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**THE
COPYRIGHT PROTECTION
ON THE INTERNET
IN THE EUROPEAN UNION LAW
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ABSTRACT

In the last two decades, economic, social and technological developments produced a new intellectual property landscape. The development of new technologies and the globalization of the economy changed the business environment, introducing the new medium; Internet. This thesis focuses on the intellectual property issues raised by the growth of Internet with a special emphasis to the exploitation and the protection of copyright in the European Union and Turkey. A basic understanding of EU approach to copyright in the digital environment is targeted by a deep analysis of the three pillars of the EU legal framework; Copyright Directive, Database Directive and Software Directive with a special focus to the fundamentals of copyright protection in the international legal framework of WIPO Internet Treaties and TRIPS. It explores the current cyberspace issues which challenge the copyright protection and concentrates on the regulatory responses and strategies in relation with them by both analyzing Turkish and European Union legislation. The thesis questions whether EU copyright protection will have a future on the Internet and whether the copyright protection in Turkey copes with that of European Union. A special concentration is given to the Turkish legislation by comparisons with that of the EU in order to create an outlook of the EU legal harmonization on copyright protection in the digital environment. In the information society the legal framework is very much dependent on the post-modernistic structure of the information technologies as it is very difficult to impose a centralized legal system that would successfully govern the relationships and acts in the cyberspace due to the increasingly globalized character of Internet. There is a need for legislations deliberated in accordance with the realities and the possibilities of the technological developments. The European legal framework, in this regard tries to emphasis a unique application for copyright protection solely for the physical area of the Union including the candidate countries, which indeed is to be adopted by Turkey as a part of her candidate status.

SUMMARY OF CONTENT

I.	INTRODUCTION
II.	INTRODUCTION TO COPYRIGHT PROTECTION.....
III.	COPYRIGHT PROTECTION IN EUROPEAN UNION
IV.	COPYRIGHT PROTECTION IN TURKEY
V.	LIABILITY OF ONLINE INTERMEDIARIES IN COPYRIGHT PROTECTION
VI.	INTERNATIONAL JURISDICTION IN COPYRIGHT PROTECTION
VII.	CONCLUSION.....

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I. INTRODUCTION	1
II. INTRODUCTION TO COPYRIGHT PROTECTION.....	5
A. Intellectual Property Rights.....	5
B. Copyright Protection	10
C. International Legal Framework for Copyright Protection	13
1. <i>Berne Convention for the Protection of Literary and Artistic Works</i>	13
2. <i>Universal Copyright Convention</i>	18
3. <i>Rome Convention (The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations)</i>	19
4. <i>Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)</i>	20
5. <i>World Intellectual Property Organization Internet Treaties</i>	24
D. History of Copyright Protection in Turkey	29
III. COPYRIGHT PROTECTION IN EUROPEAN UNION	35
A. Why Directives are Preferred for Intellectual Property Legislation?	35
B. Preparatory Acts.....	39
1. <i>Green Paper on Copyright and Related Rights</i>	41
2. <i>E-Europe Action Plan for Information Society and Intellectual Property</i>	45
C. The European Legislative Framework of Copyright Protection	50
1. <i>Directives Relating to the Copyright Protection</i>	50
2. <i>EU Copyright Directive</i>	56
a) Rights and Exceptions	57
b) Management of Digital Rights.....	69
c) Common Provisions.....	75
d) Implementation of Copyright Directive	78
3. <i>The Complementary Legislations to Copyright Protection: Protection of Databases and Computer Program</i>	79
a) Directive 96/9 of the European Parliament and of the Council on the Legal Protection of the Databases	80
b) The Decisions of European Court of Justice on Database Protection	98

c)	Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs	111
d)	Basic Provisions of Computer Program Directive	112
e)	Decompilation	121
f)	Provisions Related to Protection Measures	124
g)	Moral Rights in Computer program Copyright	126
h)	The Implementation of the Computer program Directive	127
IV.	COPYRIGHT PROTECTION IN TURKEY	128
A.	The Scope of Copyright Protection in Turkey	128
1.	<i>The Legal Framework of Copyright Protection in Law on Intellectual and Artistic Works</i>	131
2.	<i>The Concept of Copyrightable Works in Law on Intellectual and Artistic Works</i>	133
3.	<i>The Aspects of Ownership in Copyright Protection</i>	146
4.	<i>The Provisions of FSEK Concerning Copyright Protection in Digital Environment</i>	156
a)	Reproduction Right	156
b)	Right of Communication to the Public.....	160
c)	The right of dissemination.....	163
d)	The right of public performance	165
e)	The right of communication to the public by devices used for sign, voice or image transfer (the right of broadcasting).....	167
f)	The right of copying	169
g)	The Private Use Exception	175
h)	An Unpublished Reference Case Concerning Copyright Protection on the Internet	179
V.	LIABILITY OF ONLINE INTERMEDIARIES IN COPYRIGHT PROTECTION	182
A.	The Acts Challenging the Liability of Online Intermediaries	185
1.	<i>The Role of Online Intermediaries in P2P File Sharing</i>	189
2.	<i>The Models of P2P File Sharing</i>	194

B.	The Legal Aspects of Liability of Online Intermediaries.....	198
1.	<i>Liability of Online Intermediaries in the EU Legal Framework</i>	200
a)	Liability in Electronic Commerce Directive.....	201
b)	Liability in the Copyright Directive.....	214
2.	<i>Liability of Online Intermediaries in the Turkish Legal Framework</i>	216
a)	The Liability of Online Intermediaries under Turkish Copyright Protection 220	
b)	Liability in P2P File Sharing under the Copyright Protection	223
VI.	INTERNATIONAL JURISDICTION IN COPYRIGHT PROTECTION...226	
A.	The Concept of International Jurisdiction in Copyright Protection	226
1.	<i>The Foreign Element</i>	228
2.	<i>Territoriality Principle</i>	229
3.	<i>The Principle of Law of Domicile</i>	231
B.	The Jurisdiction of Courts on Copyright Protection in European Union.....	232
1.	<i>Brussels and Lugano Conventions</i>	233
2.	<i>The Council Regulation (EC) No.44/2001</i>	237
3.	<i>The International Jurisdiction in Electronic Commerce Directive</i>	246
C.	The System of International Jurisdiction in Turkey	249
1.	<i>The International Jurisdiction on Copyright Protection in Turkey</i>	254
a)	The Tribunals Specialized on Intellectual Property.....	257
D.	International Jurisdiction in Copyright Protection on the Internet	258
1.	<i>European Council's Convention on Cybercrime and International Jurisdiction in Copyright Protection</i>	261
VII.	CONCLUSION	267

ANNEX - Legal Texts

I. INTRODUCTION

In today's world, countries have the opportunity to use intellectual property rights to promote the socio-economic development of the information society and to see intellectual property as a powerful tool that assists the improvement of information, culture of innovation, creativity and knowledge. Copyright-based industries play a major part in the global knowledge-based economy. However, the arrival of the digital era has created economic, technological and legal challenges for copyright-based industries.

The widespread use of the information technologies in horizontal societies which create immensely interactive relations among individuals, have become one of the major challenges of intellectual property rights as the balance between the protection of the owners of the created work and the principle of free circulation of information and knowledge has been distorted by the nature of the cyberspace. The creation of a new Internet oriented global culture and the rapid developments in technology enable the dematerialization of the works protected and highlight the need for an efficient copyright legislation that will fit into the reality of twenty first century.

Copyright can survive and perform a useful role on the Internet as long as the principles behind the copyright law; ownership, lifetime, restricted acts and exceptions exist in accordance with the dynamics of the current environment.

It is proper to emphasize the importance of copyright protection as an academic discipline and as a driving force in the economic life of the new millennium. This thesis focuses on the copyright issues raised by the growth of Internet with a special emphasis to the exploitation and the protection of copyright in European Union and Turkey. A basic understanding of EU approach to copyright in the digital environment is targeted by analyzing the three main pillars of the EU legal framework; Copyright Directive, Database Directive and Software Directive with a special focus to the fundamentals of legal issues of copyright. It explores the current cyberspace issues which challenge the copyright protection and concentrates on the regulatory responses and strategies in relation with them.

A special concentration is given to the Turkish legislation by comparisons with that of the EU in order to create an outlook of the EU legal harmonization on copyright protection in the digital environment. The relevant international treaties, the European Union and Turkish legislation, European Union and Turkish case law and the respective rules are used in identifying the issues and the limits of copyright protection on the Internet. Where helpful, the findings are illustrated by EU and Turkish case law in order to demonstrate the complex situations on the Internet. The most important aspect of this thesis is its unique approach to copyright protection on the Internet that involves both EU and Turkish cases with the aim of creating a basis for the future cases.

The thesis describes the changing Internet environment in which institutional policies must operate, the scope of copyright protection in the digital environment and the changing legal situation in Turkey with regard to online activities that infringe copyright protection, the Issues arising from recent legislation and case law both in Turkey and EU, the liability of online intermediaries, the linking and framing of copyrighted material, the database protection, peer-to-peer file sharing systems for copyrighted data and the international jurisdiction.

