

Copyright and Related Rights in the Audiovisual Sector

Audiovisual works and artistic performances, including sound and film recordings of them, are protected by specific copyright and related regulations. There are also provisions to protect rights to distribute these works, such as those granted to broadcasters, for example.

Current regulations, however, are in need of updating: since the first international regulations on related rights were adopted in 1960-61, a host of changes, some more radical than others, have been made in the broadcasting sector. Among the most profound of these changes is, of course, the technological development and convergence of existing and new forms of transmission such as cable and satellite technology, and now digital broadcasting. They also include new methods of recording, copying and storing works, performances, original recordings and broadcasts. At the same time, the financial and technical implications of distributing audiovisual works have grown considerably. The extent to which existing related rights provide sufficient protection against the various forms of piracy which have emerged, together with possible ways of strengthening legal measures against them, are currently being considered by the EC, WIPO and the Council of Europe.

Existing and proposed EC and WIPO regulations are described in two separate chapters below: the first deals with the rights of authors, performers and producers, while the second is devoted to broadcasters' rights. Each chapter describes how the EC and WIPO, through new initiatives, intend to bring current provisions on related rights into line with today's technical and economic conditions.

These chapters, which include some comparisons with other international regulations, point out several major shortcomings as well as improvements that have already been made to the copyright system. These are summarised in the conclusion.

Rights of Authors, Artists and Producers

Protection is needed in the audiovisual sector for intellectual property such as operas, novels, radio plays, stage plays and film scripts on the one hand, and the communication and performance of existing works, i.e. related rights, on the other. The importance of related rights is growing in the digital age, with its new forms of exploitation and the inevitable disappearance of national boundaries. An internationally recognised system of effective copyright and related rights is required in order to protect the economic interests of authors, artists, phonogram producers and film producers.

Current provisions for the protection of authors, artists and producers are contained in the Berne Convention for the Protection of Literary and Artistic Works (latest version, 1971),¹ the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention, 1961),² the Geneva Convention for the Protection of Producers of Phonograms against unauthorised Duplication of their Phonograms (1971)³ and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement, 1994).⁴ EC law includes three Directives concerning the rights of authors, artists and producers: the Directive on Rental and Lending Rights, the Directive on Satellite and Cable Transmission Rights and the Directive on Terms of Protection.

Rather than describe all these regulations, the following chapter focuses on the most recent attempts to bring existing laws into line with modern technological and economic realities. Firstly, these include two agreements adopted in 1996 by the World Intellectual Property Organisation (WIPO), which are still in the ratification phase. The protection currently afforded under EC law is also described. The chapter also explains the current debate on a WIPO instrument for the protection of audiovisual performances and the amended proposal by the European Commission for a Directive on copyright and related rights.

A. Existing Regulations

1. WIPO

At the WIPO Diplomatic Conference held in Geneva in December 1996, the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) were both adopted.

The WCT protects authors' rights in their artistic and literary works. It supplements the Berne Convention for the Protection of Literary and Artistic Works, adapting its provisions to the new requirements of the Information Society. This means firstly that all regulations in the Berne Convention are applicable *mutatis mutandis*. It also means that all WCT Contracting Parties must meet the substantive provisions of the Berne Convention, irrespective of whether they are parties to the Berne Convention itself.

In contrast to the WCT, the WPPT deals with holders of related rights, its purpose being the international harmonisation of protection for performers and phonogram producers in the Information Society. However, it does not apply to audiovisual performances, which are the subject of the Resolution concerning Audiovisual Performances (see below).

1.1 Rightsholders and Subject Matter

The concept of "literary and artistic works", central to the WCT, encompasses all works in the fields of literature, science and art, whatever form they may take.⁵

The WPPT mainly protects the economic interests and personality rights of performers (actors, singers, musicians, etc) in respect of their performances, whether or not they are recorded on phonograms. It also helps persons who, or legal entities which, take the initiative and have the responsibility for the fixation of the sounds. The WPPT grants them economic rights in respect of their phonograms, although these may not form part of an audiovisual work, since these do not fall within the scope of the WPPT.

1.2 Scope of Protection

A statement concerning the WCT⁶ explains that the reproduction right set out in Article 9 of the Berne Convention, including a number of exceptions, also applies in the digital sphere. The concept of reproduction includes the storage of a protected work in digital form on an electronic device.

