*intellectual creation*". Thus we find ourselves once more having to consider the question, so typical for mainland european copyright, of what are the criteria of an intellectual creation.[286] A provision approaching the anglo–american view of this issue could not prevail.

Because of this provision no new result can be found concerning the solution of the issue of the protection of a database compiled by libraries.

The law on renting protected works was given special consideration in Art. 11 TRIP Treaty.[287] According to the first sentence of this article rental law refers expressly to computer programmes and cinematographic works. The members of the WTO should grant to authors or their legal

---

286. To this extent reference can be made to solutions given above.

287 "In respect of at least computer programmes and cinematographic works, a Member shall provide authors and their successors in title the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works. A member shall be exempted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on author and their successors in title. In respect of computer programmes, this obligation does not apply to rentals where the programme itself is not the essential object of the rental."

successors the exclusive right "to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works".

For cinematographic works the members should certainly be exempted from this principle, except for the case where rental of the film has led to widespread reproduction which seriously affects the right of reproduction. In addition, no duty arises from this copyright with regard to those computer programmes where the programme itself is not the essential object of the rental.

The minimum standard of the *term of protection* is governed by Art. 12 TRIP Treaty.

> "Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorised publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making".

For books this means that they are protected for a minimum of 50 years from the end of the calendar year after authorised publication. Should there be no authorised publication within 50 years of the book's manufacture then the term is reckoned as 50 years from the end of the calendar year of manufacture. This last point is important for works forming part of the deceased's estate.

By virtue of Art. 13 members are obliged to confine limitations or exceptions to exclusive rights "to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." In this way any evasion of copyright and neighbouring rights should be stopped. This particular clause could be characterised as a "guarantee of essential content." The very essence of copyright would be the "normal exploitation of the work" and "the legitimate interests of the right holder". Reasonableness marks the lowest limit of the author's burden.

The protection of performers, producers of phonograms (sound recordings) and broadcasting organisations is governed by Art. 14 TRIP Treaty. The Rome Convention is supplemented by the provisions of the TRIP Treaty.

Art. 8 TRIP Treaty – "Principles"– precedes Part II and allows a discretion to members in drawing up laws. Paragraph 1. of Art.8 is as follows:

> "(1) Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio–economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

According to the provisions of this article it is allowed to Member states in their laws and regulations to adopt measures for the protection of public health and nutrition as

well as for the promotion of the public interest in sectors which are of vital importance to the socio–economic and technological development of such Member states (para. 1 sentence 1.).

The potential to justify limits to intellectual property finds its limits in the rules of this treaty (para. 1 sentence 2.), which also represent the highest point of significance. Art. 8 para. 2 TRIP Treaty has in view the intellectual property holder's abuse of legal rights to the detriment of trade or the transfer of international technology.

> "(2) Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology."

The prerequisites for measures are their appropriateness in preventing the abuse of intellectual property rights by right holders as well as unfair practices and their consistency with this Treaty. Its application is with the implementation of exclusive rights.

(c) Individual Enforcement of Intellectual Property Rights

The "enforcement of intellectual property rights" is considered within a separate part (III) of the TRIP Treaty. This reflects the importance attached to this subject at the Uruguay–Round.[288]

For the individual enforcement of intellectual property rights rules were drawn up in the fields of civil, administrative and criminal procedure along with border measures. This occured against the backdrop of achieving the best effective legal protection possible. Thus Art. 41. para. 1. TRIP Treaty obliges members of the WTO to have procedures in place for the enforcement of intellectual property rights. According to the second paragraph of this article such procedures must be "fair and reasonable". Procedures which are unnecessarily complicated or expensive or include unreasonable time limits or unjustifiable delays are expressly excluded. According to para. 3 the procedure is to be in writing and decisions on the merits must only be based upon evidence. For this to happen it is not necessary to set up a special judicial system for the enforcement of intellectual property rights.

Alongside these general considerations specific provisions apply to the individual procedures.

(aa) Civil Procedure

Members are obliged to put at the dispsosal of holders of intellectual property rights a civil procedure for the enforcement of all intellectual property rights falling under this treaty.

It forms part of a *just and equitable procedure* that the defendant to a claim be timely informed of the claim both in writing with the information containing sufficient detail of

---

288. *Faupel*, GATT and Intellectual Property, GRUR Int. 1990, p. 260 (263); *Stoll* ZaöRV, 54/2 (1994), p. 241 (319).

the basis of the claim. Parties shall be allowed to be represented by independent legal counsel. For trials abroad it is important that no undue demands may be made for individuals to appear in person. The parties to such claims are entitled to substantiate their claims and present all relevant evidence.[289] It shall be possible to present legally relevant material for the purposes of substantiating a claim upon judicial direction. In cases where this is prevented the courts have the authority, based upon the information already presented to them, including the complaint or allegation of the party adversely affected by the denial of access to information, to make decisions of a final or preliminary nature.[290]

According to Art. 44 TRIP Treaty the goal of a claim can be an injunction and according to Art. 45 it can be a claim in damages, which also covers expenses. Furthermore a claim exists for information concerning the identity of third parties and channels of distribution which have contributed to the injurious behaviour.[291] In order to prevent a breach the courts shall have the authority to dispose of goods and objects.[292]

(bb) Administrative Procedures

For administrative procedures the governing article (Art. 49 TRIP Treaty) refers to the principles of civil procedure:

---

289. Art. 42 TRIP Treaty.
290. Art. 43 TRIP Treaty.
291. Art. 47 TRIP Treaty.
292. Art. 46 TRIP Treaty.

> "To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section."

Additionally, according to Art. 62 para. 5 TRIP Treaty administrative decisions concerning the acquisition and maintenance of intellectual property rights and, in so far as the law of a member of the WTO provides for such procedures, the setting aside theory by administrative remedies and inter partes actions such as obtections, requests for revocation and the extinguishment of scrutiny by a court or a court–like body, fall within these provisions.

Art. 41. para. 4 TRIP Treaty regards it as a general duty for the members of the WTO to plan for judicial review of the decisions of the administrative bodies. This also applies to questions on legal issues and on the merits of decisions of the courts of first instance. This obligation lapses in so far as in anullment proceedings concerning an unsuccessful claim or counterclaim a judicial remedy can be decided upon.

(cc) Criminal Procedure

The members of the WTO are further bound to provide for criminal procedures and penalties in the face of intentional imitation of trademarks or the intentional manufacture on a commercial scale of copyright goods.[293]

---

293. Art. 61 TRIP Treaty.

(dd) Provisional Measures

In order to prevent infringement of intellectual property rights and for the purpose of securing evidence and the presentation of information temporary measures are admissible upon the decision of a court.[294]

(ee) Special Requirement Related to Border Measures

The TRIP Treaty contains in para. 4 provisions affecting border measures.

A procedure is anticipated which enables the holder of rights, upon the basis of a grounded suspicion of the introduction of imitation goods or the unlawful manufacture of goods protected by copyright, to apply in writing to the competent authorities or customs authorities for a suspension by the customs authorities of the release of the goods into free circulation. This can also happen with regard to goods in relation to which rights other than intellectual property rights are thought to be infringed. In addition the procedure allows for the export of such infringing goods to be suspended.[295]

The terms "counterfeit trademark goods" and "pirated copyright goods" are defined in a footnote.[296]

> "For the purposes of this Agreement:

---

294. Art. 50 TRIP Treaty.
295. Art. 53 TRIP Treaty.
296. Footnote 14 to Art. 51 TRIP Treaty.

(a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in quesion under the law of the country of importation;

(b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorised by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation."

For the procedure on border measures an application is required, for which sufficient evidence has to be submitted.[297] Furthermore the competent authorities must demand a security or equivalent assurance from the party bringing the claim.[298] Additionally the suspension of the release of goods onto the market is to be reported immediately to the importer and the applicant.[299] The duration of the suspension is limited at first to ten days within which a procedure based on the merits must be set in motion.[300]

---

297 Art. 52 TRIP Treaty.
298. Art. 53 TRIP Treaty.
299. Art. 54 TRIP Treaty.

Where goods have been suspended without good cause the competent authorities are authorised to pronounce that the applicant pay damages to the importer, the consignee (receiver) and the owner of the goods.[301]

For the benefit of the applicant it is intended that he must have sufficient opportunity to test the goods detained by the customs authorities in order to be able to found his claims.[302] Should prima facie evidence be present then ex–officio action is certainly possible.[303] The competent authorities are empowered to order either the destruction or the disposal of the infringing goods.[304] Certain goods are exempted from the above provisions, namely goods non–commercial in character to be found either in the luggage of travellers or in small parcels.[305]

Bringing the above points together it can be stated that with respect to the individual enforcement of intellectual property rights in civil procedure, administrative procedure, criminal procedure, provisional measures and finally border measures the TRIP Treaty has achieved an international standard. Compared with previous treaties and conventions this treaty represents a marked improvement in the legal position of the holder of intellectual property rights.

---

300. Art. 55 TRIP Treaty.
301 Art. 56 TRIP Treaty.
302. Art. 57 TRIP Treaty.
303. Art. 58 TRIP Treaty.
304. Art. 59 TRIP Treaty.
305. Art. 60 TRIP Treaty.

dd) Specific Points on Dispute Settlement in the TRIP Treaty

The unified dispute settlement system is seen as the chief outcome of the negotiations.[306] The WTO also offers for the TRIP Treaty an organisational framework for dispute setttlement. It does this as Art. 64 TRIP Treaty refers to Arts. XXII and XXIII of GATT 1994 which are put into practice via the agreement on dispute settlement. These provisions, which have been overlain and which represent the foundation of the system of dispute settlement, are applied here insofar as the TRIP Treaty makes no special changes.[307]

Art. XXII GATT 1994 allows for possible consultation:

> "Consultation
>
> (1) Each contrtacting party shall accord symphathetic consideration to, and shall afford adequate opportunity for consultation regarding, such represantations as many be made by another contracting party with respect to any matter affecting the opperation of this Agreement.
>
> (2) The CONTRACTING PARTIES may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find

306. *Jansen*, EuZW 1994, p. 333 (334).

307 Cf. on procedures for the settlement of disputes: *Senti*, GATT–WTO, p. 33 ff.

a satisfaction solution througgh consultation under paragraph 1."

Furthermore Art. XXIII GATT 1994 concerns *the protection of concessions and other advantages*:

"Nullification or Impairment

(1) If any contracting party should consider that any benefit accuring to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of objektive of the Agreeement is being impeded as the result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concenrned. Any contracting party thus approched shallgive sympathetic consideration to the representations or proposals made to it.

(2) If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the dificulty is of the type described in paragraph 1 (c) of this Article, the

matter may be referred to the CONTRACTING PARTIES. THE CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. THE CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter–governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then befree, not later than sixty days after such action is taken, to give written notice to the Executing Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on wich such notice is received by him."

According to Art. 64 para. 2 TRIP Treaty Art. XXIII para.1 letters b and c of the GATT 1994 find no application in the settlement of disputes for a period of five years. In addition

to this Art. 64 para. 3 TRIP Treaty provides that during this five year period the Council for TRIPs will analyse the sphere of application and the modalities concerning the excepted complaints according to XXIII para. 1 lit. b) and c) GATT 1994. It places its recommendations before the Conference of Ministers for its consent.

Art. 63 TRIP Treaty obliges Member states to establish transparency by way of Statutes, other rules and by means of generally applicable judicial decisions and administrative measures in respect of intellectual property. To this effect they are either to be published officially or at the very least to be made public in such a way that Governments or the holders of rights are given notice. The same applies to treaties entered into by Member states.

With regard to the Statutes and other rules there exists a duty to notify the Council for TRIPs in order to make possible the testing of the effect of the TRIP Treaty. A duty of this kind can be certainly disregarded should consultations with the WIPO on the setting up of a common register prove successful.

c) OSCE

References to the rights of authors to copyright over their intellectual property are also found in the context of the CSCE (Conference on Security and Co–operation in Europe).

The basis of the CSCE is the final document of the talks which opened in Helsinki in 1973 and which was signed

on the 1st August 1975. (CSCE – The Final Act from Helsinki).[308]

The issues on co–operation in europe were divided into three parts: securing peace, economic co–operation and human rights. The fourth part contained the results of the conference.[309] The fruits of co–operation in humanitarian and other areas is to be found in part three.[310]

The catalogue of principles found in the Final Act is regarded as the fundamental law of the CSCE.[311] The participants commit themselves to observing human rights (the seventh principle). Express reference was made in this regard to freedom of thought, freedom of conscience, freedom of religion and freedom of belief. Apart from this reference was also made to all those rights whose origin lies in respect for human dignity: namely civil, political, economic, social and cultural rights with special reference to the rights of minorities.[312]

As far as human rights are concerned it is of special significance that all principles of the catalogue are applicable to the same extent. Because of their nature human rights are normally to be achieved by the state as a matter of domestic concern, yet it follows from the equality of rank given to human rights and also as a result of the rule

308. The final document is to be found in EA, p. D 437 ff– Final Act; the same as Bull – B Reg 1975, p. 968 ff.
309. Cf. *von Bredow*, The CSCE proceedings.
310. Cf. with human rights: *Blumenwitz*, The CSCE and human rights, 1977
311 *Fastenrath* (publisher.), CSCE, vol 1, Introduction, p. XI, *von Bredow*, The CSCE proceedings, p. 53 ff.
312. *Fastenrath* (publisher), CSCE, vol 1, Introduction, p. XII.

against interference with these rights, that both are to be achieved without reservation. The result of this is that the rule against interference can no longer be cited as against the claim to human rights without showing more. A strengthening of this principle is to be found in the conferences which followed, which in large measure referred to the principles found in the catalogue and which partly brought about enlargements thereto.[313]

An initial reference to intellectual property including copyright law is to be found in the concluding document of the CSCE follow–up summit meeting[314] of 15th January 1989. Under the heading "Information" at Nr. III 34 is to be found the following:

> "(34) They will continue their efforts in order to contribute to an ever more comprehensive recognition and an ever greater understanding of life in their countries and thereby promote trust between peoples.
>
> They will make further efforts to facilitate a more free and widespread dissemination of information of every kind, to encourage co–operation in the sphere of information and to improve the working conditions of journalists.
>
> In this context and in agreement with The International Convention on Civil and Political Rights, the General Declaration on Human Rights and their

313. See *Fastenrath* (publisher.), CSCE, vol. 1, Introduction, p. XIII.
314. Source: Bulletin of the press and information office of the West German government 1989, Nr. 10/ p. 77

> other relevant international obligations they will guarantee the receipt and further passing–on of information of every kind so that individuals are free to choose their own sources of information. With this objective in mind they will make sure that radio transmissions which are transmitted in accordance with the rules of the International Telecommunications Union (ITU) can be received directly in their countries without interference; and that individuals, institutions and organisations, *whilst observing intellectual property rights, including copyright*, are allowed to acquire, possess, reproduce and disseminate all categories of information. With this goal in mind they will remove all restrictions which do not accord with the obligations of international law considered above and other international obligations."[315]

And under Nr. III 41 the following is said under this heading:

> "(41) They will comply with the copyright of journalists."

As a result of the follow–up summit meetings in Vienna agreement was reached on both an improved mechanism for the maintenance of human rights and on freedom of movement.[316] For the first time the hitherto rarely used expression "human dimension" made its way into the Vienna final document. This term denotes all issues of

---

315. The author's own emphasis.
316. EA 1989, D p. 133 ff., cf also *Groth*, EA 1989, p. 95 ff.

human rights and of socio–cultural co–operation. Furthermore this term is used as a heading for the mechanism arrived at in Vienna concerned with the ongoing control and discussion of humanitarian decisions. Great hopes were placed in the creation of the mechanism of the human dimension which subjects the maintenance of human rights within participating countries to enduring control. In the case of breach the infringing country is duty bound to provide information and an opportunity for the problem to be discussed.[317] It is at any rate by this control mechanism that the declarations of intent, which hitherto were only humanitarian in nature, acquire their binding character.[318]

In the "Document from the Copenhagen Summit Conference on the Human Dimension of the CSCE"[319] of 29th June 1990 the following was said at Nr. 9:

> "(9) The participating countries reaffirm, that (9.1) – each person has the right to give his opinion freely, a right which includes the right to communicate. This right includes the right to freedom of opinion as well as freedom to receive and pass on news and ideas without the interference of the public authorities and without regard to international borders. The exercise of this right may only be subjected to statutory restrictions which are in accord with international standards. Access to and

317. *Fastenrath*, (publisher.), CSCE, vol. 1, Introduction, p. XVI.
318. Cf. *von Bredow*, The CSCE proceedings, p. 130.
319. Source: Bulletin of the press and information office of the West German government 1990, Nr. 88/p. 757.

> the use of means whereby documents of every sort can be reproduced must not be restricted, and certainly *rights in connection with intellectual property, including copyright, are to be observed*;..."[320]

In general it can be said that the conferences of Paris (1989), Copenhagen (1990) and Moscow (1991) have led to the improvement of the mechanism of the human dimension. It was ensured that human rights violations could be quickly cleared up via experts as well as by the reports of special missions and that further steps could be recommended.[321]

The "Charter for a new Europe", the product of the Paris CSCE summit meeting (1990), is a document of outstanding importance.[322] Following the then recent collapse of the communist states of eEastern Europe the charter was able impressively to confirm the political agreement amongst the 35 CSCE countries to a pluralist democracy founded upon respect for human rights as well as agreement upon the principles of the free market.[323] Thus the participating countries recognise a "new age of democracy, peace and unity."

---

320. The author's own emphasis.
321 *Fastenrath* (publisher), CSCE, vol. 1, Introduction, p. XVIII.
322. European Journal of Human Rights (EJHR) 1990, p. 517 ff.; the individual conferences concerned themselves subsequently amongst other things with human rights (EJHR 1991, p. 495 ff.).
323. *Oppermann*, European Law, at side note 139.

Additionally the "Document of the Cracow Symposium on the Cultural Inheritance of the CSCE participating countries"[324] of 6th June 1991 contains the following provisions on intellectual property:

> "7. The participating countries recall their obligations to guarantee unhindered access to cultural effects and agree upon the following:
>
> 7.1 Every person or independent association has the right to the private possession, use and reproduction of all categories of cultural material such as books, publications and audio–visual records along with the means of reproducing such material. *This right exists in so far as the intellectual property in the material is respected by way of the payment of a fee.*
>
> 8. The participating countries are determined to promote the mutual recognition of their respective cultures. To this end they will promote co–operation and exchange in all spheres of cultural and intellectual creativity."[325]

The passages cited here prove that intellectual property inclusive of copyright can lay claim to validity within the context of the CSCE. Intellectual property is specified in connection with the claim to free access to information and freedom of opinion, both these claims being based on human rights. Access to methods whereby material may

---

324. Source: Bulletin of the press and information office of the German government 1991, Nr 71 / p. 573.
325. The author's own emphasis.

be reproduced is mentioned expressly. The reference to the General Declaration of Human Rights and to the International Agreement on Civil and Political Rights shows yet again the wide effect of these declarations.