The thesis is organized into 5 chapters:

- Chapter I concentrates on the evolution of certain aspects of the copyright protection on the Internet and provides a global approach to the copyright protection on the Internet by identifying the major treaties and applications within.
- Chapter II depicts the main issues of copyright raised by the Internet and outlines the European legal framework of copyrights concerning the digital environment with a special emphasis to directives that are enacted. In this chapter, EU system of copyright protection in the cyberspace is defined and the legislation in force is evaluated in detail and sampled with particular cases of copyright protection on the Internet.

- Chapter III outlines the legal framework in Turkey and provides cases from Turkish jurisdiction. The Turkish legal framework is examined in detail with a particular reference to that of EU and the current situation of copyright protection on the Internet is compared with the conditions in EU. Most significantly, in this part a new, unpublished case is added to thesis which may provide a reference for the similar cases in the future.

- Chapter IV deals with the liability of the intermediaries, the most debated issue on the copyright protection on the Internet and evaluates the issue both from the EU and the Turkish point of view. This part provides a special emphasis to peer-to-peer file sharing as this act constitutes the most dramatic challenge under the scope of personal use in copyright protection.

- Chapter V covers international jurisdiction with the objective of providing an overview of the existing rules of jurisdiction in particular to copyright protection on the Internet. In the international jurisdiction section of the thesis, the scope is limited to the questions of jurisdiction and the applicable law for copyright protection in the cyberspace. The rules of jurisdictions examined in this thesis are from European Union and Turkey. The jurisdictions of the European member states are not given individually, as the main aim of this thesis is to give the European Union legal framework for copyright protection on the Internet.

II. INTRODUCTION TO COPYRIGHT PROTECTION

A. Intellectual Property Rights

In a very broad sense, as stated in dictionaries, intellectual property is a product of the intellect that has commercial value, including copyrighted property such as literary or artistic works, and identical property, such as patents, appellations of origin, business methods, and industrial processes.¹ From that common definition it is understood that the product of intellectual endeavor is accepted as a property² and intellectual property should be originated from human intellectual activity which distinguishes intellectual property from the tangible kind of property³.

Intellectual property rights constitute legal rights asserted in respect of the product of the human intellect. Commission on Intellectual Property Rights⁴

¹ "The American Heritage Dictionary of the English Language", Fourth Edition, Houghton Mifflin Company, 2000, accessed: 12.05.2003, available at www.dictionary.com.

² The word "property" comes from the Latin word "proprius" which means "one's own".

³ See, GORDON Wendy J., "Boston University School of Law, Working Paper Series, Law and Economics Working Paper No. 03-10", Chapter 28: Intellectual Property, pp. 617-646. Accessed: 9.01.2004, available at <http://www.bu.edu/law/faculty/papers> p.621, WEBER, Rolf H., "Does Intellectual Property Become Unimportant in Cyberspace?" International Journal of Law and Information Technology, Vol.9, No.2, 2001, p. 171.

⁴ A British institution focusing on the effects of intellectual property on development with special emphasis to the less developed countries. Further information on the Commission available at www.iprcommission.org

define intellectual property rights as the rights awarded by society to individuals or organizations principally over creative works: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.⁵ These rights provide the creator the right to prevent others from making unauthorized use of their property and function like incentives for people to invest in developing new ideas. So, in intellectual property, the owner of the rights has the power to authorize the use of the creation that is subject to protection.

Even though the history of intellectual property law is mostly developed in the 18th and 19th centuries, the concept of intellectual property goes far beyond this.⁶ It is very interesting that in the Ancient Greek and Roman, plagiarism was considered as a dreadful act but the right upon intellectual property existed *in abstracto* as there was no legal provision in effect.⁷

In the Medieval Europe, it is known that the Venetians were using patent laws. However with the invention of press, intellectual property rights gained a new edge. As the first publishing of a book was at the highest cost of all of

⁵ "Integrating Intellectual Property Rights and Development Policy, Report of the Commission on Intellectual Property Rights", Commission on Intellectual Property Rights, London, September 2002, p.12, accessed 3.9.2003, available at <http://www.iprcommission.org>

⁶ For the history of intellectual property see; ATEŞ Dr. Mustafa, "Fikir ve Sanat Eserleri Üzerindeki Hakların Kapsamı ve Sınırlandırılması", Ankara Seçkin, 2003 pp.31-41; DARDAĞAN Dr. Esra, "Fikir ve Sanat Eserleri Üzerindeki Haklardan Doğan Kanunlar İhtilafı" Ankara Betik Yayıncılık 2000, pp.13-26; TEKİNALP Ünal, "Fikri Mülkiyet Hukuku", Güncelleştirilmiş 2. Bası, Beta, Haziran 2002. pp. 75-79.

⁷ DARDAĞAN, 13, ATEŞ, 32.

product's life process, people doing the later publishing were gaining a considerable profit and putting the first publisher in a less competitive position.⁸ Therefore there was a need for an efficient protection. Unfortunately, protection was provided for the publisher in such a case, not for the author of the book. Afterwards, this privilege of publishing was softened by private contracts signed between the author and the publisher giving the author the right of ownership within the scope of that agreement.⁹

Intellectual property in the modern sense was firstly introduced in England with the 1709 Statute of Anne¹⁰ which was put into effect in response to a demand from the publishers that their book monopolies¹¹ be preserved. The passing of the Statute of Anne, which was the first Copyright Act in the world to deal with this issue, introduced two new concepts - the author being the owner of copyright and the principle of a fixed term of protection for published works.¹²

⁸ DARDAĞAN, 15.

⁹ DARDAĞAN, 116, ATEŞ, 33.

¹⁰ DARDAĞAN 17, ATEŞ 36. See also PHILIPS Jeremy, FIRTH Alison, "Introduction to Intellectual Property Law", Fourth Edition, Butterworths, 2001, p.146.

¹¹ PHILIPS, FIRTH, 146.

¹² See also intellectual-property.gov.uk for further information on the Statute of Anne.

The international intellectual property architecture can be divided in three main parts; multilateral, regional and bilateral.¹³ As a result of progresses in the technological structure and the interactivity of the global business environment, even though the intellectual property law was firstly developed on a national basis, the architecture of the global intellectual property regime has become increasingly complex with multilateral agreements, regional conventions and bilateral arrangements.

The Paris Convention¹⁴ (on protecting industrial property) of 1883, and the Berne Convention¹⁵ (on literary and artistic works) in 1886, provided intellectual property regime, an international nature.¹⁶ In 1952, within UNESCO, The Universal Copyright Convention was signed in order to facilitate the problematic areas rising from the system difference between European countries and America.¹⁷ The first multilateral agreement on intellectual property

¹³ Integrating Intellectual Property Rights and Development Policy Report, 156, ÖZTRAK, İlhan, "Fikir ve Sanat Eserleri Üzerindeki Haklar, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları; No.397, İkinci Baskı, Ankara, 1977, p. 6-10.

¹⁴ Paris and Berne Convention see; YASAMAN, Hamdi, "Marka Hukuku ile İlgili Makaleler, Hukuki Mütalaalar, Bilirkişi Raporları", I. Bası, Beta, İstanbul, 2003, p. 20, ÇEVİK, Orhan Nuri, "İçtihatlı Notlu Fikri Hukuk Mevzuatı (Fikri ve Sınai Mülkiyet Hakları), Yetkin Hukuk Yayınları, Ankara, 1988, p.231-260, ÇEÇEN, Anıl, "Düşünce Hukuku", Doruk Yayınları, Ankara 1995, p.421-438.

¹⁵ DARDAĞAN, 27,

¹⁶ DARDAĞAN, 21, ÖZDİLEK Ali Osman, "İnternet ve Hukuk", Papatya Yayıncılık, 2002, p. 66

¹⁷ DARDAĞAN 21, 37, ATEŞ 44, TEKİNALP, 66. See also; OPPENHEIM Charles, "Does Copyright Have Any Future on the Internet", Journal of Documentation Vol.56, No:3, May 2000, p. 280; ZAPATA LOPEZ Fernando, "The Right of Reproduction, Publishing Contracts and

is the Paris Convention on industrial products, a primary step for forming a unique protection which could not be reached by bilateral agreements.¹⁸ Today, most of the multilateral agreements are administered by World Intellectual Property Organization (WIPO) and World Trade Organization (WTO). There are three types of multilateral treaties; standard setting treaties which define agreed basic standards of protection like the Paris Convention, the Berne Convention, the Rome Convention¹⁹ and TRIPS, global protection system treaties which facilitate filing or registering of intellectual property rights like the Madrid Agreement²⁰ and classification treaties which organize information concerning inventions, trademarks and industrial designs into indexed, manageable structures for ease of retrieval like the Strasbourg Agreement Concerning the International Patent Classification²¹. The main aim of these treaties is to form a global understanding intellectual property and a harmonized implementation.

Regional treaties or instruments only cover a section governing the related intellectual property standard in a specific region like European Union. The European Patent Convention constitutes an example of regional

Technological Protection Measures in the Digital Environment” UNESCO Copyright Bulletin, Vol. XXXVI, No.3, 2002, p. 4.

¹⁸ TEKİNALP, 67.

¹⁹ EREL, Şafak N., “Türk Fikir ve Sanat Hukuku”, Ankara Üniversitesi Siyasal Bilgiler Fakültesi Yayınları, Ankara, 1998, p. 22-24.

²⁰ TEKİNALP, 72.

²¹ TEKİNALP, 69.

agreements. Bilateral agreements are the agreements concerning intellectual property regime between the two signatories and have been used since the nineteenth century.

