



# **The Recasting of Copyright & Related Rights for the Knowledge Economy**

**Executive Summary of final report**

Bernt Hugenholtz, IViR  
Mireille van Eechoud, IViR  
Stef van Gompel, IViR  
Lucie Guibault, IViR  
Natali Helberger, IViR  
Mara Rossini, IViR  
Lennert Steijger, IViR  
Nicole Dufft, Berlecon Research  
Philipp Bohn, Berlecon Research

*Institute for Information Law*  
University of Amsterdam  
The Netherlands  
<http://www.ivir.nl>  
November 2006

*Institute for Information Law / Instituut voor Informatierecht*  
Faculty of Law  
University of Amsterdam  
Rokin 84  
1012KX Amsterdam  
The Netherlands  
<http://www.ivir.nl>  
t +31 (0)20 5253406

---

EUROPEAN COMMISSION DG INTERNAL MARKET STUDY CONTRACT No. ETD/2005/IM/D1/95

THIS STUDY WAS COMMISSIONED BY THE EUROPEAN COMMISSION'S INTERNAL MARKET DIRECTORATE-GENERAL, IN RESPONSE TO THE INVITATION TO TENDER MARKT/2005/08/D. THE STUDY DOES NOT, HOWEVER, EXPRESS THE COMMISSION'S OFFICIAL VIEWS. THE VIEWS EXPRESSED AND ALL RECOMMENDATIONS MADE ARE THOSE OF THE AUTHORS.

---

## Executive Summary

This study on the ‘Recasting of copyright and related rights for the knowledge economy’ was carried out by the Institute for Information Law<sup>i</sup> on commission by the European Commission. As does the call for tender that inspired it,<sup>ii</sup> the study covers extensive ground. Chapters 1 and 2 describe and examine the existing ‘acquis communautaire’ in the field of copyright and related (neighbouring) rights, with special focus on inconsistencies and unclarities, while Chapters 3-6 deal with distinct issues that were identified a priori by the European Commission as meriting special attention: possible extension of the term of protection of phonograms (Chapter 3), possible alignment of the term of protection of co-written musical works (Chapter 4), the problems connected to multiple copyright ownership, including the issue of ‘orphan works’ (Chapter 5), and copyright awareness among consumers (Chapter 6). Finally, Chapter 7 provides an overall assessment of the benefits and drawbacks of the fifteen years of harmonisation of copyright and related rights in the EU and dwells on regulatory alternatives.

### ***Chapter 1: Introduction***

Chapter 1 commences with an overall description of the process of harmonisation that has brought, in the course of 15 years, seven directives in the field of copyright and related rights. It goes on to discuss various institutional and exogenous issues relevant to the process of harmonisation Europe. The main focus here is on the question of competence of the EC legislature in the field of copyright and related rights. This chapter also examines the legal instruments of harmonisation and unification, and concludes with a brief description of the process of convergence that is a main cause of many of the inconsistencies and unclarities that are identified in Chapter 2.

### ***Chapter 2: Consistency & clarity: consolidating the acquis?***

Chapter 2 examines the ‘acquis communautaire’ in the field of copyright and related rights, and identifies the main inconsistencies and unclarities. This chapter follows traditional categories: subject matter of protection; economic rights; exceptions and limitations; and collective rights management. Preceding this analysis, an introductory paragraph critically assesses the principle of territoriality that remains one of the cornerstones of copyright law in the EU.

#### *Territoriality*

The seven directives have smoothed out some of the main disparities between the laws of the Member States, but largely ignored one of the main obstacles to the creation of an internal market in products of creativity: the territorial nature of the economic rights. As a consequence, even in 2006 content providers aiming at European consumers need to clear rights covering some 25 Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States. While EC (case) law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of

Community exhaustion incorporating intellectual property, policies in respect of Internet-based services, as reflected in the Information Society Directive, have left the territorial nature of rights of communication intact. While the Commission's recent Online Music Recommendation does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such. As long as this territorial nature is left intact, harmonisation can achieve relatively little.

