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THE FIVE PILLARS OF MODERN EUROPEAN COPYRIGHT [Authors’ Rights] PROTECTION*

I.
A couple of months ago, in June 2002, the European Commission had organized an international conference in Santiago de Compostela, Spain, which, under the title of "European Copyright Revisited", was dedicated to the future of copyright in the European Community.¹ The conference dealt in particular with rights management, updating and consolidation of existing Directives as well as the role of copyright as a policy matter as compared to other policies. Astonishingly, the key words of "authors" and "performers" were almost never mentioned in the various speeches and other contributions to that conference, especially neither in the opening speech nor in the conclusions, both made by Mr. John F. Mogg, Director General, DG Internal Market, nor in the speech concerning the "Role of Copyright and Related Rights as a Policy as Compared to Other Policies", delivered by Judge Bo Vesterdorf, President of the European Court of First Instance. When distinguishing and delimiting copyright policy from other EU policies such as free movement of goods and services or competition, that speaker indeed managed to avoid mentioning authors' and performers' interests at all. It was only Geoffrey Yu, Assistant Director General in charge of copyright at the WIPO, Geneva, who reminded the Conference that within the copyright community "it is fine to refer to artists, composers, performers and enterprises as 'rights holders'" and that "we must use terms devoid of legal jargon", and who continued: "so 'rights holders' should become painters, writers, sculptors, musicians".

How come that high officials responsible for copyright policy and law making

* The following text is based on a statement made at the 25th anniversary of the European Writers’ Congress/EWC, celebrated as “Forum Europa III” in October 2002 in Budapest.
in Brussels are so little aware of such terminologic subtleties and sensibilities and, more, of so important sociological groups behind copyright protection, namely the creative people, i.e. authors and performers? It is our duty to remind them and all of us that the EU legislators themselves, namely the Governments of 15 Member Countries, united in the EU Council of Ministers, as well as the European Parliament, when they adopted the most important Copyright Directive or Info-Directive of May 2001, did not forget the authors and performers. They formulated very sweeping and general policy statements and legitimation formulae concerning copyright in a number of recitals (a kind of enlarged preamble) of that Directive. Let us quote only four of these statements (recitals 9-12) which, in our context, seem to be the most important ones:

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interest of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

(10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as ‘on-demand’ services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.

(12) Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint. Article

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151 of the Treaty requires the Community to take cultural aspects into account in its action.

Once again, why did high officials who obviously have also participated in the preparation of these earlier statements not refer to them when, together with a number of other participants at the Santiago Conference, they discussed the future of copyright?

II.

Of course, use of language plays an important role here. The fact that in the interest of international communication and mutual understanding we are so often forced (as again here in Budapest) to use English as a common language sometimes has, at least for the uninformed, dramatic consequences for copyright talk and copyright theory and, indeed, copyright policy. The very term of copyright is so neutral and so easy to use in contrast to the corresponding terms in almost all other European languages such as: droit d’auteur, Urheberrecht, diritto d’autore, derecho de autor, direito de autor, upphovsrätt, avtorskoe pravo, prawo autorskie, szerzői jog, etc., etc.... The term of copyright helps, in particular the unwilling, not to name or even to think about the persons primarily concerned by that discipline of law, namely the creative people: authors and performers.

III.

If it is true that copyright is there “for the encouragement of learning”\(^3\) or “to promote the progress of science and useful arts”\(^4\) or, in more modern wording, “to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large”\(^5\), we cannot avoid, also as far as the future of copyright is concerned, to include and, indeed, mention the persons who are at the beginning of the chain of creativity and cultural production. If we were to forget authors and performers, the whole construction of copyright/authors’ rights protection with its extremely long duration post mortem auctoris, its strong moral rights features, and its highly sophisticated bundle

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\(^3\) See the title of the Statute of Anne, 1709, namely “An Act for the encouragement of learning by vesting the copies of printed books in the Authors or Purchasers of such copies during the times herein mentioned”.