B. Copyright Protection

Copyright was first developed in the modern period due to the growth in printing technology which enabled the vast distribution of copies of original artistic and literary works. With the technological developments in the production and dissemination of knowledge and knowledge-based products, the extension of copyright has been increased in order to cover photography, cinematography, sound recording, broadcasting, cable transmission, computer programs and databases.²² The types of works, protected under most national copyright laws include²³ literary works, musical works, artistic works, maps and technical drawings, photographic works, motion pictures or cinematographic works, computer programs and databases and works of applied art.

Copyright is designed to protect the creator by allowing him to benefit from his work commercially and to balance the interests of the creators and

²² "Business Success, Copyright and the Digital Environment", WIPO Magazine, No.2, March-April 2003, p. 9.

²³ "WIPO Guide on Surveying the Economic Contribution of the Copyright Based Industries", 2003, p.14. Accessed: 10.02.2004, available at

www.wipo.int/copyright/en/publications/pdf/copyright_pub_893.pdf

guaranteeing public interest and fundamental freedoms. Copyright is a tool both for promoting progress in the arts and sciences and for disseminating those promoted works to the public. In addition to this, copyright establishes a moral²⁴ system that avoids the deformation of the work when it is harmful to the reputation of the created work. Moral rights cannot be sold or assigned like the economic aspects of copyright. Article 6bis of the Berne Convention outlines the moral rights as the right to claim authorship and attribution and the right to protect the integrity of the work.

In general, all copyright systems are established with the same universal objectives. First of all, it is a fact the copyright system should guarantee the protection of the creator's work. Secondly, copyright should include the remuneration for the creator, both as a stimulus for the continuance of the creation process and for the evenly distribution of the works protected. Lastly, copyright should be regarded as a tool to be used for development and culture policies of a nation. It supports and regulates the creative process while at the same time ensures the legal platform of dissemination of the copyrighted material. In addition to the copyright, there are secondary neighboring or related rights. Those rights do not originate directly from the exercise of a creative

²⁴ PHILIPS, FIRTH 136-137.

human intellect but emerge from the contributions of others who add value to the presentation of original work.

Today the major challenges to copyright protection emerge from the illicit consumption of copyrighted works in digital form. Advances in digital technology enabling the digitalization of the intellectual and artistic content poses in serious copyright infringements including; digital copying, online exploiting, distributing and modifying the copyrighted work without the authorization of the copyright owner. The copyright owners face a significant economic loss due to the unauthorized copying and redistribution of their works. The unresolved disputes over digital copyright concentrate on the respective rights of copyright owners and consumers of entertainment products such as music and movies and of computer program. Currently, the peer-to-peer (P2P) networks²⁵ are considered as the primary source of copyright infringement. However, although the digitalization of creative works has expanded the options for infringement, copyright owners are now beginning to exploit similar technological developments to control and ultimately to prevent those options.

²⁵ Peer-to-peer network is a communications network in which any computer on the network can be a client and/or a server. Any computer can access files on any other computer in the network. Two examples are Artisoft's LANtastic and Microsoft's Windows for Workgroups. Peer-to-peer networking does not involve a "server." For example five PCs on any point home network, any two PCs could be powered on and share each other's printers and drives, or play a head-to-head game. This is in contrast to client/server applications (such as Internet Sharing), that require a particular PC – the server – to be powered on in order for the other PCs – the clients – to use its services (such as its Internet connection). The definitions are available at www.techdictionary.com

C. International Legal Framework for Copyright Protection

The concept of copyright and related rights is defined in each country's legislation. However, the basic concepts in almost all laws are largely consistent with the provisions of major international conventions including; the Berne Convention for the Protection of Literary and Artistic Works, Universal Copyright Convention, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (commonly known as the Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), and the WIPO Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996.

1. Berne Convention for the Protection of Literary and Artistic Works

Berne Convention for the Protection of Literary and Artistic Works, dated 9 September 1886, is the first international regulation on copyrights. Berne Convention had been revised several times in order to cope with the needs and the developments in copyright protection.²⁶ After the revision made in Berlin,

²⁶ Amendments: Paris (4.5.1896), Berlin (13.11.1908), Berne (2.6.1928), Rome (26.6.1948), Brussels (4.7.1967), Stockholm (4.7.1967), Paris (24.7.1971 and 28.9.1979).

Berne Convention had started to be referred as the “Revised Berne Convention”.²⁷

Internationally, Berne Convention²⁸ is the key legal framework for copyright protection. It gives the general scope of copyright protection and the coverage of copyrightable works. According to the Berne Convention, the rights of authors in their literary and artistic works should be protected. In Article 2, “literary and artistic works” includes different forms of creative works, such as writings, both fiction and non-fiction, scientific and technical texts and computer programs; databases that are original due to the selection or arrangement of their contents; musical works; audiovisual works; works of fine art, drawings and paintings; and photographs.

It should be noted that Berne Convention covers all literary and artistic works as long as they are original. This means that a literary or artistic work can only be protected by a copyright if it is original.²⁹ Originality comes from the

²⁷ TEKİNALP; 64.

²⁸ The Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (1971), at <http://www.wipo.int/treaties/ip/Berne/index.html>. In 1878 the International Literary Association was created. In 1883 the Association held a meeting in Berne and drafted an International Copyright Agreement. In 1886, the Berne Convention for the Protection of Literary and Artistic Works was organized. Under the Berne Convention, member countries were required to provide the same protection to authors from other member countries as to their own authors and set a minimum level of copyright protection, including the period of copyright protection at the life of the author plus 50 years.

²⁹ See, PHILIPS, FIRTH, 138-146 and DUSOLLIER Séverine, POULLET Yves, BUYDENS Mireille, “Copyright and Access to Information in the Digital Environment”, A Study Prepared for

understanding that the creator has played a vital role on the determination of the form of the work. If the form of the work is solely determined by external factors like the technical requirements or the instructions of a third party, the work in question is not considered as original.

Limitations and exemptions are introduced in order to prevent the negative effects of the monopoly of the copyright enjoyed by the owner for the sake of the public good and public order. They are the main factors in achieving a right balance between the authorial and public interests and should be maintained.³⁰ However it should be noted that an exception or limitation to an exclusive right should not conflict with the normal exploitation of the work in case that the uses covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work.³¹

the Third UNESCO Congress on Ethical, Legal and Societal Challenges of Cyberspace Infoethics 2000, Paris, 17 July 2000, pp. 7-8

³⁰ See; DUSOLLIER, POULLET, BUYDENS p. 14, GUIBAULT Lucie M.C.R., "Contracts and Copyright Exemptions", Edt. HUGENHOLTZ Bernet P., "Copyright and Electronic Commerce; Legal Aspects of Electronic Copyright Management", Kluwer Law International, 2000, p. 127.

³¹ RICKETSON, Sam, BARRISTER, Victoria "WIPO Study On Limitations and Exceptions of Copyright and Related Rights in the Digital Environment", WIPO Standing Committee on Copyright and Related Rights Ninth Session, June 23 to 27, 2003 BARRISTER, p. 23.

There are two main aspects of Berne Convention; the reciprocity (national treatment) principle and the minimum rights principle.³² The “reciprocity principle” allows member states to grant the copyright protection that they provide to their nationals as a part of their national regulations to the nationals of the other member states reciprocally. By this way, every member nation extends the copyright protection also to the works that originate in the other signatory nations. This principle provides the protection of the copyright owner in all the member states and includes the equivalent protection of a foreign copyright owner with a national.³³ Accordingly in Turkey, an Italian artist receives the same copyright protection as a Turkish artist and the Turkish artist in Italy receives the same treatment as the Italian counterpart.

Berne Convention introduces the “minimum rights principle” to be applied for the cases where the equivalent protection provided falls apart from the minimum standards of protection set by the Convention.³⁴ In such a case the foreign copyright owner would be subject to the protection presented by the minimum standards of the Convention consisting of translation, copying, distribution, processing and moral rights of the copyright the owner.

³² STRONG, William, “The Copyright Book, Third Edition, The MIT Press, 1990, p. 196.

³³ TEKİNALP, 64.

³⁴ Ibid.

Turkey had agreed on participation in Berne Convention which was foreseen by the Lausanne Treaty. Section IV of the Lausanne Treaty on industrial, literary and artistic property, Articles 86 – 91 and Articles 14 and 15 of the Commerce Contract of the Lausanne Treaty foresees Turkey to sign the relevant international conventions. However there appeared a disagreement between Turkey and the Western countries when Turkey asked for exception for the cases of translations of foreign works to Turkish due to the newly founded Republic's situation.³⁵ It took more than 20 years for Turkey to approve the Convention. Turkey had approved the 1948 Brussels revision of the Convention in 1951.³⁶ In 1995 Turkey has approved the 1979 Paris revision of the Convention.³⁷

³⁵ TEKİNALP, 65.

³⁶ Signed and ratified by Turkey. The Decision of the Council of Ministers on the Participation in the Bern Convention (Bern Birliğine Katılıma Dair Bakanlar Kurulu Kararı); No.3/13589, 21.08.1951. The Law Approving the Berne Convention (Edebiyat ve Sanat Eserlerini Koruma için Kurulan Bern Birliğine Katılma Hususunda Hükümete Yetki Verilmesine Dair Kanun), No .5777, 28.5.1951, RG 2.6.1951, 7824 Sayı, 3t.Düstur, c.32, s.1451.

