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European Copyright Law and the Audiovisual Media: Are We Moving Towards Cross-Sectoral Regulation?

It has long been obvious that audiovisual services can be offered transnationally, and digital technology has made an important contribution in this respect. Yet repeatedly we hear the complaint that there is still no adequate legal basis for the exploitation of this potential. For example, transmitting television programmes across national borders via satellite poses no problem in terms of technology, but a lack of protection for programme-makers in a receiving country can mean that viewers there are denied access to those programmes.

Irrespective of the territorial scope of copyright law, the structure of legislative provisions can also prevent the realisation of the full potential of current technology. This is a risk, for example, where rules on copyright have been framed for specific sectors and thus present disparities, despite media convergence and the fact that audiovisual services can be offered across a range of media. In such cases, service providers have to pick their way through a regulatory maze in order to secure particular exploitation rights.

This edition of *IRIS plus* explores the system of European copyright law as it applies to the audiovisual media. It discusses the aims of copyright law and how that law is affected by digitalisation, then goes on to ask whether we can identify a trend towards cross-sectoral regulation. Finally, taking the example of collecting societies, it examines how tools for the practical implementation of copyright law fit into the existing system.

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European Copyright Law and the Audiovisual Media: Are We Moving Towards Cross-Sectoral Regulation?

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1. Introduction

Copyright law is concerned with the legal position and interests of those who create, perform and produce works, those who market them and those who may be termed – in the broadest sense – consumers of the works. One of the aims of both national and international copyright law is to strike a fair balance between these interests.

In the case of audiovisual works and similarly protected subject matter, there is a range of legal instruments designed to achieve such a balance. At European Community level alone, the following Directives have been enacted to this end: No. 91/250/EEC on the legal protection of computer programs,[1] No. 92/100/EEC on the rental right and lending right,[2] No. 93/83/EEC concerning satellite broadcasting and cable retransmission,[3] No. 93/98/EEC harmonising the term of protection of copyright,[4] No. 96/9/EC on the legal protection of databases,[5] No. 2001/29/EC on copyright in the information society[6] and No. 2001/84/EC on the resale right.[7] The Directive on electronic commerce, No. 2000/31/EC,[8] is also relevant to copyright protection,[9] and on 23 January 2003 the Commission published a proposal for a directive on measures and procedures to ensure the enforcement of intellectual property rights.[10]

It is clear from this list that EC copyright legislation is far from homogenous. Most of it was enacted to address specific situations. How did this come about and how does it affect EC lawmaking now? What criteria will determine the further development of copyright law in the EC and what shape will it take in the future?

The most obvious explanation for the lack of a comprehensive EC copyright regulatory system lies in the fact that economic legislation in this field is primarily the responsibility of the Member States. Article 295 of the Treaty establishing the European Community (EC Treaty) provides that the Treaty shall in no way prejudice rules governing the system of property ownership in the different Member States. The recognition and protection of copyright is part of that system.[11] Moreover, rules on intellectual property are generally understood to have a cultural-policy dimension, and Article 151 of the EC Treaty places responsibility for the "flowering of [...] cultures" first and foremost with the Member States. In the field of copyright the EC has no specific legislative competence of its own. However, this has not prevented it from enacting rules on copyright, something it has seen as a policy objective since the early 1990s. In doing so, it relies on its powers under Article 95 of the EC Treaty to pursue the approximation of laws affecting the internal market.[12] One of the ways in which it has used this limited, one-off authorisation has been to adopt sector-specific legislation.[13]

The multiplicity of legal sources applicable to copyright protection in the audiovisual industry reflects in part the digitalisation of the media. Digitalisation creates new types of work (e.g. databases), new types of use for existing works (secondary exploitation in digital form) and new means of restricting use (through encryption, for example) and at the same time makes restrictions harder to enforce (digital copies being less costly). It also becomes easier for operators in countries with a lower level of protection to evade the rules, especially through use of the Internet.

The European lawmakers have responded with specific directives for databases and computer programs as new types of work. A chronology of the directives concerning copyright thus charts the forward march of digital technology, at least insofar as specific technical developments have required new legislation.

Other directives suggest, however, that progressive digitalisation could result in a more comprehensive approach to copyright. In particular, the Directive on copyright in the information society (Infosoc Directive) – which is considered in greater detail below – reflects the fact that digitalisation enables traditional and new communications services to be provided via a range of networks. Cable networks, for example, can carry not only television but also Internet services. In other words, media convergence may come to mean that technology-specific solutions have no role to play in the future.

In envisaging future EC legislation, the European Commission has considered both approaches to the application of copyright – sector specifically on the one hand and comprehensively on the other. In its Green Paper on convergence in 1997[14] the Commission recognised that existing legislation at that time had been enacted for a national, analogue environment. Yet the provision of services was cutting across both traditional sector boundaries and geographical borders. As a result – according to one of two views represented in the Green Paper – sector-specific regulation would be called into question.[15]

More than five years after the publication of the Green Paper on convergence and fifteen years on from the Green Paper on copyright and the challenge of technology, it seems worthwhile to consider in what direction EC copyright law is moving. This involves asking four closely inter-related questions already touched on in the foregoing:

- What common concerns inform the various instruments regulating copyright?
- What are the technical prerequisites of digitalisation that influence the development of copyright law?
- Can we identify a trend towards a comprehensive regulatory approach (for example in the relevant EC Directives)?
- How important are collecting societies with regard to shaping the future of copyright law for the media?

2. A Common Concern with the Balancing of Economic Interests

The media relies on content that it can disseminate, and thus on authors (in the audiovisual sector these include writers, composers, journalists and directors). Conversely, only the media can effectively and profitably exploit authors' works, which need to be performed, recorded and shown. As a rule, individual authors find themselves at a disadvantage in relation to the disseminators of their work, who are more powerful in economic terms. That being so, copyright law must serve to give authors control over the way in which their work is used and the extent of that use, and thus

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afford them a reasonable share in its commercial value. The provision of services relating to creative work must be similarly protected. Accordingly, rights exist in respect of services that disseminate culture, making use of works by third parties (some of which may be in the public domain). Such services are provided, for example, by performers and phonogram producers.[16] Specific media may also provide services that merit protection: the right of retransmission, for example,[17] embodies recognition of the broadcaster's organisational and technical contribution.[18]

Exploitation rights are protected under the right to hold property, a principle explicitly set forth in Article 17 (2) of the European Union Charter of Fundamental Rights.[19] The author's protection is thus based directly on the possibility of preventing others from using the work.[20] This principle is essential in dealing with intangible goods. It is the exclusive nature of the rights that gives them an economic value for the author.[21] At the same time, exclusivity of exploitation rights is extremely important in terms of securing investment in the cultural sector.