\(^4\) See Art. I, Sec. 1 Clause 8 of the US Constitution of 1787 giving Congress the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”

\(^5\) See Recital 8 of the Copyright Directive.
of exclusive rights and remuneration rights will fall apart and will no longer be justified. What would economic theory tell us about all that, if copyright were only an industrial concept? That is very serious, indeed, since the modern fundamental opposition to copyright, not only in the internet community, can be felt everywhere. Copyright is fought against by many as a seemingly obsolete concept hindering the free flow of information and allowing a number of major companies to dictate and homogenize cultural products and programs all over the world. If copyright/authors' rights protection looses its creative anchor, it is doomed to disappear. At best it would be replaced by a system of technical control and contracts, dominated by exclusively industrial interests. But would society accept such an Ersatz in the long run?

IV.

Of course, also according to the political statements in the Copyright Directive, copyright protection is not – and never was – there only in the interest of creative people, but also in the interest of producers, consumers, culture, industry, and the public at large. Therefore the copyright system as a whole must be conceived of as a balanced and comprehensive system of rules with regard to all these interests. This is why modern copyright legislation as we know it at the national level in almost all countries of Western and Eastern Europe basically consists of five pillars or subsystems, the interplay and interrelationship of which precisely is to guarantee the balancing of those interests. In that context it is important to note from the beginning that the interests of publishers and other cultural producers can enter the playing field in two different ways, whereby the two ways are not mutually exclusive, but, on the contrary, especially in the film sector, are often used in parallel, effecting an additional strengthening of the position of producers: first, indirectly via acquisition of rights under copyright granted initially to authors and performers whereby that acquisition is regulated by copyright contract rules, and, second, directly via neighbouring or related rights immediately granted to them. On that background, the five pillars as they are reflected more or less in almost all, in particular the most recent, copyright legislations in Europe are the following: substantive copyright (authors' rights) law – neighbouring or related rights – copyright contract

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law – collecting societies law – enforcement of copyright. Let us very briefly have a closer look at each of the five pillars of copyright.

V.

First, substantive copyright (authors’ rights) law deals with objects (protected works), authors as initial owners, content, duration, and limitations of protection; that subsystem of copyright is the most traditional and oldest part of copyright legislation as we know it from the beginning and, as far as international protection is concerned, since 1886, the adoption of the Berne Convention for the Protection of Literary and Artistic Works. As Dr. Gyertyánfy has demonstrated in a recent article on the expansion of copyright⁷ there is a certain danger that we overstretch the central concept of literary and artistic works in fields where nobody would really expect them. Must every economically important information be protected as a work, indeed? Must automotive spare parts and all kind of everyday design articles be protected by copyright 70 years post mortem auctoris? In my view, it is often better to create sui generis rights to respond to certain legitimate protection needs, such as chips protection or design protection or sui generis protection for databases. An indiscriminate protection of everything by copyright would render futile the very philosophical legitimation of that protection system. To a certain degree, the differentiation between authors’ rights proper and neighbouring or related rights can also help to keep the system “pure” and consequent; which brings us to the second pillar of modern copyright protection.

VI.

Contrary to the Anglo-Saxon copyright system which does not directly know them⁸, neighbouring or related rights form the second pillar or subsystem of Continental European copyright legislation. It concerns, in particular, the so-called “Rome” rights⁹, namely special protection rights for performers, producers of phonograms and broadcasting organizations; but now they are only part of an enlarged category of neighbouring rights,

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⁸ Of course, subject matter such as phonograms or else sound recordings and films are protected as works under copyright in these countries.
⁹ See Rome Convention i.e. the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961).
since the second chapter of the Rental Right Directive has extended that category in particular to film producers. As already the title of the Rome Convention indicates, neighbouring rights, apart from the protection of performers, concern cultural industry or producers which are directly granted specially tailored protection rights in order to be able to protect their investments in cultural goods and finally render them profitable. This reflects what the policy statement in the Copyright Directive calls "the opportunity for satisfactory returns on investments". On the other hand, according to the same statement, performers, even if being owners of a neighbouring right, in the same way as authors, shall be guaranteed the availability of an adequate reward. That shows the economic rationale behind both, authors' rights and related rights protection, which can be summarized as parallelism of reward to creative people and amortisation of investment. In Germany we call that the remuneration or alimentation principle, on the one hand, and the amortisation principle, on the other hand, the full implementation of both of them only fulfilling that double economic rationale behind copyright.