³⁷ Signed and ratified by Turkey. The Law Approving the Paris Revision of the Berne Convention, dated 7.7.1995, No. 4117 (Edebiyat ve Sanat Eserlerinin Korunmasına İlişkin Berne Sözleşmesinde Değişiklik Yapan ve 1979'da Tadil Edilen Paris Metnine Katılmamızın Onaylanmasının Uygun Bulunduğu Hakkında Kanun), RG. 12.7.1995, 22341.

2. Universal Copyright Convention

Universal Copyright Convention³⁸ (UCC) was signed by the majority of the member states of Berne Convention and Buenos Aires Convention, an international copyright regulation solely designed for America continent, with the initiative of UNESCO in 1952.

The main aim of UCC is to facilitate the problematic areas rising from the differences between systems of copyright protection in European countries and America. However as UCC does not bear the reciprocity principle, it cannot provide an automatic protection and to benefit from the protection provided by the UCC, the formalities lied down by Convention should be realized.³⁹ The symbol © is used for the protection provided by the UCC accompanied with date of publication and the name of the right holder.

Turkey is not a member of the UCC system.

³⁸ Universal Copyright Convention, 6 September 1952, UN Treaty Series, Vol. 216, 1955, pp.134-206.

³⁹ TEKİNALP, 66.

3. Rome Convention⁴⁰ (The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations)⁴¹

Rome Convention is signed in 26 October 1961 in order to establish an international system of protection for the performers, producers of phonograms and broadcasting organizations. Even though Rome Convention bears minimum standards of protection and equivalent protection principle, it does not aim at creating a union as it is in Berne Convention.

Turkey has approved this Convention by passing the Law No. 4116⁴².

⁴⁰ The full text of the Rome Convention is available at www.wipo.org website.

⁴¹ This convention is on the protection of the related rights and the protection of performers, producers of phonograms and broadcasting organizations is updated with the WIPO Performances and Phonograms Treaty (WPPT) in 1996 to cope with the technological developments.

⁴² Signed and ratified by Turkey. The Law Approving the Rome Convention, dated 7.7.1995, Law No. 4116, (İcracı Sanatçılar, Fonogram Yapımcıları ve Yayın Kuruluşlarının Korunmasına Dair Roma Sözleşmesine Katılmamızın Onaylanması Uygun Bulunduğu Hakkında Kanun) RG. 12.7.1995, 22341.

4. Agreement on Trade-Related Aspects of Intellectual Property Rights⁴³ (TRIPS)

The Agreement on Trade-Related Aspects of Intellectual Property Rights⁴⁴ (TRIPS) is one of the treaties establishing the World Trade Organization in 1994.⁴⁵ TRIPS was negotiated in the 1986-1994 Uruguay Round and was put into effect in 1995 with the sole goal of strengthening and adjusting the global character of intellectual property regimes in the multilateral trading system. Turkey adopted TRIPS as a part of the Agreement Establishing the World Trade Organization.⁴⁶

Internationalization of trade accelerated the transfer of intellectual property rights in exchange for a fee or other remuneration. However, there was a common hesitation that trading parties would be unwilling to deliver their intellectual property assets to the countries with inadequate intellectual property

⁴³ The full text of TRIPS can be found at http://www.wto.org/english/docs_e/legal_e/legal_e.htm

⁴⁴ "Trade-Related Aspects of Intellectual Property Rights", Annex 1C, Marrakesh Agreement Establishing the World Trade Organization (1994), accessed: 10.1.2003, available at http://www.wto.org/english/docs_e/legal_e/27-TRIPS_01_e.htm.

⁴⁵ See also CORBETT Ronald J. T, "Protecting and Enforcing Intellectual Property Rights in Developing Countries",. The International Lawyer, Fall 2001, Vo. 35, No.3, pp. 1083-1102., EROĞLU, Yard. Doç. Dr. Sevilay, "İnternette Telif Hakkı", Uluslararası İnternet Hukuku Sempozyumu, 21-22 Mayıs 2001, İzmir, Dokuz Eylül Üniversitesi Yayını, 2002, p. 83, DARDAĞAN, 42-44, ATEŞ 47-49, TEKİNALP, 73.

⁴⁶ Turkey participated in the WTO. Law approving the participation 26.01.1995 and No.4067, the text is published on the Turkish Official Journal dated 25.02.1995 and No. 22213. Annex 1C covers the provisions of TRIPS. RG. 25.02.1995, 22213.

protection where the possibility of stealing the protected work or knowledge existed. This uncertainty highlighted the need of general rules governing the intellectual property rights. The main aim of TRIPS is to insure the intellectual property rights in the global trade environment and abolish the risk of disparities in intellectual property laws.⁴⁷ TRIPS elevates the overall level of protection worldwide and create new international standards, both substantive and procedural, for the availability, scope and use of IP rights.

TRIPS is established to reduce the disparity in the protection of intellectual property by providing an internationally agreed framework of trade rules with minimum standards of protection for a wide range of intellectual property rights.⁴⁸ So, it is not a model piece of legislation that should be adapted to the national law directly, but it is a set of minimum standards that the national legislations should comply with.⁴⁹

TRIPS Agreement covers copyright and related rights, trademarks, including service marks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and undisclosed information,

⁴⁷ SCAFFER, Richard, CARLE Beverly, AGUST Philberto, "International Business Law & Its Environment", Third Edition, West Publishing Company, 1996, p. 564.

⁴⁸ ATEŞ, 49.

⁴⁹ MAY Christopher, "A Global Political Economy of Intellectual Property Rights, The New Enclosures", Routledge, 2000, p. 70.

including trade secrets and sets minimum standards that all members should comply with in the covered areas.⁵⁰

The most significant feature of TRIPS is its binding nature upon all WTO members. Any kind of infringement may lead to trade sanctions and may cause a case to be handled by the WTO Dispute Settlement Process⁵¹ through inter-governmental diplomacy.

Similar to the World Intellectual Property Organization Copyright Treaty, its provisions on copyright are largely based upon the Berne Convention for the Protection of Literary and Artistic Works.⁵² Accordingly, TRIPS agreement ensures that computer programs are protected as literary works under the Berne Convention. Article 10 of the TRIPS Agreement states that, the compilations of data or other material, whether in machine readable or in other form, which constitute intellectual creations, by reason of the selection or by the arrangement of their contents, are subject to protection. Protection which does

⁵⁰ ADAMS A. Wendy, "Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve", *International Journal of Law and Information Technology*, Vol. 10 No. 1, 2002, p. 72, CORBETT, 1089, HUTTER Micheal, "Efficiency, Viability and the New Rules of the Internet", *European Journal of Law and Economics*, Vol.11; No.5, 2001. p. 13.

⁵¹" WTO Dispute Settlement Gateway", accessed: 1.02.2003, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm

⁵² D'AMICO JUETTNER Diana, GIRASA Roy J., "Copyright Issues for the Distance Learning Professor" *International Journal of Value-Based Management* Vol.14, 2001, p. 118

not extend to the data or material itself shall be without prejudice to any copy subsisting in the data or material itself.”

Accordingly, Article 10 of the TRIPS Agreement allows computer programs to be covered by the longest period of protection under the agreement and outlines how databases should be protected.⁵³ It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners' potential earnings from their films.

Article 14 (5) of the agreement says that performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years.⁵⁴

On the other hand, TRIPS Agreement did not adequately cover the intellectual property issues implicated by the digital distribution of content which

⁵³ MAY, 75, EROĞLU, 39.

⁵⁴ MAY, 75-76.

is introduced mainly by the use of Internet.⁵⁵ The technical measures including protections for digital rights management are not covered by the TRIPS. It is mostly because that the agreement was largely negotiated by December 1991 which was a date just before the challenges brought by Internet were taken into consideration.

For the moral rights, TRIPS supports the holder of the transferred rights over the moral right of the creator meaning that when there is a dispute, the moral right would be regarded as an impediment to the rights of the current owner.⁵⁶ This is one of the basic provisions that reveal TRIPS as an economy – oriented agreement which defends the owners of the transferred rights over the rights of the creators.

5. World Intellectual Property Organization Internet Treaties

World Intellectual Property Organization (WIPO) is founded by the signatories of the Berne and Paris Conventions in 1967 by the Convention Establishing the World Intellectual Property Organization which was signed at

⁵⁵ CUNARD Jeffrey P., HILL Keith, BARLAS Chris, "Current Developments in the Field Of Digital Rights Management" Geneva: Standing Committee on Copyright and Related Rights, Tenth Session, November 3 to 5, 2003, p. 44.

⁵⁶ MAY, 73.

Stockholm on July 14, 1967. Turkey approved this Convention in 1975.⁵⁷ WIPO is the part of the United Nations system responsible for administering various treaties on patents, trademarks, designs and copyright. Currently WIPO administers 23 treaties on a wide range of intellectual property⁵⁸.