### *Subject matter*

As regards the subject matter of copyright only a limited *acquis* can be reported. Here harmonised rules have been established only with respect to new or controversial subject matter, such as computer software, databases and photographs. The absence of a general *acquis* implies that fundamental differences between continental and common law systems will remain, although a certain 'rapprochement' is noticeable. The question arises whether an extension of the *acquis* to all copyright works would be beneficial to completing the Internal Market. The practical effect of any such harmonisation may be limited if the dynamic application of harmonised norms by national lawmakers and courts (the so-called 'homing tendency') persists. On the other hand, national variations may be so slight as not to cause any noticeable problem from an Internal Market perspective.

In the area of related rights, it is particularly the notion of broadcast that is in need of clarification. This is due to the convergence of dissemination methods, which is not reflected in the technology-specific definitions of the Rome Convention or the draft WIPO Broadcasting Treaty. On the other hand, the introduction of a 'technology-neutral' definition may cause an unwarranted extension of rights (e.g. to webcasters), considering the original rationale of protecting broadcasting organisations. To be sure, the economics of current and future broadcasting-type activities would have to be scrutinised before embarking on any attempts of clarification or harmonisation effort.

In sum, no clear advantage of aligning the *acquis* with regard to protected subject matter seems to exist.

### *Economic rights*

As regards exclusive rights, only minor inconsistencies appear in the *acquis*. One concerns the exhaustion of the distribution right, which is not defined in the same manner in the Computer Programs and Database Directives as in the Information Society Directive. Another involves the definition of reproduction. Both inconsistencies might be clarified by the Commission in an interpretative communication, without the need of treading on new ground.

A more serious inconsistency relates once again to broadcasting. The advent of online dissemination models that share the characteristics of broadcasting and on-demand delivery, cause uncertainty whether they come under the broadcasting right or making available right. Although the *acquis* contains a harmonised definition of 'making available', the same is not true for the concept of broadcasting as an act restricted by copyright and related rights. However, precisely because particularly in the area of broadcasting the transition to new forms of transmission, distribution and business models is in full swing, it might be advisable to opt here for the most flexible solution, i.e. to leave the interpretation to the courts of Member States and ultimately to the European Court of Justice. Alternatively, an attempt at delineating broadcasting and making available could be included in an interpretative communication.

The most problematic inconsistency concerns the overlap in the digital environment of the reproduction right, which includes acts of temporary copying, and the right of communication to the public, which includes a right of making available online, both of which are defined in a very broad manner in the Information Society Directive. Arguably, these rights cannot co-exist in the

way they are presently –too broadly– defined. Given that the right of making available was especially tailored to serve as the primary economic right involved in acts of digital transmission, it would make sense for the scope of the right of reproduction to be reduced in line with the normative interpretation of the right which has been advocated by scholars for several years. Consultations with stakeholders have revealed that this overlap is not merely an academic problem, but that it has actually led to undue claims for ‘double payment’ by different right holders for unitary acts of exploitation, resulting in market distortions.

### *Limitations*

The issue of limitations is dealt with in greater detail in the forthcoming IViR Study on the Information Society Directive, which will be completed in early 2007.<sup>iii</sup> This study’s provisional recommendations are as follows: (1) the issue of transient and incidental acts of reproduction should be reassessed, and a consistent legal solution applied to all categories of works capable of being transmitted; (2) the limitations on related rights permitted by the directives should be aligned with the permitted limitations on copyright; (3) the EC legislature should strive to establish a more flexible and forward looking regime of limitations on copyright and related rights. A non-exhaustive list of limitations would allow Member States to respond more quickly than the EC legislature to urgent situations that will arise in the dynamic information market. Such an open-ended regime would best reflect the principles of subsidiarity and proportionality. Recommendations (1) and (2) could largely be achieved in the form of an interpretative communication, while recommendation (3) would require some form of legislative redress.

### *Collective rights management*

As regards collective rights management, in the absence of a general directive on this issue no true ‘acquis’ can be reported here. Nevertheless, the existing directives do contain a number of rules relating to the issue, the most important of which are found in the Satellite and Cable Directive. The Directive gives rise to a number of questions that are best answered by the Commission in the form of an interpretative communication. In the first place, there is a need for clarification of the term ‘transfer’ used in article 10 of the Directive. Second, a communication could shed more light on the mediation system that the Directive imposes upon the Member States, for instance by setting mandatory negotiation deadlines. Third, a communication might delineate the notion of ‘cable retransmission’, and clarify whether it covers simulcasting via the Internet.