By the way, from that point of view, it is not very consequent, when phonogram and film producers, but not publishers, are granted neighbouring or related rights of their own. That result can only be explained historically, as publishers themselves did not want that protection, since as primary partners of the authors, on the basis of more or less unrestricted freedom of contract, they have always "got" by acquisition what they wanted, namely very extensive copyright protection, unrestricted in terms of duration and territory. Psychologically this explains to a certain degree why publishers so fiercely opposed the strengthening of the contractual position of authors and performers by recent legislation in Germany; they were reminded that their contractual relations with authors are not immune to legislative regulation. This brings us to the next subsystem, namely copyright contract law.

VII.

The third pillar or subsystem of the copyright system as a whole hence is copyright contract law. In many countries it is still not very developed, consisting more often than not of merely general rules on assignability of

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11 See Law on Strengthening the Contractual Position of Authors and Performers of March 22, 2002, English translation in IIC (forthcoming.)
rights under copyright, if not of copyright itself. If legislative regulation shall interfere with contractual relations in the interest of protection of the creative people as the weaker side of a contract, many sometimes fundamental arguments against such interference are based on the proclaimed iron principle of freedom of contract. Since we have, as just mentioned, recently fought out that battle in Germany, suffice it to say that no less an authority than the German Constitutional Court – in another context – had already confirmed that the principle of freedom of contract can fully apply only where there is power parity between the parties of a contract and that in cases of structural imparity civil law rules are called upon to compensate that imparity.  

12 This is the core of what we generally call protection of the weak (in German: Schutz des Schwächeren). It is precisely in that context that it is decided, in economic terms, what will be the share of (average) authors and performers in the financial results of copyright exploitation. According to the new German law that share, as a rule, should always take the form of an equitable remuneration in cases of use of a work or performance. At the same time, a legal mechanism was established so that standards of such equitable remuneration can be established as between the interested groups. However, within the copyright system, there are also other ways, in particular through collective administration or management of rights, that authors and performers will be able to obtain an adequate share in the income from copyright exploitation. This brings us to the next subsystem.

VIII.

The *fourth pillar or subsystem* of modern copyright regulation is collecting societies law or collective management of rights. There is a certain tendency, also to be felt in the Santiago Conference, to say that traditional collective management of rights through collecting societies, in particular in the music field, is a sometimes unavoidable evil; consequently it is said that it should and could be avoided in the future with the help of technological means of protection and of collecting money by direct individual management of rights, in particular through the Internet. Apart from the question whether such systems of direct management (and collection) can really function on a broad scale in the future, it is sometimes forgotten that

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12 See Bundesverfassungsgericht (Federal Constitutional Court), decisions of October 19, 1993, and of August 5, 1994, NJW 1994, p. 36 and p. 2749, respectively.
the traditional way of collective management by collecting societies goes far beyond only the collecting aspect. In particular in the field of music, but increasingly also in other fields such as literature, art, and film, collecting societies, regulated and controlled by specific legislation\textsuperscript{13}, have important additional functions, in particular concerning the distribution aspect where it is decided, sometimes prescribed by legal rules, sometimes simply based on traditional concepts of distribution justice, which share of the collected money the creative people will receive. It is not at all guaranteed that digital and individual management of rights in the future will have the same stringent distribution effects. Insofar, in spite of growing awareness of the problem of contractual justice, authors should not give away too easily and too fast their traditional systems of collective management. In many cases remuneration and levy systems, administered by collecting societies, appear to be more favourable to authors and performers than obviously stronger exclusive rights, but managed individually by companies. Such deliberations are also relevant for other aspects, such as the establishment of social and cultural funds within societies, which will loose their ratio essendi when the latter will disappear. The fact that modern copyright legislation increasingly also regulates in detail the whole field of collective management including such aspects as distribution, social and cultural funds demonstrates that there are also public and societal interests involved.