In 1989, WIPO came to a decision to investigate the impact of computers and communications networks upon copyright as the new uses of works and other subject matter arise in the digital environment that could never have been contemplated in the pre-digital age.⁵⁹ The primary objective of the WIPO Internet Treaties was to provide an effective protection for creators in this new era. After seven years of meetings, in 1996 two treaties were adopted by consensus by representatives of the 178 Member States of WIPO.⁶⁰ Those treaties are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (commonly referred to as the "Internet

⁵⁷ 1967 Stockholm Convention World Intellectual Property Organization (WIPO), Law. No.7/10540. RG. 19.11.1975, 15417. approved with the decision of the Council of Ministers dated 14 Ağustos 1975.

⁵⁸ For more information on WIPO", see

http://www.wipo.org/about-wipo/en/index.html?wipo_content_frame=/about-wipo/en/gib.htm

⁵⁹ RICKETSON, BARRISTER, 78.

⁶⁰ TÜRKEKUL Erdem, "İnternet Ortamında Fikir ve Sanat Eserlerinin Korunmasına İlişkin Sorunlar ve Çözüm Önerileri", Ed. ATAMER Yeşim, "İnternet ve Hukuk", İstanbul Bilgi Üniversitesi Yayınları, İstanbul Ocak 2004. p. 567, ATEŞ, 46.

Treaties”).⁶¹ The treaties have entered into force: the WCT on March 6, 2002, and the WPPT on May 20, 2002 after 30 countries joined each of the treaties.⁶²

The WIPO Internet Treaties are designed to update and supplement the existing international treaties on copyright and related rights, namely, the Berne Convention and the Rome Convention⁶³ in order to meet the needs of the environment introduced by the information society technologies and the Internet.

Internet Treaties include incorporation of certain provisions of the TRIPS Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights)⁶⁴ that are not previously included explicitly in WIPO treaties (e.g.,

⁶¹ The WIPO Copyright Treaty (WCT) (1996), accessed: 12.1.2003, available at <http://www.wipo.int/clea/docs/en/wo/wo033en.htm>. The WIPO Performances and Phonograms Treaty (WPPT) (1996) accessed: 12.1.2003, available at <http://www.wipo.int/clea/docs/en/wo/wo034en.htm> See also Bilgi Toplumuna Doğru- Taslak Rapor, 380, WEBER, 174, ZAPATA, 5.

⁶² The 39 Member States who acceded to or ratified the WCT and/or the WPPT as of April 1, 2003 are Albania, Argentina, Belarus, Bulgaria, Burkina Faso, Chile, Colombia, Costa Rica, Croatia, Czech Republic, Ecuador, El Salvador, Gabon, Georgia, Guatemala, Honduras, Hungary, Indonesia, Jamaica, Japan, Kyrgyzstan, Latvia, Lithuania, Mali, Mexico, Mongolia, Republic of Moldova, Nicaragua, Panama, Paraguay, Peru, Philippines, Romania, Saint Lucia, Senegal, Slovakia, Slovenia, Ukraine, and the United States of America. For information on the implementation of the provisions of WCT and WPPT; WIPO Survey on Implementation Provisions of the WCT And The WPPT; April 25 2003, accessed: 19.12.2003, available at http://wipo.int/document/en/meetings/2003/scrr/pdf/sccr_9_6.pdf

⁶³ The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), accessed: 12.03.2003, available at <http://www.wipo.int/treaties/ip/rome/index.html>.

⁶⁴ The TRIPS Agreement came into effect on January 1, 1995. It is the most comprehensive multilateral agreement on intellectual property, covering: copyright and related rights, trademarks including service marks, geographical indications including appellations of origin,

protection of computer programs and original databases as literary works under copyright law). In addition they cover updates not specific to digital technologies (e.g., the generalized right of communication to the public) and provisions that specifically address the impact of digital technologies.⁶⁵

The Internet Treaties developed by WIPO re-evaluate the right of reproduction defined under the Berne Convention, Rome Convention and TRIPS Agreement⁶⁶ as any transmission of a work or uploading of that work into the memory of a computer or other digital device is regarded as reproduction. WIPO Internet Treaties accepts that uploading into a computer memory is an act of reproduction. Therefore also the storage of a protected work in digital form in an electronic medium constitutes a reproduction. It means that when a work is copied from a hard disk to a server, it is reproduction. Briefly, WIPO Copyright Treaty provides the necessary inclusion Internet and digital media to the reproduction in the analogue world.

WIPO Internet Treaties deal with the extent of rightholders' control over the works made available to the public for downloading or access on the

industrial designs, patents including the protection of new plant varieties, layout-designs of integrated circuits and undisclosed information including trade secrets and test data. The TRIPS Agreement sets minimum standards of protection to be provided by Members, specifies domestic procedures and remedies for enforcement of intellectual property rights, and makes disputes about TRIPS obligations subject to WTO dispute settlement mechanisms.

⁶⁵ Intellectual Property on the Internet: A Survey of Issues, 32.

⁶⁶ Berne Convention Art. 9(1), Rome Convention Art. 10 and TRIPS Agreement, Art. 14 give producers the right to authorize or prohibit the "direct or indirect" reproduction of their works.

Internet. The treaties require that an exclusive right should be granted to control such acts of “making available,” while leaving it to individual countries to decide how to categorize this right under national law.

WIPO Internet Treaties also focus on the moral rights in digital environment. This is related both to the infringement of the creators’ moral rights of integrity and authorship. In most of the cases, the sounds and images digitally copied, downloaded and distributed are unrecognizable to copyright owners and creates an uncomfortable situation for the copyright holders whose work will be exploited in a digital format. Accordingly, in the Treaties acts of distortion, mutilation or other modification of the works are prohibited and the rights of the creators are guaranteed.

In addition to those provisions, the Internet Treaties protect “rights management information,” providing legal support to rights management systems.⁶⁷ The protection of the integrity of rights management information is a critical element of the WIPO Internet Treaties. Rights management information is the information identifying the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information.

⁶⁷ WIPO Copyright Treaty, Art.12 and the WIPPT Art.19 define the rights management systems and bear the provisions within. Article 12 of the WCT provides that contracting parties shall provide adequate and effective legal remedies against any person knowingly removing; altering, distributing, importing for distribution, broadcasting or communicating to the public any electronic rights management information without authority infringes the rightholders’ right.

Rights management systems operate on the basis of electronic data that is attached to the works and objects of related rights. However, the Internet Treaties gives the general framework and leaves the application process to the nation states. Internet Treaties do not specify enforcement provisions and therefore it is depending mostly on the nation states to sign those treaties and adopt appropriate measures.

Turkey has not signed WIPO Internet Treaties yet however, the provisions included in the copyright protection undertaken by the recent amendments show that the current Turkish copyright legislation regarding the copyright protection on the Internet is in line with the framework of the provisions of WIPO Copyright Treaty.⁶⁸

D. History of Copyright Protection in Turkey

The guilds in Ottoman Empire, even though they bear strategic importance in the social life, did not include publishing and print. It is mostly because that printing was abolished and was conceived as a sin. The permission of publishing was given to İbrahim Müteferrika, for the first time, to establish a printing house in 1727.⁶⁹ Müteferrika's credible and sincere

⁶⁸ See Chapter 3 below.

⁶⁹ ATEŞ, 38.

personality played a major role in gaining this permission. Müteferrika was obliged to ask for permission prior to each print.⁷⁰ The first printed works were a map and a book.⁷¹ The permission did not include the printing of the religious books. Müteferrika directed the press, which published 17 books by the time of his death, when it was closed down. The press was reopened only in 1784. Between 1727 and 1839, the date of the Tanzimat Fermanı, approximately 500 books are printed.⁷² There is no reference to the press and printing in both the Tanzimat Fermanı and 1856 Islahat Fermanı.

The first regulation on printing houses, printing and writing artistic and intellectual works is dated 1857.⁷³ Article 8 of the first Printing House Regulation⁷⁴ (Matbaalar Nizamnamesi) which mainly focuses on the censorship includes certain rights for the authors. According to Article 8, printing houses shall not be printing the privileged works without authorization for the whole life-term of the right owner.

⁷⁰ TEKİNALP, 79.

⁷¹ AYİTER, Nurşin, "Fikri Hukukta Fikir ve Sanat Eserleri", Ankara Üniversitesi Hukuk Fakültesi Yayınları, No.309, Sevinç Matbaası, Ankara, 1972, p. 25.

⁷² Ibid, 26.

⁷³ Ibid, 26.

⁷⁴ Birinci Tertip Düstur Cilt 2, Sahife 217.

On the contrary to the previous regulations' poor coverage of copyrights, the first Copyright Regulation⁷⁵ (Telif Nizamnamesi) in 1857 presents a very modern outlook to copyright protection. This document is a reflection of the new ideas brought up by the French Revolution and enables the author to enjoy all publishing rights of his work all throughout his life and moreover foresees the punishment of the print house owner when the number of copies permitted to be printed is exceeded.⁷⁶ 1857 Copyright Regulation provides protection for the life of the author and sets criminal sanctions for the unauthorized printing. Furthermore, it establishes the legal ground for possessory action which bans the re-printing of the same work when the actual edition is still due. This is not only related to the author but also to the printing house, as according to this provision, once a work is printed by one printing house, it cannot be printed by another one unless all of the copies of the printed work which are presented to the market are not finished. In 1872, an annex to the Copyright Regulation is made.⁷⁷ According to this addition, the protection period of the author is risen to 45 years for the original works and 20 years for the translations with the provision of the remaining years of protection after the death of the author shall be inheriting to the heirs. The retranslation of the original book by other authors is deemed to be free.

