

# SERIALS AND NEW TECHNOLOGIES: OPPORTUNITIES FOR LIBRARIES, PROBLEMS FOR THE LAW AND THREATS TO PUBLISHERS

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Part 2: The EEC legislative process with particular reference to copyright and libraries

(Part 1: The growth of new technology and its impact on serials publishing, appeared in the July issue of *Serials*, Vol.6, no.2)

The last part of my address will deal with legal affairs that are appropriate for this conference. Since this is a European conference with mainly Western European participants I will focus on the European situation and disregard developments elsewhere, particularly in the USA.

## European legislation

In Europe we are dealing with three important legislative bodies in the field of electronic information and communication: the European Economic Community (EEC), the Council of Europe and the International Telecommunications Union. Because these international bodies all take legal and policy decisions in the field of electronic information and communication, it is important that this be done in a co-ordinated way. This has been realised by those bodies, so one can see that there is an increasingly converging trend in the legislation.

The International Telecommunications Union has a very specific, mainly technical role: that of allocation, dividing the available frequencies in the radio-electronic spectrum between different types of telecommunications services - public broadcasting, navigation, etc.; allotment, dividing the bands of frequencies between the member states, and assignment, distributing the allotted

frequencies on a national level. For this reason I will not go into further detail with respect to this body. More important in our case are the remaining two bodies: the EEC and the Council of Europe. The Council of Europe however is not a real legal order. It is mainly a strong body for issues related to human rights, etc. To keep it brief, I will focus on the EEC which is by far the most important for our legislation problems. I will briefly explain the procedure for EEC legislation from the starting point to the end at point 9, as shown in Appendix 1.

## Character of Community law

Community law is not conventional international law, establishing a code of conduct between sovereign states, but a system of law which has essentially the same features as national systems, in that it creates enforceable rights and obligations, all of which may invoke legal proceedings. For this reason it is of great importance that all the relevant parties in the different member states actively follow all the initiatives on legislation and try to protect their interest as far as possible.

## Procedure for EEC legislation

The Council of Ministers is the legislative body of the EEC. Preparations and negotiations are conducted in working groups for the separate areas. The Commission has an exclusive right to put forward legal proposals to the Council of Ministers. The preparation of the proposal is done

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by the different Councils of the Commission. For instance the draft directive on rental right, lending right and on certain rights related to copyright is dealt with in the Internal Market Council. In this Council the civil servants of the nationally responsible ministries have a seat.

The proposal of the Commission is put forward to the Council of Ministers. This council is obliged to seek advice from the European Parliament and the Economic and Social Committee. At this stage there are opportunities for external forces to try to modify the draft proposal because the European Parliament passes the draft proposal to one or more of its standing committees. These committees consist of members of the Parliament. Each committee appoints a "reporter". In a case where several committees are dealing with the advice, one committee is appointed as the "principal committee". After the advice is given to the European Parliament there is a vote on amendments and the results are passed back to the Commission.

On the other side, the Economic and Social Committee, in which the seats are held by representatives of industry, retail trade and consumers, passes the draft proposal to a working group for the preparatory work. The voting is done in a plenary meeting of this committee after which the advice is passed to the Commission. The Commission studies the two sets of advice and may amend its first draft proposal on the basis of the advice. The result is passed on to the Council of Ministers. This council takes up a "common position" and passes this to the Parliament for a second reading. After this the Commission gets another chance to amend the text. Finally the Council of Ministers accept the proposal and a "directive" is the result. After the directive is issued the member states are obliged to implement the directive in their national legislation.

### **Some developments of EEC legislation**

Let me now inform you about some developments in the process of legislation on lending right, the legal status of databases and regulations with regard to reprography which involves all libraries and publishers.

#### **LENDING RIGHT AND REPROGRAPHY**

The first time that the European Commission touched on the issue of European copyright legislation was in August 23, 1988. On that date the Commission published the "Green Paper on copyright and the challenge of technology. Copyright issues requiring immediate action", (Document COM(88) 172 final)<sup>1</sup>. This paper specifically outlines regulations pertaining to audio-visual home copying, distribution rights, and the legal protection of computer programs and databases.

Some months later, on January 5, 1989 the Commission issued a "Proposal for a Council directive concerning the legal protection of computer programs"<sup>2</sup>, (Official Journal (91 of April 12, 1989, pp. 4-16). This proposal included a lending right for computer programs but it permitted public libraries to make standard programs available to in-house users (art. 5).