IX.

Finally, enforcement, the fifth pillar or subsystem of modern copyright, has to be mentioned here. It should not be underestimated, in particular since the TRIPS Agreement of 1994 in its Part III on “Enforcement of Intellectual Property Rights” (Art. 41 et seq.) has reminded us how important it is for international copyright relations. It deals with the permanent and often frustrating fight against piracy of all kind, in particular in the software, music, and audiovisual sector, but extends also to the fields of activity of collecting societies which, more often than not, have to deal with numerous users of works and performances, unwilling to pay their dues. It goes without saying that without sufficient income and profits from legal exploitation of copyrighted material, permanently endangered by acts of piracy, we can forget our nice postulates of remuneration (alimention) of authors and

\textsuperscript{13} See generally Dietz, Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the U.S.A. 2002 (forthcoming).
performers and of amortisation of investments in cultural products. It is also true that new methods of protection such as technological measures which themselves are protected now against circumvention (e.g. under the WIPO Treaties and the Copyright Directive) may help to substantially reduce the danger of illegal use of works and performances. Still, also here we have to be careful not to exaggerate, losing out of mind the philosophical basis of copyright. There is a certain danger that the industry could almost exclusively rely in the future on purely technological measures of protection combined with a system of merely contractual regulation. Once again, from our personalistic point of view, we will then have to insist that the moral and material interests of authors and performers should be safeguarded, first and foremost as far as the distribution aspect is concerned. This is another reason why we should not too easily throw away the traditional mechanism of rights management through collecting societies as long as it can still be used.

X.

A last word concerns the relation between copyright and cultural activities. Of course, copyright can only react to the market situation and conditions; it cannot dictate which works and performances of which authors, performers, and other right owners should be used in the cultural and media fields. But given the fact that – as mentioned at the beginning – the very nature of copyright is related to promotion of creativity, program planners at all levels (publishing houses, producers, broadcasters, etc., etc.) have certain responsibilities here. In the long run, in the very interest of copyright legitimation within a specific country, it would be intolerable when 80, 90, or even more percent of income from copyrighted works and achievements should flow outside that country. That is a very delicate question, indeed, and we would only like to mention that specific rules within media law such as the famous quota provision in Art. 4 of the Television Directive of 1989 (as modified in 1997)\(^{14}\), providing that “where

practicable" broadcasters shall reserve a majority proportion of their transmission time for European works, make sense also from a copyright point of view. Other practices such as the cultural and social funds established by collecting societies and even some form of paying public domain could also help to establish a sound balance between national and international destination of money from exploitation of works and performances in a specific country. As far as European copyright is concerned, we would like to mention once more the statement in Recital 12 of the Copyright Directive establishing a link between copyright protection and the cultural article of the EC Treaty (Art. 151, ex-Art. 128), demonstrating again that it is not totally irrelevant what works and performances of what authors and performers are used in Europe.

Finally, even if it should be true, as is often, but not always very convincingly stated, that at EU level there is no overall competence for regulation of copyright as a whole, but only for regulation of partial, internal market-related aspects of it, also partial regulation of copyright law makes sense only when it is made on the background of an overall concept of it with all its subsystems. Its relation to the cultural sphere as well as the legitimation grounds as formulated by the European legislators themselves must always be duly taken into consideration.

PET STUPOVA MODERNE EUOPSKE AUTORSKOPRAVNE ZAŠTITE

Suvremeni autorskopravni sustav mora biti osmišljen na način da zadovoljava različite interese – kako one autora i umjetnika izvođača, tako i one proizvođača, potrošača, kulture, industrije i javnosti. Zato se svi autorskopravni sustavi u zapadnoj i istočnoj Europi u biti sastoje od pet temeljnih stupova ili pod sistema čija međusobna povezanost jamči ravnotežu svih tih interesa.