⁷⁵ İkinci Tertip Düstur Cilt 1, Sahife 35.

⁷⁶ ATEŞ, 39.

⁷⁷ AYİTER, 27.

In 1877, with the beginning of the Istibdat (Suppression Era), the establishment of the Auditing and Control Agency (Encümeni Teftiş ve Muayene) there occurs a very authoritarian approach to printing houses and censorship has become the major issue. The declaration of 2nd Meşrutiyet, has put an end to severe censorship and the Auditing and Control Agency is abolished. The most important aspect of Meşrutiyet is the enactment of the Copyright Law (Hakkı Telif Kanunu)⁷⁸ in 1910.⁷⁹ First of all it outlines the works that fall within the scope of copyright protection and states that books, all kind of written materials which are intellectual creations, paintings, drawings, sculptures, plans, maps, technical drawings, musical works are all considered as the works that are protected with copyright. The protection over works is limited to the registration. The protection term is life of the author with 30 years of continuing protection after the death of the author. The copyright protection for paintings and other works related to drawing is 18 years. Replicas are accepted as criminal offences and subject to penalties. This regulation consists of 42 Articles most of which fall outside the scope and the understanding of the protection introduced by the Berne Convention.⁸⁰

⁷⁸ İkinci Tertip Düstur, Cilt II, Sahife 273.

⁷⁹ AYİTER, 27.

⁸⁰ ATEŞ, 40.

The signing of the Lausanne Treaty⁸¹ in 1923 is considered as a milestone for the intellectual and artistic works. Articles 86-91 of the Fourth Section of the Treaty cover intellectual property.⁸² Article 86 of the Lausanne Treaty states that rights of industrial, literary and artistic property as they existed on the 1st August, 1914, in accordance with the law of each of the contracting countries, shall be re-established or restored as from the coming into force of the present and the rights which, but for the war, could have been acquired during the war, by means of an application legally made for the protection of industrial property or of the publication of a literary or artistic work, shall be recognized and established in favor of those persons who would have been entitled thereto, from the coming into force of the present Treaty. The section 3 of the Commerce Contract annexed to the Treaty, in Articles 14 and 15 also bears provisions concerning intellectual property. Accordingly, Turkey is obligated to join the international conventions on intellectual property in the next 12 months. However Turkey, considering the young Republic's potential need for the translated books reserves the right to not to sign the Berne Convention. Due to the objection of the ten countries, Turkey's joining the Berne Convention is realized in 1951 with the Law No.5777. After the foundation of Republic of

⁸¹ Lausanne Treaty (Lozan Sulh Muahedenamesi) Düstur III. Tertip, C.5, Sahife 16-357; see also; BOZKURT Enver, "Türkiye'nin Uluslararası Hukuk Mevzuatı", Selçuk Üniversitesi Hukuk Fakültesi, Ankara, 1992.

⁸² AYİTER; 27.

Turkey, the issues of intellectual property were handled first by the Ministry of Education and later by the Ministry of Justice, and a new intellectual property law was prepared by Prof. Hirsch from İstanbul University Faculty of Law. This Law on Literary and Artistic Works No.5846 was put into effect in 1 January, 1952 and was complying with the provisions of Berne Convention.

III. COPYRIGHT PROTECTION IN EUROPEAN UNION

A. Why Directives are Preferred for Intellectual Property Legislation?

European Union has a unique legal framework. As stated by the European Court of Justice in one of the major cases of European history, *Costa v ENEL*⁸³, European Community has created its own legal system with the notion of collective self-determination. Along with the complex horizontal governance structures within the European Union, a new legal system has been formed.⁸⁴

The basic legal documents of EU are treaties that set up the institutions of the EU, allocate certain powers to the EU and contain references to the rule of law, fundamental rights and democracy. However, these treaties do not constitute the only source of law within the EU. There are also various types of secondary law.⁸⁵

⁸³ Case 6/64 *Costa v ENEL* [1964] ECR, 585–615; 593, 594. See; LINDAHL Hans, “Acquiring a Community: The Acquis and the Institution of European Legal Order”, *European Law Journal*, Vol. 9, No. 4, September 2003, p. 437, TEKİNALP/TEKİNALP, “Avrupa Birliği Hukuku”, 2. Bası, İstanbul: Beta, 2000, p. 119.

⁸⁴ VON BERNSTORFF Jochen, “Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony”, *European Law Journal*, Vol. 9, No. 4, September 2003, p. 511.

⁸⁵ See; DOUGLAS-SCOTT Sionaidh, “Constitutional Law of the European Union”, Pearson Education 2002, pp. 111-116, TEKİNALP/TEKİNALP, 69-74.

Article 249 of the EC Treaty provides the types of acts by which the EC legislate. Article 249 reads as follows:

“In order to carry out their tasks and in accordance with the provisions of this Treaty, the European Parliament acting jointly with the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities to choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force. “

Accordingly, regulations are the basic legislations in EU, issued by the Commission. Nevertheless they are not commonly preferred as they are directly applicable. Direct applicability means that regulations are implemented without any act of the Member States and they become a part of their legal system automatically.⁸⁶

Directives are unique to Community law and form the most common part of the European secondary legislation. As they are not directly applicable, they

⁸⁶ DOUGLAS-SCOTT 112.

require implementation with a given deadline. However, Member States have discretion over the application.⁸⁷

Regulations are used in the areas like agriculture and common customs tariff where speedy legislation is needed. However, contrary to regulations, directives are preferred for harmonization processes.

Directives are usually used in intellectual property harmonization in the Union as they provide a transition period for the Member States in relation with the given legal framework. For this reason, also in the legislation process of information society related issues which include intellectual property, EU has chosen directives as the harmonization tools in order to achieve a more flexible adjustment which will enable Member States to apply their national legislations adapted in accordance with the provisions of the Directives. It is not a surprise that all of the legislations concerning Internet are prepared in the form of Directives.

The EU acts enthusiastically in the field of regulating cyberspace and in this context drafts and enacts many Directives that are specifically intended to have an impact in the digital environment. However, it should be noted that the EU Directives do not have direct effect but are rather general frameworks aimed

⁸⁷ ODER, Bertil Emrah, Tekinalp/Tekinalp, AB Hukuku, 132-140.

at the Member States obliged to transpose them into their national law in two years.

The legislative process in EU concentrates on the establishment of a functioning internal market and the institution of a system ensuring that competition in the internal market is not distorted. In this process, harmonization of the laws of the Member States is very crucial for the achievement of Single Market lies solely on the formation of a wholly accepted legal system. Harmonization offers legal certainty and an increased level of protection in the internal market and encourages investments and increases the competitiveness of European industry. Without harmonization at Community level, the different applications cause legislative inconsistency and a chaotic market where free movement of services and products is restricted. Therefore the legal harmonization undertaken in the field of copyright does not provide a proper and unique system of protection in EU but mostly set an area of European Law with a common framework of protection enabling the flawless functioning of the internal market.⁸⁸

⁸⁸ ÖZCAN, Mehmet, "Avrupa Birliği'nde Fikri ve Sınai Haklar", Nobel Yayın Dağıtım, Ankara, 1999, p. 150.

B. Preparatory Acts

EU figures out two important policy goals that should be emphasized in copyright protection; the social dimension and research and development. The first goal is a part of the information society objectives. For EU, unlike the US, social aspects of the information society; namely creativity and a vibrant cultural sphere, is much more important than the information economy itself. According to the EU approach to copyright protection, there should be a balance between the protective measures and the social consequences of the implementation of those provisions.

In general there are generally of two kinds of implementation in copyright infringement by the courts on a case-by-case basis, like the American fair use, or by law as in most European countries. As the American system is more flexible and open, due its case-based character, the European approach presents a more definite regime with narrowly defined and exhaustive cases.⁸⁹

Strong intellectual property rights are promoted as mechanisms that encourage creativity. It should be noted that intellectual property rights are in force for only nearly 200 years. In human history of creativity most of the works are created without any kind of protection. Unless, it is also debatable that at

⁸⁹ DUSOLLIER Severine, "Exceptions and Technological Measures in the European Copyright Directive of 2001 – An Empty Promise", *International Review of Industrial Property and Copyright Law*, Vol.34, No.1, 2003, pp. 62-75.

that time the access and the availability of information was not sufficient. The second goal is related to the research and development policies of the Union. For EU, the implementations of copyright protection should not restrict or threaten the research area which is a vital part of the future competitiveness of EU economies.

Within this context of copyright protection the EU gives special emphasis to certain issues that should be taken into consideration during the implementation of protective measures. EU defends that copyright protection should guarantee the continuity of competition in the market and should in no way damage the nature of the market. It is important that protective measures should not encourage price discrimination.

EU believes that there should be an increased system of security while at the same time maintaining the principles of transparency, reliability, competition, free expression, cultural diversity and privacy.

In the light of the above mentioned ideals, EU prepared two documents that shaped the harmonization of copyright protection in information society; Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society⁹⁰ setting out the harmonization objectives and E-Europe

⁹⁰ Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society, COM (95) 382 final, 19.06.1995.

Action Plans⁹¹ scheduling the transformation to the information society by outlining economic, legal and social missions to be realized.