On the other hand, the recognised rights of authors, performers and producers have to be weighed against the right to freedom of information as enshrined, for example, in Article 10 of the European Convention on Human Rights (ECHR)[22] and Article 11 (1) of the European Union Charter of Fundamental Rights. Not only the media but also media users, whose intention to access information (*i.e.* content) may conflict with copyright law, may invoke freedom of information. Any act connected with the pursuit of information from a generally accessible source enjoys protection. This is an important precondition for freedom of opinion.[23] There are, however, restrictions placed on freedom of information (see Article 10 (2) ECHR and Article 52 Charter of Fundamental Rights). Of particular relevance here are those restrictions imposed by copyright law.[24]

The law on copyright is thus concerned with striking a balance between the interests of those who create cultural works and those who use them. Freedom of information has to be weighed against the right to hold property. While this will inevitably lead to exclusivity of exploitation rights, the legislation must be framed in such a manner as to take account of cases where the public interest is the prime consideration. This is achieved by allowing certain types of free use or by introducing simplified procedures, for example through collecting societies.

There is a similar conflict of interests between the parties concerned in all issues arising from the exercise of performers' and producers' rights. This common configuration of interests may be an argument for framing copyright legislation to embrace as many sectors as possible – particularly so in an environment of convergence and digitalisation.

As we have seen, European copyright law does not constitute an all-embracing framework. Like the relevant international agreements it reflects the need to balance interests. The international treaties concerning copyright lack uniformity inasmuch as they comprise many different regulatory instruments governing areas that to some extent differ and to some extent overlap. Moreover, the lists of signatory states generally differ. The subject-matter of many agreements is quite specific.[25] Nonetheless, certain regulatory instruments are framed in a cross-sectoral way. The Berne Convention for the Protection of Literary and Artistic Works, for instance,[26] takes a comprehensive approach to protection, and the Rome Convention protects the work of performers, producers of phonograms and broadcasting organisations. All EU Member States are signatories to both the Berne and Rome Conventions. The Copyright Treaty (WCT)[27] and Performances and Phonograms Treaty (WPPT)[28] of the World Intellectual Property Organisation (WIPO) complement the Berne and Rome Conventions and have been signed by the EC. The purpose of the WPPT is to harmonise the rights of performers and phonogram producers internationally. The WIPO is currently preparing a Broadcasting Treaty.[29]

International agreements thus provide for general cross-sectoral regulation in the fields in which they apply. This is true of the Berne Convention, which includes stipulations on the term "works" (Article 2), on rights of use (Articles 8 *et seq.*) and on the term of protection (Article 7). The impact of this type of "horizontal" regulation on EU law will be discussed in section 4 below.

In the meantime, however, despite international harmonisation, the system of copyright protection remains unchanged. It is based on the principle of territoriality, with the result that we have a collection of national, territorially limited copyright laws.[30]

3. Digitalisation

Copyright law has always been affected by the progress of technology – the advent of records and audiocassettes and videocassettes, and developments in television, for example – and digitalisation is the most recent major influence. As this paper will demonstrate, however, digitalisation does not entail fundamentally new procedures with regard to copyright. Digital reproduction is still a form of reproduction.[31] Online transmission can be classified under the heading of making available to the public.[32] It is to be expected, nonetheless, that the relevance of particular forms of use will change. In particular, the practice of downloading content that enjoys copyright protection via the Internet may well supersede forms of use that depend on analogue systems or on a recording medium. At the same time, digital technology simplifies reproduction and distribution.

Digital technology also opens up new possibilities for securing protected content, for example with digital rights management (DRM).[33] Of particular relevance here are encryption and copy-control procedures that allow the distribution of digital content to be managed.[34] Such systems have the potential to offset the disadvantages threatening rightsholders as a result of digitalisation.[35] They are, however, being developed by the cultural industry and in its interests. Authors will be able to benefit from them insofar as their interests are aligned with those of the industry. This is most likely to be the case where, as in relation to retransmission rights, the industry is affected as a rightsholder.

The extent of the demands made by digitalisation on copyright law depends partly on the adaptability of the existing copyright regime. Of particular interest are rights of exploitation, which must be adjusted to reflect the potential of new digital forms of use. We also need to examine provisions that permit specific exceptions (generally on grounds of public interest) to the protection of the author's right to decide how a work may be exploited. Rights of exploitation and exceptionally permissible uses can be given legal expression either by listing particular protected activities – or, in the case of the latter, particular unprotected activities – or through more general stipulations. Where particular activities are protected, the question arises as to whether the protection applies only in respect of specific technical forms of use. The more detailed the provisions, the less flexibility they offer in responding to technical developments.