## ***Chapter 3: Extending the term of protection for related (neighbouring) rights***

Holders of neighbouring rights in performances and phonograms have expressed concern that the existing term of protection of 50 years puts them and the European creative industries, in particular the music industry, at a disadvantage, as compared to the longer protection provided for in the United States. Chapter 3 examines these concerns, first by describing and comparing the terms in the EU in the light of the existing international framework and existing terms in countries outside the EU, secondly by examining the rationales underlying related (neighbouring) rights protection and finally by applying economic analysis.

The authors of this study are not convinced by the arguments made in favour of a term extension. The term of protection currently laid down in the Term Directive (50 years from fixation or other triggering event) is already well above the minimum standard of the Rome Convention (20 years), and substantially longer than the terms that previously existed in many Member States. Stakeholders have based their claim mainly on a comparison with the law of the

United States, where sound recordings are protected under copyright law for exceptionally long terms (life plus 70 years or, in case of works for hire, 95 years from publication or 120 years from creation). Perceived from an international perspective the American terms are anomalous and cannot serve as a legal justification for extending the terms of related rights in the EU.

An examination of the underpinnings of existing neighbouring rights regimes does not lend support to claims for term extension. Whereas copyright (author's right) protects creative authorship, the rights of phonogram producers are meant to protect economic investment in producing sound recordings. The related rights of phonogram producers have thus more in common with rights of industrial property, such as design rights, semiconductor topography rights, plant variety rights and the *sui generis* database right. Whereas all these rights share the same 'investment' rationale, their terms are considerably shorter, while setting higher threshold requirements. For example, whereas the database right requires 'substantial investment' in a database, the phonographic right requires no more than the making of a sound recording, be it a complex studio production or simply a matter of 'pushing a button' on a recording device. Indeed, a good argument could be made for shortening the term of protection for phonogram producers.

Given that the legal protection of phonogram producers is based on an investment rationale, it is important to note that the costs of owning and operating professional recording equipment has substantially decreased in recent years due to digitalisation. On the other hand, the costs of marketing recordings has apparently gone up. These costs now make up the largest part of the total investment in producing a phonogram. However, it is doubtful whether these costs may be taken into account as investment justifying legal protection of phonogram producers. Insofar as marketing costs accrue in the goodwill of trademarks or trade names, phonogram producers or performing artists may already derive *perpetual* protection therefore under the law of trademarks.

For the large majority of sound recordings the producers are likely to either recoup their investment within the first years, if not months, following their release, or never. If a recording has not recouped its investment after 50 years, it is very questionable that it ever will. On the basis of this finding it can be assumed that a term of protection of 50 years offers phonogram producers more than enough time to recoup their investment.

As the rights expire, recordings falling into the public domain will become subject to competition and falling prices, which will lead to a loss of income for the former right holders. Stakeholders argue that this will negatively affect future investment in A&R. However, it appears that only limited shares of phonogram producers' overall revenues are currently invested in A&R, so the predicted negative effect on investment in new talent is likely to be limited.

Another argument that stakeholders have advanced in favour of term extension refers to the so-called 'long tail' (i.e. the reduced costs of digital distribution has created new markets for low-selling content). A term extension might indeed inspire phonogram producers to revitalise their back catalogues recordings, and make them available to a variety of digital distribution channels. On the other hand, the immense market potential of digital business models should already today have provided ample incentive to phonogram producers to exploit their back catalogues in new media. The recent history of the internet, however, indicates that these opportunities have not always been seized by those stakeholders now asking for a term extension.

Stakeholders have also posited that not granting a term extension would distort competition between right holders based in the EU and their competitors in non-EU countries, where right holders may enjoy longer terms. It has been argued that foreign countries would apply a 'comparison of terms' to the detriment of EU right holders. This argument is wholly unconvincing, for various reasons. In the first place, the Rome Convention probably requires full national treatment, which rules out a comparison of terms by those countries that are bound by the convention. Moreover, many countries not party to the Rome Convention, such as the United States, do not apply a comparison of terms at all.

