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Council Decision Calling on EC Member States to Ratify International Conventions on Copyright

INTRODUCTION

Copyright laws vary significantly among the European Community Member States.¹ These differences have placed the European Community “in a state of total disharmony” in terms of copyright protections. Consequently, these differences affect the Single Market goal set for EC 1992.² The Commission of the European Communities (Commission) has recognized that differences in copyright protection among the Member States will interfere with the free movement of goods and services across EC Member States’ borders.³

As a result of this threat to the free market economy, the Commission recently submitted a proposal for a Council Decision concerning the accession of the Member States to two principal international copyright conventions.⁴ The Council of the European Communities (Council) approved the proposal and adopted the decision.⁵ The Council Decision required all EC Member States to ratify or accede to the Berne Convention and the Rome Convention by December 31, 1992.⁶

Subsequently, the Council approved a draft resolution requesting Member States to ratify the Berne Convention and the Rome

¹ Multinationals Raise Concerns as EC Moves to Harmonize Copyright Protection Limits, INT’L TRADE REP. (BNA), Feb. 12, 1992, available in LEXIS, Nexis Library, Omni File.
² Id.
⁶ Id. at 5–6.
Convention. This later decision replaced the earlier, more binding decision that the Commission had first proposed. The draft resolution now has the same legal effect as unilateral declarations by individual Member States.

This Comment considers the Council's decision to request full participation by the EC Member States in the Berne Convention and Rome Convention. Part I of this Comment examines the various Member State copyright protections afforded pursuant to both national laws and international agreements, including the Berne Convention and the Rome Convention. Part I further discusses the problems arising from differing national protections. Part II discusses the EC's current plan to provide a minimum level of uniform protection through the use of international conventions and the EC's scheme to harmonize copyright protection on the Community level. Part III identifies the advantages and disadvantages associated with the planned Community harmonization of copyright laws. This Comment concludes that the benefits of easier movement of goods and services justifies the Council's approach to harmonization and conforms to the goal of a European free market economy for 1992.

I. Present State of European Community Copyright Protection

Copyright protection in the European Community comprises rights provided in international agreements and protections granted by national laws. In general, copyright allows authors to control the reproduction, adaptation, public distribution, and public performance of their creations. This right applies to an author's expression of ideas and concepts. It does not protect the idea behind the work, but rather, only the author's individual expression of that idea. For example, an author may copyright a book describing the economic supply and demand theory, yet,

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8 Id.
9 Id.
10 See Alan Latman et al., Copyright for the Nineties 30 (3d ed. 1989). The author's right exists as long as the author retains possession of the work. Id. at 12. Through assignments and licenses, the author relinquishes to the licensee the right to control the destiny of his or her work. See id.
11 Id. at 30.
12 Id.
other authors may write on the same theory; other authors, however, may not copy the original author's particular expression of that theory.

Currently, an author desiring copyright protection in more than one country must comply with the laws of each individual nation. International agreements, however, have simplified the requirements for authors to obtain foreign copyright protection. Several international conventions have, to some extent, harmonized international copyright protection among the signatory nations. The two international agreements to be discussed in this Comment are the Berne Convention and the Rome Convention.

A. The Berne Convention

The Berne Convention was completed in 1886. It currently includes a number of revisions. Unfortunately, not all EC Member States have ratified all of the revisions. Thus, the level of uniformity varies even between signatories.

The Berne Convention is divided into substantive and administrative sections. The substantive provisions include specific and general obligations of signatories. The Convention focuses on national treatment of copyright and sets out a minimum level of

