THE EUROPEAN COMMISSION'S POLICY ON THE HARMONIZATION OF PROTECTION OF THE MORAL RIGHTS OF AUTHORS AND PERFORMERS IN THE EUROPEAN UNION

Author: Theodore C. Asprogerakas – Grivas, PG Dipl., MA, Attorney at Law

Harmonization of national laws is a fundamental obligation for the European Commission. The very foundations of the Union were based on the common intention of the Member States to harmonise to the maximum possible extent the Internal Market.

In the past 25 years the Commission has made constant and significant efforts to harmonise the national laws of the Member States in the field of intellectual property rights. Many Directives, directly related to copyright are now in force, while many others related to other intellectual property matters also exist. Legislation here is more extensive than in any other field of harmonization.

One should normally expect that moral rights' harmonization would be a part of the general harmonization efforts of copyright and related rights.

However the European Commission so far has made no attempt to harmonise intellectual property in the field of moral rights. This is a rather surprising fact when one takes under consideration that the EC in the last twenty five years has made tremendous efforts for harmonising the economic rights of authors and beneficiaries of related rights by issuing many Directives, which harmonise almost every aspect of the economic rights of all beneficiaries, including term and enforcement of protection[1].

[1] Namely, the following Directives: a) Counsil 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, b) Directive 96/9/EC of the European Parliament and of the Counsil of 11 March 1996 in the protection of databases, c) Counsil Directive 91/250/EEC of 14 May 1991 on the protection of computer programs, d) Directive 2001/29/EC of the European Parliament and of the Counsil of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, e) Directive 2001/84/EC of the European Parliament and of the Counsil of 27 September 2001 on the resale right for the benefit of the author of an original work of art, f) Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, g) Directive 2006/115/EC of the European Parliament and of the

Moreover, the EC is very keen on bringing actions before the European Court of Justice against any Member State failing to embody correctly or fully comply with the requirements of the above Directives and introducing exceptions and limitations. Many terms of the above Directives have been an object of analysis and definition by the European Court of Justice.

On the other hand no official instrument has been issued in harmonising the field of moral rights of same beneficiaries (authors and holders of neighbouring rights).

One should first discuss the past of moral rights' harmonization attempts, within the EU.

The issue of harmonization of Union laws was under examination from year 1988 when addressed by Commission's 1988 "Green Paper – Copyright and the Challenge for Technology".[2] [3]

Moral rights protection was also among the points listed in the Commission's 1991 «Follow-up to the Green Paper- Working Programme of the Commission in the Field of Copyright and Neighbouring Rights" under chapter 8.3.[4] Hearings of all interested parties were held on 30.11 and 1.12.1992. The beneficiaries of protection aimed for strong moral rights, while the entrepreneurs were hostile against such protection.

The 1995 "Green Paper - Copyright and Related Rights in the Information Society"[5] addressed under section VII of Part 2 the issue of moral rights' harmonization but only in order to carry the process of consultation further.[6]

The 1996 "Follow-up to the Green Paper - Copyright and related rights in the

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Counsil of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) and f) Directive 2006/116/EC of the European Parliament and of the Counsil of 12 December 2006 on the term of protection and certain related rights (codified version).

[2] COM(88)172 final, June 1988

[3] C. Seville, *EU Intellectual Property Law and Policy* (Edward Elgar,2009), par.2.3.1

[4] COM(90)584 final, 17.1.1991

[5] COM(95)382 final, 19.7.1995

[6] See also T. Hoeren, "The Green Paper on Copyright and Related Rights in the Information Society" (1995) 17(10) *E.I.P.R.* 511-514

information society"[7] addressed again under chapter 4 the issue of moral rights and the impact of the different moral rights national regimes in the common market. However, the only proposed action was a further study of the issue. The issue of the harmonization of moral rights protection started to weaken and the opinions supporting such harmonization were only few. [8]

The 2004 "Commission Staff Working Paper on the review of the EC legal framework on the field of copyright and related rights"[9] considered under par.3.5, there was no evidence that moral rights' current state affected the good functioning of the internal market in the digital environment, thus, concluded that no harmonization was necessary.

The recent 2008 Green Paper on Copyright in the Knowledge Economy[10] makes absolutely no reference to the moral rights of authors and performers. Moral rights are officially no longer on the Commission's agenda.[11]

In addition, the satellite and cable [12] in rec.28, the Database Directive[13] in rec.28, the Copyright Directive[14] in rec.19 and the Term Directive (codified version)[15] in rec.20 and art.9 explicitly state that their respective provisions do not affect moral rights.

It is therefore objectively clear that the Commission is reluctant to proceed with such harmonization. The questions arising are numerous and significant: Is such reluctance justified? Why has the Commission not yet attempted to harmonise authors' and performers' moral rights?

As there is no official position from the Commission on this matter, an argumentation for the Commission's reluctance to proceed to the harmonization of

[7] COM (96) 568 final, 20.11.1996

[8] See par.5.2.8 of the Opinion of the Economic and Social Committee on the "Green Paper - Copyright and Related Rights in the Information Society".