The Office for Democratic Institutions and Human Rights (ODIHR) has functions in the context of the mechanism of the human dimension. It organises biannually a meeting at expert level on the implementation of human rights at which the development of human rights in participating countries is tested. In addition to this the ODIHR acts as a co–ordinating centre for information concerning human rights and conducts seminars on specific human rights issues.[326]

The procedure within the human dimension is structured in such a way that a participating country, which levels criticism at another country in respect of human rights and requests information from that country concerning the human rights situation there, is entitled to a written response within ten days from the country concerned. Furthermore, bilateral meetings can be called within a week so that human rights issues including concrete cases can be dealt with. A committee of experts can be called upon whose mission it should be to first find the facts and then report them. The experts are entitled to make recommendations which lead to possible solutions. The country which has set this process in motion has the opportunity to add its own opinion to the report. The report and opinion is then conveyed to all CSCE participating countries. Finally

---

326. *Fastenrath* (publisher.), CSCE, vol. 1, Introduction, p. XXIV

the committee of high officials can advise on the results of this and recommend the next steps.[327]

In the final clause of the entire document of the CSCE Final Act from Helsinki it is made specific that the Act is "not registrable according to Art. 102 of the UN Charter" (the so–called "legal disclaimer"). According to Art. 102 of the UN Charter the parties to a treaty cannot base a claim upon treaties or international agreements which have not been registered in accordance with Art. 102. It is for this reason that the general view is that the Final Act is not an agreement under international law.[328]

The effect of obligations under international law consists solely in the repetition of already existing customary and treaty law and in the duties of states which are non–legal in nature, namely political and moral obligations.[329] Several authors recognise the existence of a quasi–political obligation (soft law).[330]

The same can be said of the documents emerging from the CSCE successor conferences held in Belgrade, Madrid and Vienna.[331] It is also the case that they contain

---

327. *Fastenrath* (publisher.), CSCE, vol. 1, Introduction, p. XXVIII.
328. Cf. *Blumenwitz*, headword: Germany since 1945, in: Dictionary of Law – International Law– published by I. Seidl – Hohenfeldern, 2nd edition. 1992, p. 44; and also *Beyerlin*, headword: The Protection of Human Rights via the UNO and the CSCE, in: Dictionary of Law – International Law–, published by I. Seidl – Hohenfeldern, 2nd edition. 1992, p. 210.
329. *Beyerlin*, headword: The Protection of Human Rights via the UNO and the CSCE, in: Dictionary of Law – International Law– published by I. Seidl – Hohenfeldern, 2nd edition. 1992, p. 210.
330. *Oppermann*, European Law, at side note 136.

no "definitively final" answers, rather they contain directives and opinions and for this reason are not to be regarded as binding treaties of international law.[332]

Finally it is to be pointed out that in the meantime the CSCE has grown to include some 52 states.[333]

d) ECHR

The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 november 1950 (ECHR) is a treaty subordinate to international law.[334] With the 11th protocol of 11th May 1994 important procedural changes were intended.[335] Guaranteed rights are preserved in their entirety.

---

331. *Beyerlin*, headword: The Protection of Human Rights via the UNO and the CSCE, in: Dictionary of Law – International Law– published by I. Seidl – Hohenfeldern, 2nd edition. 1992, p. 210.
332. *Mates*, EA 1976, p. 361; *Oppermann*, European Law, at side note 139.
333. Albania, Armenia, Austria, Azerbaijan, Belgium, Bosnia–Hercegovina, Bulgaria, Belarus, Canada, Croatia, Cyprus, Czechoslovakia, Denmark, East Germany (until the 2nd October 1990), Estonia, Finland, France, Georgia, Germany, GB, Greece, Hungary, Iceland, Ireland, Italy, Kasakstan, Kirgisia, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldavia, Monaco, The Netherlands, Norway, Poland, Portugal, Rumania, Russian Federation, San Marino, Slovenia, Spain, Sweden, Switzerland, Tadjikistan, Turkey, Turkmenistan, Ukraine, USA, Usbekistan, Vatican State and Yugoslavia (suspended since 8.7.1992).
334. *Frowein/Peukert*, ECHR – Commentary, Introduction, at side number 4; see also *Frowein*, JuS 1986, p. 845 (847).

aa) ECHR and Copyright

The ECHR does not contain a stipulation which on its own recognises authors' rights. A link with property law – as found in the German Constitution – is not possible in the context of the original text of the Convention, because the text does not contain property law. The reason for this is that unity on the preparation of a final draft was not reached in time.

Property law was first codified in article 1 of the first protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[336]

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or

---

335. The 11th protocol only comes into force when all Treaty states give their consent. At the time of writing 10 of the 11 Treaty states have done so. The ratificaition procedure will probably be concluded by the end of 1996. Cf. *Drzemczewski/Meyer – Ladewig*, EuGRZ 1994, p.317 ff.
336. BGBl. 1956 II p. 1880 – in force in West Germany according to the announcement of 13.4.1957 (BGBl. II p. 226) on the 13.2.1957

to secure the payment of taxes or other contributions or penalties."

However no express anchoring of "intellectual property" is found here so that its inclusion must be tested by way of interpretation.

The term "property" is to be understood in the broad context of international law[337] and includes the property in both movable and immovable objects, as well as all acquired and vested rights.[338] In the French text of article 1 to the first protocol "observance of all valuable rights" is covered via the wording "respect de ses biens" as against the likewise authentic english draft. Alongside the divergent french and english texts ("peaceful enjoyment of his possessions"; "droit au respect de ses biens") the European Court of Human Rights made clear in the *Handyside*[339]*– case that these texts refer to the same "property" term. Nothing of consequence arises from the different terms employed.*

In addition to the status of property in private law there are also qualified claims which can be tested in private law.

---

337. Cf. *Böckstiegel*, The general Principles of International Law on Expropriation, an analysis of art. 1 of the first protocol, 1963, p.11 ff.; *Partsch*, The Rights and Freedoms of the ECHR, in: The Fundamental Rights, Vol I 1 1966, 452 f.; *Dahm*, International Law, Vol I, 1958, 518; *Verdross/Verosta/Zemanek*, International Law, 5th edition. 1964, 368.
338. Cf. COM B 8543/79, van Marle amongst others/.NL, 8.5.1984, Fig. 123.
339. *Handyside* case, judgment of 7th December 1976, EuGRZ 1977, p. 38 (48); *Marckx* case, judgment of 13th June 1979, EuGRZ 1979, p. 454 (461)

There are also conditional claims which crystallise[340] upon the happening of the condition as with intangible property rights.[341]

Patent law, trademark law and other related protective laws are included alongside copyright law as intangible property rights and intellectual property.[342]

Regarding the content of art.1 to provide protection for intellectual property three rules have to be distinguished.[343]

"The peaceful enjoyment of possessions" is given pride of place in the first sentence of paragraph 1. The second sentence of paragraph 1 governs the conditions under which expropriation is allowed. Finally Treaty states are granted the right to control the use of property corresponding to the public interest by means of laws considered necessary for the purpose. This right is granted by paragraph 2.

As far as the protection of copyright law is concerned this means that it can in principle claim respect. Nevertheless limits to this respect are permissible in the public interest.

---

340. E 7775/77, DR 15, 143.
341. *Frowein/Peukert*, ECHR Commentary, art. 1 of the 1st protocol, at side number 5.
342. *Frowein/Peukert*, ECHR Commentary, art. 1 of the 1st protocol, at side number 5; on patent laws E 7830/77 DR 14, 200; *Moser*, The European Convention on Human Rights and Civil Law, p. 266; *Buck*, Intellectual Property and International Law, p. 233.
343. *Frowein/Peukert*, ECHR Commentary, art. 1 of the 1st protocol, at side number 21 f.

As well as this the use of the right can be limited by statute according to measures taken in the public interest.

Hitherto it has been the tendency of the European Court of Human Rights to recognise a limited operation of the right of protection of intellectual property. This goes hand in glove with the broad discretion granted by the Court to the Treaty states with regard to the guaranteeing of property.[344]

It is not to be expected that the level of protection so granted will exceed the level already found in Germany and in the Revised Berne Convention. Furthermore the application of art. 10 ECHR – the right of freedom of expression – has to be considered.

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity

344. Cf. *Peukert*, EuGRZ 1992, p. 1 (2) – with reference to the case *Hakansson and Steursson*; the same., EuGRZ 1988, p. 509

or public safety, for the prevention of disorder or crime, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Here too an explicit rule on the rights of authors is missing. Support for the moral rights of authors, especially in respect of the work's integrity, is regarded in the literature as being based upon the right of freedom of expression.[345] Article 10 paragraph 1 ECHR expressly allows for statutory rules, conditions and limitations. Measures of this kind can also serve to protect the rights of the author under the "rights of others" reference in paragraph 2.

If the primary application of the "rights of others" is to afford protection against defamation the registration of the rights of the author as the corollary to freedom of information must not be excluded. At this juncture the tension between art. 27 paras. 1 and. 2 of the Universal Declaration of Human Rights is to be remembered.

bb) Legal Effects

The preamble to the European Social Charter of 18th October 1961[346] makes express reference to the ECHR and to the first protocol in which property is protected and in so doing supports the international protection of pro-

345. *Peter Leuprecht*, Droit d'auteur et droits de l'homme au plan europeen, dans: Colloque international. Droits d'auteur & l'homme, Paris 1989, p.68.
346. BGBl. 1964 II p. 1262.

perty. Additionally the ECHR acts as a "decision source" for the judicial findings of the European Court of Justice. This corresponds to a consistent practice of the court.[347] In art. F para. 2 of the Treaty this practice was confirmed.

As a treaty of international law the ECHR creates obligations between Member states. It is important to emphasise that the ECHR was the first worldwide body, subject to the public authority of the Member states, to guarantee human rights with a body of binding rules.[348] According to art. 62 ECHR (art. 55 in the most recent draft) the usual dispute resolution mechanism of international law is excluded. In this way primacy is given to the procedures of collective enforcement via the organs of the ECHR.[349] According to art. 1 of the ECHR (which remains unchanged) the individual rights guaranteed by the Convention are created directly by international law. The subjective rights which the Convention creates become applicable upon ratification.[350] By virtue of art. 59 para. 2 of the Basic Law the Convention has become part of the legal order in Germany and is directly applicable in german courts and tribunals.[351]

As for the relationship to national law this means that the legal maxim "lex posterior derogat legi priori" can in gene-

---

347. ECJ, judgment of 21.9.1989, in legal matter 46/87 and 227/88, collection, 1989, p. 2759– *Hoechst*; ECJ, judgment of 5.10.1994 – Rs. C–404/92 P NJW, p. 3005 (3006).
348. *Geiger*, The Basic Law and International Law, § 72 I (p. 402 f.)
349. *Frowein/Peukert*, ECHR–Commentary, Introduction, at side number 4; cf also Ireland/GB, GH 25, 90 Fig. 239 = EuGRZ 1979, 159.
350. *Frowein*, JuS 1986, p.845 (847); ECJ, EuGRZ 1979, p.149.

ral be used. Certainly any conflict of this sort between the ECHR and a later domestic law will find its solution via the principle of interpreting domestic law so as not to conflict with international law.[352]

There is no duty to apply the Convention in national law.[353] However the Court emphasises: "That intention finds a particular faithful reflection in those instances where the Convention has been incorporated into domestic law".

The legal position of the Convention in the member states is somewhat variable.[354] In Austria the Convention is on a par with the Constitution, in Switzerland this is almost the case as a complaint in public law there can be based upon

---

351. Cf. *Frowein*, Supranational Human Rights Guarantees and National Law, in: Isensee/Kirchof (editor.), Handbook of Public Law, Vol VII,§ 180 at side number 6; *Hilf*, The place of the European Convention of Human Rights in German Law, in: *Mahrenholz/Hilf/Klein*, Development of (39), *Ress*, The European Convention of Human Rights and the Member states: The effect of judgments of the European Court of Human Rights in domestic law and before domestic courts, in: Meier, (editor), The Protection of Human Rights in Europe, 1982, p.227 (260 ff).

352. *Frowein*, Supranational Guarantees of Human Rights and National Law, in: Isensee/Kirchof (editor), Handbook of Public Law, Vol VII,§ 180 at side number 6; and the same., Federal Republic of Germany, in: Francis Jacobs (editor.), The Effect of Treaties in Domestic Law, London 1987, p. 63 (68 f.);cf.also BVerfG (Federal Constitutional Court) 74, 358 (370) and BVerfG, EuGRZ 1990, p. 329 (331) – and also *Frowein*, The German Federal Court and the European Convention on Human Rights, in: FS Zeidler, 1987, Vol II, p. 1763 ff.

353. *Frowein/Peukert*, ECHR Commentary, Introduction, at side number 5.

the Convention. In Belgium, Luxembourg, the Netherlands, France, Malta, Portugal, Spain, and Cyprus the Convention is of higher authority than statute whereas in Germany, Italy, Greece, Denmark, Finland, Liechtenstein, San Marino and Turkey it has the same authority as a domestic statute. In the UK, Ireland, Sweden, Norway and Iceland the Convention is not valid as domestic law and therefore no direct appeal can be made to it. In these latter countries the Convention has the character of international law only without the courts and domestic administrative tribunals being able to use it as a norm.[355]

In the settlement of disputes art. 24 of the ECHR is intended for complaints made by states and art. 25 for complaints made by individuals.[356] According to the 11th protocol the complaint made by the individual – from now on governed by art. 34 of the ECHR in the New Version – can be raised under the same preconditions. No longer does the individual complainant have to go via the Commission but rather he/she can go directly to the Court. The direct application is made in front of the European Court of Human Rights instead of before the Commission. The Court is organised both in chambers and committees (art. 27 ff. ECHR new version). Complaints made by Member

354. GH 61 (1983), 42 – Silver = EuGRZ 1984, p. 147, 154; cf. also GH 25 (1978), 91 – Irland v UK = EuGRZ 1979, p. 149.
355. *Frowein*, Supranational Guarantees of Human Rights and National Law, in: Isensee/Kirchof (editor) Handbook of Public Law, Vol. VII, §180 at side number 5.
356. Cf. also *Frowein*, JuS 1986, p. 845 (846 f.) and the same., Supranational Guarantees of Human Rights and National Law, in: Isensee/Kirchof (editor.), Handbook of Public Law, Vol VII, §180 at side number 8 ff.

states are governed by art. 33 ECHR of the new version. According to art. 26 ECHR (art. 35 para. 1 in the new version) the exhaustion of domestic remedies is a precondition for the application. As far as Germany is concerned the exhaustion of domestic remedies means a complaint based upon the constitution.[357] According to art. 52 of the ECHR (arts 42 and 44 in the new version) the decision of the Court is final. Art. 53 of the ECHR subjects the member states to the decisions of the Court, which means they are bound to comply with the decision in all cases. This obligation of the Convention has, in principle, the character of international law.[358]

A decisive advantage of the EHCR as against other rules of international law exists essentially in the more effective powers of enforcement. The party seeking protection finds here an efficiently functioning system of law.

III. The Protection of Copyright in the EU

According to the view of the European Commission, the Community should achieve 4 principal goals in the field of copyright:

Firstly the faultless running of the Common Market is to be attained. With this goal in mind obstacles and legal diffe-

357. *Frowein*, Supranational Guarantees of Human Rights and National Law, in: Isensee/Kirchof (editor.), Handbook of Public Law, Vol VII,§ 180 at side number 4.

358. Cf on this point *Frowein*, Supranational Guarantees of Human Rights and National Law, in: Isensee/Kirchof (editor.), Handbook of Public Law, Vol VII,§ 180 at side number 13 ff.

rences which seriously interfere with the functioning of the market through restrictions or distortions of cross–border trade and competition involving these goods and services have to be removed.[359]

Secondly the competitiveness of the European Community vis–a–vis trade partners is to be improved, above all in growth areas such as the new media and information technology.[360]

Thirdly care should be taken to ensure that intellectual property resulting from creativity and extensive investment within the Community cannot be adopted unlawfully by others outside the Community.[361]

Fourthly and lastly the concernhas to be allayedthat the limiting effects of copyright protection do not become too great for lawful competition. This is particularly so in the case of purely functional industrial design and for computer programmes so that copyright protection does not extend to a genuine monopoly of unlimited extent and duration. Not only should the interests of rights holders be taken into account but also the interests of third parties as well as the common interest should be considered.[362]

In Art. 3m EC Treaty "the support of research and technological development" is taken up as a goal of the Community. Furthermore the goal of the Community as expressed in Art. 3p EC Treaty with regard to support for culture

---

359. Green Paper, p. 3 f., at side note 2.
360. Green Paper, p. 4, at side note 1.3.3
361. Green Paper, p. 4, at side note 1.3.4
362. Green Paper, p. 5, at side note 1.3.5. and 1.3.6.

(calls for): "a contribution to a high quality general and professional education and the development of cultural life in Member States".

By way of its inclusion in the list of Community goals its significance has increased as measured by a Community–wide competence in this field.

1. Community Competencies

The regulation of copyright on a Community–wide basis, especially its harmonisation, requires a platform of authorisation. This follows as a result of the principle of limited authorisation.[363] As there is no reference in the EC Treaty to a special legal basis which authorises the EC to set up a Community–wide system for the protection of intellectual property and copyright thus Arts. 100 ff. EC Treaty come into play.[364]

In the context of the report of the European Court on "The Competence of the Community for the Conclusion of International Treaties in the field of Services and the Protection of Intellectual Property – Procedure of Art. 228 para. 6 EC Treaty"[365] the question had been considered amongst others whether the Community had the competence on the legal basis of Art. 113 EC Treaty to make agreements on the trade related aspects of rights in intellectual property including trade in imitation goods (TRIPs).[366] The European Court rejected rights in intellectual property as

363. Cf. Art. 189 para. 1 EC Treaty: "in accordance with this treaty".
364. *Ullrich/Konrad*, The Protection of Industrial Property, in: Dauses C. III, at side note 82.
365. Opinion 1/94 of the Court of 15th November 1994.

falling within the area of application of Art. 113 EC Treaty not because these rights specifically affect the international exchange of goods but rather much more because they affect internal trade to the same or somewhat greater extent than they do international trade.[367]

In the Maastricht Treaty new rules and competencies were adopted in Title IX Culture (Art. 128 EC Treaty) in Title XV Research and Technological Development (Art. 130f–130t EC Treaty) and the Title XIII Industry (Art. 130 EC Treaty), which are related to this whole area.

a) Competencies of the EC–Treaty

aa) Approximation of Laws

Art. 100 EC–Treaty gives the Council the authority to pass directives "which have a direct effect upon the setting up of the Common Market".[368] This was an approximate legal basis for action by the Community in the field of copyright. Art 100 EC–Treaty is an indispensable instrument for the harmonisation of the different national laws and for the creation of a unified standard in the Community in the absence of legal rules of Member States in this field.[369]

---

366. As to the essential far–reaching formulation of the question see the opinion 1/94 of the Court of 15th November 1994.
367 Opinion 1/94 of the Court of 15th November 1994, p. I–123 (at side note 57).
368. The rule has been reshaped in relation to the procedure of the Union Treaty.
369 Green Paper, p. 11, at side note 1.5.9.