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14 Id.
15 Id. International Conventions have established a minimum set of rights that authors of all member countries can claim regardless of other national laws. Id. The differences among these conventions measure the extent of minimum protection afforded. See id.
16 International copyright protection schemes began emerging in the 1800s when international trade, communication, and travel expanded. Edward W. Ploman & L. Clark Hamilton, Copyright 49–75 (1980). Countries became more concerned with protecting their works abroad as well as with protecting foreign works domestically. The effort resulted in the creation of treaties establishing reciprocity between countries in order to offer the same protections to foreign works and domestic works, and there was increased revision of domestic laws to comply. This ultimately led to the first international conferences of nations in Berne, Switzerland in 1884 and 1888. These conferences established a convention and union of countries adhering to international copyright rules. The Berne Convention and Berne Union form the "cornerstones for the present elaborate system of international treaties" and agreements. Id. at 18–21.
17 Berne Convention, supra note 4.
18 Ploman & Hamilton, supra note 16, at 49.
19 Id. at 50–51.
20 Leaffer, supra note 13, at 380.
21 Id.
protection with which signatories must comply.\footnote{22} The Berne Convention covers “literary and artistic works” including “every production in the literary domain, whatever may be mode or form of its expression. . . .”\footnote{23} The Convention protects published or unpublished works of an author who is a national of a signatory state.\footnote{24} The Berne Convention also protects non-nationals if they first publish or simultaneously publish the work in a member country.\footnote{25} Furthermore, a work need only comply with the requirements of the originating country to obtain copyright protection in that country. Under the Berne Convention, a work will be protected in all member countries without complying with any other country’s requirements.\footnote{26} Finally, for its durational requirement, the Berne Convention establishes a minimum term of protection for the life of the author plus fifty years, or fifty years from the date of publication.\footnote{27}

The current text of the Berne Convention is the 1971 Paris revision.\footnote{28} Ten of the twelve EC Member States are parties to the Berne Convention, as revised by the Paris Act. Only Belgium and Ireland have not ratified the Convention.\footnote{29}

B. \textit{The Rome Convention}\footnote{30}

In contrast to the Berne Convention’s protection of authors, the Rome Convention protects the “neighboring rights” of per-

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\begin{itemize}
\item \footnote{22} Id.
\item \footnote{23} Berne Convention, \textit{supra} note 4, at art. 2(1); see also Leaffer, \textit{supra} note 13, at 380. Choreography, painting, architecture, compilations, and derivative works are protected under the Berne Convention. Berne Convention, \textit{supra} note 4, at arts. 2(1), (3), (5).
\item \footnote{24} Berne Convention, \textit{supra} note 4, at art. 3(1)(a).
\item \footnote{25} Id. at art. 3(1)(b); see also Leaffer, \textit{supra} note 13, at 380.
\item \footnote{26} Berne Convention, \textit{supra} note 4, at art. 5(2); see also Leaffer, \textit{supra} note 13, at 381–82. The Berne Convention does not preclude member countries from establishing additional formalities with which authors must comply when publishing first in that country. See Leaffer, \textit{supra} note 13, at 381–82.
\item \footnote{27} Berne Convention, \textit{supra} note 4, at art. 7(1)–(3). The fifty years from date of publication term is for anonymous and pseudonymous works, whereas, the life plus fifty years applies to identified authors. \textit{Id.} Additionally, member countries may extend the term of protection. \textit{Id.} at art. 7(6).
\item \footnote{28} Leaffer, \textit{supra} note 13, at 379.
\item \footnote{29} Proposal for a Council Decision, \textit{supra} note 3, at 6, \¶ 10. The improvements to copyright protection established by the Paris revision include: 1) allowing authors who have habitual residence in a member country but are not nationals of that country to be treated as nationals; 2) works of applied art are to be protected as artistic works unless the specific country protects them under laws on designs and models; and 3) the rules governing scope of the Convention have been rearranged in order to clarify them. \textit{Id.} at 4–5, \¶¶ 8, 9.
\item \footnote{30} Rome Convention, \textit{supra} note 4.
formers, broadcasters, and producers of sound recordings. These rights are not recognized by the Berne Convention. The Rome Convention also focuses on national copyright principles. It establishes minimum rights that must be provided to performers, broadcasters, and producers of sound recordings in order for a country to adhere to the Convention. A performer’s minimum rights include: 1) control over the broadcast of previously unfixed or unbroadcast performances; 2) control over the fixation of performances; and 3) the reproduction of fixed performances. The Rome Convention protects broadcasters in that, absent their consent, their broadcasts cannot be rebroadcast, fixed, reproduced, or communicated to the public for profit. It also prohibits unauthorized commercial reproductions of phonograms. The Rome Convention establishes certain notice and durational requirements as well.

Today, only seven Member States of the European Community are parties to the Rome Convention: Denmark, France, Germany, Ireland, Italy, Luxembourg, and the United Kingdom. Other Member States have not yet accepted the Rome Convention because each state’s national laws must fully comply with the Convention’s provisions before it can ratify, accept, or accede to the Convention. Furthermore, authors have not always favored the Rome Convention because they believe it weakens authors’ rights by increasing the available compensation to performers and broadcasters.