With regard to exploitation rights, a distinction has to be made between physical exploitation and communication to the public. The first includes reproduction and distribution (Articles 2 and 4 of the Infosoc Directive), whereas the right of communication to the public covers, for example, broadcasting rights. Under Article 3 of the Infosoc Directive the right of communication to the public is explicitly extended to include the right of making available. This provision is based on Article 8 of the WCT, which provides for the

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exclusive right to authorise communication to the public by wire or wireless means. This includes making works available to the public in such a way that members of the public may access them from a place and at a time of their choice. Article 3 (1) of the Infosoc Directive is worded almost identically.[36]

The WCT and the Infosoc Directive differ, however, in their provision for and definition of exceptions. Whereas Article 10 of the WCT provides in a general way for exceptions to be made, Article 5 of the Directive includes a lengthy enumeration of exceptions. Some commentators see the listing of exceptions as evidence of a tendency to legislate for copyright on a media-specific and technology-specific basis. By contrast there are proposals for a legislative approach that generally permits fair use.[37]

Such an approach, however, leaves no scope for requiring that fair (monetary) compensation be paid. Provision for compensation exists, for example, in Article 5 (2) (b) of the Infosoc Directive, under which the Member States may exempt from protection the act of copying for private use[38] – the aim being to make works available to users who cannot afford to buy an original. This provision also reflects the fact that previously it was virtually impossible to control private copying.[39] In return for this restriction of their rights – imposed in the general interest – rights-holders are to be compensated. There are thus sound reasons for not eschewing specificity in every case. On the other hand, there are potential advantages in a non-exclusive system of exceptions, with a list of examples that makes minimal reference to technical detail.[40]

From this brief survey it would appear that copyright law remains constant with regard to the framing of exploitation rights (physical exploitation and communication to the public). It has not been revolutionised by either the WCT or the Infosoc Directive. The impact of digitalisation is apparent in adjustments to reflect new developments, for example in the way that copyright protection rules have been extended to cover authorship of databases. Newly emerging phenomena have been incorporated into the existing framework of copyright protection. While the essential features of copyright legislation may not have changed, the importance of contract law is growing. In many cases, contracts determine the conditions on which works or subject matter may be used by those who acquire exploitation rights in respect of them.[41] Contractual arrangements by definition concern individual cases. It is, however, possible to standardise them, for example under systems of collective rights management, which will be discussed below. Such an approach and the technological environment of convergence based on digitalisation could militate in favour of cross-sectoral copyright legislation.

4. Is There a Trend Towards Cross-sectoral Regulation?

In this section we ask how far existing EC copyright law may be regarded as "horizontal" in the sense that it applies across various sectors. Where a horizontal approach is apparent, we consider whether it has been motivated by the converging digital environment or by other factors, and how effective it is. Conclusions may thus be drawn about requirements for future legislation.[42]

The term "horizontal" is regularly used now to describe the 2002 package of telecommunications directives.[43] The telecoms package is seen as an example of horizontal legislation in that it provides a single legal framework for all types of transmission networks and services.[44] The corollary to this, with regard to regulating for content, would be to lay down a set of basic requirements applicable across the board to all types of reporting and communication of information via all possible means of distribution (press, broadcasting, Internet and multi-media mobile telephony). The need to legislate horizontally in this way is under discussion, for example, in relation to the classification of media content in order to protect young persons. The various systems that exist for rating and labelling content liable to corrupt young persons in different media would be replaced by a single system that would also apply to hitherto unregulated areas. Horizontal legislation on advertising is also being discussed. Apart from the EC rules on comparative advertising, which are intended to be generally applicable, this is an area regulated on a sector-specific basis. There is vertical legislation, for example, on television advertising[45] and advertising for tobacco products (the latter having recently been renewed). By contrast, there is no body of legislation on Internet advertising. The lack of cross-sectoral regulation on advertising (with regard to medium and type of product advertised) is widely perceived as inequitable, and a horizontal approach could help to produce a better balance.

In all the initiatives mentioned, the first step has been to consider particular "sectors" according to materially based criteria. As a result, the legislative approach to these areas has inevitably been determined by conditions particular to them (in many cases technical conditions) – the fact, for example, that telephone networks were previously used exclusively for telephone services. This approach has been taken irrespective of whether the lawmakers' purpose has been to overcome recognised problems (as in the case of the "Television without Frontiers" Directive, intended to coordinate restrictions on the transfrontier provision of television services, resulting from the differing national systems of regulation) or proactively to create better conditions for development (as in the case of cable network deregulation, providing that networks could be used for purposes other than relaying television programmes). In the examples cited, the target sectors are relatively easily identifiable: under the heading of infrastructure for disseminating electronic communications, we have, for example, terrestrial television, satellite television and cable networks.

In the realm of copyright law, legal consequences pertain to works and related subject matter. Copyright rules can thus be classified initially according to the type of work to which they apply (*i.e.* literary or audiovisual works, databases or software). In determining which rights an author or other rightsholder will enjoy, one of the key criteria is the relevant "form of distribution or communication" (*i.e.* print, CD, cable transmission or satellite broadcasting). Within that criterion a further distinction can be made between "medium" (e.g. book or broadcast) and "form" (e.g. print or cable distribution). Moreover, the distinction between analogue and digital exploitation also comes into play (for example, whether a sound recording is made on analogue tape or compact cassette on the one hand, or by means of digital copying on the other).

Where specific criteria with regard to the aim or object of a piece of legislation predominate to the extent that they dictate its character, the legislation may consequently be classified as either "vertical" or "horizontal". Legislation can be classified as horizontal if it is applied irrespective of the type of work. On the other hand, sector-specific weighting of at least one criterion (e.g. the necessarily digital nature of a computer program) suggests that the legislation in question falls into the vertical category.

Applied to existing European directives on copyright, this system of classification yields certain conclusions, which are set out below.

The Software Directive contains provisions for the protection of computer programmes, ranging from a definition of the protected works (in Article 1) through protected uses (Articles 4 *et seq.*) to the term of protection (Article 8). Underpinning the Directive is the consideration that developing computer programmes requires

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considerable investment. It was therefore deemed appropriate that copyright protection should be extended to embrace computer programmes. However, the Directive confines itself to provision for just one type of work. The conceivable forms of distribution and, at the same time, the digital nature of the exploitation are therefore inherently predetermined. Type of work is thus such a predominant feature of the Directive that, on the basis outlined above, it has to be regarded as an example of vertical legislation.

The Database Directive provides for the protection of databases in a similar way. Alongside copyright for the authors of databases (Article 3) it creates a new *sui generis* right for the producers of databases (Article 7). The intention here is to protect investment in procuring, monitoring and presenting the content of a database. In both cases, however, the provisions for protection concern only one type of work and, according to the criteria outlined, this Directive, like the Software Directive, is a vertical measure.