Another argument advanced by stakeholders is that a failure to bring the term of protection in the EU in line with the US will negatively affect the competitiveness of the European music industry. However, the competitiveness of phonogram producers is based on a wide variety of factors, intellectual property protection in general and the term of protection in particular being just one of them. Moreover, the worldwide music market is dominated by only four multinational companies (the so-called ‘majors’), that can not be characterised as either ‘European’ or ‘American’. Juxtaposing the interests of the European and the American music industries, therefore, would be wholly artificial. Even so, the market dominance of the ‘majors’ is an economic factor to be taken into consideration. A term extension would in all likelihood strengthen and prolong this market dominance to the detriment of free competition.

A final argument sometimes advanced in favour of term extension comes from the world of accountancy. It assumes that a longer term of protection would increase the value of ‘intangible assets’ in the balance sheets of European record companies. Granting a shorter term of protection to record companies in the EU than their competitors in the US already receive, would arguably result in a comparatively lower valuation of assets of European companies. This argument, however, is largely without merit. The value of a record company’s own recordings is not regularly recognised as intangible assets by the record labels, and not capitalised in the balance sheets. Acquired catalogues of recordings are usually capitalised, but routinely written off well before the existing terms of related rights protection expire. A term extension will perhaps play a minor role only in the valuation of the goodwill of a record company in the context of a merger or acquisition. Even then, its effect will be minimal.

The fact that some recordings still have economic value as rights therein expire, cannot in itself provide a justification for extending the term of protection. Related rights were designed as incentives to invest, without unduly restricting competition, not as full-fledged property rights aimed at preserving ‘value’ in perpetuity. The term of related rights must reflect a balance between incentive and market freedom. This balance will be upset when terms are extended for the mere reason that content subject to expiration still has market value. The public domain is not merely a graveyard of recordings that have lost all value in the market place. It is also an essential source of inspiration to subsequent creators, innovators and distributors. Without content that still triggers the public imagination a robust public domain cannot exist.

Admittedly, an argument could be made in favour of extending the term of protection of performing artists, since the reasons for protecting artists are comparable to those underlying author’s rights. However, in the light of existing contractual practices, it is unlikely that performers would actually fully benefit from a term extension, since record companies routinely require a broad assignment of the rights of the performing artists. Therefore, extending the term of protection of performing artists should be considered only in connection with the harmonisation of statutory measures that protect the artists against overbroad transfers of rights. Obviously, a term extension would benefit only those artists that are still popular after 50 years and continue to receive payments from collecting societies and phonogram producers. This however concerns only a small number of performing artists.

#### ***Chapter 4: Calculation of the term of protection of co-written musical works***

Stakeholders have also expressed concern about existing disparities at the national level regarding the calculation of the term of protection of musical works. Although the Term Directive has harmonised the terms of copyright and related rights protection, disparities have remained because Member States treat musical works containing lyrics (‘songs’) in different ways. The Term Directive has not determined how to qualify such musical works, e.g as a single joint work, as two works –music and lyrics– or as some form of collaborative works. Chapter 4 describes the

way the laws of the Member States deal with co-written musical works, examines the resulting disparities, queries whether there is a need for amendment of the Term Directive and looks at alternative solutions.

Split copyright terms only affect co-written music that is at least seventy years old (but more likely 100-120 years) and still actively licensed. Clearly, the size of the problem is modest today considering that the large volume of popular songs of the post-war period will not begin to fall (partly) out of copyright for another few decades. Also, since most music is co-written by authors of the same generation, the actual gap between the respective terms of protection will normally not be substantial. Moreover, split copyright does not arise where the creators have both contributed to music and lyrics, or are registered as such (e.g. Lennon & McCartney). The problem is currently experienced mainly in the area of opera, an area of limited significance from the Internal Market perspective.

Admittedly, the existing disparities cause some administrative inconvenience to the music publishers that control most of the rights concerned, and possibly to the collecting societies as well, but in the light of the principles of proportionality and subsidiarity this would hardly justify initiating an amendment of the Term Directive. Moreover, in the light of recent advances in the field of digital rights management, right holders must be able to surmount these administrative inconveniences with relative ease and without incurring disproportional cost.