The directive on the legal protection of the topography of semi–conductor products was a case involving the application of Art. 100 EC Treaty.[370]

Due to the coming into force of the Single European Act measures for the realisation of the internal market can also be based upon Art. 100a ECTreaty.[371]

The European Court specifies in its report on the GATT:

> "At the level of internal legal enforcement in the field of intellectual property the Community has at its disposal a competence for the harmonisation of national rules according to Art. 100 and 100a and upon the basis of Art. 235 can create new titles which are then superimposed upon national titles. This was done with the passing of the regulation (EC) Nr. 40/94 of the Council of 20th December 1993 concerning the Community trade mark (ABl. L 11 of 14th January 1994, p.1). Other voting rules apply to the passing of these provisions (unanimity in the case of Arts. 100 and 235) or procedural rules (a parliamentary hearing in the case of Arts.100 and 235, a procedure of joint participation in the case of Art. 100a) as are valid in the context of Art. 113."[372]

---

370. See below.
371 Procedural changes having an impact have been carried out in the Union Treaty.
372. Opinion 1/94 of the Court of 15th November 1994, p. I–123 (at side note 59).

Aspects of commercial policy arose in individual cases so that it was necessary to make use of the jurisdictional authority found in Art. 113 EC–Treaty. This applies to the regulation on the strengthening of common trade policy and especially to the stregthening of protection against unlawful trade practices.[373] Under this regulation there exist possibilities for taking measures to counteract a deficit in third countries concerning the protection there of the intellectual property of Community businesses (or discrimination against them in this field.)[374] However an authority for the harmonisation of intellectual property does not arise out of this regulation.[375] The same can be said of the regulation on the application of general preferential terms for certain commercial goods from developing countries as of 1989.[376]

---

373. Regulation (EEC) NBr. 2641/84 of the Council of 17th September 1984, ABl. L 252, p. 1 On this point cf the resolution 87/251/EEC of the Commission of 12th March 1987 on the introduction of a consultation and dispute resolution procedure concerning a measure of the US preventing the import of certain aramid fibres into the US (ABl. L 117, p. 18); the announcement of the starting of an action based on unlawful trade practices taking the form of the unlawful copying of sound recordings in Indonesia (ABl. 1987, C 136, p. 3); the making known of the start of an inquiry concerning an unlawful trade practice in the context of Regulation (EEC) Nr 2641/84 of the Council on the issue of piracy in relation to the copying in Thailand of Community sound recordings (ABl. 1991, C 189, p. 26).
374. Opinion 1/94 of the Court of 15th November 1994, p. I–124 (at side note 63)
375. Cf. on this point the opinion 1/94 of the Court of 15th November 1994, p. I–124 (at side note 63).
376. Regulation (EEC) Nr. 4257/88 of the Council of 19th December 1988, ABl. – L 375, p. 1– by way of example arising in relation to Korea.

bb) General Authorisation and Cultural Politics

(1) The Jurisdictional Basis of Copyright and the Protection of Industrial Property.

Further, reference to Art. 235 EC Treaty, the general authorisation, comes into the picture when a Community measure is necessary in the context of the realisation of one of the goals of the Single Market and the necessary jurisdiction for this is not provided for in the Treaty. The Council can however pass the necessary legal measure (directives, regulations or other legal measures). Art. 235 EC Treaty permits an "EC access" (*Hans Peter Ipsen*) to the field of culture.[377]

Art. 235 EC Treaty is not applicable for harmonisation measures for which Art. 100a EC Treaty provides the necessary authority. Should there be problems which cannot be solved by harmonisation alone, such as in the field of product piracy, then Art. 235 EC Treaty is the correct jurisdictional basis. By way of precedent in this context reference is made to the regulation of the Council concerning measures for the prohibition against transfer of imitation goods into the Community.[378]

Art. 222 EC Treaty is to be considered as a limit to the Community–wide competence to make rules. According to this article the Treaty leaves the rules on property ownership of Member states undisturbed. This means that the transfer of property to private or public owners and

---

377. *Oppermann*, European Law, at side note 1983.
378. Green Paper, p. 13, at side note 1.5.17.

thereby the question whether property should be taken over by the state or conversely privatised is one which is left to the competence of Member states. Nevertheless the Community can regulate the content of laws on property, the extent of the protection which they afford and the limits of their exercise if this should be necessary for the perfect functioning of the Common Market.[379] In this way the Community maintains a degree of freedom of action for the regulation of copyright and the protection of industrial property.

Taken together these mean that the Community via Arts. 100 and 100a EC Treaty can pass rules in connection with the Common Market, the internal market and the special requirements of Art. 235 EC Treaty which affect copyright.

Furthermore advance was made in the field of patents via international treaties. The 1973 European Patent Convention, The 1975 Community Patent Convention and the setting up of the European Patent Office in Munich[380] are all worthy of mention.

(2) The Jurisdictional Basis for Realising Cultural Projects

With reference to the EROMM–project the question has to be asked whether the Community has the authority to

---

379. Green Paper, p. 15, at side note 1.5.20.; on this point see "Television without Borders", a Green Paper on the creation of a Common Market for broadcasting, especially for satellite and cable, COM (84) 300 of 14th June 1984, p. 323–328.

380. Cf *Singer*, The New European Patent System, 1979.

become actively involved in the realisation of this project via a appropriate legal instrument.

The objects and achievements of the cultural arts are affected[381] by the establishment of the free movement of goods, persons and services within the Community. The trade in books and other media products has shown this to be so.[382] On the other hand the mutual consideration between the EC and Member states is visible from Art. 5 EC Treaty from which it can be concluded that cultural matters remain fundamentally the preserve of Member states.[383]

In this regard the permissibility of national measures such as the obligation to maintain fixed price controls on books in Germany and the intended manufacturing system of Presse–Grosso with its inevetable of monopoly are worthy of note.[384]

A general "cultural preserve" or "exception in the field of culture", where the competence of the Community would generally be excluded, does not exist.[385] Taken at its lowest point the field of "cultural and economic matters" forms an exception to the fundamental competence of the Member states.[386]

---

381. *Roth*, ZUM 1989, p. 101 ff.
382. European Court, Judgment of 10th January 1985 – Case 229/83 (Leclerc./.Sarl) – collection 1985, p.17 – the fixing of prices for books.
383. *Oppermann*, European Law, at side note 1984.
384. Cf. European Court, judgment of 3rd July 1985 – Case 243/83 (Binon./.Agence) – collection 1985, p. 2034 – Binon; further *Ipsen*, GS Geck, 1989, p. 348 ff.; *Hoffmann–Riem–Ipsen*–Symposium 1988, p. 74 ff.
385. Cf: *Oppermann*, European Law, at side note 1984.

Art. 235 EC Treaty can also be used in cultural matters where the subject matter comes under this heading.[387] Actions for the promotion of culture were already based upon Art. 235 EC Treaty. The Commission has tried to exhaust the possibilities in which it has presented (1977, 1982, 1987 and 1992[388]) related concepts for a coherent EC policy in the field of culture.[389] The Commission gives five fundamental areas for action in the cultural arena:[390]

- firstly the creation of a European cultural sphere;
- secondly the support for the European audio–visual industry;
- thirdly access to cultural resources;
- fourthly education and further education in the cultural sphere;
- fifthly a cultural dialogue with the outside world.

Alongside the regulation of Art. 235 EC Treaty there exists an expanding degree of cultural cooperation "at the edge

---

386. This rather unfortunate term has been coined by the EC Commission; cf *Oppermann*, European Law, at side note 1984.
387 *Oppermann*, European Law, at side note 1979.
388. *EC–Commission* (editor), The New Community Concept of Culture, doc. COM (92) 149.; cf also Final Conclusions of Council of Ministers with Responsibility for Cultural Issues of 12th November 1992, ABl. 1992 C 336/1.
389. EC–Commission (editor.), "New Impetus for Community Action in the Cultural Field", bull. EC 1987, supplement 4; cf. bull. G 1977, supplement 6 and 1982, supplement 6; on the problems of the Commission: *Ipsen,* GS Geck, 1989, p. 348 ff.
390. EC–Commission, "New Impetus for Community Action in the Cultural Field" (EC–bulletin, supplement 1987/4).

of the Community" via agreement in the Council amongst ministers responsible for cultural matters and via the signing of special treaties.[391] Such cultural co–operation bears the classical hallmarks of international law.

Intergovernmental ballots and agreements of ministers with responsibility for cultural matters often lead to decisions of the Council which are not legally binding but which, like recommended practices, are to be understood as self-imposed duties.[392]

A committee on cultural matters was established by the Council in 1988 and consists of representatives of the Commission and of Member states and it prepares the EC's cultural–political activities for the Council.[393]

There is the European Cultural Foundation which takes the form of an inter–state treaty.[394]

Further there is the "European Cultural Foundation" (ECF), which is a private organisation of Dutch law with its seat in Amsterdam. It exists to serve the public and has been in existence since 1954.[395]

---

391. *Forrest*, RMC 1987, p. 326 ff.; *Oppermann*, European Law, at side note 1979.
392. Cf. the Solemn Declaration of the European Council in Stuttgart 1983. On this point see also *Oppermann*, European Law, at side note 1986.
393. ABl. 1988, C 197/1.
394. Cf. *Massart–Pierard*, RMC 1986, p.34 ff. Its coming into force has been continuously postponed since 1982.
395. *Oppermann*, European Law, at side note 1987; *ECF* (editor.), A Network for Europe, no date given.

An example of EC cultural policy[396] in action is the co–operation between the libraries in the field of information,[397] the creation of a European library[398] and support for the translation of significant works of European culture.[399]

Should the co–operation of the libraries in the context of the EROMM project be simply co–ordinated or supported without it being necessary to lay a formal instrument such a plan is unproblematic because without more it adapts to the catalogue of the cultural activities of the Community.

A jurisdictional basis is necessary should the signature of a duty–bearing legal instrument (Art. 189 EC Treaty) be designated for the regulation of the project. For this purpose alongside Art. 235 EC Treaty, the Treaty of Maastricht[400] considers Art. 128 EC Treaty as having priority.

b) Additional Competencies in the EC–Treaty

The recent additions to the Treaty, namely Titles IX Culture (Art. 128 EC Treaty) XV Research and Technological Development (Art. 130f-130t EC Treaty) as with XIII Industry (Art. 130 EC Treaty) contain new competencies which

---

396. See *Hahn*, European Cultural Policies, 1987.
397 ABl. 1985, C 271/21 ff
398. Written question Nr. 1405/84 from Karel van Miert to the Commission of the European Communities: ABl. C 97 of the 18.4.1985, p. 26 on the question of the cost of protection in the hiring out of books in EC Member states ABl. C 161 of 1.7 1985, p. 16. on the harmonisation of methods for catalogueing books: ABl. C 73 of 2.4.1981, p 22.
399. ABl. 1987, C 309/3 f
400. The key date is 1 11 1993.

appear to make possible an advanced role for the Community in the field of the protection of industrial property and copyright.

aa) Competence in Cultural Matters

The Treaty of Maastricht was responsible for the insertion of Title IX Culture to Art. 128 EC Treaty. Thus the possibility now expressly exists for an involvement of the Community generally in respect of cultural–political matters.

Especially in regard to the cultural aspects of copyright there now exists by virtue of Art. 128 EC Treaty a secondary competence of the Community.[401]

Certainly it is to be pointed out that Art. 128 EC Treaty in no way represents competition to Art. 100 ff EC Treaty, because in paragraph 5 it expressly excludes all harmonisation of legal and administrative rules. This means that the approximation of laws in the field of copyright is, as was the case before, based upon the general rules.

Art. 128 para. 1 EC Treaty emphasises the common cultural inheritance but on the other hand recognises the national and regional variations of a "European culture"[402]:

The term "culture" ("cultures", "cultural inheritance") appears hard to grasp[403] notwithstanding the reference to fields of activity in paragraph 2.

---

401 Cf. *Kreile*, EuZW 1993, p. 24.

402. It is to be pointed out that this wording was avoided in the treaty. Instead of which Art. 128 para 1 makes reference to "cultures of Member states" and "common cultural inheritance"

> "(1) The Community makes a contribution to the development of the cultures of the Member States by safeguarding their national and regional identities as well as by the simultaneous emphasis of the common cultural inheritance."

In Art. 128 para. 2 EC Treaty the field of activity of the Community is defined.

> "(2) Via its involvement the Community promotes co–operation between Member States and supports and adds to their efforts when necessary in the following areas:
>
> -the improvement of knowledge and the spread of culture and history of European peoples.
>
> -the maintenance and protection of the cultural inheritance of European significance.
>
> -non–commercial cultural exchange.
>
> -artistic and literary creation, including in the audio–visual field."

According to Art. 128 EC Treaty it is the goal of the Community in cultural matters to support co–operation in the specified fields by way of the simultaneous preservation of national and regional diversity. Co–operation in the sphere of "books and reading" (the preservation of paper, translation, *libraries*, museums) can be counted amongst its

---

403. Cf on this point European Court, Case 7/61, Slg. 1961, p. 693 (720); *Tomuschat*, Legal aspects of community activity in the field of culture, in: FIDE (editor.), Vol. 1, 1988, p 15 (20); *Ress*, DÖV 1992, p. 944 (950).

competencies.[404] In the field of "artistic and literary creation" the *book* is one of four priorities which the Council and the ministers responsible for cultural matters have set.[405]

The EROMM project by way of the cross–border exchange of cultural goods and by co–operation in the preservation of these goods directly supports the preservation and protection of the cultural inheritance. This inheritance is of European significance. According to the concrete arrangement a contribution is made to the non–commercial exchange of cultural goods because the register of titles promotes borrowing between the libraries. In this way an indirect contribution to the improvement and dissemination of culture and history of European peoples is realised.

Paragraph 3 – the clause affecting third countries – adds:

> "(3) The Community and the Member States promote co–operation with third countries and with international organisations which have responsibilities in the cultural sphere, especially with the Council of Europe."

---

404. *Wittmann*, Cultural Policies, in: Weidenfeld/Wessels (editor.), Year Book of European Integration 1993/94, p. 213 (214).
405. *Bekemans/Balodimos*, Changes brought about by the Treaty on European Union in the Field of General and Professional Education and Culture, European Parliament, Directorate–General Science, working document, series "Europe of the Peoples" W 2, 1992, p. 25.

The EROMM project is an example of this as well because the gradual inclusion of third countries is laid down there as one of its goals.

According to para. 5 the competence of the Council[406] in this regard exists amongst the cited conditions:

> "(5) As a contribution towards the realisation of the goals of this article the Council decrees:
>
> –according to the procedure of article 189b and after committees representing the regions have been heard *supporting measures* to the exclusion of *every harmonisation* of laws and administrative rules of the Member States (be taken). In the context of the procedure of article 189b the Council decides unanimously;
>
> –*unanimously* recommendations proposed by the Commission."[407]

This competence exists for the Council in relation to organisational and financial measures of support and for recommendations.

The term *supporting measures* is relatively open[408] whereby the EC is able to undertake a variety of actions. EC tenders such as cultural events, academies and prizes are as examples. In this way a specific "cultural policy" is carried out which with the preservation of cultural inheritance in mind also pursues regional improvements.[409]

---

406. Cf. *Geiger*, Commentary, at side note 8.
407 The author's own emphasis.
408. *Ress*, DÖV 1992, p. 944 (947).

In summary the conclusion can be drawn that the Council, in the context of the jurisdiction provided to it in Art. 128 EC Treaty, can be active for the EROMM project.

By way of conformity with procedure the Council must in its supporting measures conform to Art. 189b EC Treaty and allow the Parliament to take part just as according to Art. 128 para. 5 in connection with Art. 198a–c EC Treaty it must allow the committee of the regions to be heard. The vote must be unanimous.

Recommendations made on the proposal of the Commission also require unanimity.

The principle of subsidiarity plays a somewhat deeper role in the field of cultural matters. That it is anchored in Art. 3b EC Treaty means on the one hand that it is binding for all fields of Community activity. However the wording of Art. 128 para. 1 EC Treaty on the other hand exhibits a further special restriction by way of the formulation "under the safeguarding of their national and regional diversity" and the use of the term cultures in the plural.[410] For the testing of jurisdiction this means: the authority to act is tested according to Art. 3b para. 2 EC Treaty. Thus the competencies which belong to the fields where the Community itself has exclusive competence have to be excluded. That leaves complete harmonisation areas such as the area of

---

409. *Ress*, DÖV 1992, p. 944 (947).
410. Cf. *Forrest*, The Cultural Dimnsion, p. 328; *Bekemann – Balodimos*, Changes brought about by the Treaty on European Union in the Fields of General and Professional Education and Culture. "Europe of the Peoples" series W2, European Parliament Directorate–General Science, Luxembourg 1992, p6.

Art. 36 EC Treaty ("national cultural goods having artistic, historical or archeological value or of industrial and commercial property") and the cultural field of Art. 128 EC Treaty.

Secondly according to the principle of subsidiarity the Community is only entitled to be active "in so far as the goals of the measures considered cannot be satisfactorily achieved at the level of the Member States and hence due to their extent and effect can be better achieved at the Community level" (Art. 3b para. 2 EC Treaty).[411] Thirdly as the product of Art. 128 paras. 1 and 4 EC Treaty consideration must be shown for the culture of the Member states. Should the profit of integration as a whole be small set against a substantial intervention in the compentence of countries in cultural matters then Community involvement has to be denied.[412]

A breach of the principle of subsidiarity is not the case here because co–ordination amongst libraries makes possible co–operation which cannot be achieved adequately at the level of the Member states and due to their manner in establishing a Community–wide network and their extent and effect it (ie co–operation) can best be achieved at the Community level (Art 3b EC Treaty). Intervention in national and regional diversity has not happened; on the contrary access to the "cultures" has been created via cultural exchange and co–operation. (Art. 128 para. 1 EC Treaty).

---

411 Cf the principle of subsidiarity

412 *Ress*, DÖV 1992, p. 944 (948)

For Germany a limited Community–based approach to cultural matters is especially important because in its widest sense, culture is first and foremost a matter of regional concern[413] (ie to the German Länder or administrative regions). According to Art. 146 para. 1 EC Treaty the possibility exists that a regional minister (eg in Germany, a minister from one of the Länder) represents[414] the Member State in the Council.

For Community activities which affect intellectual property matters in any way the *Kulturverträglichkeitsklausel* is of significance.

> "(4) The Community takes account of the cultural aspects of its activities by virtue of other provisions of this Treaty."

And even if the legal effect of such a "clause on integration" is not sufficiently clear then the taking into account of the culturally important decisions will be of advantage for the rights of authors in individual cases.

Ress deduces from this clause a "rule of taking into account"[415] according to which the Community in its involvement must take account of the cultures of the Member states in their national and regional diversity. As a concrete result of this the *Kulturverträglichkeitsklausel* should be both a guide for the exercise of complete competencies of the EC and a source of interpretation for provisions and measures.[416]

---

413. Cf *Ress*, DÖV 1992, p. 944 (945).
414. *Ress*, DÖV 1992, p. 944 (945).
415. *Ress*, DÖV 1992, p. 944 (947)

Outside the expansion of the areas of competence of the EC Treaty in Art. 128 EC Treaty doubt which had hitherto existed was swept away by the adoption of cultural matters in the catalogue of goals in Art. 3 p) EC Treaty.

The Community had already used Art. 235 EEC Treaty as the basis of cultural activities. From the four prerequisites of the article it is questionable whether cultural objectives could be assumed as an area of Community activity.[417] This is from now on no longer in doubt so that Art. 235 EC Treaty still comes into consideration when considering the jurisdictional basis of Community involvement.