As a supplement to the Green Paper the Commission issued "Books and reading: a cultural challenge for Europe", (COM(89) 258 final)<sup>3</sup>. An interesting part of this supplement was the statement indicating the Commission's intention to issue a proposal for action with regard to reprography. This intention became concrete on January 17, 1991, when the Commission published document (COM(90) 584 final), called "Initiatives to the Green Paper"<sup>4</sup>. It contains proposals which the Commission plans to issue by December 31, 1992. Of special importance are regulations which the Commission proposes with regard to the copying of audio-visual materials for private use, regulations concerning the legal status of databases and regulations with regard to reprography.

One week later, on January 24, 1991 the "Proposals for a Council Directive on rental, lending and neighbouring rights", - COM(90) 586 final - SYN 319<sup>5</sup> - were published. In article 1 of this directive, called "Rental right and lending right" an exclusive and inexhaustible lending right for all legally protected works is proposed. This grants to the producer exclusive rights for rental (for profit) and lending (by libraries) of a work under copyright. To respect the free flow of information, article 4 gives member states the facility to make an exception to the exclusive right for lending "on cultural-political grounds",

providing that the author obtains at least an equitable remuneration. Very important in this context is the difference between an exclusive right and a right to remuneration: the owner of an exclusive right could prohibit lending of works by libraries.

On May 14, 1991 the EEC Council passed the first directive concerning copyright, the "Directive for the legal protection of computer programs"<sup>6</sup>. This version no longer contains the special provision for libraries to make standard computer programs available for in-house use, which was proposed earlier by the Commission. According to the Council, the public lending clause for computer programs lies outside the scope of the directive.

In the course of the political process, the content of article 4 changed many times, unfortunately, mostly not in favour of the position of the libraries. This is not surprising if we keep in mind that the character of the EEC Treaty is mainly economic. In the formulation of policy the Commission (and the other bodies) does not have to take into account the educational and cultural elements. Because of its economic character the people who are responsible for this directive at the European Commission and at the European Parliament hardly considered the educational and cultural consequences. Until the beginning of last year there was no structured lobbying for the interests of the libraries and its users. It is very important that the individual members of the European Parliament are informed on behalf of the library world, preferably by a fellow countryman.

Although the EP has as one of its goals to unite the countries, it appears that the more the member states unite, the more its individual members become nationalistic. The EP appreciates being informed by persons who are involved, or better represent, the parties that will be affected by the directive. This is the lobbying tradition and libraries and its users were almost completely absent until recently! The most important actors at the European Parliament are the persons who are appointed as rapporteur of their committee. For the directive on lending right the responsible committees are those of Culture, of Economic and of Legal Affairs. Originally the majority of the three committees was unfortunately in favour of an amendment to award the author an exclusive

right for lending books, CD's and videos. Thanks to the work of a working group of the Dutch Federation of Library-, Documentation- and Information Organisations (FOBID), Mrs. Giavarra was able to inform the members of the EP about the interests of the libraries and its users. Since its foundation in May this year the European Bureau of Library, Information and Documentation Associations (EBLIDA) performed the work of the FOBID working group as well as providing the main person, Mrs Giavarra, who is now director of EBLIDA. She has done a wonderful job because at the plenary meeting no amendments on article 4 were adopted. Therefore the proposal of the Commission remained the same. No exclusive right for the lending of books, CD's and videos was adopted.

After the European Parliament the Council of Ministers has to decide on a "common position". The Internal Market Ministers are responsible for this directive instead of, what we would expect, the Ministers of Culture or Education. The meetings of the Council of Ministers are secret. At the meeting on June 18 1992 the Council adopted a common position and happily decided that lending right does not necessarily have to be implemented by the member states in national copyright law. As regards the Berne Convention this is an advantage. According to the proposal of the European Commission, member states can make an exception to the exclusive right by giving compensation to the author. The Council of Ministers introduced the possibility for member states to make an exception to the payment to authors for certain establishments. The Council of Ministers also asked the European Commission to compose a report on the consequences of the lending right in the member states before 1997.

The directive on lending right will now be sent to the EP for a second reading and it will be adopted by the Council of Ministers before the end of 1992. Member states have to implement the directive in their legislation before July 1994.

#### LEGAL PROTECTION OF DATABASES

Although lending right is not the most important issue for this conference, I have discussed it in detail so that you will know which procedures can be expected in the near future, when the EEC will be dealing with an issue that is the core of our

present and future work, namely the legal protection of databases, since another result of the Green Paper is the proposal for a directive on the legal protection of databases. In an effort to combat international piracy of databases, the Commission wants to harmonise the legal protection of databases within the Community.