[9] SEC (2004) 995, 19.7.2004

[10] COM (2008) 466 final, 16.7.2008

[11] See further D. Kallinikou, *Pneumatiki Idioktisia & Syggenika Dikaiomata* (Sakkoulas,2008), p.525

[12] OJ [1993] L248, p.0015-0021

[13] OJ [1996] L077, p.0020-0028

[14] OJ [2001] L167, p.0010-0019

[15] OJ [2006] L372, p.0012-0018

moral rights will be attempted.

One argument could be that the Member States themselves neither require nor favour moral rights harmonization. One study of M. Salokannel, A. Strowel and E. Derclaye on April 2000 under a study contract[16] with the EC concludes, among others, that no governments saw a need for harmonising moral rights except for Italy and Greece.

However, one could counter argue against this view.

Firstly, the EC did not accept the conclusions of this study, at least officially. A statement attached to the study clearly states that the European Commission is not whatsoever bound by this study.

Secondly, the European Commission neither needs nor requires a Member State consensus in order to proceed with a harmonization program. Its harmonization authority comes directly from the EC Treaty and no consensus prerequisites exist. Articles 94 & 95 of the EC Treaty oblige the Commission to harmonise the domestic legislatures in order to establish a common market to all aspects; there is no reason why moral rights should be excluded. Furthermore, in only few cases the European Commission asked for a consensus or opened public dialogues with the Member States before the Counsil proceeds to legislation.

A third fact that should be mentioned is that, nowadays the European Union is much expanded with the addition of ten new Member States. The year's 2000 study does not reflect the current situation.

Another argument could be that the moral rights of authors and performers are already harmonised by the Berne Convention, the WIPO Copyright Treaty, 1996 (WCT) and the WIPO Performances and Phonograms Treaty 1996 (WPPT), which have been ratified by all Member States. Recital 19 of the Copyright Directive's Preamble clearly adopts this argument. This could be considered as an official opinion of the European Commission.

However, this opinion would also leave significant gaps open: The three Treaties harmonise only a limited number of moral rights to a limited number of beneficiaries, while the Treaties do not contain any provisions in the fields of

[16] Study contract ETD/99/B5-3000/E28 commissioned by DG Internal Market.

exceptions, limitations and exercise of moral rights. Moreover, the WPPT protects the moral rights of the performers of aural performances or performances fixed in phonograms only, leaving all other performers and performances out of the scope of its protection.[17]

Under this view, it seems that harmonization made by the above international instruments is limited and therefore insufficient.

Another argument for the non harmonization of moral rights could be the fear of the Member States that such harmonization at an EU level could possibly lead to lowering the level of protection. However, this argument is not very persuasive. Harmonization has usually led to an increase of protection, when it comes to intellectual property rights. Moreover, if this fear was justified, the common law countries, which traditionally aimed for a minimum (if not none at all) protection of moral rights would favour and lobbying for such harmonization, which they apparently do not.

A harmonization effort, that is not broadly known, was tried by the Social Commission during the preparation of a Directive amending and codifying the Term Directive.[18] However, the European Commission considered that the strengthening of moral rights has no financial impact on performers and record producers and would thus not make an incremental contribution to performers' remuneration.[19] Moreover, that the strengthening and harmonising the moral rights of performers, would bring some non-pecuniary benefits to performers, by allowing them to restrict objectionable uses of their performances.[20]

However, strong counter argumentation can be put forward. The significant differences between the various moral rights regimes not only reduce the remuneration of authors and performers but at the same time affect severely the common market. That was also one of the conclusions of the 2000 study of the Commission mentioned before.[21]

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[17] S. Ricketson – J. Ginsburg, *International Copyright and Neighbouring Rights* (OUP, 2006), vol. ii, par.19.53 (ii)

[18] OJ [1993] L 290, p.0009

[19] See COM (2008) 464 final proposal of 17.7.2008

[20] The EC's proposal was admitted and rec.20 of Directive 2006/116 clarifies that it does not apply to moral rights.

[21] However, the 2004 Working Paper concludes to the opposite conclusion.

An obvious example are works made by employees, where in the common law countries the authors-employees enjoy no moral rights protection, while in the continental countries they enjoy full protection of their moral rights and can object to certain uses. An extensive number of fair dealing uses can nullify the moral right protection of authors and performers in UK, while in many continental countries such exceptions do not even exist. Similar situations arise in works of collaboration, or collective works, while the exploitation of a work in transformative ways in the internet would be subject to completely different treatment from one Member State to another concerning the moral rights different regimes.[22] Needless to add, that authors could exercise their moral right of access or retract to some Member States, while in others not. Generally speaking, authors and performers relying on their moral rights protection regimes can object to certain exploitation uses of their works or performances in some Member States, while for the same uses they cannot in others. Therefore, the impact on the internal market is severe.

Given the above evaluation it is submitted that the reluctance of the European Commission to proceed with the harmonization of the moral rights of authors and performers within the internal market is not fully justified.

On the other hand, there seem to be many reasons which would justify such harmonization on EU level. As mentioned before, the internal market will be harmonised, thus an accomplishment of extreme significance would be achieved by the EC. Harmonization of the internal market is an obligation and not a right for the EC; therefore, where a need for harmonization occurs the EC has to act. Moral rights are a field where such harmonization is required.