The WCT extends authors' rights in respect of their works by granting them three new exclusive rights, i.e. the right to:

- authorise or prohibit the distribution to the public of original works or copies thereof by sale or otherwise (right of distribution);
- authorise or prohibit the commercial rental of cinematographic works (if such commercial rental has led to widespread copying of such works, materially impairing the exclusive right of reproduction) or works embodied in phonograms (right of rental);
- authorise or prohibit communication to the public of their original works or copies thereof, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (right of communication to the public).

In respect of phonograms and performances within its scope, the WPPT grants rightsholders the exclusive right to:

- authorise or prohibit direct or indirect reproduction of a phonogram (right of reproduction);
- authorise or prohibit the making available to the public of the original or copies of a phonogram by sale or other transfer of ownership (right of distribution);
- authorise or prohibit the commercial rental to the public of the original or copies of a phonogram (right of rental);
- authorise or prohibit the making available to the public, by wire or wireless means, of any performance fixed on a phonogram in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them, e.g. on-demand services (right of making available).

With regard to live performances, i.e. those not fixed on a phonogram, the WPPT also grants performers the exclusive right to authorise:

- broadcasting to the public;
- communication to the public;
- fixation (of sound only).

The WPPT also guarantees the right to claim to be identified as the performer of a work and, on that basis, the right to object to any distortion, mutilation or other modification to or interference with the performance that may be prejudicial to the performer's reputation.

Finally, WPPT Contracting Parties are obliged to guarantee performers and producers of phonograms the right to a single equitable remuneration for the direct or indirect use of phonograms, published for commercial purposes, for broadcasting or for communication to the public. In respect of this rule and the exclusive rights granted under the WPPT, performers and phonogram producers from all Contracting Parties are to be granted equal domestic rights ("national treatment"). However, the right to remuneration may be restricted or even denied if a Contracting Party makes a reservation to the Treaty. If this is the case, other Contracting Parties are permitted to deny, *vis-à-vis* the reserving Contracting Party, national treatment.

1.3 Limitations

WPPT Contracting Parties may only make such reservations as are provided for in their domestic laws on the protection of literary and artistic works. The WPPT and WCT also stipulate that protection may only be restricted in individual cases where this does not conflict with normal exploitation of the work and where authors' economic interests remain protected.

1.4 Term of Protection

The WCT adopts the same regulations as the Berne Convention where terms of protection are concerned, except for the exclusion of photographic works set out in Article 7.4 of the Convention. Copyright therefore expires 50 years after the author's death. In the case of a work of joint authorship, the 50-year term is calculated from the death of the last surviving author. In the case of anonymous or pseudonymous works, the term of protection runs for 50 years after the work is lawfully made available to the public. "Countries of the Union", in the sense of Article 1 of the Berne Convention, may decide that the term of protection for cinematographic works should end 50 years after the work was made available to the public with the author's consent or, if this did not happen within 50 years of the work being produced, 50 years after its production.

The term of protection under the WPPT is at least 50 years. For performers' rights, this period begins when the work is fixed on a phonogram; for phonogram producers it begins when the phonogram is released to the public or, if it is not released within 50 years of fixation, when the phonogram is made.

1.5 Geographical Scope of Application

The WCT and WPPT are open to all WIPO and European Community Member States. Both enter into force only after 30 States have deposited instruments of ratification or accession. The WCT has so far been signed by 50 States and the EC. However, only twelve States have so far ratified or acceded to it (situation as of 24 November 1999). The WPPT has been signed by 49 States and the European Community. Only eleven States have so far ratified or acceded to it (situation as of 24 November 1999).

2. European Community

Directive 92/100/EEC harmonises rental and lending rights and the protection of certain rights related to copyright (hereafter known as the "Directive on Rental and Lending Rights").⁷

2.1 Rightsholders and Subject Matter

The Directive on Rental and Lending Rights protects authors in respect of their works, performers in respect of their performances and phonogram producers and producers of the first fixations of films ("film producers") in respect of their fixations.⁸ Unlike the WPPT, the Directive also applies to audiovisual performances and, as discussed in Chapter II, to the rights of broadcasters.