Art. 235 EC Treaty certainly assumes that there is no other jurisdiction–providing norm in the Treaty. Via the existence of Art. 128 EC Treaty this subsidiarity is from now on no longer assumed without more, so that the application of Art. 235 EC Treaty to the field of cultural matters will be greatly reduced in significance.

In the Maastricht Treaty it was recognised in the field of financial aid in Art. 92 para. 3 EC Treaty as being potentially compatible with the Common Market if financial aid according to section d) (is necessary):

> "for the support of culture and the preservation of the cultural inheritance insofar as it does not interfere substantially with the conditions of trade and competition in the Community, which run counter to the common interest;"

---

416. *Ress*, DÖV 1992, p. 944 (948).
417 Cf. *Ahlt*, European Law, p. 120; *Schweitzer/Hummer*, European Law, p. 394.

This passage justifies state financial aid under the term "culture". In this way culture stands above the term competition.[418]

bb) The Sphere of Technology

Whilst copyright exhibits a special proximity to the title "culture", the industrial property rights have a similar proximity to the recently created title XV Research and Technological Development (Art. 130f.130t EC Treaty) and to the title XIII Industry (Art. 130 EC Treaty).

Oppermann has already stated that "the principle of the protection of intellectual property (patents, trademarks, copyright etc) at the European level belongs in this regard to the development of a common policy for research and technology". Inventions and the individual rights of personality are in essence the fruits of the human researching spirit.

In title XV "Research and Technological Development" the objectives of the Community in Art. 130 f EC Treaty are widened in order to strengthen scientific and technological fundamentals. Art. 130g EC Treaty links concrete measures which the EU will carry out. As part of this objective Art. 130 i ff. EC Treaty envisages programmes extending over many years as well as specific shorter programmes. The procedure for reaching a decision is governed by Art.

---

418. Cf. *Bekemans/Baladimos*, Changes brought about by the Treaty on European Union in the Fields of General and Professional Education and Culture, European Parliament, Directorate–General Science, working document, series "Europe of the Peoples" W2, 1992, p. 38.

130o EC Treaty. It lies in the nature of the matter that these measures will affect industrial property rights.

Similar effects are also to be expected via Community policy on industry (title XIII). Art. 130 EC Treaty expressly intends "support for a better use of the industrial potential in the fields of innovation, research and technological development".

The extension of the objectives in Art. 3 m) EC Treaty to cover "support for research and technological development" has already been pointed out.

2. The Harmonisation of Copyright

The necessity for the part harmonisation at the very least of copyright law within the EU arises from the principle of territoriality which has a special effect in relation to sole and exclusive rights. In this regard the decision of the European Court on the direct application of Art. 6 of the EC–Treaty changes nothing because this means that authors must not be discriminated against on the basis of national rules, but it does not exclude this.[419]

The fundamental principle of treatment as a national (the national principle) arises out of the Revised Berne Convention. The territoriality principle is valid here also up to and including rights of minimum protection. For this reason it is possible that the same copyright object is subject to a number of territorial protective codes which differ from each other. The exploitation of an object on an internatio-

---

419 European Court of 20th October 1993, verb. Rs. C–92/92 and C–326/92 – Phil Collins.

nal scale is often insufficiently protected by national systems of protection.[420] By way of example in this regard are the cases where, due to various terms of protection for copyright, a work is common property in one country whereas in another country it is not. In such cases this can have economic consequences.

The stating of legal differences is in itself not a cause for concern, however an action is necessary should the legal differences so result that the exercise of one of the basic freedoms of the Treaty is infringed or the functional efficiency of the Common Market is destroyed. Via the *Cassis-Dijon*–jurisprudence of the European Court there exists in relation to copyright law[421] a de facto mutual recognition of national standards which affects the functioning of the Common Market. Possibilities for competition are spread via these sole and exclusive rights and the potential for innovation and distribution is released.[422] Fundamentally there are two routes toward unification of the law: either the route toward the creation of a European register of protection or the bringing into line of the content of the protective rights of the Member states.[423]

---

420. *Ullrich/Konrad*, in: Dauses C. III, at side note 6.
421 Cf. also Art. 36 EC–Treaty.
422. *Ullrich/Konrad*, in: Dauses C. III, at side note 81.
423. *Ullrich/Konrad*, in: Dauses C. III, at side note 82.

The harmonisation of copyright in the EU[424] has hitherto been somewhat piecemeal. The reasons for this are to be found in the heterogeneity of the material subject to copyright protection as the distinction of § 2 German Copyright Law and its related rights of protection according to §§ 79–87 Copyright Law illustrates in the structure of the affected markets. The fundamental distinction between continental copyright protection and Anglo–American copyright is also indicative of this. This is also the case in the observance of social interests which are qualified[425] in the rules on property ownership of the Member states (cf. Art 222 EC Treaty). It has to be said that the original base of the Commission in this regard was too narrow.

In the Commission's White Book on the completion of the internal market by 1992, only the protection of software was anticipated.[426]

As far as the audio–visual media are concerned only a few forward steps[427] are visible despite the Green Paper "Television without Frontiers".[428] In the Green Paper on copyright and the challenges of technology to the whole

---

424. Cf also *Dietz*, The Harmonisation of Copyright in Community Law, GRUR Int. 1985, p. 379ff , *Schricker*, Harmonisation of Copyright in the EC, GRUR 1989, p. 466 ff.; *ibid* Towards The Harmonisation of Copyright in the European Community, *FS Steindorf*, 1990, p. 1438 ff
425. Cf *Ullrich*, The Arrangement of Competition Law and the Law of Intellectual Property in the Community – a sketch, in: Müller–Graff (editor) Common Private Law in the European Community, Baden–Baden 1993, p. 325 (363).
426. Document COM (85) 310 of 14.6.1985.
427 Cf also *Ullrich/Konrad*, in: Dauses C III at side note 111.
428. Document COM (84) 300 of 14.6.1984.

issue of copyright requiring immediate action[429] only a couple of projects on harmonisation were referred to. The Green Paper has been subject to heavy criticism[430] in the literature on this subject. This is especially so regarding the reduction of copyright issues to purely economic aspects of the exploitation of copyrigh. The relegation of the economic interest of the author in favour of the interests of the exploiter is especially remarkable.[431] *Dietz* makes the criticism that "copyright without an author" is the central idea and gives convincing evidence in support of this.[432]

It is clear from the goals of the Commission as referred to above that the economic aspect is decisive and to which the spiritual roots of copyright have been sacrificed.

In the working programme of the Commission in the field of copyright and neighbouring rights (The Green Paper Initiative)[433] the Commission has let it be known that it not only concerns the bringing into line of national laws but also the improvement of the existing protection of intellectual property via the raising of the overall level of protec-

---

429. Document COM (88) 172 of 23.8.1988; Position of The German Society for Protection of Industrial Property and Copyright, GRUR Int. 1989, p. 183.
430. Cf. *Schricker*, The Harmonisation of Copyright and Publishing Law in the Internal Market of the European Community, in Bekker (editor), The Trade in Books in the European Internal Market, 1989, p. 29 ff.
431 *Dietz*, Harmonisation, in: Ress (editor), The Development of European Copyright, p. 62 (63).
432. *Dietz*, Harmonisation, in: Ress (editor), The Development of European Copyright, p. 62 (64).
433. COM (90) 584 final.

tion. In this much it represents an improvement on the Green Paper.[434] From now on the programme will be known as the "global programme",[435] which means that all copyright questions which can have an effect upon the establishment of the internal market for cultural products and services should be regulated. Copyright will no longer be dealt with in a purely economic light but rather as a "cornerstone of the intellectual creative process."[436]

Furthermore concrete proposals for individual areas are being presented on which the view of the Commission will be most likely made clear. In the fight against piracy a harmonisation of certain protective rights is intended[437] via the introduction of exclusive rights on copying and distribution for practising artists, manufacturers of records and videoprogrammes and broadcasting organisations along with the introduction of exclusive recording rights for practising artists and broadcasting organisations.

In the field of sound and audio–visual reproduction for private purposes the Commission is planning at first two initiatives in the field of the copying of sound and audio–visual recordings for private use.[438]

In relation to the law of dissemination, of exhaustion (ie when copyright protection no longer applies) and the law on renting, the Commission has prepared a proposal for a

---

434. Cf also *Wandtke*, On the Cultural and Social Dimension of Copyright, UFITA Vol. 123 (1993), p. 5.
435. COM (90) 584 final., p. 1 passim.
436. COM (90) 584 final., p. 2, at side note 1.3.
437 COM (90) 584 final., p. 9, at side note 2.3.2.
438. COM (90) 584 final., p. 13, at side note 3.4.3.

directive on the law of renting and lending. In this the following is intended:

– an exclusive right to licence or prevent the commercial hiring out of copyright–protected works, records and videos;

– a definition of those who are the beneficiaries of the right ofrenting (authors, practising artists and producers);

– an exclusive right for loaning, which is subject to certain exceptions, based upon cultural considerations of Member states;

– the laying down of the length of protection of the rights on the renting and lending of works corresponding to the minimum rules of the Berne Convention (a minimum of 50 years from the death of the author) and the Treaty of Rome (a minimum of 20 years), until at the Community level the harmonisation of the duration of protection has come into force."[439]

Furthermore in relation to the legal protection of computer programmes a directive has been worked out which had to be given effect in Member states by 1.1.1993.[440] In relation to databases the Commission is presenting proposals for Community action in its works programme. On account of the economic significance of databases and the danger of distorting the internal market it is necessary to create a unified and stable legal area for the setting up of databases.[441] Set in motion by the judgment in the

---

439. COM (90) 584 final., p. 15, at side note 4.3.2.
440. COM (90) 584 final., p. 16 f., at side note 5.3.

Patricia[442] case there have been efforts in the field of harmonisation of the duration of copyright–protection. The Commission makes four assumptions: firstly a total harmonisation for all forms (of copyright) is necessary, secondly the duration of copyright must be based upon a high level of protection, thirdly the duration of protection must not interfere with rights which have been acquired in the context of national rights and fourthly the proposal for the directive must " endeavour to maintain the delicate balance between copyright and neighbouring rights without the intended measure becoming too complex."[443]

The personal rights of the author[444] have been recognised[445] in the working programme. The law on the rights of artists concerning their entitlement to a percentage of the monies arising from the further sale of their works[446] (droit de suite) is also mentioned along with the problem of radio broadcasting.[447] Finally the role of the Community in both bilateral and multilateral external relations is considered in some detail. The GATT, WIPO (World Intellectual Property Organisation) and relations with the

---

441 COM (90) 584 final., p. 20, at side note 6.3.1.

442. European Court, decision of 24th January 1989 – legal matter 341/87 (EMI Electrola./.Patricia) – collection. 1989, VI, p. 92 – Patricia.

443. COM (90) 584 final., p 32 f., at side note 8.2.5.

444. Cf. also *Mestmäcker/Schulze*, Commentary on Copyright, Part III, §1, p. 5 f.; *Dietz*, ZUM 1993, p. 309 ff.; *Schardt*, ZUM 1993, p. 318 ff.

445. COM (90) 584 final., p. 33 f., at side note 8.3.

446. COM (90) 584 final., p. 35, at side note 8.5

447 COM (90) 584 final., p. 36 f

countries of Middle and Eastern Europe amongst others play an important role.

As a concrete result of the efforts on the "politics of European copyright" up to now the following legal instruments have been adopted by the Council of Ministers upon proposal by the Commission:

– the regulation (EEC) Nr. 3842/86 of the Council of 1st December 1986 concerning measures to prevent the transfer of imitation goods into the area of free circulation governed by customs law,[448]

- the directive 87/54/EEC of the Council of 16th December 1986 on the legal protection of the topography of semi–conductors,[449]
- the directive 91/250/EEC of 14th May 1991 on the legal protection of computer programmes,[450]
- the directive 92/100/EEC of 19th November 1992 on the law of renting, lending and on specific neighbouring rights related to copyright in the field of intellectual property.[451]

Upon proposal by the Commission the following plans have been emphasised:

---

448. ABl. L 357; on the fight against piracy see the regulation on implementation (EEC) 3077/87 of the Commission of 14.10.1987, ABl of 31.5.1988 ABl. 1988 L 140/13.
449. ABl. 1986 L 24/36; cf. also the decision 88/311/EEC of the Council of 31.5. 1988, ABl. 1988 L 140/13.
450. ABl. 1991 L 122/42; cf. *Michalski*, The New Rules for the Protection of Copyright in Computer Programmes, DB 1993, p. 1961 ff.
451 ABl. 1992 L 346/61, based upon Art. 57 para. 2, 66 and 100a.

- a directive for the harmonisation of the duration of copyright protection and specific neighbouring rights of protection.[452]
- a directive on the legal protection of databases.[453]
- a directive on the private copying of sound and audio–visual sound recordings.
- a directive for the co–ordination of specific copyright rules and ancillary rules on copyright as they affect satellite and cable broadcasting organisations.

Finally it remains to point out the resolution of 14th May 1992 "in relation to a strengthened protection for copyright and neighbouring protective rights"[454] in which the Council of Ministers recognised of the duty of Member states, to become a party to the Berne Convention for the Protection of Literary and Artistic Works in its revised Paris draft of 24th July 1971 and to the international Treaty of Rome for the Protection of the Rights of Practising Artists, the Manufacturer of Cassettes and of Broadcasting Organisations of 26th October 1961 before the 1st January 1995[455] so far as this is not already the case.[456]

In the opinion of the Court with regard to TRIPs it was said that only in certain cases and then only up to a certain point has a harmonisation been achieved and in other areas no form of harmonisation is anticipated.[457] Meanw-

---

452. Doc. COM (92) 33 final.
453. Doc. COM (92) 24 final.
454. ABl. C 138/1
455. Doc. COM (90) 582 final.
456. On this point see above.

hile with the conclusion of the TRIPs harmonisation of intellectual property within the Community has been achieved because this treaty lays down rules in areas in which there are no Community measures on harmonisation. In this way a contribution has been made to the creation and functioning of the Common Market.[458]

3. Fundamental Freedoms and Copyright

Cross–border traffic in goods and services can be hindered via copyright laws and measures for the protection of industrial property.[459] The precedent cases which the European Court has determined[460] give an indication of the directly applicable rules of Arts. 30 ff. and 59 ff. of the EC Treaty. Thus the basic rule is that copyright law cannot be validly applied to limit the free circulation of goods which have been properly brought into circulation within a Member State.[461]

Additionally the validity of the exclusive rights of the author must agree with the prohibition of discrimination as contained in Art. 6 of the EC Treaty.

---

457. Opinion 1/94 of the Court dated 15th November 1994, I–123 (at side note 103).
458. For the corresponding comments of the Commission see the opinion 1/94 of the Court dated 15th November 1994, I–123 (at side note 58).
459. Cf. on this point the considerations of the German Federal Court, NJW 1992, 689 (692).
460. Cf. on this point *Reischl*, European Copyright and the Protection of Industrial Copyright In The Light of The Case Law of the European Court of Justice, 1990.
461. Cf. The Green Paper, p. 1, at side note 1.1.2.

a) The Free Circulation of Goods

Laws of copyright are, like laws for the protection of industrial property, national laws which on account of their territorial limits[462] are suitable to segregate domestic markets. The segregation of markets in the sphere of the cross–border circulation of goods stands in direct opposition to the aims of the internal market. The EEC Treaty and in particular EC Treaty articles 30 and 34 prohibit non–tariff barriers to trade within the Community. Articles 30 and 34 of the EC Treaty include the measures taken by Member states and have as their goal the removal of national rules which restrict trade.

Article 30 of the EC Treaty forbids quantative import restrictions and other measures which are of like effect. Under the term import restrictions the European Court understands "all measures which represent, whether partly or in whole, a prohibition on the import, export or through movement (of goods)".[463] The meaning of measures of like (ie of similar or equivalent) effect is in its content controversial and a binding interpretation (Art. 177 para. 1a EC Treaty) was made by the European Court in the Dassonville case according to which the following is a valid definition:

---

462. On the territoriality principle: *Ulmer*, Intangible Property Rights In International Private Law, 1975, ibid, RabelsZ 41 (1977), p. 479; *Ullrich/Konrad*, in: Dauses, C. III at side note 5.

463. The European Court, decision of 12th July 1973 – Case 2/73 – Case (Geddo./.Ente Nazionale Risi) – collection. 1973, p. 865 ff. (879).

> "each trade rule of Member States which is apt to restrict internal Community trade, whether directly or indirectly actually or potentially, is to be regarded as a measure having the like effect as a quantitative (import) restriction."[464]

In the well known "*Cassis de Dijon*" decision the European Court made it clear that not only discriminatory measures of a Member State but also such measures which draw no distinction between domestic and foreign goods belong to those measures which are of like effect to quantitative import restrictions.[465] In two recent decisions the European Court has corrected its prior case law meaning of the term "measures having like effect" in the sense of Art. 30 of the EC Treaty.[466] In the related cases 267 and 268/91 (*Keck* and *Mithourad*) the Court made the comment:

> "As the participants in the economy increasingly base their claim upon Art. 30 of the EC Treaty in order to complain of every rule which has the effect of limiting their economic freedom of manoeuvre even if this is not directed at products from other Member States, the Court regards it as necessary to examine and make clear its jurisprudence in this field."[467]

---

464. European Court, decision of 11th July 1974 – Case 8/74 (Dassonville) – collection 1974, p. 837 ff. (852).
465. European Court, decision of 20th February 1979 – Case 120/78 (Cassis de Dijon) – collection. 1979, p.649 ff.
466. Cf. on this point *Becker*, From "Dassonville" via "Cassis" to "Keck" – The Term "Measures having like Effect" in Art. 30 EC Treaty, European Law, p. 162 ff.
467 Judgment of 24.11 1993, at side note 14.

The European Court came in this decision to the conclusion that a prohibition of the further sale at a loss does not infringe Art. 30 EC Treaty because it does not represent a measure having like effect. In the reasoning of the Court:

> "As against the previous case law of this Court the use of national requirements which limit or forbid specific methods of sale is not appropriate for products from other Member States to hinder, directly or indirectly actually or potentially, the trade between Member States in the sense of the *Dassonville* judgment. Insofar as these requirements apply to all economic participants operating in the domestic market and insofar as they touch upon the market of domestic products and the products from other Member States properly and as a matter of fact in the same way (then they are suitable)."[468]

In the "*Hünermund*"[469] case the central issue was whether the rule preventing chemists from advertising goods outside their line of business, which are not medicines as such but whose sale is allowed by the relevant German rules, can be justified according to European Law. In its reasoning that the rule against advertising did not lie within the area of application of Art. 30 EC Treaty, the Court referred to the judgment in the *Keck* case and con-

---

468. Judgment of 24.11 1993, at side note 16.
469. European Court, judgment of 15.12.1993, Case 292/92 (Hünermund amongst others/regional apothecary court Baden–Württemberg), NJW 1994, p. 781 m. comments of *Möschel*.

firmed the correction to its jurisprudence by emphasising the formula stated in the *Dassonville* case.[470]

The European Court regards patents and other ancillary rights to copyright as measures having the same effect because in this way the import from other countries can be prevented. Correspondingly in cross–border circulation within the EC they are covered by the prohibitory rule found in Art. 30 of the EC Treaty.