The provisions of the Cable and Satellite Directive are also sector specific. This instrument needs to be considered in association with the "Television without Frontiers" Directive, which created the basic preconditions for free trade in television programmes within the internal market. Because, however, when the "Television without Frontiers" Directive was in preparation, no agreement could be reached on appropriate accompanying measures in respect of copyright, this issue was set aside to be resolved by subsequent legislation. With a view to promoting transfrontier broadcasting, definitions of communication to the public via satellite and of cable retransmission have been included.[46] The Cable and Satellite Directive is thus confined to the medium of broadcasting, and indeed covers only forms of retransmission via cable and satellite. The provisions in respect of the two technologies differ: whereas Article 2 stipulates that authors shall have the exclusive right to authorise communication to the public by satellite, Article 9 states that rights in respect of cable retransmission shall be exercised only through a collecting society. The aim here is to ensure that the smooth operation of cable transmission is not jeopardised by the possibility of multiple claims by third parties holding rights. The restriction of its provisions to communication via cable and satellite characterises this Directive, in terms of our basic criteria, as an example of vertical lawmaking.

The Resale Right Directive provides for the right of authors of works of graphic and plastic art to have an economic interest in subsequent sales of the work concerned. In effect, graphic and plastic art is thus characterised by the fact that, as a rule, only one (original) production of a work will exist. This means that, in most cases, authors cannot derive economic benefit from their creative works by participating in the making of copies as a form of exploitation. In the sense that it relates to a particular type of work and thus addresses a specific situation, the Directive may be classified, according to our criteria, as vertical legislation. At the same time, it has a horizontal dimension inasmuch as it refers, in relation to the duration of protection, to Directive 93/98/EEC with its generally applicable term of protection of 70 years from the death of the artist.

In distinguishing between vertical and horizontal approaches to lawmaking, we also find a hybrid species in the shape of the Rental and Lending Right Directive. Chapter I of this directive lays down rules in respect of specific forms of exploitation (the rental and lending of original works and copies, fixations of performances, phonograms and film originals and copies). While it applies to various types of work, it is concerned only with their physical exploitation, and – among the different forms of physical exploitation and use rights – only with rental and lending rights. The linking factor is thus a particular form of distribution or communication, and in this respect, according to our criteria, Chapter I is an example of vertical legislation.

In Chapter II the Directive establishes exclusive rights to be enjoyed by performers, broadcasting organisations and phonogram and film producers. These rights embrace exploitation in both material form (Article 6 covering fixation, Article 7 reproduction and Article 9 distribution) and immaterial form (Article 8 providing for communication to the public). Related rights other than those set forth in Chapter II are not covered and the Directive thus provides for legal consequences only in relation to the rights enumerated. However, these rights are deemed by the legislator to be particularly important and are the subject of comprehensive provision.[47] The linking factor is thus the existence of a related right of protection. On this basis the Directive covers types of distribution and communication for all the relevant rights of protection. For example, in Article 8, the right of communication to the public embraces the work of performers, phonogram producers and broadcasting organisations. We can therefore see the Directive's approach as encompassing different types of work. According to our criteria, Chapter II as a whole thus represents an example of horizontal legislation in respect of protected subject matter.

It seems appropriate to include in the group of more horizontally framed directives those concerned not with exploitation rights as such but with "subsidiary" questions. The Duration Directive, for example, standardises the term of protection enjoyed by works and related subject matter protected by copyright – and applies in respect of all types of work, all forms of distribution and communication to the public, and both analogue and digital technology. This approach is so predominant that the Directive has to be classified as an example of horizontal lawmaking. One of the aims of this Directive was to close off loopholes in the system of protection. Divergent provisions in the Software Directive[48] and the Rental and Lending Directive[49] were amended by the Duration Directive and, to that extent, vertical legislation was superseded by horizontal provision.

The Commission Proposal for a Directive, COM (2003) 46 final, of January 2003 also takes a horizontal approach. The Commission wants the Member States to have a duty to introduce effective, proportionate and deterrent penalties with a view to protecting intellectual property. It recognises that the rules on copyright protection at EU level are not uniform. Existing directives on copyright already include standards for the protection of rights (Article 7 of the Software Directive and Article 8 of the Infosoc Directive are examples) but the Commission Proposal comes at the question from a different angle: its starting point is not specific types of work or specific exploitation rights, but simply the existence of intellectual property. Its provisions would therefore apply to all aspects of copyright and related rights.[50] In our system of classification it thus bears the hallmark of horizontal lawmaking.

Classification of the E-Commerce Directive, which deals with the development of electronic business in the European Community, is less straightforward. This instrument also concerns infringements of copyright inasmuch as it includes provisions on liability for activities in the network environment. Only certain digital types of work and forms of exploitation come into play in electronic commerce, suggesting that the directive falls into the vertical category. Unlike the directives discussed above, however, the E-Commerce Directive is not primarily concerned with copyright. Instead, its provisions address the whole field of e-business and it thus defies classification on the basis of our criteria for copyright law.[51]

In analysing the Software Directive we immediately encounter similar difficulties. The Directive is intended to further the development of the information society in Europe. This entails, among other things, creating an internal market for new products and services, and copyright and related rights are seen as particularly important in this respect. The latest technical developments in the exploitation of works are not deemed to require new concepts, but

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the law has to be adapted to take account of the changed economic circumstances, and here the Directive aims to achieve a high level of protection.[52] One of its effects is to ensure compliance with the WCT and WPPT.[53]

The WCT and WPPT complement the Berne and Rome Conventions, which generally take a horizontal approach. In so far as the Software Directive takes its cue from the existing international framework – which, as outlined above, contains many cross-sectoral provisions – this can be seen as an indicator of its horizontal character.

The Infosoc Directive interprets the rights of reproduction and communication to the public in a broad way in order to ensure legal certainty within the internal market. On the one hand, this is stated explicitly with regard to the right of reproduction, the Directive stipulating that its scope should be defined in conformity with the Community *acquis*.[54] On the other hand, it states that the right of communication to the public should cover all forms of such communication, including broadcasting and interactive on-demand transmission.[55] As we have seen, this is where the Directive, in Article 3, introduces the concept of making available to the public. Previous provision for the right of distribution – which must be seen in association with the right of reproduction – had been sector specific: for example in Article 4 (c) of the Software Directive, Article 5 (c) of the Database Directive and Article 9 of the Rental and Lending Right Directive. By contrast, Article 4 of the Infosoc Directive gives authors a distribution right in respect of all types of work.[56] From the breadth of its provision it would thus appear that, in terms of our classification, the Infosoc Directive is an example of horizontal lawmaking.