2.2 Scope of Protection

The above-mentioned rightsholders are entitled to authorise or prohibit the rental and lending of their works. When a contract for film production is concluded, individually or collectively, by performers with a film producer, the performer covered by such a contract is presumed, subject to express clauses to the contrary, to have transferred his rental right. The Directive on Rental and Lending Rights allows Member States to make provision for a similar presumption with respect to authors or to the rights included in Chapter II (fixation, reproduction, broadcasting and communication to the public). Alternatively, Member States can provide that film production contracts that provide for remuneration within the sense of the Directive have the effect of authorising rental. When giving up their rental rights, authors and performers retain an unwaivable right to equitable remuneration. Member States are also authorised to derogate from the right to remuneration, provided the author is at least compensated in some other way or if the work is used in particular circumstances.

Chapter II of the Directive on Rental and Lending Rights ("rights related to copyright") grants the following additional rights to performers, phonogram producers and film producers:

- performers may authorise or prohibit (1) the fixation of their performances and (2) the broadcasting by wireless means and the communication to the public of their performances, except where the performance is itself already a broadcast performance or is made from a fixation (fixation right);
- performers, phonogram producers and film producers have the right to authorise or prohibit the direct or indirect reproduction of protected fixations (reproduction right),⁹
- performers and phonogram producers have a right to shared remuneration for the public broadcasting or communication of a phonogram produced for commercial purposes or a reproduction of such a phonogram (right of communication to the public);
- performers, phonogram producers and film producers are entitled to make available to the public, through sale or otherwise, fixations of their performances, phonograms and the first fixations of films (distribution right).¹⁰

2.3 Limitations

Member States may provide for limitations of the related rights referred to in Chapter II in respect of private use, the reporting of current events, internal use (ephemeral fixation) or for the purposes of teaching or scientific research. Irrespective of this, they can limit these rights in accordance with the limitations on copyright provided for in respect of literary and artistic works.

2.4 Term of Protection

Under the terms of Directive 93/98/EEC,¹¹ which harmonises national regulations on the terms of protection of copyright and certain related rights in the European Community, authors' rights expire 70 years after their death. In the case of a work of joint authorship, the 70-year term is calculated from the death of the last surviving author. In the case of anonymous or pseudonymous works, the term of protection runs for 70 years after the work is lawfully made available to the public. The term of protection for cinematographic or audiovisual works expires 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the work.

The rights of performers expire 50 years after the date of the performance. However, if a fixation of the performance is lawfully published or lawfully communicated to the public within this period, the rights expire 50 years from the date of the first such publication or the first such communication to the public, whichever is the earlier. The rights of phonogram producers and film producers are protected for the same periods of time as those of performers.

2.5 Geographical Scope of Application

The Directives apply only in the EC Member States.

B. Proposed Regulations

1. WIPO

The efforts to include "audiovisual" in addition to "audio" performances within the scope of the WPPT, are not reflected in the text itself. However, in the Resolution concerning Audiovisual Performances, adopted at the same 1996 conference at which the WPPT was agreed, the participants undertake to protect "visible", i.e. audiovisual performances under an additional Protocol to the WPPT. This Protocol, which was originally supposed to be ready by 1998, had still to be finalised after the last meeting, held in December 1999. The WIPO Standing Committee on Copyright and Related Rights (SCCR) is preparing a Diplomatic Conference to be held in 2000, at which either a Protocol to the WPPT or a special treaty on audiovisual performances should be concluded, providing consensus can be reached. It is still unclear which of the two options is likely to be chosen, although most proposals favour a Protocol.

1.1 Scope of Protection

Since the WPPT already offers performers a certain amount of protection in respect of their audiovisual performances, attempts to broaden protection are focusing on areas that the WPPT does not cover. For example, the following three problem areas were identified in 1997:

- personality rights in respect of non-fixed (live) audiovisual performances and audiovisual fixations of those performances;
- economic interests in respect of fixations of non-fixed performances;
- economic interests in respect of the use of audiovisual fixations of performances.

The proposed instrument is to be based on the WPPT and will probably adopt most of the definitions contained in that Treaty.

One important theme that remains controversial is the scope of personality rights. Whereas most States are happy to follow the example of the WPPT, some delegations¹² believe that, since the audiovisual sector is unique, performers' personality rights should receive special treatment. For example, it has been proposed that the right to object to modifications of a performance should be withdrawn. Such a right, it is claimed, should only be granted if the modification is seriously prejudicial to the performer's reputation. This would exclude any changes made by producers or their legal successors in the normal exploitation of an audiovisual work over which they have the right of exploitation.