C. EC Member States’ National Copyright Protection

Copyright protection varies significantly among EC Member States. Only Ireland and Belgium have not ratified the Berne
There are also five Member States that have yet to ratify the Rome Convention: Belgium, Spain, Greece, the Netherlands, and Portugal. This non-uniformity is strongly evident in the Member States' national laws. For example, protection for authors is extended seventy years in Germany, sixty years in Spain, and fifty years in most of the other Member States. The neighboring rights protections are also inconsistent: Luxembourg offers twenty-year protection, and Germany twenty-five. The United Kingdom, Ireland, Denmark, Portugal, and France offer fifty-year protection for neighboring rights, while this protection is only optional in Italy. Furthermore, no protection of neighboring rights is available in Belgium, the Netherlands, or Greece.

II. COUNCIL DECISION TO PROMOTE EC COPYRIGHT HARMONIZATION

The European Commission recognizes that the disparity in national laws has an impact on free trade and the movement of goods across Member States' borders. Jean-François Verstrynge, head of the Commission's Industry Directorate-Copyright Division has described the EC as being "in a state of total disharmony" regarding copyright. In fact, the European Court of Justice has

44 Multinationals Raise Concerns as EC Moves to Harmonize Copyright Protection Limits, supra note 1, at 273.
45 Id.
46 Id.
47 Id. Another example of inconsistent Member States' laws is in the area of reprography which is the reproduction of a work by some mechanical means such as photocopy or facsimile. Reprography: Search for a Solution to Copyright Protection at EEC Level, EUR. REP. (Eur. Info. Serv.) Mar. 23, 1991, available in LEXIS, Europe Library, Eurrep File. Belgium offers no special protections against reprography, while in Luxembourg, the author's consent is required for any reproduction (private or other purposes). Id. In Portugal, the author has exclusive rights to reproduction except for an individual owner's private use, for educational purposes, or for libraries. Id. In Italy, however, the reproduction is unrestricted for an owner's private use and for libraries, but any other use must be negotiated. Id. Still other countries require licenses for certain situations (e.g., France, the Netherlands, and Germany). Id.
48 Multinationals Raise Concerns as EC Moves to Harmonize Copyright Protection Limits, supra note 1, at 273.
49 Id.
stated that a Member State may "block imports of products from another [M]ember [S]tate which [does] not respect its own copy­right rules." This situation threatens the success of the Single Market economy.

In response to these problems, the Council has established a two-stage plan to harmonize EC copyright law. First, the Council has called on all Member States to ratify the Berne Convention and the Rome Convention which would result in a minimum level of uniform protection. Second, the EC is continually proposing and enacting legislation to further harmonize Community intellectual property laws. For example, one recent directive required harmonization of copyright laws for computer programs. Another proposed directive provides that any actor appearing in a film or television program being offered for video rental shall be equitably remunerated.

The Commission proposal for a Council decision first established that copyright is a valuable resource which plays a vital role in EC economic life. The Commission viewed the need for uniform copyright protection to be a natural method of promoting the Single Market for 1993. The Single European Act (SEA)
mandates that the Community take action to achieve an internal market which would ensure the free movement of goods, services, and capital. The Commission indicated that multilateral agreements made on the national level might not be sufficient to achieve this Community goal. The Commission stated, however, that multilateral conventions could form a common basis for harmonization. On this foundation, the Community could implement additional legislation that would strengthen copyright and neighboring rights in Community law.

The Proposal also emphasized the disparity of membership in the Berne Convention and Rome Convention. The Commission highlights certain provisions in the most current revisions of these conventions which should be harmonized for all Member States. The Commission stated that the differences in national laws "create . . . obstacles to the free movement of goods and services and distortions of competition which are prejudicial to the economic and cultural interests of creators, authors, artists, enterprises, States and the Community as a whole." The Commission believed that the international market would be impaired if the rights of these entities depended solely on national laws.

The Commission also found support for its proposal in the EC Green Paper on Copyright and the Challenge of Technology, which promotes the achievement of worldwide minimum levels of protection for copyright and neighboring rights. The Green Paper states that

> [i]ntellectual and artistic creativity is a precious asset, the source of Europe's cultural identity and of that of each Individual State. It is a vital source of economic wealth and of European influence throughout the world. This creativity needs to be protected: it needs to be given higher status and it needs to be stimulated.