At the same time we need to ask whether the extensive enumeration of exceptions in Article 5 is not so heavily reliant on the description of technology-specific uses as to constitute an example vertical legislation.[57] Moreover, in respect of exceptions and limitations, Member States are explicitly required to make a distinction between analogue and digital copying.[58]

As outlined earlier, digitalisation of the media appears to influence the way in which copyright law is adapted to keep pace with technical change. The adaptation process must take proper account, on the one hand, of adjustments or readjustments in protected forms of exploitation and, on the other, of permissible exceptions (see section 3 above). The rules on exceptions need to be seen in the context of corresponding provisions in national copyright laws. Contrary to the Commission's original aim of limiting the number of exceptions in the Infosoc Directive, the existing exceptions were incorporated into Article 5.[59]

Some of the exceptions are subject to specific conditions, for example that rightsholders receive fair compensation.[60] In respect of the reproduction right the following exceptions are permitted: acts of reproduction that are transient and have no economic significance (see Article 5 (1)),[61] reproductions on paper (Article 5 (2) (a)), reproductions on any medium for private use (Article 5 (2) (b))[62] and ephemeral recordings made by broadcasting organisations (Article 5 (2) (d)).[63] In respect of the rights of communication to the public and of reproduction, the permitted exceptions are use in teaching and research (Article 5 (3) (a)) and analogue (as opposed to digital) use in cases of minor importance where exceptions already exist under national law (Article 5 (3) (o)).[64]

The rules on exceptions are actually dependent on specific technical procedures (e.g. reproduction on paper) or actions (e.g. ephemeral recordings) and cannot therefore justify the conclusion that the Directive takes a vertical approach. Rather, we need to consider the underlying reasons for the rules. Certain provisions for exceptions simply serve to make the right of exploitation more concrete. Article 5 (1), for example, exempts from the provisions of Article 2 those acts of reproduction whose sole purpose is to enable transmission or lawful use, and which have "no independent economic significance". Article 5 (2) (d) permits broadcasting organisations to make ephemeral recordings. The purpose here is to allow (authorised) users to make technical use of works in accordance with the exploitation rights that they hold.[65] Other provisions for exceptions reflect the notion of the public good and thus aim to achieve the balance of interests discussed in section 2 above. Rules are thus included for the benefit of non-commercial establishments such as libraries (see Article 5 (2) (c)) and hospitals (Article 5 (2) (e)). Reproduction on paper and on other media for private use is also permitted in the public interest, with a view to making works accessible to users who cannot afford to purchase an original. A further consideration here was the virtual impossibility of controlling private copying.[66]

Article 5 of the Infosoc Directive is thus designed to make rights in respect of normal use more concrete, and to reflect the interests of society. The exceptions and the limitations that it places on the rights of reproduction and communication to the public do not therefore justify its classification under the heading of vertical legislation. This view is also supported by the fact that the provisions for exceptions contained in Article 5 paragraphs 2 *et seq.* are optional and leave the Member States a considerable measure of discretion – although the list of exceptions is exhaustive.[67]

From the foregoing we cannot conclude that the horizontal legislative approach apparent in Articles 2- 4 of the Directive is subsequently restricted by technology-specific provisions for exceptions.

Chapter III of the Directive is concerned with providing adequate protection against the circumvention of protective technological measures. The measures in question (copy control mechanisms, for instance) are technology specific. They protect works stored in digital form, e.g. on CDs or DVDs. The exclusive focus on digital technology is inevitable given that comparable protective mechanisms do not exist for either records or music and videocassettes. Regulation was thus necessitated solely by advances in digital technology. This consideration aside, Chapter III of the Directive also takes a cross-sectoral approach. It is concerned not with specific types of work or specific forms of distribution or communication to the public, but with acts that rightsholders seek to prevent through technological measures. The aim is to protect all rightsholders from the circumvention of such measures.

In terms of our criteria, therefore, the Infosoc Directive, considered in its entirety, is a predominantly horizontal instrument because its effect is not confined to particular types of work or particular forms of distribution or communication to the public, nor – except in Chapter III – is it directed specifically at either analogue or digital exploitation.

Is a trend towards horizontal regulation thus apparent already in EC copyright law? The answer is not straightforward. It is true that certain recent European Directives are sector specific. The Database Directive, for example, is a response to digitalisation through vertical regulation (for a specific, *digital* type of work). Essentially, however, we cannot say the same of the Infosoc Directive, which shares the aim of adapting the law to reflect developments in digitalisation. Rather, and most notably when seen in the context of the Duration Directive and the Proposal for a Directive to provide effective protection against piracy, the Infosoc Directive appears to suggest that the mass emergence of digital manifestations of works and types of exploitation – using digital forms of distribution among others – is tending to be met by cross-sectoral legislation. To put it in a nutshell, the EU lawmaking bodies have not produced a (further) sector-specific instrument exclusively for the Internet, but instead have adapted the existing system of

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copyright law. The legislation has once again focused on achieving a fair balance of interests between authors and users. The legislators chose to adopt a vertical approach in the Infosoc Directive only where it was dictated by the digital context. A key consideration here was the need to respond to the changed balance of power between rightsholders and private users resulting from the fact that digitalisation makes it very much easier to produce unlimited numbers of top quality copies at minimal cost. As we have seen, the legislative response was to stipulate exceptions and limitations in respect of the reproduction right, and to introduce protection of technological control measures. From this we can conclude that coordination and harmonisation of Member States' national laws, particularly with regard to achieving a fair balance of interests, are seen as prerequisites for pursuing more ambitious objectives. Such objectives might include creating the conditions for improved competitiveness in the audiovisual industry (as in other sectors), characterised as it is by convergence of content and means of distribution in the digital age.