1. Green Paper on Copyright and Related Rights

The first attempt towards the harmonization of the copyright system in accordance with the information society objective was made in the European Council meeting at Corfu on 24 and 25 June 1994. In Corfu, the leaders of the EU stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. Copyright and related rights are considered as one of the issues playing a major role in attaining information society goals as they protect and stimulate the development and the marketing of new products and services over the networks and the creation and exploitation of their creative content in digital formats.

There was a need of a new copyright system that would respond adequately to the economic realities of the digital era and guarantee the smooth functioning of the internal market with the aim of proper development of the information society in Europe. In the light of this need in 1995 European

⁹¹ E-Europe An Information Society for All (COM (1999) 687); E-Europe 2002 (COM (2001)140); E-Europe 2005 (COM (2002) 263).

Commission published the “Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society”, setting out the harmonization objectives concerning the right of reproduction, the right of public communication, electronic anti-copying measures, the right of distribution and the principle of exhaustion.

The Green Paper was divided into two chapters. In the first chapter, the Commission tried to describe how the information society ought to function and identified the issues that aroused as a result of the emergence of the information society. In the second chapter, the Commission highlighted the issues of copyright and related rights that should be given priority in order to ensure the proper functioning of the information society. of the new services being offered will remain very limited.”

The Green Paper was a part of a process of consultation. Interested parties, including organizations and governments, were asked for their views and as a result of the consultations in June 1996 the Florence Conference titled “Copyright and Related Rights on the Threshold to the 21st Century” was organized. Following the Conference, in November 1996 the Commission elaborated a Communication to the Council and European Parliament as a follow-up to the Green Paper on Copyright and Related Rights in the Information Society. In this Communication the Commission has focused on the challenges for the new technologies and their affects on the copyright and

related rights. Meanwhile there were also other global negotiations continuing on the issue of copyrights, including TRIPS and WIPO Internet Treaties.

The diverse and fragmented scope of copyright protection in Europe accelerated the analysis of Commission and figured out the need for a harmonized system of exemptions in European market. However, the first draft prepared by the Commission was severely criticized by the Member States due to its limited scope of exemptions.

On 27 January 1998 the Commission presented a proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the information society with the purpose adapting Community legislation on copyright and related rights to the development of the information society and bringing it in line with the WIPO Treaties.⁹²

The exemption provisions constituted the most disputed part of the Directive proposal and regarded as legal policy comprises by most of the Member States. The EU Copyright Directive is prepared to update the European system of copyright protection including the requirements for compensation to authors, composers and other rightholders for copying. The

⁹² GUIBAULT 142.

EU Copyright Directive is adopted in accordance with the main provisions of the WIPO Internet Treaties and based on principles and rules already laid down in the Directives currently in force in this area⁹³, in particular Directive 91/250/EEC⁹⁴ on the legal protection of computer programs, Directive 92/100/EEC⁹⁵ on rental right and lending right, Directive 93/83/EEC⁹⁶ on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Directive 93/98/EEC⁹⁷ on harmonizing the term of protection of copyright and certain related rights and Directive 96/9/EC⁹⁸ on the legal protection of databases.

The EU adopted the WIPO Copyright Treaty⁹⁹ and the WIPO Performances and Phonograms Treaty¹⁰⁰ by the Council Decision¹⁰¹ of 16

⁹³ HOEREN, para. 51.

⁹⁴ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122, 17.5.1991, p. 42. Directive as amended by Directive 93/98/EEC.

⁹⁵ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346, 27.11.1992, p. 61. Directive as amended by Directive 93/98/EEC.

⁹⁶ Council 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, OJ L 248, 6.10.1993, p. 15.

⁹⁷ Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L 290, 24.11.1993, p. 9.

⁹⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20.

⁹⁹ WIPO Copyright Treaty (WCT) Geneva (1996), OJ L 89/8, 11.4.2000.

¹⁰⁰ WIPO Performances and Phonograms Treaty (WPPT) Geneva (1996), OJ L 89/15, 11.4.2000.

March 2000, stating that WIPO Treaties will help to ensure a balanced level of protection for works and other subject matter, while allowing the public access to material available via networks. In the said Decision, the EU informed that the subject matter of the WCT and the WPPT falls to a large extent within the scope of existing Community directives in this field and guaranteed that the Member States will bring into force the measures adopted by the European Parliament and the Council necessary to adapt the existing Community legislation to the obligations deriving from the WCT and the WPPT.

2. E-Europe Action Plan for Information Society and Intellectual Property

In the 21st century, the challenge set for Europe is to embrace the digital age and become a competitive knowledge-based economy. EU plans to achieve those goals by "eEurope", the EU's scheme for guiding the process of change towards information society by 2010.

In the 1990's digital technologies have proved to be a powerful engine for economic growth and competitiveness in all over the world, mainly in US and Japan. With the inclusion of knowledge-based technologies, the vital rivals of

¹⁰¹ Council Decision of 16 March 2000 on the approval, on behalf of the European Community, of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, 2000/278/EC, OJ L 89/6, 11.4.2000.

EU; US and Japan had started to enjoy unprecedented economic growth while EU was left behind in making the adaptations to the digital revolution.

In order to catch up with US and Japan specific measures were set to be taken into consideration by the Community and the Member States for the infrastructures in the sphere of information. The Bangemann Report, Europe and the Global Information Society¹⁰² which is prepared for the European Council meeting on 24-25 June 1994 in Corfu is considered as the first step creating an information society policy for development. The Bangemann Report recognized the information society technologies as generating new industrial revolution and suggested that this new revolution should be encouraged by the liberalization of the telecom sector and the encouragement of legal harmonization.

The main concern in the Bangemann Report was to form a strategy that would give the EU a principal role in the new Information age, in setting the technical, commercial and legislative framework. Within this context, one of the major tasks was to establish a common and agreed regulatory framework for the protection of intellectual property rights, privacy and security of information

¹⁰² The Bangemann Report, Europe and the Global Information Society is available at <http://europa.eu.int/ISPO/infosoc/backg/bangemann.html>, accessed: 13.8.2003. See also AKDENİZ, CLIVE, WALKER.

and to harmonize the national regulatory systems and to form a functioning internal market for information society.

The European Commission launched the basic outline for eEurope in November 1999 and EU set a new goal of becoming the most competitive knowledge-based society in the world by 2010, at the Lisbon Summit in March 2000.¹⁰³ At the Lisbon Summit, European leaders stressed 3 conclusions;

- businesses and citizens must have access to an inexpensive, world-class communications infrastructure and a wide range of services;
- every citizen must be equipped with the skills needed to live and work in this new information society and
- a higher priority must be given to lifelong learning as a basic component of the European social model.

Subsequent action plans -the Action Plan 2002 endorsed by the EU leaders at their Feira summit in June 2000 and the Action Plan 2005 approved by EU leaders in Seville in June 2002- have set out roadmaps for creating an inclusive information society. Action Plan 2002 placed the Internet at the top of the

¹⁰³ Bilgi Toplumuna Doğru- Taslak Rapor, 386.

European political agenda. Action Plan 2005¹⁰⁴ narrowed the focus by solely engaging with the issues of effective access and the usage and the ready availability of the Internet. The main goal is to achieve on the widespread availability and use of broadband networks throughout the Union by 2005 and to ensure the security of networks and information.

The eEurope scheme is focused on the achievement of information society by putting into effect the necessary legislations and by creating new institutions that serve to this common goal. The EU treaties provide that European laws can be made in order to answer the needs of the Community. In this regard, legislations are adapted to take account of new technologies. eEurope 2002 has achieved significant successes on one of the top priorities which was to modernize the rules and regulations governing the Internet.

The legal framework for governing Internet aims to creation of an environment for business that helps the development of digital skills and services. Harmonization is targeted to contribute to the proper functioning of the Single Market, by ensuring the free movement of the information society goods and services. In this context EU adopted a legal framework for electronic commerce, copyright protection and eu. top level domain that will allow

¹⁰⁴ For more information, see; (accessed: 17.9.2003)

<http://www.euractiv.com/cgi-bin/cgint.exe/429622-60?204&OIDN=1502966&-tt=me:>

European citizens, organizations and businesses to have web-sites and e-mail addresses that end with ".eu".¹⁰⁵ And lately, the Commission proposed a Directive to harmonize the use of public sector information. The strategy of EU towards network security, cyber crime and the data protection was set in the Directive on electronic communications.

The EU endorses that, the regulatory environment concerning Internet should stimulate the development of e-business and promote the opportunities introduced by cyberspace. In this context, the EU has intended to harmonize rules on intellectual property relevant to the global challenge of digital technology. The EU acted in accordance with the four guiding principles for the application of the regulatory environment of information society.¹⁰⁶ These guiding principles are; subsidiarity which foresees the Community action to be applied only for the cases where the mutual recognition of national rules and of appropriate self-regulatory codes is insufficient for the effective functioning of the internal market, the Single Market principles which are coherence, predictability and simplicity, taking account of the business realities and safeguarding of the Community interest.

¹⁰⁵ Information on .eu domain available at <http://europa.eu.int/scadplus/leg/en/lvb/124228.htm> (retrieved: 26.09.2003).

¹⁰⁶ PEARCE, Graham, PLATTEN Nicholas, "Promoting the Information Society: The EU Directive on Electronic Commerce", *European Law Journal*, Vol.6, No.4, December 2000, pp.366-367.