Laws of copyright can develop the same effect so they too can restrict the cross–border circulation of goods.

Against the application of Art. 30 of the EC Treaty the objection was raised that copyright also includes the rights of the author, but this line of argument has not been taken into account in the case law of the European Court, which in any case with the help of copyright, sees in the prevention of imports a trade restriction in the sense of Art. 30 EC Treaty.[471] The prerequisite for the applicability of the rules on the circulation of goods is that the term "Goods" must first be satisfied. At the same time this also determines the scope of application as regards the subject matter and represents a limit to the usual fundamental freedoms.[472]

---

470. Cf. *Becker*, EuR 1994, p. 162 (164).
471. Cf. *Sack*, The Realisation of The European Internal Market in The Field of The Legal Production of Industrial Property and Copyright, in: Dichtl (editor.), Steps Toward a European Internal Market, p. 43 f.; *Mestmäcker/Schulze*, Commentary on Copyright, Vol. 1, III, § 2, p. 29; European Court, judgment of 20th January 1981 – Case. 55 and 57/80 (Music Organisation./. GEMA) – collection 1981, p. 147 ff. Rz. 12.
472. Cf also Art. 60 EC Treaty.

It is clear that its restriction to services is not to be overestimated in its practical significance. Because in the jurisprudence of the European Court the prevailingtendency is to interpret Art. 59 in the sense of a prohibition of each and every limit to the free circulation of services and thus in the sense of the establishment of a common market in services, the understanding of Art. 59 is not far removed from that of Art. 30 so that a restriction appears almost dispensable.[473]

Should the classification of goods be troublesome then according to the case law of the European Court goods as defined in Art. 10 para. 1 of the EC–Treaty are "Products, which have a monetary value and therefore can be the subject matter of commerce".[474] It is a moot point whether the renting of microfiches and their copying comes under the term of "goods" or whether it is more properly viewed as a service. Microfiches are the products of manufacturing and processing systems,[475] they have a monetary value[476] and can also be the subject matter of commerce, because they are suited to having a price on the free–mar-

---

473. *v. Wilmowsky*, Waste Management in the Internal Market, p. 77; *Rengeling*, in: FS Börner, p. 364, *Middeke*, National Environmental Protection in the Internal Market, p. 129 (Manuscript); *Grabitz*, in: FS Sendler, p. 448 ff.; *Becker*, The Sovereignty of EC Member states in the Tension between Environmental Protection and the Free Movement of Goods, p. 48 ff.

474. The European Court, judgment of 10th December 1968 – Case 7/68 (Commission./ Italy) – collection: 1968, p. 633 (642)

475. The necessity of this characteristic is in part held to be unnecessary, cf *Middeke*, National Environmental Protection in the Internal Market, p. 133 (Manuscript) with additional comments.

ket. Thus it is determined that the cross–border sale of microfiches comes under the free circulation of goods.

Should in the context of a project the reproduction of a work by a partner library come into play, this then raises the issue whether that changes anything. In a decision of the European Court concerning the work being done in the manufacture of videocassettes, such work was not classified as being services as such because the output of such products by the manufacturer leads directly to the manufacture of a physical object.[477] In this way it is clear that the European Court takes the *object* as the limiting factor. Thus such a reproduction or copy will not be regarded as a service but rather as goods in free circulation. That services in contrast to goods are invisible is taken as the distinguishing criterion.[478] The issue as to the classification of renting is to be solved by way of analogy. In one of its earlier cases which concerned whether TV products were to be classified as goods the European Court held that TV programmes are to be seen in the nature of services, whereas the trade in all the materials, sound devices, films and other products which are used in the transmission of TV programmes, comes under the classification of goods in free circulation.[479] If one were to use

476. On the positive and "negative monetary value" cf. *v. Wilmawsky*, Waste Management in the Internal Market, p.78, *Middeke*, National Environmental Protection in the Internal Market, p. 133 (Manuscript) with further comments.
477. European Court, judgment of 11th July 1985 – verb. Case 60 and 61/84 (Cinetheque) – collection 1985, p. 2605 (2623).
478. *Ahlt*, European Law, p. 73.
479. European Court, judgment of 30th April 1974 – Case 155/73 (Sacchi) – collection 1974, p. 409 (428 f.).

the classification criteria of the European Court (visible transaction, physical object) and also the form in which the product crosses frontiers,[480] it would be possible to classify the renting (of microfiches) under the free circulation of goods.

Art. 36 of the EC Treaty certainly allows non–tariff trade restrictions "if they are justified for the protection of industrial and commercial property".[481] As far as industrial and commercial property is concerned the exclusivity of use of such non–physical objects, kown as intelletual property,[482] is characteristic.[483] At the very centre is copyright[484] alongside which are patent law,[485] registration law,[486] brand protection law,[487] trademark protection,[488] protection of get–up,[489] protection of a firm's name,[490] protection of registered design[491] and know–how.[492]

---

480. *Friedrich*, UPR 1988, p. 4 (9)

481 Cf on this point *Mestmäcker/Schulze*, Commentary on Copyright, Vol. 1, part III, § 1, p. 28 ff., *Beier*, The Protection of Industrial Property and The Free Movement of Goods in The European Internal Market and in Commerce with Third Countries, GRUR Int. 1989, p. 603 (608 ff.); *Joliet*, Intellectual Property and Free Movement of Goods: The Development of the Case Law of the Court of the European Communities in the years 1987 and 1988, GRUR Int. 1989, p. 144 ff On the Compatibility of the Case Law of the European Court with Art. 14 of the Basic Law before the German Federal Court 73, p. 339 ("So long II") *Rupp*, The Protection of Industrial Property in the Conflict between National Laws and European Community Law, NJW 1976, p. 993 ff., *Ipsen*, Content and Boundaries of the Influences of Community Law on the Brand Trademark as Property, in: *Hefermehl/Ipsen/Schluep*, National Trademark Protection and the Free Movement of Goods in the European Community, 1979, p. 179 ff

482. *Ullrich/Konrad*, in: Dauses, C. III at side note 7

It seems fundamentally justified when the holder of such ancillary copyright prohibits the import of goods which a third party has manufactured without his consent in another Member State and has brought into circulation there. By way of example terms of protection for ancillary copyright can have already expired in the export country but not so in the country of import where a longer term of protection pertains. This is precisely the point in copyright law, where, as has been shown above, different terms of protection apply upon the author's death.

If in an EC Member State a book is printed by chance after the expiry of the fifty year protective term without the consent of the author's legal successor the book's import into Germany can be prevented because in Germany the

---

483. European Court, judgment of 14th September 1982 – Case 144/81 (Keurkoop./.Nancy Kean Gifts) – collection 1982, p. 2853 (2870 ground for consideration 14); on copyright: judgment of the European Court of 20th January 1981 ("charge differentials II") – collection 1981, p. 147.
484. European Court, judgment of 20th January 1981 ("charge differentials II") – collection 1981, p. 147; cf. Harris CMLR 1982, p. 62; Ubertazzi, GRUR Int. 1984, p. 327 (329 ff.); *Ullrich/Konrad*, in: Dauses, C. III at side note 8; a. A. *Schenz*, ZUM 1982, p. 613 (615 ff.).
485. European Court, judgment of 31st October 1974 – Rs. 15/74 (Centrafarm./.Sterling Drugs) – Slg. 1974, p. 1147.
486. *Beier*, GRUR Int. 1989, p. 603 (608).
487. European Court, judgment of 8th June 1982 – Case 258/78 (Nungesser and Eisele./.Commission) – collection 1982, p. 2015 – Maize seeds.
488. European Court, judgment of 3rd July 1974 – Case 192/73 (Zuylen Freres./ Hag) – collection 1974, p. 731 – Hag I.
489. *Ullrich*, Protection of get–up in the Common Market, in: Schrikker/Stauder (editor.), Handbook of Presentation Law, 1986, p.1203 f

seventy year term has not yet expired.[493] In this regard copyright is very much a non–tariff trade restriction according to Art. 30 EC Treaty, which is justified on account of the protection of industrial and commercial property according to Art. 36 of the EC–Treaty.[494]

According to the second sentence of Art. 36 of the EC Treaty trade restrictions attributable to a privileged legal position must "neither represent a means of arbitrary discrimination nor a disguised limitation on trade between the Member States." The European Court implements Art. 36 of the EC Treaty in a restrictive way and thus emphasises the exceptional character of the rule. That means that restrictions upon the free flow of goods can only be based upon Art. 36 of the EC Treaty "in so far as they are justified for the protection of rights, which make out the specific subject matter of this property."[495]

---

490. European Court, judgment of 22nd June 1976 – Case 119/75 (Terrapin./ Terranova) – collection 1976, p. 1039.
491 European Court, judgment of 14th September 1982 – Case 144/81 (Keurkoop./ Nancy Kean Gifts) – collection 1982, p. 2853.
492. *Sucker*, in: Groeben/Thiesing/Ehlermann, EEC–Treaty, Art. 85 at side note 435.
493. European Court, GRUR Int 1989, p. 319 – Differences in periods of protection.
494. Cf on this example *Sack*, The Realisation of the European Internal Market in the Field of Industrial Property and Copyright, in: Dichtl (editor.), Steps Towards a European Internal Market, p. 44 f
495. European Court, judgment of 31st October 1974 – Case. 15/74 (Centrafarm./ Sterling Drug) – collection 1974, p. 1147 (1163, ground for consideration 8)

In this way the European Court distinguishes between the *exercise* and *existence* of industrial property rights.[496] On the one hand the Treaty does not affect the existence of industrial copyright[497] which has been granted by the legislature of a Member State but on the other hand the exercise of these rights can according to the circumstances be greatly affected by the prohibitory rules of the Treaty.[498] The right to prevent the import of phonograms, which have been brought into circulation within another Member State by the holder of the right or by a third party with the consent of the holder (the so–called principle of the Community–wide exhaustion of domestic rights)[499] does not belong to the subject matter of the property.[500]

---

496. Cf. *Ebenroth/Parche*, GRUR Int. 1989, p. 738 ff.
497. Cf. Art. 222 EC–Treaty, which leaves undisturbed the property ownership rules of Member states.
498. European Court judgment of 3rd July 1974 – Case 192/73 (Zuylen Freres./.Hag) – collection 1974, p. 731 (ground for consideration 8) – Hag I; cf. on this point further *Ullrich/Konrad*, in: Dauses, C. III at side note 11.
499. European Court, judgment of 8th June 1971 – Case 78/70 (Deutsche Grammophon./.Metro) – collection 1971, p. 487 (500); (cf. on this point the decision of the OLG Hamburg Int. 1970, p. 377, which rejected the application of the rules on the exhaustion of national remedy found in § 17 para 2 of the German Copyright Law); European Court, judgment of 20th January 1981 – related Case 55 and 57/80 (Musikvertrieb Membran./. GEMA) – collection 1981, p. 147 – differentials on charges II. Cf. on the same point *Mestmäcker/Schulze*, Commentary on Copyright, Vol. 1, part III, § 3, p. 34 ff.
500. cf. on this *Mestmäcker/Schulze*, Commentary on Copyright, Vol. 1, Part III, § 1, p. 31; Gotzen, Industrial Property and Copyright in the Case Law of the European Court on Art. 30–36 of the EC–Treaty, GRUR Int. 1984, p. 146 (147 ff.); *Loewenheim*, in: Schricker (editor.), Copyright § 17, at side note 31.

The principle of exhaustion of domestic rights nevertheless finds its limits where the author can from the very beginning only carry out the exploitation of the right within the borders of national markets. The holder of the right to show a film for the first time in a Member State can apply to prevent the showing of that film without his consent on cable television in that stateeven if, with the consent of the original rights holder, the film has already been transmitted by a third party in another Member State and the allocation of the right to do so could only be given at a national level.[501]

Should a phonogram, without the consent of the holder of the protected right, have been brought into free circulation[502] in another Member State on account of the expiry of the term of protection or because specific parts of protected rights are not in fact protected[503] in the other Member State, then the case is somewhat different. In these cases as with the payment for the mechanical reproduction as part of the settlement of copyright for the public showing of an honoured musical composition[504] the Euro-

---

501 European Court, judgment of 18th March 1980 – Case 62/79 (Coditel./.Cine) – collection 1980, 881 – Coditel I; European Court, judgment of 6th October 1982 – Case 262/81 (Coditel./ .Cine) – collection 1982, p. 3381 – Coditel II; cf. also *Ullrich/ Konrad*, in: Dauses, C. III at side note 37.

502. European Court, judgment of 24th January 1989 – Case 341/ 87 (EMI Electrola/Patricia) – collection 1989, VI, p. 92 – Patricia.

503. On the Right of the Author to Prevent the Renting of Videocassettes: European Court, judgment of 17th May 1988 – Case 158/86 (Warner Brothers./ Erik Viuff Christiansen) – collection 1988, p. 2605 (2625) – Warner Brothers.

pean Court affirmed that such cases belong to the specific subject matter.

Furthermore the internal law of Member State must not permit the introduction of a burden or penalty due to entry across the border because this would mean a division within the SingleMarket.[505] It follows from this that the specific subject matter of copyright is not determined in a general way but is by way of contrast specifically determined by reference to the particular mode of copying or reproduction.[506]

The German Federal Court made reference to the free movement of goods in "The Doors"[507] and "Beatles"[508] cases. "The Doors" case concerned the compatibility of the law on circulation as found in § 96 para. 1 of the German Copyright Law with the norms on the free movement of goods. By way of reference to the decision of the European Court ("EMI./.Patricia") on differences in the term of copyright protection[509] it was specified that an internal law on distribution does not contradict the fundamental prin-

---

504. European Court, judgment of 9th April 1987 – Case 402/85 (Basset./.SACEM) – collection 1987, p. 1747.
505. European Court, judgment of 20th January 1981 – related Case 55 and 57/80 (Musikvertrieb Membran./.GEMA) – collection 1981, p. 147 – charge differentials II; cf. further *Krüger–Nieland/Krüger*, in: FS Kutscher, 1981, p. 247 ff.; *Joliet/Delsaux*, CDE 1985, p. 381.
506. *Ullrich/Konrad*, in: Dauses, C. III at side note 14.
507. German Federal Court, NJW 1993, p. 2183 (2185) - The Doors; cf. *Vinck*, LM H. 8/1993 § 16 UWG Nr. 142; see also the comments of *Schack*, JZ 1994, p. 43–45.
508. German Federal Court, JZ 1994, 360 (362) – Beatles.
509. European Court, GRUR Int. 1989, p. 319 f

ciple of the free movement of goods "if phonograms are introduced from one EC–Member State in which they were brought lawfully into circulation without the consent of the holder of the protective right and in which a term of protection for the manufacture of phonograms existed but has since run out."

The difference drawn by the German Appeal Court between the law of distribution and the law of prohibition is of no significance for the German Federal Court because in neither case was the lawful introduction of phonograms onto the market of another Member State based upon an action or consent of the holder of copyright but rather upon the expiry of the term of copyright protection, which was decisive for the decision according to EC law.

In the "Beatles"[510] case a foreign manufacturer of phonograms was entitled to prevent the distribution of phonograms in a Member State (A), which had lawfully been manufactured in another Member State (B) provided that this lawfulness was based upon a shorter term of protection in the Member State (B) where the goods had been manufactured. A restriction according to Art. 36 EC Treaty is in any case unjustified if it represents a means of arbitrary discrimination or a veiled measure for restricting trade. It is not enough to establish arbitrary discrimination that the Beatles records had been lying unused for some 25–30 years in the archives of the plaintiff. Reference to the creative significance of the Beatles for the internatio-

---

510. Cf the comments of *Schack* on the judgment, JZ 1994, p. 362 f

nal music world would be of little significance in this regard.

b) Free Movement of Services

Furthermore the rule prohibiting restrictions to the free movement of services according to Art. 59 ff. of the EC Treaty is complied with via copyright and the protection of industrial property.[511] Art. 59 ff. prohibit non–tariff restrictions on the free movement of services across national borders. The radio and television transmission of copyright protected works represent the primary cases of application.[512]

From first principles the rules concerning the free movement of goods cannot be applied to services.[513] However, the European Court has used the juridical ideas of Art. 36 paras 1 and 2 by way of analogy with the exercise of protective rights. Thus inroads into the free movement of services have been made.[514] According to the case law of the European Court restrictions to the free movement of services which are based upon the existence of national copyright are justified.[515]

---

511. Cf. on this point *Mestmäcker/Schulze*, Commentary on Copyright, Vol I, part III, § 4, p. 43 ff.
512. Cf. *Oppermann*, European Law, at side note 1508 ff.
513. European Court, judgment of 30th April 1974 – Case 155/73 (Sacchi) – collection 1974, p. 409 (412) – Sacchi. On the Inapplicability of Art. 37 to Broadcasting Monopolies; cf. also Art. 60 EC Treaty.
514. European Court, judgment of 6th October 1982 – Case 262/81 (Coditel./.Cine) – collection 1982, p. 3381 (3401, at side note 13) – Coditel II.

Restrictions are permitted when necessary[516] for the protection of public order, for the protection of industrial and commercial property or on account of compelling reasons of standards and consumer protection or for reasons to do with the common good or copyright.[517]

c) The Rule Against Discrimination.

In the decision[518] of the European Court of 20th October 1993, involving by the pop singers Phil Collins and Cliff Richard, it was significant that the rule against discrimination found in Art. 6 para. 1 of the EC Treaty was applicable to domestic copyright law.[519] From now on no artist in an EC country shall be prejudiced in his copyright on account of being a non–national. The rights applicable to national authors[520] must also apply to non–nationals. The

---

515. *Mestmäcker/Schulze*, Commentary on Copyright, Vol. 1 part III, § 4, at side note 43.
516. So *Sack*, The Realisation of the European Internal Market in the Field of the Protection of Industrial Property and Copyright, in: Dichtl (editor.), Steps Towards a European Internal Market, p. 55.
517 European Court, judgment of 18th March 1980 – Case 62/79 (Coditel./.Cine) – collection 1980, p. 881 (903) – Coditel I, standard Case Law.
518. European Court, decision of 20th October 1993, related legal matter C–92/92 and C–326/92, EuZW 1993, p 710 – Phil Collins.
519. "As Art. 7 (EEC Treaty) forbids all discrimination on the basis of nationality it requires that those persons who find themselves in a position subject to Community Law be treated in exactly the same way as the nationals of the Member State concerned." Cf. the critical comments of *Schack* on the decision to be found in JZ 1994, p 144 ff
520. Complaint was made here of german copyright law.

assessment of this case has regarded it as a breakthrough for a unified European system of copyright.[521] The significance of European law for national rules of copyright law is made obvious by this actual example.[522]

The underlying question is whether the distinction in § 125 of the German Copyright Law, whereby practising artists of German nationality are entitled to claim for their own performances the protection of §§ 73 – 84 and § 96 para. 1 of the German Copyright Law, according to which, regardless of the place of the performance they (ie the artists) can prevent the distribution of copies of their work which have arisen without their consent, whereas foreign artists according to § 125 paras. 2–6. of the German Copyright Law cannot rely upon § 96 para. 1 of the German Copyright Law, if the performances took place outside Germany, is discriminatory in the sense of Art. 6 of the EC–Treaty. In the cases which came before the Munich[523] and German Federal Court[524] such an application of § 125 of the German Copyright Law would have led to the result that a live–recording of a musical performance in the USA carried out by a third party without the

---

521. Frankfurter Allgemeine Zeitung of 21st October 1993, p. 35.
522. The observations on this point are to a large extent based upon my own contribution – *Kröger,* The Application of the Prohibition Against Discrimination to Copyright and Neighbouring Rights, EuZW 1994, p. 85 ff., as well as the comments on the decision of The European Court in the Phil Collins case in EuZW 1993, p. 710 which were slightly revised. On the same topic cf. also the German Federal Court, NJW 1994, p. 2607 with the comments of *Schulze* p. 2610 – Rolling Stones.
523. LG Munich I, GRUR Int. 1992, p. 404 – Phil Collins.
524. BGH, EuZW 1992, p. 644 – Cliff Richard.

consent of the performing British artists would have been marketable.[525]

aa) The Sphere of Application of The Rule Against Discrimination.