5. Collecting Societies

As we have already seen, even in the analogue environment authors were not given exclusive responsibility for exercising their rights. This is another area where the question of achieving a balance of interests has been critical. While, in principle, copyright law gives authors, artists and producers individual rights, these would have little value if it were up to the rightsholders to pursue their claims in every circumstance. This consideration is particularly important in the digital environment which, for example, greatly facilitates reproduction. Collecting societies, to which rightsholders entrust the management of their rights, assume the task of asserting those rights on behalf of their members. From the user's point of view, this system has the advantage that all rights required may be obtained from a relatively small number of agencies. In respect of analogue use, collecting societies play a major role worldwide. They could become less significant in a digital environment if, for example, DRM systems reduced the need for rights clearing. On the other hand, it is conceivable that their importance could increase, for example through the management of rights for Internet-based uses.

Traditionally, collecting societies have operated within national boundaries. Their ability to offer a global range of rights is based on a host of reciprocal agreements.[68] A step towards increased competition between collecting societies was taken with the European Commission decision of 8 October 2002.[69] This concerns reciprocal agreements on multi-territorial licensing for broadcasting via the Internet. The idea behind multi-territorial licensing is that broadcasters who wish to engage in parallel transmission of programmes via the Internet (simulcasting) will no longer have to apply for a simulcasting licence from each individual national collecting society.[70] Instead they will simply apply to any one of a group of participating societies.[71]

To date, European law contains no farther-reaching provisions on collecting societies.[72] However, under Article 9 of the Cable and Satellite Directive, authors and holders of related rights may grant or refuse authorisation for cable transmission only via a collecting society. This rule is designed to ensure the smooth operation of cable transmission, which could be jeopardised by the possibility of claims by individual rightsholders.[73] As we have seen, in terms of our criteria, the Cable and Satellite Directive is an example of vertical legislation. As media convergence progresses, it could make sense to extend the approach of Article 9 to other means and forms of distribution, in order to ensure that the much-discussed balance of interests also applies in the digital environment. Such an extension could entail horizontal legislation. However, the Commission has more than once expressed opposition to this outcome, which might be seen as coercive.[74]

Exactly how the collecting societies evolve in the international, digital environment will have major implications for the contractual assignment of rights. On the one hand, with the advent of DRM, there are calls for the societies' role to be restricted to the field of analogue reproduction.[75] Even in the digital environment, however, it will be hard to replace the administrative role of the collecting societies, for example in assigning packages of rights. Should the importance of the collecting societies increase in an environment of convergence, where it becomes difficult to delineate specific types of work and means of distribution, we can expect the trend towards horizontal lawmaking to become more marked.

6. Overview

A survey of copyright law development at European level prompts the conclusion that, in many areas, legislation designed to achieve cross-sectoral harmonisation has either been passed or is planned. This is particularly true in respect of related rights, duration of rights and effective protection. According to the system of classification proposed in this paper, the Infosoc Directive thus far represents the most comprehensive example of the horizontal approach. It covers both authors and holders of related rights and embraces all the exploitation rights with their exceptions and limitations. By contrast, certain directives are concerned with specific types of work for which the Community has deemed it especially important to make specific provision. Others are concerned with specific rights of exploitation. Sector-specific instruments of this type are justified, as a rule, by the specific characteristics inherent in the field concerned. If we consider the evolution of the law in relation to electronic communication, this linkage does not seem immutable. In the pursuit of keener competition not only between but also within the established media, lawmakers have tended to respond to digitalisation and convergence – not only of communications services and media content but also of the various services' means of transmission – with horizontally framed legislation.

What, then, is the likely future course of development in European copyright law? Although the Community has limited authority to make provision in respect of intellectual property, it has used the demands of the internal market as a basis for directives on copyright, some of which we can classify as examples of horizontal lawmaking. To date, this trend has been most marked in the Infosoc Directive with its broadly framed definitions. We can thus discern in outline – despite all the constraints inherent in the application of such a concept to a field in which so many different aspects require legislation – the emergence of a cross-sectoral European system of copyright law.[76] The system cannot, however, be regarded as a comprehensive one (or at least not yet). There is, for example, no general definition of works and no stipulation on what constitutes authorship. In particular, there are no provisions on the right to claim authorship.[77] With regard to contractual assignment of copyright, only piecemeal provision exists.[78]

The ideas discussed in this paper may be summed up in the proposition that a cross-sectoral approach to legislation on copyright could stimulate competitiveness and efficiency in areas of particular relevance to the audiovisual industry. Such areas include, notably, protection of the creative community and of those who invest in disseminating culture, but also the setting of basic standards for media content, the regulation of advertising (important with regard to refinancing) and the question of transmission paths which determine how content reaches the consumer. Copyright law will be part of the process of development, the shape it takes depending on the system and in particular on the extent of provision for aspects directly relevant to realisation of the internal market.