Three other important subjects also feature on the SCCR's agenda: (1) rights relating to broadcasting or communication to the public; (2) transfer of rights; (3) "national treatment".

As far as the first point is concerned, controversy surrounds the question of whether performers should be granted an exclusive right to authorise broadcasting or communication to the public, or whether they should merely be entitled to remuneration (in accordance with Article 15 of the WPPT). Point (2) has given rise to a wide variety of proposals, ranging from the introduction of a legal presumption that rights are transferred, to the idea that the transfer of rights should not be dealt with at all. Ultimately, it is a matter of deciding what should be regulated by the Contracting Parties individually, i.e. at national level, and what should be regulated jointly, i.e. through international consensus. Since it is closely connected with the first two points, the question of national treatment also remains unresolved.

1.2 Outlook

The SCCR and the Member States are set to resume their discussions in March.

2. European Community

The European Commission was involved in the preparation of the WCT and WPPT, both of which it signed, along with the EC Member States, on behalf of the EC. The Commission's amended proposal for a Directive on copyright and related rights in the information society¹³

is primarily designed to transpose the most important elements of the two WIPO treaties. Secondly, it should broaden the EC's legal framework in the field of copyright and bring it into line with the latest information society developments. Unlike the WPPT, the new EC legislation builds on existing regulations that already protect audiovisual performances.

2.1 Scope of Protection

According to the proposed Directive, Member States should now grant two additional exclusive rights to authors, performers, phonogram producers and film producers:

Article 2 grants performers the exclusive right to authorise or prohibit, in whole or in part, reproduction of fixations of their performances (reproduction right). This exclusive right also applies to authors in respect of their works, to phonogram producers in respect of their phonograms and to film producers in respect of the original and copies of their films. Article 2 also defines the concept of "reproduction" as "direct or indirect, temporary or permanent reproduction by any means and in any form".

Under Article 3.2, performers have the exclusive right to control "on-demand" access, by wire or wireless means, to fixations of their performances (the so-called "right of making available").¹⁴

This right also applies *mutatis mutandis* to authors, phonogram producers and film producers.

Authors are also granted the exclusive right:

- to authorise or prohibit any communication to the public of originals and copies of their works (right of communication to the public);
- to any form of distribution to the public of the original of their works or copies thereof, by sale or otherwise (distribution right). This right is exhausted within the Community if the transfer of ownership of that object within the Community is made by the rightsholder or with his consent.

In contrast to the WPPT, the proposed EC legislation does not regulate performers' personality rights. The Commission decided not to seek harmonisation in this area because of the differing provisions already set out in national legislation.

Furthermore, provision is made for the protection of technological measures and rights-management information.

2.2 Limitations

The possible exceptions to the exclusive rights set out in the proposed Directive go beyond those provided for in the WCT and WPPT.

In respect of the aforementioned exclusive rights, it is stipulated that temporary acts of reproduction which are an essential and integral part of a technological process whose sole purpose is to enable use to be made of a work, and which have no independent economic significance, should be allowed. This type of reproduction may include certain "cache" copies arising during transmission over the Internet, for example.

The other exceptions provided for in the proposed Directive are exhaustive. In other words, the Member States can, in principle, maintain existing national limitations, provided these are listed in the Directive itself.¹⁵ In any case, they can select any of the exceptions listed, on condition that they may only be applied to certain specific cases without prejudicing the rightsholders' economic interests.

Exceptions may be granted, for example, in respect of the exclusive right of reproduction and the right of communication to the public. These rights may be limited in the context of use for the purposes of education or scientific research, use for the benefit of disabled people, in connection with the reporting of current events, quotations or for the purposes of public security.

The Commission's original draft Directive was amended in accordance with the views of the European Parliament,¹⁶ which called for greater protection of rightsholders with regard to the exceptions and limitations. Under the amended proposal, rightsholders are entitled to fair compensation for copies made for private use, as illustrations for teaching or for the purposes of scientific research – uses which previously did not give rise to any claim for compensation. In addition, it



is hoped that rightholders will be allowed to control certain private digital copying for personal use by way of appropriate technical means in order to protect their own interests.