The Commission proposes full copyright protection for databases which meet the necessary originality criteria relating to the selection or arrangement of a database, and a shorter period of protection (10 years) for the content of databases. The last one is particularly for statistical or other data arranged in alphabetical or chronological order. It offers protection against extraction and re-use of contents, which copyright cannot provide. The two types of protection can be applied cumulatively as they concern different aspects. This directive will have positive and negative consequences for the library and information world. Besides being producers we are also users of databases.

It is very clear that this proposal will play a vital role in the area of electronic publishing and electronic document delivery. EBLIDA is preparing a position paper on this subject.

The working document sets out to address both the creative and the economic aspects of the protection of databases, namely, protection of the intellectual creation of the author under copyright law, and protection of the creator's investment against parasitic behaviour.

A database is seen as data of any kind stored in electronic form. Data in printed form will continue to be protected as a literary work or as collected work. The content of the database will still be protected as a literary work.

What I have tried to make clear is that regulation from the European Communities is a very complex process which affects national legislation and activities. Directives of the European Community have to be implemented in national legislation. There is the opportunity to influence the content of the directives, but we must be organised and the work has to be co-ordinated. The library world must be sure that their needs and concerns will be heard. With your support EBLIDA can protect the interests of the library world at the European institutions. I call upon you to make sure that your national library

organisations join EBLIDA, if they have not yet done so.

### **Personal remarks about science and copyright**

To conclude this part of my address in respect of legal problems, I would like to take this opportunity to say a few personal words about science and copyright.

If we talk about science, it should be made clear what exactly we are talking about. Not only is there a difference in the languages, (in the English language "science" means natural science, whereas in French, Dutch and Russian, for instance, it means knowledge in a broad sense), but there is also some confusion about science in an academic context and science in an industrial context.

In the academic context it is basic science mostly sponsored by governments and done at universities or governmentally funded institutions. Because of its educational component it has to be done at the forefront of science, so universities have to do fundamental research. The knowledge acquired in this way is publicly owned and should be accessible to anyone. Basic science creates a world-wide reservoir of knowledge where everyone can go to find out what others have done. The ideal of every academic researcher is to publish his work and to be known as the first.

I will not go into details about industrial science but it is obvious that the main aim is to develop products that strengthen the company's position and enable it to compete with other firms or be better than they are and even to destroy or buy the competitors.

The information flow of both types of science is, therefore, completely different. As mentioned before, academic research and the results of basic science should be accessible to anybody, with no insuperable restrictions. It is nonsense that the academic author's intellectual property should be protected and applying copyright to those publications is almost indecent to mankind.

In the case of serials, it is ridiculous if publishers state that they have to levy these rights in order to protect the authors. It is, of course, purely to protect their own business. One should not misunderstand me, I do appreciate the

problem but it should be dealt with under the right "flag". That is why I propose to call it a "charge for return of investments". It is time that the intellectual world starts to realise that they are making a fundamental mistake to sell, which mostly means to give away for free, their copyrights to publishers.

Copyright is a good thing for professional writers who are not paid by governments but earn their living from writing. There should be a fundamental difference in each law with respect to copyright arrangements between these two distinctive groups.

**Acknowledgements**

Before I end my address, I wish to record my sincere thanks to the colleagues who were willing to help me in the preparation of this paper including my own staff for searching relevant information for me and subsequently handling the numerous interlibrary loan request as a result of it.

I started with some variations on my title as printed in the programme. I would like to add another one: Serials and new technologies: opportunities for all parties involved!" I hope this conference will help in achieving this last variation on my title.

*References:*

1. EEC Commission Green paper on copyright and the challenge of technology. Copyright issues requiring immediate attention. Document COM(88) 172 final, August 23, 1988
2. EEC Commission Proposal for a Council directive concerning the legal protection of computer programs. Official Journal 91, April 12, 1989, 4-16.
3. EEC Commission Books and reading: a cultural challenge for Europe. Document COM(89)258 final.
4. EEC Commission Initiatives to the Green Paper. Document COM(90)584 final, January 17, 1991.
5. EEC Commission Proposals for a Council Directive on rental, lending and neighbouring rights. Document COM(90)586 final - SYN 319, January 24, 1991.
6. EEC Commission Directive for the legal protection of computer programs. Official Journal, L122 May 14, 1991, p42 ff

**Appendix 1: EEC legislative process**