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1) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, *OJ* L 122/42, 17 May 1991 (Software Directive).
2) Council Directive 92/100/EEC of 19 November 1992 on the rental and lending right and on certain rights related to copyright in the field of intellectual property, *OJ* L 346/61, 27 November 1992 (Rental and Lending Right Directive).
3) 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 248/15, 6 October 1993 (Cable and satellite Directive).
4) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights, *OJ* L 290/9, 24 November 1993, as amended by Directive 2001/29/EC of 22 May 2001, *OJ* L 167/10, 22 June 2001 (Duration Directive).
5) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *OJ* L 77/20, 27 March 1996 (Database Directive).
6) Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *OJ* L 167/10, 22 June 2001 (Infosoc Directive).
7) Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, *OJ* L 272/32, 13 October 2001 (Resale Right Directive).
8) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *OJ* L 178/1, 17 July 2000 (E-Commerce Directive).
9) See Recital no. 16 of the Infosoc Directive, 2001/29/EC.
10) Commission Proposal of 23 January 2003 for a Directive on measures and procedures to ensure the enforcement of intellectual property rights, COM(2003)46 final, available from: http://europa.eu.int/comm/internal_market/en/indprop/piracy/com2003-46/com2003-46_de.pdf
11) On EC competence in the field of media policy see Schwarze, Jürgen, "Medienfreiheit und Medienvielfalt im Europäischen Gemeinschaftsrecht", *Zeitschrift für Urheber- und Medienrecht (ZUM)* 2000, vol. 11, pp 779, 798 *et seq*.
12) Certain Directives also refer to Article 47 (2) of the Treaty.
13) Much of this legislation takes its inspiration from the Green Paper on copyright and the challenge of technology, COM (88) 172 final, of June 1988, or from the Follow-up to the Green Paper – Working Program of the Commission in the field of copyright and neighbouring rights – COM(90)584 final, of 17 January 1991.
14) Green Paper on the convergence of the telecommunications, media and information technology sectors and the implications for regulation, of 3 December 1997, COM(97)623 final, available from: http://www.europa.eu.int/ISPO/convergencegp/97623en.doc
15) The other view represented in the Green Paper was that convergence in the provision of services would continue to be limited by the particular characteristics of the existing sectors, Green Paper COM(97)623 final, *loc. cit.*, p. 37 *et seq*.
16) See, for instance, Articles 6 (1) and 9 (1) of Directive 92/100/EEC.
17) See, for instance, Article 13 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (the Rome Convention) of 26 October 1961, available from: http://www.wipo.int/clea/docs/en/wo/wo024en.htm
18) Hertin, Paul, in: Fromm/Nordemann, *Kommentar zum Urheberrecht*, 9th edition, Stuttgart, Berlin and Cologne, 1998, § 87 (3).
19) The Charter's status under Community law is not unequivocal, but see, for example, the judgment of the Court of First Instance in Case T-377/00, Philip Morris *v* Commission, 15 January 2003.
20) Decision of the German Federal Constitutional Court of 7 July 1971, *Entscheidungssammlung* 31, pp. 229, 240 *et seq.*: "Among the characteristics of copyright as property in the Constitutional sense is the fact that profits resulting from creative work belong in principle to the author [...] and that the author may dispose of them freely on his or her own responsibility. This constitutes the core of copyright as protected by the Constitution." [Editors' translation].
21) Dreier, Thomas, "Urheberschutz und Schutz der freien Kommunikation", in Roßnagel, Alexander (ed.), *Allianz von Medienrecht und Informationstechnik?*, Series of Publications of the Institute of European Media Law (EMR), vol. 24, Baden-Baden 2001, pp. 113 *et seq*.
22) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed on 4 November 1950. The Convention is referred to in Article 6 (2) of the Treaty on European Union. It is also binding on all the Member States of the Council of Europe. See European Court of Justice Case 29/69, Stauder [1969] 419.
23) On Article 5 (1) of the German Basic Law [Constitution], see Herzog, Roman, in Maunz, Dürig and Herzog, *Kommentar zum Grundgesetz,* Article 5 (1), margin nos. 81 *et seq.*, and 95.
24) Herzog, *loc. cit*, Article 5 (1), margin nos. 249 *et seq*.
25) For example, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, of 29 October 1971, available from: http://www.wipo.int/clea/docs/en/wo/wo023en.htm
26) Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886, Paris Act of 24 July 1971 (Revised Berne Convention), available from: http://www.wipo.int/clea/docs/en/wo/wo001en.htm
27) World Intellectual Property Organisation Copyright Treaty (WCT), signed on 20 December 1996, available from: http://www.wipo.int/clea/docs/en/wo/wo033en.htm
The WCT entered into force on 6 March 2002.
28) World Intellectual Property Organisation Performances and Phonograms Treaty (WPPT), signed on 20 December 1996, available from: http://www.wipo.int/clea/docs/en/wo/wo034en.htm
The WPPT entered into force on 20 May 2002.
29) See the proposal of the EU and its Member States to the WIPO, of 28 September 2001, available from: http://europa.eu.int/comm/internal_market/en/intprop/news/treatylang_en.pdf
For information on the meeting of the WIPO Standing Committee on Copyright and Related Rights (SCCR) held in Geneva from 4-8 November 2002, which discussed this question, see: http://www.wipo.int/copyright/en/index.html
30) Schack, Haimo, *Urheber- und Urhebervertragsrecht*, 2nd edition, Tübingen 2001, margin nos. 798 *et seq*.
31) This is made explicit in the Agreed Statement concerning Article 1(4) WCT and in Articles 7, 11, 16 WPPT; see von Lewinski, Silke, in Walter, Michel, *Europäisches Urheberrecht, Kommentar*, Vienna and New York 2001, Infosoc Directive, margin no. 21.
32) Von Lewinski in Walter, *loc. cit.*, Infosoc Directive, margin nos. 66 *et seq*.
33) See also Article 21 of the Commission Proposal for a Directive COM (2003) 46 final, *loc. cit.*
34) Waß, Clemens Matthias, *Digital Rights Management – Die Zukunft des Urheberrechts?*, available from: http://www.rechtsprobleme.at/doks/wass-drm.pdf
35) Dreier, Thomas, "Urheberrecht an der Schwelle des 3. Jahrtausends – Einige Gedanken zur Zukunft des Urheberrechts", *Computer und Recht (CR)* 2000, vol. 1, p. 45, available from: http://www.ira.uka.de/~recht/deu/iir/dreier/publications/cr2000.pdf