2.3 Term of Protection

Directive 93/98/EEC, which harmonises the term of protection of copyright and certain related rights in the European Community, is also applicable. Article 3.2, however, is amended by the proposed Copyright Directive to read as follows: "The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram is lawfully published during this period, the rights shall expire 50 years from the date of the first such publication".

2.4 Geographical Scope of Application

The Directives apply only in the EC Member States.

Rights of those who distribute audiovisual works

Broadcasters, i.e. those who distribute audiovisual works, are subject to a number of specific regulations in the intellectual property field. Whereas copyright applies to a tangible piece of intellectual property, broadcasters' "related rights" cover the considerable organisational, financial and personal investment connected with the distribution of programmes. Therefore, it is not the content of a programme, but the programme itself that is protected by specific related rights. The aim of these rights is to protect broadcasters' investments from certain unfair uses.¹⁷

Broadcasters are granted related rights by the Council of Europe's European Agreement on the Protection of Television Broadcasts (1960)¹⁸ and the European Convention Relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting by Satellite (1994),¹⁹ the Rome Convention (1961) and the TRIPS Agreement (1994). We will only discuss these regulations here in order to draw attention to some major shortcomings in the protection they offer.

There are currently three EC Directives which concern related rights in respect of broadcasts: the Directive on Rental and Lending Rights (see A. 2.1), Directive 93/83/EEC on Satellite and Cable Transmission Rights²⁰ and the Directive on Terms of Protection (see A. 2.4). The related rights granted to broadcasters by these Directives, together with their limitations, are summarised below.

C. Existing regulations

1. WIPO

There are currently no WIPO regulations in this field. The WCT and WPPT are exclusively concerned with the rights of authors, performers and phonogram producers.

2. European Community

The main Community regulations in this field are contained in the EC Directive on Rental and Lending Rights. The Directive on Satellite and Cable Transmission Rights merely explains that the provisions of the Directive on Rental and Lending Rights also apply to satellite broadcasts.

2.1 Rightholders and Subject Matter

Without defining the concepts in any more detail, the Directive on Rental and Lending Rights protects broadcasters in respect of their "programmes", irrespective of whether they are transmitted by wireless or terrestrial means, by satellite or by cable. The EC regulation thus provides greater protection than other relevant international instruments, which regard broadcasting only as wireless transmission and thus only cover programmes broadcast in that way. The Directive also applies to cable distributors, provided they do not merely retransmit by cable the programmes of other broadcasters.

However, it is unclear whether the Directive also protects programmes transmitted over the Internet ("webcasting") and signals that are either not accessible to everyone (encrypted signals) or not intended for some groups of viewers (programme-carrying signals which, before being broadcast, are exchanged between broadcasters). The Directive on Satellite and Cable Transmission Rights does at least explain that encrypted programmes are protected as long as they are broadcast by satellite after suitable decoders have been made available to the public (although there is no stipulation regarding encrypted terrestrial or cable programmes).

2.2 Scope of Protection

According to the Directive on Rental and Lending Rights, broadcasters and cable distributors enjoy the exclusive right to authorise or prohibit the fixation of their broadcasts and the reproduction of such fixations (reproduction right). In reality, these fixation and reproduction rights involve numerous practical difficulties, such as with regard to their application in the digital sector. For example, it is not clear whether they cover digital copies, sometimes work-related, made within the framework of computer-based transmission procedures.²¹

Broadcasters' fixation and reproduction rights are also strengthened by the distribution right.²² Here also, the protection provided by the EC goes beyond that of other international regulations, which do not include such a distribution right.

Furthermore, broadcasters can prevent the unauthorised (wireless) retransmission of their programmes by other broadcasters (retransmission right). This right does not apply to unauthorised retransmission of programmes over a cable or telephone network – a clear weakness, with major economic implications, in the protection offered against unauthorised retransmission of programmes via cable or computer networks. Contrary to what its name might suggest, the Directive on Satellite and Cable Transmission Rights does not grant any rights in respect of cable retransmission. It merely sets out certain provisions on the exercise of a right to cable retransmission in Member States where it already exists.²³

Finally, broadcasters can control the communication of their programmes to the public if this takes place in venues that charge an entrance fee (right of communication to the public). It is debatable, however, whether this rule, which was originally aimed at public television lounges, still popular during the 1960s, remains relevant today.