The issue whether the law of copyright and neighbouring rights falls within the sphere of application of Art. 6 of the EC–Treaty is answered variouslyin the literature. Against a listing of these rights it is asserted that in the absence of a direct rule of Community law and a missing harmonisation – as seen from different areas of law – the area of application is not taken for granted.[526] It is further pleaded that Community Law does not include precisely those economic activities which are based upon the application of national rules for the protection of intellectual property.[527] The factual elements which form the prerequisites of copyright and its neighbouring rights would not affect the *exercise* of these rights but rather their *existence*, which according to Art. 222 of the EC Treaty is removed from the area of application of the Treaty.[528] Because the varying levels of protection for ancillary copyright results from the differences in the national legal systems this has simply to be put to one side on the way to an approximation of laws.[529]

---

525. Cf. on this point *Schack*, JZ 1994, p. 144 f.
526. BGHZ, EuZW 1992, p. 644 (646).
527. *Löwenheim*, GRUR Int. 1993, p. 105 (111).
528. *Löwenheim*, GRUR Int. 1993, p. 105 (112).
529. *Löwenheim*, GRUR Int. 1993, p. 105 (111).

By way of contrast the European Court in the Phil Collins case referred to above decided that copyright and its neighbouring rights does fall within the area of application of Art. 6 para. 1 of the EC Treaty. In its decision the Court made it abundantly clear that it is a matter for individual states "to determine the prerequisites and modalities of the protection of property in literary and artistic works", and international Conventions are certainly to be observed. In determining the applicability of Community Law via this decision and hitherto decided cases the European Court is linking the distinction between the *existence* of rights, which the Treaty guaranteed, and the *exercise* of rights, which come under the rules of the Treaty.[530] The Court establishes the existence of the rights with the help of the specific object of property.[531] In the Phil Collins case the European Court sees the specific object of copyright and neighbouring rights "in (the need) to guarantee protection for the rights of personality along with the protection of the economic rights of the possessor" (at side note 20). With this characterisation and especially with the citation of the right of the author's personality the Court

---

530. EuGH, Slg. 1971, p. 69, at side note 5 – Sirena and the most recent European Court, EuZW 1993, p. 410 – Phil Collins. For critical comment on this decision cf. *Rupp*, NJW 1976, p. 993 (995); *Pernice*, The Content of Fundamental Rights in Community Law, 1979, p. 183; *Rengeling*, The Protection of Fundamental Rights in the European Community, p 44.

531. European Court of 8.6.1971 – Deutsche Grammophon, legal matter. 78/70 collection. 1971, p. 487 (500, at side note 11); European Court 18.2.1992 – Commission/Great Britain and Northern Ireland, legal matter C–30/90.

registers the essential existence of these rights as a matter of fact.

As a result of the double significance of the commercial use of copyright, on the one hand as a source of revenue and on the other as a form of marketing control, it appears to the Court to be proper to draw parallels to the "other" industrial and commercial property rights (at side note 21). In this way a link is established with sole and exclusive rights, which rights are so typical of this area of law. Such sole and exclusive rights, which on account of their significance for the "exchange of goods and services as well as for conditions of competition within the Community" build the essential building blocks of the EC Treaty according to the jurisprudence of the Court and thereby fall within the area of application of the Treaty, especially within the rules of Arts. 30 and 36, 59 and 66 of the EC Treaty, namely the rules on competition.

The Court deduced from this that copyright and neighbouring rights, which especially in consequence of their effects on inner–Community trade "are subject to the general rule against discrimination to be found in Art. 7 para. 1 of the EEC Treaty (Art. 6 EC Treaty), without it being necessary to connect them with the special rules of Arts. 30, 36, 59 and 66 of the EEC Treaty" (at side note 27).

By confirming the fundamental applicability of the Treaty to these rights an exception to the area of application of the Treaty according to Arts. 36 and 222 of the EC Treaty is simultaneously rejected.[532]

In its reasoning the Court, in the same way as it had solved other problems concerning the protection of industrial property rights, solved the problem of drawing up the boundary between the necessary protection of property on the one hand and the improper exercise of protective rights on the other. This compromise solution, whilst leaving to individual Member states the determination of the existence of protective rights, simultaneously links their exercise to the rules of the Treaty for the sake of freedom of trade and thereby assumes the possibility of being able to separate both features. As the example of the limited or forbidden exercise shows, the existence of rights is affected to the extent that such a distinction appears doubtful.[533]

bb) Content of the Rule Against Discrimination

It must be asked whether the distinction drawn between nationals of one Member State and nationals of another can be justified on objective grounds on account of the rule governing the rights of foreigners contained in § 125 of the German Copyright Law.

The European Court has come to the conclusion that a breach of Art. 6 para. 1 of the EU Treaty is present here, because laws of a Member State exclude authors and practicing artists of other Member states from rights which are recognised to nationals.[534] Differences between natio-

---

532. Cf. *Mestmäcker*, GRUR Int. 1993, p. 532 (535).
533. Cf. *Rupp*, NJW 1976, p. 995; *Pernice*, ibid pl. 183; *Rengeling*, ibid, p. 44; *Kröger*, Property as a Fundamental Right of the EU, in Barnes, 1995.

nal rules on the protection of copyright and neighbouring rights (the principle of territoriality) as well as the fact that not all Member states have acceded to the Treaty of Rome (the principle of reciprocity) were offered as providing justification for a rule which draws such a distinction. Interestingly these reasons were argued successfully before the German Constitutional Court, where the compatibility of the rules of §§ 121 and 125 of the German Copyright Law were tested with the help of Art. 3 of the Basic Law (Grundgesetz).[535] The goal of influencing other states in this way to accede to international treaties or at least to sign reciprocal conventions which granted to german claimants abroad an increased level[536] of protection was regarded by the German Constitutional Court as proper.[537] Meanwhile justifications such as these – relating as they do to international law – do not allow themselves to be carried over[538] easily into Community Law as the application of the territoriality principle stands in contrast to the internal market according to the then Art. 8a EEC–Treaty and the argument on reciprocity stands in contrast to the fundamental community principle of equality of treatment.[539]

The Court makes it abundantly clear in the Phil Collins case that differences are legitimate, "in so far as the legal

---

534. For critical comment on this issue see *Schack*, JZ 1994, p. 144 (146)
535. German Constitutional Court BVerfGE 81, p. 208 ff
536. So BT–Drucks. IV/270, p. 112 on § 131 of the government bill.
537 German Constitutional Court BVerGE ibid, p. 224.
538. See *Löwenheim*, GRUR Int. 1993, p. 105 (114 f.).
539. Cf *Mestmäcker*, GRUR Int. 1993, p. 532 (533).

systems are applicable according to objective criteria to all persons coming within them without regard to the nationality of those concerned" (Tz. 30). It points out further in this regard that "every form of discrimination based upon nationality"[540] is forbidden according to the wording of Art. 6 para. 1 of the EC–Treaty. Viewed from the other perspective "for those persons (ie. non–nationals) who find themselves in a situation governed by common rules, full equality of treatment with those nationals of the Member State concerned" (Tz. 32) is called for.[541] The Court finally assumes that it is forbidden for a Member State "to make the granting of an exclusive right dependent upon one being a national of the Member State concerned" (Tz. 32). In this way neither the differences in national rules nor the fact that not all Member States have acceded to the Treaty of Rome constitutedan objective justification.

cc) The Prohibition of Discrimination And Its Effect

In the Phil Collins case the Court answers the question as to the effect of Art. 6 para. 1 of the EC Treaty with a reference to a legal precedent according to which the right to equality of treatment is bestowed directly via Community Law and can hence be made valid at national level with the legal consequence that discriminatory rules become inapplicable. The Court reaches the conclusion that an author or practicing artist of another Member State, just like any other person who derives rights therefrom, is

---

540. The author's own emphasis.
541. Cf. The European Court of 2nd February 1989, – Cowan – legal matter. 186/87, collection. 1989, p. 195 at side note 10.

entitled to make a direct appeal before national courts to the rule prohibiting discrimination laid down in Art. 6 para. 1 EC Treaty, in order to demand the same protection as is granted to nationals (Tz. 35).

In this way the fundamental principle concerning treatment of nationals which in international copyright protection is anchored[542] in Art. 5 of the Revised Berne Convention (RBC), Art. II of the Universal Copyright Convention and Art. 2 of the Treaty of Rome is given effect in Community Law.

dd) Final Conclusions

By way of summary the express inclusion of copyright and its neighbouring rights, as with other commercial property rights, was fixed by the European Court in the Phil Collins decision as being within the area of application of the EC Treaty. In its justifying arguments the European Court preserved its rationale of giving protection to industrial property.[543]

The fundamental importance of the national principle in European Law guarantees authors and practicing artists of other Member states the same rights as are granted to nationals. Just as this statement is important for the basis of this decision it is also important for the achievement of an international standard. It was only because of the circumstance, namely that the Treaty of Rome could not be

542. The rules were not applied in the present case. On this issue generally cf *Bergsma*, The Principle of Treatment as a National in International and Swiss Copyright Law, 1990.

543. Cf *Rengeling* , ibid, p. 44 ff

applied because of the facts of the case, that the principle of treatment akin to nationals (ie the national principle) which is anchored in the Treaty of Rome was inapplicable. This principle certainly forms a component of the protection of copyright worldwide. To the Conventions referred to above – Revised Berne Convention, Universal Copyright Convention and the Treaty of Rome – can be added Art. 2 para. 1 of the Paris Convention for the Protection of Industrial Property. Numerous states have acceded to these international conventions.[544]

In his comments on the decision *Schack* complains, "with what disregard does the European Court believe itself to be entitled to ignore the numerous and reliable treaties signed by non–EU states"[545] and he sees an "affront to those states party to the Berne Convention of 9.9.1886 (Art. 1 RBC), if the European Court believes it can interfere with the principles of the Convention on treatment as a national and basic minimum rights via an absolute rule of equality of treatment of EU nationals with authors of a particular Member State".[546] However, against this it must be made clear that Community Law stands in somewhat of a special relationship to general international law in that the general rules of international law, including those of interpretation, are made subject on an extensive basis to the specific rules of the Community.[547] Further, Community Law is to be interpreted and applied as an autono-

---

544. Cf. the list in GRUR Int. 1992, p. 380 f.
545. *Schack,* JZ 1994, p. 144.
546. *Schack,* JZ 1994, p. 144 (146).
547. Cf. *Oppermann* European Law, at side note 502.

mous legal system in its own right. Whilst older multilateral treaties of Member states can bind[548] the Community, it must be taken into account that the rights and duties as a member of the Economic Union unquestioningly cannot.[549] The fundamental principle of treatment akin to a national and the prohibition of discrimination contained in Art. 6 EC Treaty have the same goal. This rule should be of use to both british artists. According to the judgment it is certainly unnecessary to refer back to the RBC as the claim can be based directly on Art. 6 of the EC Treaty. For international treaties on copyright this means that their effect will most probably be developed in relation to third (ie non–EU) countries.[550] The issue of the applicability in the Community of the legal principles of the RBC will be dealt with best of all, as *Schack* rightly points out,[551] by entry to the Community.

The European Court has given a further noteworthy reference in its recognition of the right of the author's personality as a second means of support alongside his economic rights.[552] Art. 6bis RBC can be seen here as a form of minimum standard which guarantees the right of the personality of the author (droit moral) in the numerous states party to the RBC. Because for the foreseeable future there will not be a harmonisation of the various versions of pro-

---

548. European Court 1972, p. 1219 ff – related legal matter 21/24/72 "International Fruit Company" affecting GATT
549. Cf *Oppermann*, European Law, at side note 515.
550. *Flechsig/Klett*, European Union and the European Protection of Copyright, Journal of Copyright and Media Law (ZUM)1994, p. 685 (689).
551 *Schack* JZ 1994, p. 144 (147).

tection of the author's personality in Member states a common minimum standard based upon Art. 6bis RBC is necessary. This can be achieved via the accession of all Member states to the most recent draft of the RBC.[553] The existence of different degrees of protection alongside the present danger to the author's legal position on account of new technical possibilities of exploitation renders the completion of the Commission's work on harmonisation essential.

Further conflicts which have been reduced but not truly resolved by the rule of treatment akin to nationals (ie the national principle) with regard to European protection will be set aside once a unified system of legal rights is in place.

---

552. Cf. on the discussion on "European Law and the personal rights of the author" *Dietz*, The Personal Rights of the Author in the Context of the EU–Commission's Plans on Harmonisation, Journal of Copyright and Media Law (ZUM)1993, p. 309 ff and *Schardt*, The Personal Rights of the Author in the Context of the EU–Commission's Plans on Harmonisation, Journal of Copyright and Media Law (ZUM), 1993, p. 318 ff.

553. The same applies to the Treaty of Rome. Cf. the recommendation of the Commission on accession, ABl. C 24 of 31.1.1991, COM(90) 582; opinion of the Economic and Social Committee, ABl. C 269 of 14.10.1991; opinion of the European Parliament on first reading, ABl. C326 of 16.12.1991; and the acceptance of a revised recommendation of the Commission on 14.2.1992, ABl. C 57 of 4.3.1992 and COM (92) 10.

4. Secondary Law affecting the Project

a) Directives on The Law of Hiring Out and Loaning[554]

It is necessary to consider at the outset the directives on hiring out and lending.[555]

aa) Creation and Purpose

On the 13th December 1990 the Commission put before the Council a directive on the law of hiring out and lending and other neighbouring rights.[556] The position taken by the Economic and Social Committee[557] was as positive as that adopted by the European Parliament on first reading.[558] The changes proposed by the European Parliament were adopted in part inthe revised Commission proposal.[559] The Council had adopted a common position[560] as of 18th July 1992 which demanded a high level

554. In this chapter the terms hiring out and renting are used interchangeably. Both should be distinguished from loaning (or lending).

555. Cf on this subject: *Loewenheim*, Rules Governing Compensation for the Private Copying of Audio–Visual Works in the EC, ZUM 1992, p 109 ff; *Poll*, The hiring out of videoprogrammes and the principle of exhausting alternate remedies with special reference to EC law, ZUM 1987, p 416 ff.; *Hefti*, The Rules concerning reprographic reproduction in the EC, ZUM 1987, p 115 ff ; *Krüger*, The Europeanisation of Copyright Law: The hiring and loaning of books and audio–visual material, GRUR 1990, p 974 ff.

556. ABl. C 53 dated 28.2.1991, COM (90) 586 final version and Bull EC 12– 1990, fig. 1.3.170.

557. ABl. C 269 dated 14.10.1991.

558. ABl. C 67 dated 16.3.1992.

559. ABl. C 128 dated 20.5. 1992, COM (92) 159.

560. Common Position of the Council, Bull EC 6–1992, fig 1.3.27

of protection and yet in several respects lagged well behind the recommendations of the Commission. The Council gave its consent[561] on the 19th November 1992, adopting the position taken up by the European Parliament in second reading.[562] The present valid draft is different in a number of respects from the original proposal put forward by the Commission. The Council directive 92/100/EEC dated 19th November 1992 on the law of hiring out, lending and also on the protection of intellectual property[563] (an area related to copyright law) is henceforth valid as secondary community law. This directive incorporates specific changes in relation to terms of protection (ie limitation periods)[564] for copyright protection. By way of jurisdiction the directive draws support from Art. 57 para 2, Art. 66 and Art. 100a of the EEC Treaty.[565]

It is the objective of the directive "to take account of the increased and partly new and illegal use of works enjoying copyright protection as well as of specific objects of performance eg. audio works, via a unified and improved form of legal protection whose scope covers the entire EC."[566]

The legal instrument is created with regard to the realisation of the internal market according to Art. 8a of the EEC

---

561. ABl. L 346 dated 27.11.1992.
562. ABl. C 305 dated 23.11.1992.
563. ABl. L 346 dated 27.11.1992, p. 61 ff.
564. ABl. L 290 dated 24.11 1993, p 9.
565. Cf. COM (90) 586 final version., p 24 ff. On the permissibility of a dual legal basis cf. *Scheuing* in: FS Börner, p. 377 ff. and *Middeke*, DVBl. 1993, p. 769 ff. on the comparable problem.
566. COM (90) 586 final version., p 6, at side note 7.

Treaty and relating to equal competition according to the goal set out in Art. 3f of the EEC Treaty. The Commission regards copyright law as a fundamental instrument of cultural affairs[567] and in this respect regards the free circulation of goods and services as necessary. The harmonisation of the law on hiring out, the law as it affects libraries and the law of limitation in respect of copyright material is necessary in order to guarantee this.[568] Thus at one and the same time solutions should be found to important problems, hiring and lending of works protected by copyright plays an ever greater economic and cultural role whereas at the same time the extent of piracy[569] is increasing dramatically. Furthermore, adaptation to the new forms of use is something to be achieved. In short the reasonable income of the author is regarded as an important basis for creative and cultural works and the manufacture of audio and visual creations necessitates a high level of risk investment.[570] The recognition of the economic rights of the author over the use to which his work is put means that a fundamental principle of copyright protection has been realised.[571]

bb) Content

The directive consists of three parts which from the point of view of content are linked with each other. The first chapter is concerned with the law of hiring and lending.

---

567 COM (90) 586 final version., p 4. at side note 4.
568. COM (90) 586 final version., p 4. at side note 5.
569. ABl. L 346/61
570. ABl. L 346/61
571 Cf *Kreile*, EuZW 1993, p 24 (25).

Chapter Two deals with related rights of protection. Chapter Three fixes the law on the duration of copyright protection. The rules of the first chapter (Arts 1–5) have two things in contemplation. Firstly commercial hiring, especially the hiring out of CDs and video cassettes, which is linked with copying and secondly non–commercial lending, especially through public libraries.