36) See also Recital no. 24 of the Infosoc Directive, 2001/29/EC: "covering [...] all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates [...]".
37) See, for example, Hugenholtz, Bernt, "Media Convergence and Transparency in Copyright Law", in European Audiovisual Observatory (EAI), *10 Years of Transparency in the Audiovisual Sector*, Strasbourg, 2003, pp. 62, 65 *et seq*.
38) Recital no. 35 of the Infosoc Directive, 2001/29/EC.
39) Schack, *loc. cit.*, margin nos. 494 *et seq*.
40) *Cf.* Hugenholtz, *loc. cit.*, p. 66.
41) See Cabrera Blázquez, Francisco Javier, "In Search of Lost Rightsholders: Clearing Video-on-Demand Rights for European Audiovisual Works", *IRIS plus* 2002-8, available from: http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus8_2002.pdf.de ; Hugenholtz, Bernt/de Kron, Annemique, "The Electronic Rights War", *IRIS Focus*: *Copyright Law in the Digital Age*, Strasbourg 2000, p. 9 *et seq*.
42) Cf. Green Paper on Convergence, COM (97) 623 final, *loc. cit.* p. 37 *et seq*.
43) See van Eijk, Nico, New European Rules for the Communications Sector, *IRIS plus* 2003-2.
44) Insofar as the package of directives relates to competition law, however, it is possible to see it as sector-specific legislation on competition.
45) See Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, *OJ* L 298/23, 17 October 1989, amended by Directive 97/36/EC of the European Parliament and Council of 30 June 1997, *OJ* L 202/60 of 30 July 1997 (Television Directive).
46) See Article 1 (2) (a) of the Cable and Satellite Directive, 93/83/EEC, and the related Recital no. 14. In relation to Article 1 (3) see Recital no. 27.
47) Nonetheless, Recital no. 20 of the Rental and Lending Right Directive 92/100/EEC authorises Member States to provide more far-reaching protection than that required by Article 8.
48) Article 8 of the Software Directive 91/250/EEC.
49) Articles 11 and 12 of Directive 92/100/EEC.
50) Recital no. 15 of the Commission Proposal, COM (2003) 46 final, states that: "It is necessary to define the scope of this Directive as widely as possible [...]".
51) See Recital no. 16 of the Infosoc Directive 2001/29/EC and Recital no. 50 of the E-Commerce Directive 2000/31/EC.
52) Cf. Recitals nos. 2, 5 and 9 of the Infosoc Directive 2001/29/EC.
53) See Recital no. 15 of the Infosoc Directive 2001/29/EC.
54) Cf. Recital no. 21 of the Infosoc Directive 2001/29/EC.
55) See Recitals nos. 23 *et seq.*, and especially nos. 25 and 29, of the Infosoc Directive 2001/29/EC.
56) See Walter, Michel, in Walter, *loc. cit.*, Infosoc Directive, margin no. 61.
57) Cf. Hugenholtz, *loc. cit.*, p. 65 *et seq*.
58) Recitals nos. 38 and 39 of Directive 2001/29/EC.
59) As described by Hugenholtz, *loc. cit.*, p. 65. Recital no. 31 of the Infosoc Directive 2001/29/EC justifies the incorporation of the existing rules with reference to the need for harmonisation in respect of exceptions as elsewhere. Recital no. 44 warns of the need to recognise the increased economic impact that exceptions may have and to limit them accordingly. Article 5 goes further than Article 10 (1) of the Rental and Lending Right Directive 92/100/EEC.
60) E.g. Article 5 (2) (b), see Recital no.35 of the Infosoc Directive 2001/29/EC.
61) Recital no. 33 of the Infosoc Directive 2001/29/EC refers, for example, to browsing and caching.
62) Recitals nos. 38 and 52 of the Infosoc Directive 2001/29/EC.
63) Recital no. 41 of the Infosoc Directive 2001/29/EC.
64) On the distinction between analogue and digital reproduction, see Recitals no. 38 *et seq.* of the Infosoc Directive 2001/29/EC.
65) See Article 5 (5) Infosoc Directive 2001/29/EC; and Walter, in Walter, *loc. cit.*, Infosoc Directive, margin no. 101. Cf. Article 6 (1) of the Database Directive 96/9/EC.
66) See Schack, *loc. cit.*, margin nos. 494 *et seq*.
67) As explicitly stated in Recital no. 32 of the Infosoc Directive 2001/29/EC.
68) See Mendes Pereira, Miguel, *Collective management and licensing of copyright and EU competition law: Recent developments for the online world*, *Boletin Latino Americano de Competencia* No. 15, October 2002, p. 167, 170 *et seq*., available from: http://europa.eu.int/comm/competition/international/others/latin_america/boletin/boletin_15_2_es.pdf
69) Commission Decision of 8 October 2002 (COMP/C2/38.014) – Simulcasting, available from: http://europa.eu.int/comm/competition/antitrust/cases/decisions/38014/en.pdf
See also Mendes Pereira, *loc. cit.*, p. 171 *et seq*.
70) See Cabrera Blázquez, *loc. cit.*, p. 2 *et seq*.
71) The parties to the reciprocal agreement in question were collecting societies from the countries of the European Economic Area, with the exceptions of France and Spain, and from Central and Eastern Europe, Asia, South America, Australia and New Zealand.
72) For some time, however, the Commission has been considering regulation in this field. A paper on the subject is currently in preparation. See: http://www.europa.eu.int/comm/internal_market/en/intprop/news/reinbothe04-04-02.htm
73) See Recital no. 28 of Directive 93/83/EEC. See also Cabrera Blázquez, *loc. cit.*, p. 4 *et seq.*; and Reinbothe, Jörg, "Rechtliche Perspektiven für Verwertungsgesellschaften im Europäischen Binnenmarkt", *ZUM* 2003, vol. 1, pp. 27, 28 *et seq*.
74) See Cabrera Blázquez, *loc. cit.*, p. 4; and the Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable transmission, COM(2002) 430 final, of 26 July 2002, p. 15 *et seq*.
75) Wuermeling, Ulrich, "Letzte Rettung der Verwertungsgesellschaften", *Kommunikation und Recht* (*K&R*) 2003, vol. I, p. I.
76) Cf. Kreile, Reinhold, and Becker, Jürgen, "Restructuring of Copyright Law in the EU", *Zeitschrift für gewerblichen Rechtsschutz und Urheberrecht*, International Section [*GRUR International*], 1994, pp. 901, 903 *et seq*.
77) On the right to claim authorship see Article 6bis of the Berne Convention. The only relevant provision in EU law is Article 2 (2) of the Rental and Lending Right Directive, concerning authorship of a cinematographic work. See the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community, available from: http://www.europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1824|0|RAPID&lg=DE&display=
78) See, for example, Articles 2 and 9 of the Satellite and Cable Directive 93/83/EEC.

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