2.3 Limitations

Broadcasters' rights are subject to the same limitations as those of other rightholders under this Directive.²⁴

2.4 Term of Protection

The Directive on Terms of Protection provides for a term of 50 years (the Directive on Rental and Lending Rights originally stated 20 years) from the moment the programme is first broadcast.

2.5 Geographical Scope of Application

All three Directives apply only in the EC Member States. Outside the European Community, broadcasters are protected by the other international instruments mentioned at the beginning of this chapter. Broadcasters that operate outside the EC must therefore expect to enjoy less comprehensive protection in certain areas (e.g. protection of programmes transmitted by cable, lending and rental rights,²⁵ distribution right).²⁶

D. Proposed Regulations

1. WIPO

The legal protection of broadcasters also featured once again on the SCCR's agenda²⁷ (broadcasters having been excluded from the two previous WIPO rounds).²⁸ The subject is thus being considered at global level. At the time of the most recent Committee session in December 1999, a number of concrete proposals for a possible initiative had been drawn up as a basis for discussion. In reality, however, many issues

remain unresolved, some of them fundamental, such as the nature of the instrument, to whom it should be addressed and which rights should be protected.

Apart from the option of a non-binding regulation, such as a recommendation, other possible measures are being considered, in particular a Protocol to the WPPT or even a separate treaty dealing solely with broadcasters' rights.

1.1 Scope of Protection

It is generally agreed that concepts such as "broadcasting" and "broadcasting organisation" need to be precisely defined, while the scope of the proposed regulations must also be determined. There is also a consensus that satellite television and encrypted programmes should be regarded as broadcasting. One area of dispute concerns whether cable channels should be treated in the same way. Although most people think that this should be the case, the practical arrangements are a matter of dispute. The same applies to issues such as legal protection of programme-carrying signals before they are actually broadcast and the treatment of programmes transmitted over the Internet.

Consideration is also being given to whether and to what extent existing rights, particularly the reproduction right and the right of communication to the public, should be revised.

Another important item on the SCCR's agenda is whether and to what extent new, so-called "economic" rights are needed in order to take into account the transformation in economic conditions, particularly the increasing commercialisation of broadcasting. Several rights have already been proposed (some of which are based on the WCT and WPPT). In particular, a new right in respect of cable transmission, an exclusive right to authorise programme encryption, a distribution right and a right to make programmes available to the public "on-demand" have been suggested. It has also been proposed that provisions be drawn up to protect technological measures and so-called rights-management information.

Participating Member States have also repeatedly stressed the need, with any type of regulation, to check whether related rights actually need to be extended and whether sufficient consideration is being given to the need to maintain a balance with the interests of third parties (particularly holders of copyright and related rights, broadcasters of different sizes, the public and individual viewers).

1.2 Outlook

The SCCR did not succeed in reaching any practical conclusions at its December meeting. Rather than set a date for further implementation of these plans, the Committee merely decided to consider the subject again and continue negotiations at its next ordinary meeting.

2. European Community

2.1 Nature of Measure

As mentioned in B.2, the European Commission is currently prepar-

ing a draft Copyright Directive. Legal protection of broadcasters forms only a small part of the proposed instrument. Nevertheless, the Directive contains a number of provisions that supplement and modernise existing Community legislation. Under these proposals, broadcasters would be granted the same rights as other holders of related rights.

2.2 Scope of Protection

In other words, the proposed reproduction right would also apply to broadcasters. Following the model of the WIPO treaties, broadcasters would also enjoy the right of making available.²⁹ Legal protection of technological measures and so-called rights-management information would also therefore include measures to protect programmes from unauthorised acts of exploitation (e.g. encryption mechanisms). However, there are no plans to introduce a general right to cable retransmission, to define (or even extend) the concept of broadcasting or to modernise provisions on the right of communication to the public.

Conclusion

Current attempts by the EC and WIPO to enhance the protection of performers and producers are largely based on existing provisions on "related rights". Whereas the proposed EC Copyright Directive is designed to bring the level of protection of related rights into line with that accorded to copyright, and increases them both at the same time, the WIPO is concentrating solely on the protection of audiovisual performances, which it plans to develop in parallel with the WPPT.

