The Role of Europe in the Development of Related Rights Laws

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As a European intellectual property lawyer, the author is often struck by the amount of comparative analysis in the area of intellectual property which adopts US intellectual property laws, rather than European ones, as their point of comparison. This seems strange when in many respects US intellectual property laws have their own unique features and when European such laws are often more closely aligned with the laws of most other countries in the world. This series of articles aims to expand knowledge of and to explain something of European intellectual property laws; how they got to their present state, what are current hot topics in them, where they are heading and why they matter. This second article in the series will focus on related rights.

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In September 2011, the Council of the European Union (EU) agreed by a ‘qualified majority’¹ to a European Commission proposal,² as amended by the European Parliament,³ which mandates EU Member States to extend the term of protection that their national legislations give to sound recordings⁴ from 50 to 70 years. This is the latest in a long line of EU measures in the fields of copyright and related rights, stretching back 20 years, although unlike most such previous measures in these fields its primary aim is not to mandate harmonization where there was none before; instead as to sound recordings, it increases yet further a term that has already been harmonized up throughout the EU. Its passage has for this reason been more controversial than most earlier measures in the area, but it is no more than the latest manifestation of a persistent interest from the countries of Europe in the protection of those intellectual property rights that are the subject of this article⁵ and which in it are referred to as related rights, namely, rights in sound recordings, performances and broadcasts.⁶ Civil law countries sometimes refer to these as ‘neighbouring rights’ and common law countries such as the UK refer to some of them as ‘copyright’,⁷ despite their protection not being mandated by the Berne Convention.

The interest on the part of European countries in related rights was first manifested, before even the entry into force of the Treaties which led to the establishment of the EU, in the negotiations which led 50 years ago to the Rome Convention of 1961 for the protection of performers, producers of phonograms and broadcasting organizations, and in which European countries were particularly active. This was the first international Treaty to provide for the protection of related rights, although for its first 30 years relatively few countries adhered to it, especially outside Europe, even though it increased the profile of related rights and was in part instrumental in many countries which did not adhere to it either for the first time protecting, or increasing their protection for, related rights during this period. It also facilitated the rapid passage of and adherence to the Geneva Convention of 1971 for the producers of phonograms against unauthorized duplication of their phonograms.

Late in the 1980s however, the European Commission became interested in copyright and related rights, issuing its 1988 Green Paper and its 1991 Follow-up paper on these topics, and at its behest in 1991, the Council promulgated a Resolution recommending, as to related rights, that EU Member States adhere to the Rome Convention, as at that time Belgium, Greece, the Netherlands, Portugal and Spain had not yet done so. That however, was only a recommendation and so of more legal significance was the parallel work of the Commission in shepherding two Directives through the EU legislative process; one that would mandate protection of related rights, and which became law in 1992 (ref. 8), and another that would mandate harmonization of term,
which became law in 1993 (ref. 9). The former measure in effect required Member States to protect related rights consistent with the Rome Convention but went rather further than it in some ways – for example as to restricted acts, as to which it also mandated the introduction of a rental right for material the subject of related rights protection, as well as for copyright works.

The later measure mandated protection of related rights of 50 years instead of the 20 years minimum term provided for by Article 14 of the Rome Convention, in order to resolve disparities in terms of protection for related rights in the EU, as many Member States had a 50 year term of protection for such rights, this reflecting an approach in the UK that treated rights in sound recordings and broadcasts as being in effect a type of copyright. The consequences of such differences in the term of related rights protection were well exemplified by one case in which recordings which had legitimately been placed on the market in Denmark because the Rome Convention protection for the sound recording of 20 years had expired, could not be imported into Germany without infringing the corresponding right in Germany, which lasted for 50 years. Because the records had not been placed on the market in Denmark by or with the consent of the rights holder, the European Court of Justice could not apply to this situation the principle of ‘exhaustion of rights’, which it had for many years used in order to prevent parallel intellectual property rights in different countries in Europe being used to partition the internal market. Similar issues arose in relation to copyright, as to which the same measure mandated an extension of term of protection from the minimum of 50 years after the year in which the author had died, as required by Berne Convention to 70 years.

Although the TRIPS Agreement of 1994 did not mandate full compliance with the Rome Convention, Article 14 of TRIPS required Members to protect the related rights of the Rome Convention to the degree there set out. However, unlike the Rome Convention, it only requires performances to be protected to the extent fixed in a sound recording. Thus it excludes audiovisual performances, which are protected in the EU, and which remain part of the ‘unfinished business’ of international related rights harmonization. It however went further than the Rome Convention in mandating protection for performers and for sound recordings of 50 years, consistent with the then US terms for these (as the USA, like the UK previously, had not distinguished between copyright and related rights) and the only recently established EU ones. The WIPO Performances and Phonograms Treaty of 1996 built on this foundation (leaving more ‘unfinished business’ of international related rights harmonization in its failure to deal with broadcasts) but for the EU and its Member States to accede to it they had to introduce its major innovation, the making available right. It was not until 2001 that a further EU legislative measure mandated Member States to introduce a making available right for related rights and thereby allowed the EU and its Member States to accede to the 1996 Treaty.