Another point to consider is that a harmonised term calculation rule would most likely extend the term of copyright protection of co-written musical works in those Member States that currently provide for 'split' terms (e.g. UK, Germany, Nordic countries). The hidden economic and social costs associated with such a de facto term extension in large parts of the European Union obviously need to be factored in.

Moreover, given that national copyright laws do not treat musical works differently from other works that involve contributions by more than one person, the question is why a special rule should be introduced solely for music. Similar term calculation problems may also occur with other types of productions, e.g. multimedia productions, illustrated books, industrial design and computer software. A more consistent solution would then be to harmonise the concept of joint work of authorship for all types of subject matter.

### ***Chapter 5: Rights clearance issues relevant to the reutilisation of existing works: multiple ownership and orphan works***

An issue that has been lingering among institutional users of copyrighted works for some time concerns the re-utilisation of works of multiple copyright ownership. The emergence of the information society has created new markets for old 'analogue' content, such as archived newspaper articles, scientific publications and broadcast television programs. Re-utilisation often requires licenses from a multitude of authors or rights owners. In some cases right holders are difficult or even impossible to track and identify. Chapter 5 examines the validity of these concerns, refers to existing models in Member States and elsewhere (in particular, to the current debate in the United States regarding 'orphan works'), and proposes solutions.

Where it concerns the general rights clearance problems associated with works of multiple ownership, no Community action is recommended. Seeking licenses from a multiplicity of right holders may be sometimes inconvenient and costly to prospective users, but this does not in and of itself justify legislative intervention, unless a structural market failure can be demonstrated. Moreover, the laws and legal practices of the Member States already provides for a variety of legal solutions to alleviate these problems, varying from special rules on ownership of audiovisual works to the mechanism of collective licensing. Arguably, the European Commission might limit

its role to promoting voluntary arrangements including the establishment of ‘one-stop shops’ by organisations of right holders and collecting societies.

As regards ‘orphan works’, this is indeed a case of structural market failure that would justify some form of legislative intervention, even though the size of the problem is as yet difficult to quantify. Rules addressing the issue should ideally reflect an equilibrium between safeguarding the interests of right holders and giving legal certainty to bona fide prospective users. This points to a system that allows for a competent public authority to issue a licence to use an orphan work, under strict conditions. Such a licence would not be all-inclusive, but granted to a designated user for a specific use only. If the right owner would re-appear, he might collect the royalties fixed in the licence, and deposited in an escrow account or with a collecting society.

Legislative measures of this kind would best be introduced at the national level. Alternatively, Member States might consider addressing the orphan works problem by way of extended collective licensing. Absent evidence indicating that the orphan works problem has a noticeable impact on the Internal Market, it would be premature for any legislative initiative at the Community level. However, it is suggested to complement national measures by appropriate measures at EU level that attend to the licensing difficulties that may occur in case of a cross-border exploitation of orphan works. This could be done in the form of a Commission recommendation, instructing the public authorities to cooperate and facilitate cross-border licensing.

Finally, it is advised to encourage right owners to make rights management information widely available to the public, in order to minimise the orphan works problem in the future. As a possible legal flanking measure, which would require intervention by the Community legislature, one could consider amending article 7 of the Information Society Directive in such a way that the legal protection of rights management information is only granted to right owners in case this information has been deposited in a publicly accessible database.

## ***Chapter 6: Consumer awareness and acceptance of copyright***

Chapter 6 critically examines the prevailing belief that copyright is losing its moral imperative with the general public. To this end a distinction is made between consumer *awareness* and consumer *acceptance* of copyright. The former refers to knowledge, while the latter implies acknowledgement of copyright principles and values.

Various developments have contributed to a growing knowledge about copyright and related rights among the general public. The growth of online stores offering copyright and DRM protected content has confronted consumers with copyright-based business practices as a matter of course. There is increased public debate about the position of the consumer in copyright law, as is illustrated by the implementation of the Information Society Directive in France. Also, publicity campaigns by stakeholders have familiarised the general public with copyright principles and end users’ rights and obligations. Clearly, large-scale copyright infringement by consumers can not be explained in terms of a lack of copyright awareness. Consequently, no need appears to exist for the Community institutions to promote or undertake further initiatives aimed at raising copyright awareness.