The business of the libraries is considered from the economic perspective:

> "The non–commercial loaning, above all via the libraries, represents in most member–states a quantative and in economic terms a very significant use which should not be underestimated. Such use cannot be compensated for alone by the regular payment of a contractual retainer. It is not only books which are affected but increasingly the new media such as audio–cassettes and videos. With the development of libraries[572] on a Community–wide basis this tendency is bound to increase in the future."[573]

On the strength of this assumption the competitive relationship between hiring out and lending is further highlighted and also the fact that in this respect competition exists between commercial lenders and public libraries.[574] The use of works and objects from libraries leads to reduced sales and thus to losses; the economic position with

572. Commission Report, "The book: an inalienable element of cultural life in Europe", COM (89) 258 final version, p 13 f.
573. COM (90) 586 final version., p 7, at side note 8.
574. COM (90) 586 final version., p 5, at side note 6.

regard to lending is comparable to that of renting in much the same way.[575]

Thus the following results are drawn:

> "Should a Member State so decide to make the cultural creations of its citizens generally available either gratuitously or for a small fee then the Member State must pay for all things which contribute to the running of a library, which not only means the library personnel but also those things which in their creative essence result in the functioning of a library. Not least,as far as public borrowing is concerned, effective measures, which at their very least secure for authors a reasonable payment for the not inconsiderable use of their works, appear to be a necessary means of maintaining and supporting European culture in all its diversity."[576]

These rules have as their object the fight against piracy in the form of illegal reproduction and transmission as well as the fight against legal reproduction and transmission in Member States, which is only legal because there is no or no adequate protection in the Member State concerned.[577] With regard to terms of protection for copyright reference should be made to the appropriate directive which replaces those named in Chapter Three (Art. 11 ff).[578]

---

575. COM (90) 586 final version., p 8, at side note 9
576. COM (90) 586 final version., p 8, at side note 9
577 COM (90) 586 final version., p 8, at side note 10.
578. ABl. L 290 dated 24.11 1993, p 9.

cc) Application to the EROMM–Project

The issue to be discussed here is the effect of the directive on the EROMM project.

According to Art. 1 of the directive the rules of the first chapter cover the hiring out and loaning of copyright protected works, whether they be originals or reproductions, as well as the other objects so specified in Art. 2 para 1. Audio cassettes, video programmes and books[579] are certainly intended to be covered. It is questionable whether microfiche is covered by the rules. Because the directive concerns reproductions also because Art. 1 para. 1 as well as Art. 2 para. 1 expressly distinguishes between originals and reproductions, it is assumed that microfiche is covered by the rules. This interpretation is consistent with the decisions which have been gained from the RBC and to which the reasoning of the Commission refers.[580]

Further, a "hiring out" or a "loaning" in the sense of the directive had to lie in the overlapping loan element. According to Art. 1 para. 2 of the directive "hiring out" means the time–specific use for direct or indirect economic or commercial purposes.

In the instance where microfiche is hired out for a specified time period for reward, then an economic purpose exists. Also, in the case of an agreement between two parties a direct economic purpose similar to barter exchange could be assumed from the mutual duties. As was pointed out above the regulation is primarily addressed to com-

579. Cf. *Kreile / Becker*, ZUM 1992, p 581 (586).
580. COM (90) 586, p. 37.

mercial hiring out. In the reasoning which accompanied the directive proposal the following was said:

> "As long as the public libraries are not committed directly to competitive enterprise, ie that by hiring out they do not directly pursue their own economic interests and above all that the charges levied do not exceed administrative costs, then their business will not come under the definition of hiring out."[581]

The text with its reasoned basis contained a formulation which emphasised more strongly the economic aspect, ("direct or indirect economic advantage": "use serving a profit–making purpose"), however the conclusion is to be drawn from the reasoning, namely that the public libraries are in principle not intended to be covered by hiring out. It is also clear from the systematic interpretation given that the separation of hiring out and loaning is intended to bring about a differentiation of the two areas of law. Finally the business of libraries – despite the proximity of economic interests – is not to be viewed as that of hiring out but rather as that of loaning. The condition that the lending here does not go direct to the user but rather to another library is to be regarded as a necessary intermediate step. Should in these circumstances charges be levied which clearly exceed the administrative costs then such lending between libraries would have to be regarded as "hiring out". In this respect as far as lending between libraries is

---

581 COM (90) 586 final version., p. 34.

concerned a "hiring out" in the absence of this pre–condition cannot be envisaged.

However, there could be a "loaning". According to art. 1 para. 3 "loaning" is to be understood as a time–specific use which does not serve a direct or indirect commercial purpose and which is made available to the public by way of accessible institutions. As already explained above the rule has non–commercial loaning by public libraries in view, this being the typical relationship of the library user to the library itself. In the previous texts of the directive this point was dealt with at greater length. It was written there, "especially by way of public libraries, special scientific and school libraries, church libraries, media libraries, libraries specifically for the arts, craft libraries and other collections...".[582]

Art. 2 para. 1 grants the author (artist, creator of an audio–work., etc) *exclusive rights* regarding hiring out and loaning respectively. Art. 1 para. 4 makes this point particulary clearly:

> "(4) The rights specified in paragraph 1 are neither extinguished on account of the sale of those originals and reproductions of works subject to copyright protection as specified in article 2 paragraph 1 and also such other objects there specified as enjoying copyright protection nor are they extinguished on account of other transactions which result in their dissemination."

---

582. COM (92) 159, ABl. C 128 /11.

The exclusive right in the context of the directive means that the person in possession of the right is entitled to prevent third parties from hiring out or loaning copies of such works without his consent. Thus it amounts to a prohibition.[583] In Art. 4 para. 2 of the directive the further legal consequence is appended:

> "(2) The author or the practising artist cannot renounce his claim to reasonable compensation in respect of the hiring out."

It is noteworthy here that the compensation claim is expressly referred to only in relation to the *hiring out.* In this respect the ratified text differs from the earlier draft. That this is so means that it can be assumed that this is not a case of oversight, but rather that this result was intended. Furthermore, in Art. 4 the compensation is referred to only in relation to the "hiring out". In this way the distinction in terms between "hiring out" and "loaning" is central to the claim for compensation in accordance with Art. 4. Should the lending amongst libraries not be regarded as "hiring out" then no compensatory claim according to Art. 4. exists. Art. 5 is an exception to the exclusive public law of loaning:

> "(1) The Member States can make exceptions from the exclusive rights referred to in article 1 with regard to the business of loaning to members of the public in so far as the author receives compensation for this. Member States are free to determine the level of compensatory payments in

583. Cf *Kreile.* EuZW 1993, p. 24 (25).

> accordance with their own particular cultural objectives."

By way of contrast with Art. 4, which refers to the law on hiring out, Art. 5 is concerned with the law on loaning. An exception to the exclusive right of the author is specified in Art. 5. This exception, which exists for the benefit of public loaning, is granted to Member states. The second sentence of Art. 5 para. 1 grants a discretion to Member states to fix the level of compensation according to national cultural objectives. Furthermore Art. 5 para. 2 exempts specific types of institution from having to make compensatory payments altogether:

> "(3) Member States can exempt specified categories of institution from the payment of compensation according to paragraphs 1 and 2."

This tendency to benefit public libraries was made clear in the position adopted by the Economic and Social Committee:

> "The Committee would like to emphasise that, as a result of the application of the law on loaning, the work of public libraries should not be placed in danger through the levying of excessive fees."[584]

This requirement has been complied with very much against the description of the original content.[585]

Art. 5 para. 2 designates a duty to compensate the author for all exemptions to the exclusive loaning law for audio

---

584. ABl. C 269/55.
585. Cf. above.

works, films and computer programmes. Finally in art. 5 para. 4, a report will be published in the Community dealing with the business of loaning to the public.

By way of summary it can be stated that a surprisingly wide discretion is available to Member states in relation to the organisation of the law on lending as it relates to public libraries. The earlier drafts had intended a more restrictive approach in this respect. As long as the EROMM project does not advance into the commercial sector the broad rules concerning the law on lending, which permit the lending of books between libraries, are applicable.

In Germany reference in this regard should be made to the rule found in § 27 of the Copyright Act, which, in contrast to the directive, contains no exclusive rights for the author:[586]

> "(1) When reproductions of a work are rented out or on loan, where the renting or loaning is permitted by §17 para. 2, the author is to be paid compensation where the hiring–out or loaning serves a profit–making purpose for the party renting or loaning (the work or reproduction) or where the reproductions are rented out or on loan from institutions to which the public has access (libraries, record collections or a collection of other reproductions). The claim for compensation can only be validly made when brought by a performing rights society.

586. Cf *Kreile / Becker*, ZUM 1992, p. 581 (586 f.)

(2) Paragraph 1 is not applicable if the work was published exclusively for renting or loaning purposes or where the reproductions are, in the context of a work or service relationship, lent out exclusively for a purpose, whereby they are used to fulfil the duties arising out of the work or service relationship."[587]

Authors have a claim in accordance with § 27 Copyright Act for compensation for the hiring out of their works. Regarding the law of loaning this exists in the form of a claim for compensation which is also known as Bibliothekstantieme.[588]

The neighbouring protective rights which appear in the second chapter of the directive could be of significance for the EROMM project. The following rights have been identified as being exclusive in character: the law of keeping records (Art. 6), the law pertaining to reproductions (Art. 7), the law of public broadcasting and communication (Art. 8) and the law of broadcasting (Art. 8). These rights may be restricted according to article 10.

However the rights which are specified there are not applicable to the organisation of the EROMM project. The law pertaining to reproductions and also the law of broadcasting refers only to practising artists, the makers of audio–records and to makers of film records and broadcasting concerns. Unlike in chapter 1 authors are not cited

---

587. In the text dated 10.11.1972 (BGBl. I p. 2081).
588. Cf. COM (90) 586 final version., p. 15, at side note 26.

in relation to their own works. In its reasoning the Commission made the following observation:

> "Because the legal position in relation to the law pertaining to the reproduction and dissemination of authors work is essentially comparable in Member States, chapter II of this directive proposal limits itself to the harmonisation of those entitled to ancillary copyright protection, ie the practising artist, the maker of records, the filmmaker and the broadcasting concern."[589]

It can be stated that the directive does not bring about any changes in relation to the results which have been referred to above.

The term of copyright protection (ie the length of time for which copyright protection subsists) is referred to in chapter three. This is to be found in article 11. This topic has already been considered above. It is important to grasp that the directive expressly refers to the Revised Berne Convention and thus incorporates within the Community the values of the RBC. In Chapter Four the time at which the directive is to take effect is specified. Article 13 para. 1 states:

> "(1) This directive is applicable to works, performances, sound recordings, broadcasts and first recordings of films which are covered by this directive, which are still protected by the legal rules of the Member States in the sphere of copy-

589. COM (90) 586 final version., p. 8 at side note 10.

right and neighbouring rights of protection on the 1st July 1994 or to those works which satisfy the criteria for protection in the meaning of this directive as of this date."

The important date for the application of the directive is 1st July 1994.[590] The other paragraphs of Art. 13 allow Member states to pass transitional measures. It is noteworthy that Member states can assume in accordance with paragraph 3 that those in possession of rights, if they have conceded these rights to third parties before the 1st July 1994, have thereby agreed to the hiring out or loaning of the specific objects referred to in Art. 2 para. 1. Furthermore, it can be assumed from paragraph 7 that those in possession of rights, who acquire new rights on account of the passage of national legislation necessary to implement the directive and who have consented to use before the 1st July 1994, have thereby ceded the new exclusive rights.

b) The Legal Protection of Databases

The legal protection of databases is an intended project of the EU. As far as the legal protection of databases is concerned until now only proposals for a directive have existed. The EROMM project does not have applicable secondary law. Because this project is still in its embryonic stages several points regarding the anticipated legal protection of databases in the EU should be mentioned.[591] It is important to note that the legal position can still change.

---

590. Cf. also art. 15 of the directive.

aa) Creation and Purpose

On the 13th May 1992 the Commission placed a proposal for a directive on the legal protection of databases before the Council of Ministers.[592] The Economic and Social Committee put forward its position on this matter on 24th November 1992.[593] In its plenary session of 23rd June 1993 The European Parliament supported in first reading the proposal of the Commission subject to different changes.[594] The changes had the objective of specifying the beneficiaries of copyright protection, of giving greater precision to a number of definitions and of raising from 10 to 15 years the period of protection against the taking of extracts without permission.[595]

As a result of this on the 4th October 1993 the Commission put before the Council an amended proposal for a directive on the legal protection of databases.[596]

---

591 Cf. *Kreile / Becker*, ZUM 1992, p. 581 ff., *Hackemann*, The Legal Protection of Databases, CR 1991, p. 305 ff.; *from the same author*, Copyright Law and Databases – a comparative approach with reference to international law, ZUM 1987, p. 269 ff.; *Röttinger*, The Legal Protection of Databases according to EC Law, ZUM 1992, p. 594 ff.; *Hillig* The Protection of Databases from the Perspective of German Law, ZUM 1992, p. 325 ff.; *Hoebbel*, EU Directive Proposal on the Legal Protection of Databases, CR 1993, p. 12 ff.; *Gummig*, The protection of Databases against the Background of EU efforts towards Harmonisation, ZUM 1992, p. 354 ff.

592. ABl. C 156 dated 23.6.1992, COM (92) 24 and Bull. EEC 1 /2 – 1992, figure. 1.3.14.

593. ABl. C 19 dated 25.1 1993 and Bull. EEC 11–1992, figure. 1.3.40.

594. ABl. C 194 dated 19.7 1993.

595. Cf. Bull. EEC 6–1993, figure. 1.2.32.

Article. 57 paragraph 2, Art. 66 and Art. 100a of the EEC Treaty formed the legal basis of the directive. The directive is intended to create a harmonised and stable legal basis for the protection of databases.[597] The "electronic information services", which cover a variety of cases, are very much in view. Thus bibliographic databases, electronic address and telephone books and full–text databases are covered. CD–ROM databases and Online ASCII database services could be mentioned by way of example.[598]

The advance took place against a background of the growing significance of databases in the development of information markets in the Community.[599] The objective is to create "a solid and unified system for the protection of the rights of the creator of databases and the suppression of piracy and unfair competition."

bb) Content

As is already clear from that part of this work which concerns databases, the EEC was very much in unknown legislative territory with its directive proposal.[600]

It is of fundamental importance that the protection of databases should be anchored in copyright law and not be treated as sui generis.

---

596. COM (93) 464 final version.
597. COM (92) 24 final version., p. 2.
598. Cf. ABl. C 194 dated 19.7.1993, p. 6 passim.
599. Cf. *Kreile*, EuZW 1993, p. 24 (25).
600. Cf. Abl. C 194 dated 19.7.1993, p. 15 ff., *Hoebbel.* CR 1993, p. 12.

The structure of the directive equates the directive with a computer programme. In the first chapter – common provisions – specific terms are taken up (Art. 1). The second chapter – copyright law – contains amongst other things the subject matter of protection (Arts. 2–9). In the recently introduced third chapter – protective rights of their own kind – the object of protection and the duration of copyright protection is laid down (Arts 10–13). Chapter Four – common provisions – contains concluding legal rules (Arts. 14–17).

cc) Application to the Project

At first the title register as subject matter had to come within the area of application of the directive. The subject matter is partly set out by the term database as given in the directive.[601] Article 1 of the directive defines a database in the following terms:

The title register contains a collection of titles which are arranged and stored by means of a computer programme. A Test System is likewise intended. In this respect the title register fulfils the requirements of the term database contained in the directive and thus comes within its area of application.

The computer programme as such does not come within the definition of database.[602]

---

601. The amended directive proposal is to be found: COM (93) 464 final version., p. 19 ff
602. On demarcation *Hoebbel*, CR 1993, p. 12 (14).

Also excluded from the directive are non–electronic databases, eg card indexes.[603] Art. 2 Nr. 3 specifies further preconditions for the subject matter.

> "3. A database is protected by copyright if it represents an original work in the sense that it concerns a collection of works or information which, on account of its selection or arrangement, is the sole intellectual creation of the author. Other criteria are inapplicable when determining whether a database is the subject of copyright."[604]

The corresponding question mustbe raised here as above in connection with the RBC as well as with the German Copyright Law, namely whether the title register is a work, which on account of its selection or arrangement represents the sole intellectual creation of the author. By way of contrast with the tests which were referred to above the second sentence makes it abundantly clear that no additional qualitative or quantitative preconditions may be applied to the protection of databases. The narrow jurisprudence of the German Federal Court, which places great emphasis upon the level of creativity, will not be able to be sustained.[605]

This does not however amount to a blank cheque. With the elements "original work", "selection or arrangement" and "own intellectual creation" it is clear that the well known terms will once more be applied in this matter.

---

603. *Röttinger*, ZUM 1992, p. 594 (597).
604. The author's own emphasis.
605. *Hoebbel*, CR 1993, p. 12 (15).

Something approaching a highlighting standard is required in relation to the originality of the work. In the directive's reasoning reference was made to originality:

> "The originality of a database is to be determined in the light of the selection or organisation of the works or information of which it consists and not by way of reference to a work observed as a whole, the latter being so for a computer programme."[606]

The definition of originality corresponds with the definition given on the legal protection of computer programmes.[607] As to the criteria "selection" and "arrangement" the following is said there:

> "It is essential to the electronic storage and processing of the data that the selection not be closed and that the arrangement of the content always be capable of further development. A database which works on or close to real time, eg one which is set in motion every 30 seconds, has at its disposal a content which grows with time and is even sometimes partially wiped out with time. In addition to this the arrangement of this content can also be further developed in the light of new inputs and patterns of use. Nevertheless the criteria and parameters for the choice and arrangement (of the content) must be specified by a human author, independent of

606. COM (92) 24 final version., p. 45, at side note 2.3
607 Directive 91/250/EEC, ABl. L 1991/122, p. 42.

> whether the choice or arrangement is later carried out with the help of intelligent or expert software systems, and also independent of whether the content of the database remains unchanged over an extended period of time. In so far as specific decisions of choice were made by the selection or arrangement of information, the original criteria and parameters which determine these choices can hence be attributed to a human author."[608]

Whether the required originality is present in the selection and arrangement of the title register appears doubtful. This is so because an independent decision forms the basis of the selection, namely whether the book should be copied or not. By way of admission onto the register there exists only very limited space for an expression of individual choice[609] which can be attributed to the author as the database is already complete. From the same information a second author would produce the same content. In this context the reasoning accompanying the directive has this to say:

> "In those few instances in which neither the selection nor the arrangement can realistically be altered by a second author it is possible that the protection which is normally provided by copyright for collections cannot be granted because the second author will not be able to prove the originality of his choice of selection. Further-

608. COM (92) 24 final version., p. 25 f., 3.2.3.
609. Cf. COM (92) 24 final version., p. 25 f., at side note 3.2.4.

> more should the first collection not be subject to copyright because it employs certain general methods eg the listing of each contributor or the use of an alphabetical arrangement, because copyright taking this form would have the result that every author would be prevented from arranging works or information comprehensively or alphabetically. It would be an unacceptable extension of copyright and an unwanted restrictive measure should the straightforward accumulation of works or material, arranged according to generally used methods and principles, enjoy the same protection as other literary works."[610]

It can be regarded as significant that the present database reproduces another work and the selection is made according to technical points of view, namely according to whether a microfilm has been carried out. An additional thought presents itself in this regard. According to this no manufacturer should have such a monopoly over the source of raw materials that he can exclude others from the market for the corresponding end products or services.[611] This is equally the case for a title register on which material not subject to copyright is collected. The effort expended both in time and money is irrelevant. In the same way the size of the database and the amount of stored data is not to be taken into consideration.