Prvi stup čini materijalno autorsko pravo koje se bavi sa objektima autorskopravne zaštite (autorskim djelima), autorima, sadržajem, trajanjem, ograničenjem i zaštitom autorskog prava. Ovo je najstariji pod sistem i najtradicionalniji dio autorskopravne legislative. Drugi stup čine autorskom pravu sredna prava, koja su specifična za kontinentalnoeuropejski pravni krug; anglo-saksonski krug ih ne poznaje izravno. On obuhvaća posebno tзв. «rimska prava» tj. prava umjetnika izvođača, prava proizvođača fonograma i organizacije za radiodifuziju, ali i širi krug srodnih prava, između ostalih i prava proizvođača videograma.

Treći stup ili podsistem autorskopravne zaštite čini autorsko ugovorno pravo. U mnogim zemljama ono nije još uvijek vrlo razvijeno, i često se sastoje tek od pukih općih pravila. U okviru ovog stupa, kao poseban problem javlja se sukob između načela slobode ugovaranja kao temeljnog načela svakog ugovornog prava, i načela zaštite slabije strane, koja je u autorskom pravu predstavljena upravo kreativcima. Mehanizmi njihove zaštite postižu se zakonskim intervencijama u slobodu ugovaranja, ali i kroz četvrti stup autorskopravne zaštite – sustav kolektivnog ostvarivanja autorskog prava tj. udruge. Taj je stup često kritiziran i često se traže novi načini njegovog izbjegavanja, naročito kroz suvremena tehnološka dostignuća koja omogućavaju direktno individuialno ostvarivanje prava npr. Internet. Pritom se međutim zaboravlja često na činjenicu da, osim što je upitno mogu li ovakvi sustavi direktnog ostvarivanja prava uopće funkcionirati u budućnosti na jednom širem planu, tradicionalna uloga udrug za kolektivno ostvarivanje prava ide dalje od same naplete naknada.
U mnogim područjima te udruge imaju i regulatornu i distributivnu funkciju. Stoga se autori ne bi smjeli prenagliti i odustati od tradicionalnog načina ostvarivanja prava.

Kao posljednji, peti stupjavlja se praktična provedba. Radi se o stalnim i poprilično uzemirujućim borbama protiv piratstva svake vrste, posebno u odnosu na glazbu, računalne programe i audiovizualni sektor, ali i na brojne probleme udruga za kolektivno ostvarivanje prava u vezi s neplaćanjem naknada. Bez snažnih mehanizama u ovom stupu cijeli sustav postaje jednostavno neostvariv. Kao nove metode zaštite javljuju se tehničke mjere, koje mogu pridonijeti značajnom smanjenju broja nezakonitih korištenja djela. Pa ipak, one trebaju biti upotrebljavane s oprezom, jer bi se isključivim oslanjanjem na njih i na sustav ugovorne regulacije u pitanje dovele temeljne filozofске postavke autorskog prava.

Konačno valja upozoriti na odnos autorskog prava i kulturnih aktivnosti. Autosko pravo može samo reagirati na tržišne uvjete, a ne može diktirati koja će se djela izvoditi. Međutim uzimajući u obzir samu prirodu autorskog prava koja je povezana sa promocijom kreativnosti, svakako postoji odgovornost u planiranju programa na svim razinama, pa raznim metodama valja postići ravnotežu nacionalnih i međunarodnog protoka novca od iskorištavanja djela u pojedinoj zemlji. Jednako tako, valja upozoriti da iako se često ukazuje na činjenicu da na razini Europske unije ne postoji nadležnost za cjelovito uređivanje autorskog prava, već samo za parcijalno uređivanje, niti to parcijalno uređivanje nema smисla ako nema uporište kako u općem konceptu autorskog prava i svim podsistemima, tako i u povezanosti sa kulturnom sfjerom.