An assessment of the acceptance of copyright by the general public is more difficult to make. For this purpose empirical data on p2p file sharing and software sharing were analysed as ‘indicators by proxy’. These surveys make clear that unauthorised use and distribution is the norm for approximately 50 per cent of the populations concerned. However, a much larger share of the European public does recognise the equitability of and the need for copyright protection. However, in such circles as student communities as well as the ‘virtual communities’ that are p2p networks, the prevailing ethical norm is not so much one of complying with copyright, but rather

one of sharing. It was furthermore found that consumer behaviour is also informed by a weighing of the advantages and disadvantages of file sharing versus legally purchasing copies. If a commercial content provider offers the consumer a 'bad bargain' in terms of limited availability, high prices or restrictive use conditions (e.g. portability), then the consumer is not likely to find it unethical to opt for p2p file sharing instead.

Given the fact that copyright (non)conforming behaviour seems largely influenced by social norms and rational/economic considerations, it would appear that European institutions have limited options to help compliance to copyright law. Consistently seeking input from stakeholders that represent consumers in the policy making process may contribute to a balanced end result, which in turn can lead to a better acceptance of and adherence to copyright norms. But the stakeholders themselves –industry and consumers alike– are clearly best positioned to influence acceptance, for instance through the development of more consumer-friendly business models and informative campaigns, including initiatives like standardised labelling of product features on playability. The European Commission could continue to play a facilitating role, especially by supporting the dialogue between industry and consumers.

### ***Chapter 7: Conclusions & recommendations***

Chapter 7 builds on Chapters 1 and 2, and critically examines the benefits and draw-backs of fifteen years of harmonisation of copyright and related rights in the EU.

A structural deficiency of the harmonisation process is the asymmetric normative effect of harmonisation by directive. As this study has illuminated, the harmonised norms of copyright and related rights in the seven directives in many cases well exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered. More often than not the norms also exceed average levels of protection that existed in the Member States prior to implementation. This process of 'upwards' harmonisation is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

Another structural draw-back are the administrative costs of the harmonisation process. The step-by-step approach towards harmonisation that the EC legislature has followed, has placed an enormous burden on the legislative apparatus of the Member States. For national legislatures, the harmonisation agenda of the EC has resulted in an almost non-stop process of amending the national laws on copyright and related rights.

On balance, the harmonisation process has produced mixed results at great expense, and its beneficial effects on the Internal Market remain largely unproven and are limited at best. This conclusion calls for caution and restraint when considering future initiatives of harmonisation by directive, even it were only a modest 'recasting' exercise. In the light of the renewed interest in the EC's legislative competence and in view of the growing importance of the principles of subsidiarity and proportionality, the authors of this study advise the EC legislature not to undertake any new initiatives at harmonisation, except where a clear need for amendment of the existing *acquis* can be demonstrated.

Instead, various other legislative instruments appear to be more suitable and effective to further the goal of an internal market for content-related goods and services. In the short run, various instruments of 'soft law', such as recommendations, interpretative notices or communications, would appear to be the legislative tools of choice. Soft law is particularly suitable for dealing with the dynamics of an information market that is in constant flux and regularly requires *ad hoc* legislative adjustment.

In the long run, if the Community is serious about creating an internal market for copyright-based goods and services, it must inevitably confront the problem of territoriality in a

fundamental way. This would imply the adoption of a Community Copyright Regulation to replace the existing directives and partially pre-empt the national laws on copyright of the Member States. Besides its obvious deregulatory effect, a regulation of this kind might provide a certain ‘rebalancing’ of rights and limitations, in order to rectify the overprotection resulting from 15 years of ‘upwards’ harmonisation.

---

<sup>i</sup> IViR, University of Amsterdam, The Netherlands, <http://www.ivir.nl>.

<sup>ii</sup> See the Call for tender MARKET/2005/08/D, Study on the recasting of the copyright for the knowledge economy, Notice of contract 2005/S131-129165 of 09.07.2005.

<sup>iii</sup> IViR ‘Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’ (Call for tender MARKET/2005/07/D), forthcoming (2007).