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58 Id. at 3, ¶ 5; Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter SEA].
60 Id. at 3, ¶ 6.
61 Id.
62 Id. at 7, ¶ 15.
63 Id. at 4-7, ¶¶ 8-14.
64 Id. at 7, ¶ 15.
65 Id. at 7, ¶ 16.
66 Id. at 2, ¶ 2.
67 Id. at 2, ¶ 3.
The Commission recognized that this cannot be achieved without international harmonization.\textsuperscript{68}

In addition to the Community-level benefits of harmonization, the Commission emphasized that Community action could serve as a valuable example worldwide.\textsuperscript{69} Full Community adherence to the international conventions could serve as an impetus for worldwide adoption of minimal copyright protections.\textsuperscript{70} Harmonized protections, in turn, would globally promote intellectual creativity.\textsuperscript{71}

\section*{III. Analysis of the Council Decision}

The Council's approval of only the draft resolution to request Community-level harmonization of minimum copyright protections has considerable merit. As demonstrated by a decision of the European Court of Justice, a Member State can block the import of goods from another EC Member State which does not respect the importing country's national copyright laws, even if the goods comply with the exporting country's laws.\textsuperscript{72} This ability to stop trade at national borders is inconsistent with the Community aim of achieving a single internal market free of national barriers. The draft resolution could stimulate intellectual creativity at the individual level and free trade among the Member States and internationally. Although the draft resolution does not as effectively promote harmonization as the original Council Decision, it will encourage all Member States to achieve the same minimum level of protection. With additional Community legislation to achieve expanded Community harmonization, the EC as a single entity should be able to weaken the barriers currently existing at Member States' borders.

The Member States, however, did not fully support the initial Community harmonization plan.\textsuperscript{73} Member States did not believe that the Commission had a right to require national governments

\begin{footnotesize}
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 8, ¶ 18.
\textsuperscript{70} See id.
\textsuperscript{71} Id.
\textsuperscript{72} Proposal Would Harmonize Laws, Extend Safeguards Database, supra note 50.
\textsuperscript{73} Internal Market Council: Ministers Face Heavy Agenda for December 19 Council Sitting, supra note 43, at 11.
\end{footnotesize}
to ratify international conventions74 because they are not strictly internal legislation. The Council decision would have required Member States to accept law existing outside of the European Community. The recent draft resolution represents a compromise which calls Member States to action, yet avoids full Community-level responsibility.

The Council's decision to promote harmonization of copyright law is a positive step. Although the Member States do not view the implementation requirements favorably, the Member States do recognize the merits of Community harmonization.75 As a result, several Member States have already introduced legislation to effectuate the provisions of the Rome Convention.76

CONCLUSION

The Council Decision and draft resolution urging Member States to ratify the Berne and Rome Conventions should be an effective method of promoting the Single Market for 1992. Full Community participation in these international conventions will harmonize the basic principles of copyright protection. Supplemented with additional EC legislation to expand protection uniformly at the Community level, the harmonization will remove the barriers to free trade currently existing at national borders. Individual authors/artists will be provided with greater protection and predictability, and Community enterprises will be in a better position to combat copyright infringements.

Despite the complaints of individual EC Member States, many States have already taken measures to implement the Council's objective. Harmonization will merely create a set of uniform minimum rights. Individual Member States may still expand national copyright protections to suit their specific needs. Thus, the benefits to free trade and the functioning of the Single Market outweigh the imposition on individual Member States.

Kathleen R. Browne

74 Id. Member States also question the legal basis on which the proposal is asserted. The Council Decision is based on Article 113 of the EEC Treaty which does not contain a provision requiring Member States to ratify international agreements. Id.; TREATY ESTABLISHING THE EUROPEAN COMMUNITY [EEC TREATY] art. 113.
75 Internal Market Council: Ministers Face Heavy Agenda for December 19 Council Sitting, supra note 43, at 11.
76 Id. Belgium, Spain, the Netherlands, and Portugal have already prepared legislation to effectuate the Rome Convention. Id. The only Member State, therefore, who has not yet taken steps to adopt the Rome Convention is Greece. Id.