Apart from the general enhancement of existing protection measures, the changes introduced by the EC Directive have little impact on broadcasters' rights. Indeed, the proposed Directive merely makes occasional improvements to existing provisions. However, the WIPO is planning to create a comprehensive legal framework aimed specifically at broadcasters, regardless of other international instruments on related rights already in existence.³⁰ It is likely, therefore, that the WIPO negotiations will result in a legal instrument aimed solely at broadcasters and which, by its very nature, may be more comprehensive, more detailed and possibly even more far-reaching than the proposed EC Directive.³¹

With the proposed changes, the protection of audiovisual performances and broadcasts offered by the WIPO treaties would catch up with existing EC legislation. In future, it may even go beyond current and possibly future EC law. This would certainly be the case if the new WIPO instrument were to include provisions on performers' personality rights.

It is to be hoped that negotiations within the different organisations will remain in harmony with each other, eventually leading to a well-balanced, consistent and fair international legal framework for the protection of copyright and related rights in the audiovisual sector.

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1) IRIS Special, International Copyright Instruments, p.5.

2) IRIS Special, *ibid.*, p.63.

3) IRIS Special, *ibid.*, p.75.

4) OJ L 336/213.

5) Although the WCT also protects computer programs and databases, these are not discussed here.

6) Agreed Statements Concerning the WIPO Copyright Treaty, adopted at the Diplomatic Conference of 20 December 1996.

7) Council Directive 92/100/EEC of 19 November 1992 on Rental and Lending Rights and on Certain Rights Related to Copyright in the Field of Intellectual Property, OJ L 346, 27 November 1992, p.61.

8) The principal director of a film or other audiovisual work is considered to be the "author" or "co-author". Other individuals may be granted "co-author" status in accor-

dance with Member States' domestic laws.

9) The proposed Copyright Directive (see below) would render this Article null and void.

10) The distribution right is exhausted if the object is first sold in the Community by the rightsholder, or with his consent (Article 9.2).

11) Council Directive 93/98/EEC of 29 October 1993 on the Term of Protection of Copyright and Certain Related Rights, OJ L 290, 24 November 1993, p.9.

12) Including the United States and India.

13) Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society, COM (97) 628 final, 10 December 1997, OJ C 108, 7 April 1998, p.6, and COM(99)250 final, 25 May 1999, OJ C 180, 25 June 1999, p.6.

14) I.e. "the exclusive right to authorise or prohibit the making available to the pub-

lic, by wire or wireless means", of protected works, "in such a way that members of public may access them from a place and at a time individually chosen by them" (Article 3.2 of the proposed Copyright Directive).

15) The admissibility of further exceptions in less significant cases is currently being discussed.

16) Opinion of the Parliament, 10 February 1999.

17) The related rights of a programme do not affect any copyright which may arise from the individual elements of that programme, such as copyright in respect of audiovisual works and the rights of film producers, actors, script writers, etc.

18) ETS Nos. 54, 81, 113.

19) IRIS Special, International Copyright Instruments, p.85.

20) Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, OJ L 248, 6 October 1993, p.15.

21) See Article 2 of the proposed Copyright Directive and section B2.2 of this report.

22) Broadcasters' distribution right also covers the first sale of a fixation (the so-called exhaustion principle) in order to prevent broadcasters from controlling cross-border trade in copies without restriction.

23) The Council of Europe's Television Agreement, which has legal force in just six European countries, is currently the only instrument to make provision for such a

right in respect of cable transmission.

24) See A.2.3, above.

25) If a broadcaster is the producer of an original fixation of a film, it also enjoys the rights mentioned in A.2.2 (above).

26) However, the European Television Agreement goes even further than EC legislation in some areas (e.g. cable transmission rights, broader rights of communication to the public).

27) The SCCR is also discussing rights in respect of audiovisual performances, see B.1, above.

28) See WCT (1996) and WPPT (1996).

29) See B.2.1, above.

30) It is already clear that it will be some time before a WIPO instrument on the protection of broadcasters is adopted, since it is being discussed alongside proposals to extend the protection of audiovisual performances which, it is hoped, will be concluded first.

31) Similar ideas are being pursued by the Council of Europe, which is currently considering updating the rights of broadcasters. The Group of Specialists on the Protection of Rights Holders in the Media Field (MM-S-PR) has already met several times to draw up an instrument for the protection of broadcasters. However, the nature and scope of this initiative remain unclear.

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