Meanwhile in the USA, the pressure to respond to the EU Directive of 1992 on harmonization of term had resulted in the Copyright Term Extension Act of 1998. One particular aspect of such pressure concerned copyright in the narrow, Berne Convention, sense, and concerned the ‘comparison of terms’ derogation from the principle of national treatment as permitted by Article 7(8) of the Berne Convention which was included in the EU Directive. This prevented EU Member States from providing copyright protection of more than life plus 50 years to works whose country of origin was outside the EU, unless and to the extent that such country itself conferred such longer term on works of EU origin. The 1998 Act extended US copyright terms, not distinguishing between copyright in the narrow sense and related rights, by 20 years; to the year of the author’s death plus 70 years, and for ‘works’ of corporate authorship (such as sound recordings) to 95 years after publication (provided that this did not exceed 120 years from creation). Thus the US term of protection for sound recordings was now longer than that in the EU, but as a consequence in part of a US reaction to an EU measure that had extended only its term of protection for copyright, in the narrow sense, beyond that in the USA.

The origins of the most recent EU legislation in the longer US term for sound recordings can be seen in the Commission’s original proposal for the latest Directive, which had envisaged extending the term of sound recording to 95 years. It was the European Parliament that cut this back to 70 years and included provisions aimed at benefitting the performers whose work is fixed in the sound recordings, rather than just the record companies who will in general own the rights in these. The interests of the performers have become the primary justification for the measure,
which the Council in its press release that accompanies the latest Directive justifies as ‘increasing the level of protection of performers by acknowledging their creative and artistic contributions.’ It goes on to state that ‘performers generally start their careers young and the current term of protection of 50 years often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetimes.’ It goes on to observe that the Directive contains measures in order to ensure that artists who have transferred their exclusive rights to phonogram producers actually benefit from the term extension and may recover their rights subject to certain conditions.

However, not all agreed. Of the 10 (out of a total of 27) EU Member States who either voted against the measure or abstained, the Swedish and Belgian Governments felt strongly enough about matters to minute their objections to it. Sweden felt the measure to be neither fair nor balanced, and to risk ‘undermining the respect for copyright in general even further.’ Although it believed ‘there to be good reasons for measures aiming at improving the situation for those professional musicians and other artists who often operate under economically difficult conditions’, it observed that ‘extension of the term of protection will however not primarily be of benefit to this group.’ Belgium considered that the measure ‘will mainly benefit record producers and not performing artists, will only have a very limited effect for most of the performing artists, will have a negative impact on the accessibility of cultural material such as those contained in libraries and archives, and will create supplementary financial and administrative burdens to enterprises, broadcasting organizations and consumers.’ They also cited academic writings on the topic. But 17 Member States evidently felt otherwise. Taken together with the support of the European Parliament and of the Commission, this was sufficient, in the EU legislative framework, to make the measure law. But its origins lie in differing perspectives, as between the USA and the EU, as to whether related rights are a type of copyright or are something that is separate to it.

References

1 The Belgian, Czech, Dutch, Luxembourg, Romanian, Slovak, Slovenian and Swedish delegations voted against and the Austrian and Estonian delegations abstained.


3 Outcome of the European Parliament’s first reading (Strasbourg, 21 to 24 April 2009) 8898/09, 30 April 2009.

4 In addition to extending the term of protection for sound recordings (or ‘phonograms’ in international related rights terminology) the new Directive includes a less controversial provision which harmonizes the approach to the term of copyright in music and words for songs, treating these as joint works whose term is determined by the last author to die, rather than as separate works, as some countries in the EU had previously provided, and which meant that copyrights in the same work could expire at different times in different EU countries.

5 A separate article will discuss the harmonization of copyright (in the restricted sense of the Berne Convention) in the EU.

6 EU related rights legislation also mandates protection for the fixations of films which first vests in the producer of such films, which in civil law countries runs alongside the copyright in films which first vests in the director or others having an authorial, as opposed to a purely financial, input into the film. Common law countries such as the UK and the USA typically conflate the two although as a result of EU harmonization the UK, whose law had previously first vested copyright in films in the producer alone, has had to amend its law to provide that such copyright should first also vest, inter alia, in directors.

7 UK legislation does not use the term ‘copyright’ for rights in performances, preferring instead, so far as possible, to retain vestiges of its old criminal law based protection for performers and to fill in the gaps in this from the perspective of the law as mandated under EU Directives by means of a ‘performers property right.’

8 Directive 92/100/EC on rental and lending rights and on certain rights related to copyright, replaced on codification by Directive 2006/115/EC of the same name.


10 Case C-341/87, EMI Electrola v Patricia (European Court of Justice, 24 January 1989).


12 Council Document 10568/11 ADD 1, 2 September 2011.

13 The proposed directive for a copyright term extension – A backward-looking package, Centre for Intellectual Property Policy and Management (CIPPM, Bournemouth University), the Centre for Intellectual Property & Information Law (CIPIL, Cambridge University), the Institute the Institute for Information Law (IViR, University of Amsterdam), and the Max Planck Competition and Tax Law (Munich); Helberger N, Dufft N, Van Gompel S, Hugenholtz B, Never forever: Why extending the term of protection for sound recordings is a bad idea, European Intellectual Property Review, 30 (5) (2008), 174; Dusollier S, Les artistes interprètes pris en otage, Auteurs & Media, 2008, 426.