Another argument favouring harmonization is the avoidance of discrimination, which arises by the different treatment of performers' moral rights protection. Specifically, performers of works of sound have their fundamental paternity and integrity rights secured, while other performers (for example actors, dancers) do not. This is clearly discrimination which seems difficult to justify under arts.12 & 13 of the EC Treaty.[23]

The same situation arises also for authors' moral rights to the extent that authors of continental countries enjoy a significantly wider range of moral rights protection

[22] See M.F. Makeen, *Copyright in a Global Information Society* (Kluwer, 2000), p.281-284

[23] See par.33 of the Opinion of Advocate General in case C-360/00 P *Land Hessen v G. Ricordi & Co. Bühnen- und Musikverlag GmbH* [2002] ECR I-5089.

(including to their subject matter the rights of divulgation, access and retraction) than in others. The result is the same as above, namely an arguably unjustifiable discrimination.

Moreover, in the majority of the national intellectual property laws of the EC Member States, the moral rights and the economic rights in a work or a performance are the two sides of the same coin, under either the monistic or the dualistic view. It is only to the common law countries, where copyright is completely separated from the moral rights. Under the circumstances, it could hardly be justified how it is possible for EC to harmonise one side of the coin (economic rights of authors and performers) and not the other (their respective moral rights).

Furthermore, one should consider the cultural protection.[24] It is generally accepted that moral rights as from their very nature represent the bond between the author (or the performer) and his creation (or his performance respectively). The law of intellectual property should be able to promote cultural growth and protection. It would also be beneficial for cultural diversity[25]. The moral rights regime is a strong weapon in the hands of authors and performers, which protects them from the abuse of their rights and safeguards them from abolishing any bond with their respective works and performances when the economic rights are assigned (or pass with any reason) to another person or legal body. This protection guarantees support and reward for the creative activity and the benefit of progress of authors and performers. Therefore, the EC is justified to proceed with such harmonization, based on its obligation of protecting and promoting cultural inheritance of Europe.

On the other hand, cultural protection and moral rights are two different things. No one can argue persuasively that promoting moral rights will make the intellectual property market flourish. The situation in UK proves exactly the opposite:[26] Weak moral rights protection and particularly the existence of provisions allowing the unconditional waiver and consent of moral rights of both authors and performers have lead the entrepreneurs to invest more in the exploitation of the economic rights of copyrighted works. The result is that the common law countries (including UK's) film

[24] EC Treaty (Amsterdam) art.151

[25] Same argument was adopted under par.7.4 in Commission's staff working document accompanying the proposal for a Council directive amending Directive 2006/116/EC as regards the term of protection of copyright and related rights - impact assessment on the legal and economic situation of performers and record producers in the European Union [COM(2008)464 final].

[26] See W. Kingston, "Why harmonization is a Trojan horse" (2004) 26 (10) *E.I.P.R.* 447-460

and record industry is among the strongest worldwide.[27] Without exception, none of the continental European countries can match the growth and impact of the UK's copyright industry. One should add that authors also benefit from this situation; as long as entrepreneurs invest to the exploitation of their creations, they are motivated to create more. One could safely argue that we have already reached a time that the demand for the exploitation of new works exceeds the offer. This led in the past years to new ways of exploitation of user generated content by major internet enterprises, such as YouTube and MySpace.[28] This is, however, no reason for totally excluding moral rights from the harmonization process.

Another serious issue that also favours further harmonization is the existing incompatibilities in the Member States legislations against the international instruments provisions.[29] A characteristic example is the requirement of assertion[30] of the UK's Copyright Designs & Patents Act in order for the paternity right to be exercisable. This requirement could arguably be held incompatible with the provisions of articles 5(2) and 6*bis* of Berne Convention. More incompatibilities are likely to exist among the different legislations of the EU Member States; the elimination of which constitutes a further argument favouring the harmonization in the field of moral rights. One should further consider that failure of full compliance with the Berne Convention's provisions can lead to an action before the ECJ.[31]

One could counter-argue that such harmonization does not guarantee full compatibility of legislations to the international or EU provisions. This is true; however, in this situation an action before the ECJ is very likely to be brought against the infringing nation and the matter be judged there. The process of harmonization is neither always easy nor automatic. Long transformation of domestic legislatures or litigation may be needed but this is the only way. The non-compliant Member States will be treated accordingly.

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[27] See also P. Kamina, *Film Copyright in the European Union*, (CUP, 2002), p.61

[28] Also I. Griffiths–M. Doherty, "The harmonization of European Union copyright law for the digital age" (2000) 22(1) *E.I.P.R.* 17-23

[29] See also J.A.L. Sterling, "International codification of copyright law: possibilities and imperatives-Part 2" (2002) 33(4) *I.I.C.* 464-484

[30] CDPA, ss.78 & 205

[31] See case C-13/00 *Commission of the European Communities v Republic of Ireland* [2002] 2 CMLR 10

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For all the reasons analyzed above, harmonization of the regime of authors' and performers' moral rights within the EU seems legally justified.