---

610. COM (92) 24 final version., p. 26 f., at side note 3.2.5. f.
611. Cf. COM (92) 24 final version., p. 27, at side note. 3.2.7

Even if from an economic perspective a database appears to merit protection certain claims for copyright in respect of intellectual property must be denied as general information would then be quickly monopolised.

dd) Other Rules

"The right of protection against unauthorised extraction" has still to be considered as this right exists independently of the copyright protection for databases.[612] This rule against the unfair assumption of another's work appeared in the first directive proposal at Art. 2 Nr. 5 and is to be found in the recently created chapter three – rights of protection sui generis – at Art. 10:

> "1. "The right of protection against unauthorised extraction" in the context of this directive means that the holder of rights in relation to a database is entitled to prevent the extraction and further exploitation of information or parts of information from the database in question.
>
> 2. Member States provide the holder of rights in relation to a database with the opportunity to prevent the unauthorised extraction or further exploitation of the content of the database for *commercial* purposes. This right of preventing the unauthorised extraction of the content of a database exists *independently* of whether the database is to be considered for *copyright protection*. It does not exist for the content of a

612. Cf. *Röttinger*, ZUM 1992, p. 594 (598).

> database whose works are already protected by copyright or neighbouring protective laws."[613]

Article 10 creates a special right of exploitation for the stored data. In addition to the protection for databases as collections, a limited form of protection is granted to the content of databases, via the precondition as to originality, provided this content is not itself protected by means of copyright.[614]

Further, the granting of licences for the commercial exploitation of information under fair, non–discriminatory conditions is intended where the author of the database is the only source of this information.[615]

The Commission regards this protective right as sui generis because it comes close to the rules of unfair competition.[616] A breach of the rules against the unfair assumption of another's work is only possible in cases of commercial use. In the reasoning accompanying the directive the following appears:

> "... in every case users can use the content for their own personal purposes. Provided the source is cited a limited commercial exploitation is also allowed. The entire reproduction of the content of a database for the purpose of marketing a competitor product without making further independent

---

613. The author's own emphasis.
614. COM (92) 24 final version., p. 27, at side note. 3.2.8.
615. Cf. COM (92) 24 final version., p. 28, at side note 3.2.8. as well as art. 11 of the directive.
616. Cf. COM (92) 24 final version., p. 38, at side note. 5.3.8. ff.

> efforts vis–a–vis the collection or testing of the material is not allowed."[617]

A breach is regarded as having occurred where an "essential element"[618] or the entire content has been adopted.

Reference should be made further to Art. 5 which regulates the admission of works or information to a database in the following terms:

> "1. The admission of every type of work or information to a database requires the approval of the copyright owner or of other acquired rights or accepted duties.
>
> 2. The admission of bibligraphical references (excluding essential representations or summaries of the content or of the form of existing works) or of short quotations does not require the approval of the possessor of rights in this work as long as the name of the author and the source are clearly cited in accordance with Art. 10 para. 3 of the Berne Convention.
>
> This article was revised editorially in light of the new directive proposal. From now on from works or information not having prior approval only those "which do not come under copyright law (reference sources), do not breach the

617. COM (92) 24 final version., p. 38, at side note. 5.3.7. The author's own emphasis.
618. Cf. art. 11 para. 8.

copyright in existing works (statement of contents) or come under article 10 of the Berne Convention (quotations)"[619] can be admitted to a database.

Statements of contents, which are protected by copyright, can be admitted to a database without prior approval. By way of contrast it is permissible for a compiler of the database to draw up his own statements of contents of already existing works and to record this in his own database, provided his statement of contents does not thereby breach the copyright in the already existing work, namely by way of "essential representations or summaries of the content or of the form".[620]

619. COM (93) 464 final version., p. 5 f
620. COM (93) 464 final version., p. 6.

AGREEMENT ON THE FOUNDATION AND OPERATION OF AN EUROPEAN REGISTER OF MICROFORM MASTERS (EROMM)

The Niedersächsische Staats– und Universitätsbibliothek Göttingen (SUB), as represented by its Director,

the Bibliothèque Nationale de France (BNF), Paris as represented by its President,

the British Library (BL), as represented by the Director General of London Services, and

the Instituto da Biblioteca Nacional e do Livro (IBL), Lisbon as represented by its President,

– Considering the danger of disintegration threatening a huge part of library holdings throughout the world and the urgent need for effective measures for their preservation,

– considering the impossibility of financing preservation and restoration of the holdings, that are to be preserved, and – by consequence – the necessity to preserve information contained in printed books by microfilming and other technical forms of substituting the originals,

– estimating the huge effort needed to preserve a significant part of endangered holdings and therefore wishing to coordinate such activity by the creation of a register of items preserved as microform masters,

---

620. COM (93) 464 final version., p. 6.

– looking forward to cooperation with libraries as well as with public and private institutions that have an interest in the preservation of library holdings,

have agreed on the following:

Article 1

Creation of an European

Register of

Microform Masters – Functions of the host library

(1) A European Register of Microform Masters (EROMM) held by libraries is created at the Niedersächsischen Staats– und Universitätsbibliothek Göttingen.

(2) EROMM is an organ of the SUB Göttingen without legal personality of its own.

(3) The SUB Göttingen undertakes to carry out the work of EROMM as prescribed by the present agreement and under the agreed budget. The functions of the SUB Göttingen as host library are to

a) receive microform master records delivered in UNIMARC by the EROMM partners,

b) file those records in the EROMM database,

c) offer online access to the EROMM database,

d) produce extractions of EROMM records in UNIMARC on data carrier,

e) do the administrative work of EROMM which includes control of bibliographic quality, correspondence with part-

ners, preparing the Steering Committee's meetings, and giving advice to new partners,

f) administer the funds of EROMM,

g) document EROMM's work and engage in public relations – together with the Steering Committee and all EROMM partners.

(4) By two thirds majority of its members the Steering Committee (see art. 9) may decide to charge another institution to take on the functions of the host library. This decision comes into effect after the end of a financial year (dec. 31st in case of SUB Göttingen), if the host library has been formally notified of this decision at least six months before the end of the same financial year. The choice of the host library will be reconsidered at least once every five years.

(5) If the SUB Göttingen wishes to terminate involvement with EROMM this will be possible only with the completion of a financial year. The partners will have to be given not less than one year's notice before the end of this financial year.

(6) Charging another institution to take on the functions of the host library requires redrafting this contract to include the name of the new host library. In addition the governing national law and the venue have to be specified (see art. 12).

Article 2

Functions of EROMM

EROMM has the following functions:

1. Recording of microform masters held by libraries and by other institutions.

2. Supplying EROMM records to interested parties for their own use (see art. 6) by offering online access and by delivering records on data carrier.

Article 3

Delivery of records to EROMM

(1) The signatories to this agreement will deliver any microform master records they own or of which they possess actual and legal power of disposal free of charge to EROMM within a year after the coming into force of the present agreement. From then on they will deliver their records regularly.

No minimum quantity of records to be delivered will be defined. However, a minimum of two deliveries per year is required. If this minimum requirement cannot be met a written explanation is to be submitted to the president of the Steering Committee before the end of the year. The president of the Steering Committee will notify the SUB Göttingen about this fact immediately.

(2) EROMM will accept records only when delivered free of charge by institutions charged with collecting microform master records, if those institutions are

a) national centres,

b) regional library systems, or

c) other regional, national or international library associations.

Such institutions are welcomed as new signatories to the present agreement (see art. 11).

(3) The signatories to this agreement will notify the EROMM Steering Committee (see art. 9) in writing which affiliated libraries they represent. Those libraries will enjoy access to EROMM records under the same conditions as the signatory partners themselves.

(4) The signatories to this agreement will ensure as far as will be possible that the institutions owning the microform masters the records of which are filed in EROMM guarantee that service copies made from the microform printing masters will be provided upon payment of invoice.

(5) The signatories to this agreement agree that records delivered to EROMM are used for purposes as defined in art. 6 paragraph 2. There is no possibility of withdrawing or deleting records once they have been delivered to EROMM. The signatory partners or else the institutions which are responsible for producing the records in their original form retain the right to dispose of their own records filed in EROMM for any purpose without restriction.

(6) The inclusion in the EROMM database of records of commercially produced and published microforms that can be ordered directly from commercial agencies or from libraries is an option to be examined in future.

(7) The institutions delivering the records ensure, that the respective national laws of data protection are observed.

Article 4

Ownership of EROMM records

The institutions, who have responsibility for the production of the EROMM records, remain owners of those records and retain the right to dispose of them for any purpose without restriction, as long as national law or contracts they have signed do not stipulate otherwise.

Article 5

Technical form of

record delivery

(1) Delivery of records mentioned under article 3 is made on magnetic tape or floppy disk in the bibliographic format UNIMARC as defined for EROMM and in compliance with the relevant international standards (comp. annex "Technical fiche").

(2) The records have to provide the mandatory technical information on the microform, esp. clear indication of the country of origin, the library that owns the microform master and, if applicable, the distributor who makes service copies available.

(3) In case a microform master no longer exists and it is impossible to refilm the original the record in question should be updated to announce the need for renewed filming of another copy of the original edition.

Article 6

Delivery of records and products by EROMM to EROMM partners

(1) EROMM supplies records and products containing those records to

a) national centres,

b) regional library systems, or

c) other regional, national or international library associations.

(2) Records and products (data carrier, microfiche etc.) supplied by EROMM are to be employed by the said institutions and libraries affiliated to them solely for their own use and not for commercial use (cf. art. 7):

- coordinating their microfilming activities by using information concerning the existence of microform masters of certain works
- acquiring service copies from the libraries owning the microform masters or from agencies charged with distributing service copies by those libraries
- cataloguing the service copies acquired. When making this kind of use the indications marking the record as coming from EROMM and the institution responsible for its cataloguing have to be retained.

(3) The principle form of access to EROMM records shall be online access to the data base at the SUB Göttingen. Other hosts may be charged or allowed by the Steering

Committee to down load the EROMM records and offer them online if paragraph 2 of this article and article 7 are being observed. In addition EROMM records will be provided by the SUB Göttingen on data carrier at an economic rate. Based on a proposal made by the SUB Göttingen the Steering Committee will define the amount of free online access for partners and the price to be charged for online access above this amount as well as the price for EROMM products.

(4) Signatories to the present agreement are to be supplied with a magnetic tape containing the full set of EROMM records once and with updates twice a year free of charge. Other products will have to be paid for at special rates. The Steering Committee may decide to change this provision if experience with EROMM and with the use made of online access on the one hand and of magnetic tapes and other products on the other necessitates this.

(5) It is not the aim of EROMM to enter into competition with publishers and the book trade by marketing microforms. EROMM is not concerned with publishing activities of individual libraries. (cf. art. 3 paragraph 6)

Article 7

Putting EROMM records at the disposal of third parties

(1) No commercial exploitation of EROMM records and products shall be allowed.

(2) Third parties will have only reading access to the EROMM–database. The Steering Committee may grant exceptions to this rule.

(3) In compliance with the condition stated in paragraph 2 of art. 6 and with art. 8 the SUB Göttingen may with the Steering Committee's consent supply EROMM records and products to agencies that are not signatories to this agreement.

Article 8

Copyright

(1) The signatories to the present agreement guarantee, that while working with EROMM they will observe the international, the respective national laws, and the European Union law of copyright and related laws. This regards microfilmed works that are still in copyright.

The preservation microform as such, however, and the bibliographic records filed in EROMM are not protected by copyright. By filing the titles of works as they are found in the original books no infringement of copyright can occur.

(2) Libraries in general and those using EROMM data in particular are required to respect copyright. Without prior consent of the author they may provide a microform copy of a work still protected by copyright exclusively for preservation purposes to institutions that themselves own a copy of the original, i.e. for replacement of the original in case it is out of print or for filing the microform in an archive to protect against eventual loss of the printed text.

Article 9

The EROMM Steering Committee

(1) An EROMM Steering Committee is set up, members of which will be one voting representative for each signatory party to this agreement. The Steering Committee is the representative of all institutions participating in EROMM in relation to the SUB Göttingen in its role of host library for EROMM.

(2) The Steering Committee has the following functions:

a) To decide on matters of principle. These are

- changing the host library (art. 1 paragraph 4),
- voting on the budget (paragraph 2b and 2c below),
- deciding to produce and market an EROMM product (cf. art. 5 and art. 7 paragraph 3).
- accepting new partners (cf. paragraph 2e below and art. 11),
- entering into cooperation with non–signatories (cf. paragraph 2f below).

b) To receive and discuss the SUB Göttingen's financial and management report for the previous year.

c) To vote on the new budget prepared by the SUB Göttingen half a year before the beginning of the next financial year and to fix prices for online access and EROMM products on the basis of proposals made by the SUB Göttingen (cf. art. 10).

d) To vote on recommendations on the further development and exploitation of EROMM to be submitted to the signatories of this agreement.

e) To vote on accepting new partners.

f) To vote on the eventual cooperation with institutions that are not signatories to this agreement.

(3) The presidency of the Steering Committee will change every two years on January 1st, in the alphabetic sequence of the official names of the participating institutions. With this agreement coming into force the representative of the institution coming first in the alphabet will become committee president for the first period.

(4) The SUB Göttingen is required to make the necessary preparations for the Steering Committee's meetings and to execute the latter's decisions within the limits set by the present agreement and the current budget.

(5) The Steering Committee meets at least once a year on invitation of the SUB Göttingen. On request of a minimum of half of the signatories to this agreement the SUB Göttingen will invite the Steering Committee to hold an extraordinary meeting. Expenses for attending meetings are covered by the institutions sending their representatives.

A signatory party may not be present at a certain meeting: In this case this party has to express its views in writing on a question that has to be voted upon according to the agenda; regarding this question this signatory's written statement will be regarded as a valid vote.

(6) When voting on matters of principle (see paragraph 2a above) the necessary quorum is attained when three forths of the members of the Steering Committee give their vote. For the taking of any other decision the neces-

sary quorum of votes is attained when two thirds of the members of the Steering Committee are present or have given their vote in writing on such matters as are to be voted on according to the agenda.

(7) As long as the quorum is attained decisions on matters of principle a majority of two thirds of the votes cast is required. For accepting new partners and for entering into cooperation with institutions that are not signatories to this agreement unanimity of the votes cast is required (see paragraph 2e and 2f above). In all other cases the simple majority of votes cast is sufficient.

(8) Proposals concerning matters of principle and the budget proposal have to be sent with the agenda to all partners at least four weeks in advance of a meeting. For moving EROMM to a new host library see art. 1 paragraph 4 and 5. For the rates of financial subscriptions see art. 10 paragraph 2 and the budget proposal annexed to the protocol joined to the present agreement.

(9) Further rules of procedure may be defined by the Steering Committee.

Article 10

Financing of EROMM

(1) The costs of EROMM will be shared equally by the signatories to this agreement.

(2) The financial year for EROMM starts on January 1st and ends on December 31st. The SUB Göttingen submits its financial statement for the previous year and a draft budget for the coming year to the signatories of this agree-

ment before the end of the first quarter of the current financial year.

The Steering Committee approves the financial statement and the draft budget for the coming year before the end of the second quarter of the current financial year.

(3) The financial contribution for one year are to be transmitted by each partner to the SUB Göttingen before the end of the first quarter of the current financial year (31st of March). Effective measures are to be taken, to assure that the funds reach Göttingen in time.

(4) Direct contributions by the signatories to this agreement will be reduced by:

- new institutions joining EROMM and taking their share of contributions,
- revenue accruing from rates to be paid by non partners for online retrieval of EROMM records, that will be calculated slightly above cost price,
- revenue accruing from contributions to be paid for online retrieval of EROMM records, that will be made by partners according to the factual use they and their affiliated libraries make of the EROMM database.

  Such contributions shall be made by those partners, whose use of online access is above the amount defined for free access (Art. 6 Abs. 3),
- revenue accruing from the sale of EROMM products, and

– subsidies by third parties.

(5) Any new model for financing EROMM shall also, if necessary, include a proposal to modify the present agreement (cf. art. 7 paragraph 1).

Article 11

Joinder to the agreement of new partners

(1) The signatories to this agreement will strive to enlist

a) national centres,

b) regional library systems, or

c) other regional, national or international library associations.

as new partners.

(2) The joinder of a new partner will be documented in an annex to this agreement (cf. art. 9 paragraph 2a).

Article 12

Resolving disagreement

(1) This agreement is governed by German law. The German text of this agreement prevails in case of conflicting interpretations.

(2) Venue for the resolution of all conflicts arising from this agreement is Göttingen.

Article 13

Final clause

(1) This agreement will be effective from the date of signature of the last partner to sign.

(2) This agreement runs until December 31st, 1996 notwithstanding art. 13 paragraph 3. If no partner cancels his participation before July 1st, 1996 the duration of the agreement will be prolonged for another five years.

(3) The withdrawal of a partner may become effective at the end of a financial year. The partner has to give written notice of his intent to terminate involvement to the president of the Steering Committee half a year in advance. The president of the Steering Committee will notify the SUB Göttingen about this immediately.

(4) By two thirds of its members' votes the Steering Committee may decide to propose an amendment to the present agreement. To come into effect the agreement in its new form has to be signed by every partner.

(5) By three forths of its members' votes the Steering Committee may decide to dissolve EROMM.

(6) In case of the dissolution of EROMM the signatories to this agreement will agree on how to utilize EROMM records and products in a spirit of mutual understanding. In this context the rule will be, that after covering costs the host library has had in fulfilment of its EROMM related duties, products and revenue from the sale of products will be redistributed to the partners according to the relative number of records they have contributed to EROMM.

Protocol

to the EROMM agreement

(1) Draft budgets for 1994 and 1995 respectively have been submitted to the interested institutions prior to the signing of the EROMM agreement by the SUB Göttingen.

(2) The budget proposal for 1994 is accepted as valid by signing the present protocol.

(3) The Steering Committee shall agree on the budget for 1995 before July 1st, 1994.

(4) The Commission on Preservation and Access, Washington D.C. has notified the signatories to this agreement that it is prepared to give substantial financial support to EROMM for the period from July 1994 to December 1995. In view of this the EROMM partners offer to provide CPA with magnetic tapes of the records filed in the EROMM database to be used for the benefit of the American scholarly and library communities and in accordance with art. 6 paragraph 2 of the EROMM agreement. After the end of the CPA's direct involvement with EROMM they wish to conclude formal exchange arrangements with the major American library information networks.

(5) The representatives of the signatories of the present agreement and members of the Steering committee are:

Marcelle BEAUDIQUEZ, BNF

Maria Fernanda Casaca FERREIRA, IBL

Mirjam FOOT, BL

Werner SCHWARTZ, SUB

(6) In accordance with art. 9 paragraph 3 of the EROMM agreement the representative of the Bibliothèque Nationale de France will act as president of the Steering Committee until December 31st, 1995.

(7) In accordance with paragraph 4 of this protocol the Commission on Preservation and Access, Washington D.C. will be invited to attend the meetings of the Steering Committeee as permanent guest for the period from July 1994 to December 1995.

(8) The EROMM service within the SUB Göttingen is managed by:

Jürgen BRAUN, SUB

(9) Before July 1st, 1994 the partners to this agreement will submit to the Steering Committee a statement listing the libraries or library networks they represent (cf. art. 3 paragraph 3 of the EROMM agreement). The president of the Steering Committee will notify the SUB Göttingen about all details relevant here.

With online access to the database becoming operational during the second half of the year 1994 the SUB Göttingen will provide access to any library thus qualified.