C. The European Legislative Framework of Copyright Protection

1. Directives Relating to the Copyright Protection

The legislative framework of copyright protection in EU can be categorized with nine directives setting the general legal environment for copyright. The Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights¹⁰⁷ lays down the term of protection for copyright and related rights in the Community and provides a protection of 70 years from the author's death. It is 50 years from the date of fixation in the case of a sound recording, broadcast or the like. This is valid for the works of EU authorship or origin. For the works having a third country origin, EU accepts the comparison of terms. According to this, if a work is protected for at least as long as 70 years after its author's death in its country of origin, then it will also be subject to copyright protection of 70 years in the EU.

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art¹⁰⁸ provides creators with an adequate and standard level of

¹⁰⁷ OJ L 290, 24.11.1993.

¹⁰⁸ OJ L 272 of 13.10.2001.

protection and eliminate the distortion in the conditions for competition currently existing within the single market for contemporary art. Whereas Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property¹⁰⁹ (amended by Council Directive 93/98/EEC of 29 October 1993¹¹⁰) harmonizes the law relating to rental right, lending right and certain rights related to neighboring rights so as to provide a high level of protection of literary and artistic property.

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and related rights of copyright applicable to satellite broadcasting and cable retransmission¹¹¹ fills the gaps in the protection of programs broadcast across borders where satellite broadcasting or cable retransmission are involved.

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases provides¹¹² harmonized copyright protection and protection through a new specific sui generis right for databases.

¹⁰⁹ OJ L 346, 27.11.1992.

¹¹⁰ OJ L 290, 24.11.1993.

¹¹¹ OJ L 248, 06.10.1993.

¹¹² OJ L 77, 27.03.1996.

European Parliament and Council Directive 98/84/EC of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access¹¹³ is designed to guarantee across the European Union an equivalent level of legal protection for services whose remuneration relies on conditional access such as pay-television and pay-radio services, on-demand video and audio services, electronic publishing and a large range of on-line services that are available to the public on a subscription or pay-per-view basis.

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs¹¹⁴ (amended by Council Directive 93/98/EEC of 29 October 1993¹¹⁵) harmonizes Member States' legislation regarding the protection of computer programs in order to create a legal environment which will afford a degree of security against unauthorized reproduction of such programs.

European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society¹¹⁶ adapts legislation on copyright and related rights to reflect technological developments and, in particular, the information society, and to transpose into Community law the main international obligations arising from

¹¹³ OJ L320, 28.11.1998.

¹¹⁴ OJ L 122, 17.05.1991.

¹¹⁵ OJ L 290, 24.11.1993.

¹¹⁶ OJ L 167, 22.06.2001.

the two treaties on copyright and related rights adopted within the framework of the World Intellectual Property Organization (WIPO) in December 1996.

Lastly, Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights¹¹⁷ is prepared to bring together all the different pieces of EU legislation which are currently applicable to intellectual property and other related rights. With this new directive EU leaves the thematic approach to the protection of intellectual property rights which has resulted in a fragmented body of legislation covering a variety of issues (copyrights, trade marks, authors' rights, designs, counterfeiting and piracy, computer programs, etc.) and sets standardized rules for all of them. The main aim of this directive is to create more predictability for European businesses.

All of the directives mentioned above form the legal structure of copyright protection in EU, however only three of them manage to harmonize copyright protection in the digital environment; European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Copyright Directive), Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, and Directive 96/9/EC of the European Parliament and of

¹¹⁷ OJ L157, 30.4.2004.

the Council of 11 March 1996 on the legal protection of databases. These directives try to meet the need for legislations deliberated in accordance with the realities and the possibilities of the technological developments.

The Copyright Directive is regarded as the most important move for creating uniform rules for copyright and related rights with respect to particularly important user rights and exemptions for the purpose of achieving maximum freedom of the circulation of goods and services within the European Single Market. The Copyright Directive targets attaining the *acquis communautaire* in the field of copyright, and maintaining the necessary balance of interests between the copyright protection of providers and the justified user interests of European consumers on the Internet.¹¹⁸

Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (EU Copyright Directive) is the most recent Directive on copyright which sets the rules for the online environment in compliance with the WIPO Internet Treaties and therefore stands as the reference point for evaluating the copyright protection on Internet.

¹¹⁸ LEHMANN Micheal, "The EC Directive on the Harmonization of certain aspects of copyright and related rights in the Information Society,- A Short Comment", ICC International Review of Industrial Property and Copyright Law, Vol.34, No:5, 2003, pp. 522-523.

Apart from the legislations in force, within the Fifth Framework Program, EU established an IPR Helpdesk Copyright and Internet Guide¹¹⁹ in order to inform EU citizens on the use of copyrighted work on their websites and to protect the rights of the copyright owners. In this guide, EU sets some basic rules to be followed in order to use the content in accordance with copyright law.¹²⁰ The first step is to define the set of elements required for the website (text, pictures, music, photo, etc.) and detect the required use (extract, reproduction, publication, etc.). Secondly, the elements eligible for copyright protection for which the duration of protection has not expired should be examined. Thirdly, it should be noted if the projected use requires the consent of the author or whether there is an exemption for the user. In case that there is no exemption, the user should identify all of the copyright owners in order to make contracts with authors to get their authorizations for the specific use of their copyrighted work.

¹¹⁹ The European Commission has set up an Intellectual Property Rights Helpdesk on the Internet, aimed at protecting the intellectual property rights. Information is available in English, French and German. It provides information about national legislation, national associations, advice and support agencies with links to full text and websites.

Available at www.ipr-helpdesk.org/guias/guia2/en/guia.pdf

¹²⁰ IPR Helpdesk Copyright and Internet Guide, pp. 2-3.

2. EU Copyright Directive

European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (EU Copyright Directive)¹²¹, establishes the framework for the legal protection of copyright and related rights in the information society. The Copyright Directive is considered as the most significant move for creating uniform rules for copyright and related rights on the Internet to imply freedom of the circulation of goods and services within the European Single Market. It deals with the rights of creators of copyrighted material to control the electronic reproduction and dissemination of their works, including digital broadcasting and services available to consumers “on demand” and also provides exceptions to those rights to ensure that browsers can make temporary copies of works for caching purposes which is essential for reducing the bandwidth traffic.¹²²

EU Copyright Directive is a complementary legislation to the current legal environment concerning the protection of computer programs, rental and lending rights and the protection of databases but does not include provisions for the question of transmissions between Member States or from third

¹²¹ OJ L 167, 22.06.2001.

¹²² SAXBY Stephen, “New Copyright Regulations Make Their Debut - Editorial” Computer Law & Security Report Vol. 19 No. 2, 2003, p. 443.

countries. However, it should be noted that Copyright Directive foresees an adjustment with the provisions of Database Protection Directive and Electronic Commerce Directive.

a) Rights and Exceptions

Articles 2 to 4 set out the rights protected by the Copyright Directive. Exclusive rights over the reproduction are listed in Article 2 whereas provisions regarding communication and distribution right of originals or copies of protected works are given in Article 3 and in Article 4. Accordingly, the right of distribution is granted to authors only, however, the rights of reproduction and communication to the public are also granted to the holders of related rights namely, performing artists, phonogram producers, film producers and radio broadcasting organizations. The rights of reproduction and communication to the public are applicable for both analog and digital broadcasts provided by wire or over the air.

Article 2 of the EU Copyright Directive covers the reproduction right, stating that Member States should provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. This right covers all acts necessary for the reproduction essential to online transmission. The exclusive right of reproduction permits right holders to authorize or prohibit 'direct or indirect,

temporary or permanent reproduction by any means and in any form, in whole or in part,' of authors' works and performances protected by related rights"¹²³

This exclusive right can be used by authors for works, performers for the fixations of their performances, phonogram producers for their phonograms, producers for the first fixations of films, in respect of the original and copies of their films; and by broadcasting organizations for fixations of their broadcasts. The most important aspect of this Article is that it gives the exclusive right of reproduction without any limited clause of form. Broadcasts can be transmitted by wire or over the air, including by cable or satellite, in any form.

Article 2 elaborates the reproduction right much more widely than the provisions of Berne Convention.¹²⁴ The reproduction right in Copyright Directive provides the creator a wider scope in authorizing and controlling the copy of his work. Accordingly, authors, performers, phonogram producers, producers of films and broadcasting organizations have the right to authorize or prohibit reproduction in whole or in part, directly or indirectly, temporarily or permanently, in sum by any means and in any form.

¹²³ KREVER, André, "European Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society", UNESCO Copyright Bulletin, Vol. 35 No.1, January-March 2001 p. 6.

¹²⁴ Article 9(1) of Berne Convention reads as follows; "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form".

This is such a broad concept of reproduction right, mostly related to the copying processes in the digital environment of Internet. Accordingly, right of reproduction covers the acts of feeding a work into a computer and depositing it in a RAM. Uploading a work on to the Internet is also accepted as a restricted act as it falls within both the act of reproduction, and issuing copies to the public. There should be a license in order to transmit a copyrighted work by any means.

The right of communication to the public is provided in Article 3 and it is based on Article 8 of WCT and Article 14 of WPP.¹²⁵ It gives the authors an exclusive right to authorize or prohibit any communication to the public of their works. How this communication takes place whether by wire or wireless means is not a determining factor for this right. So, the right of communication to the public applies to all works without exception, covering also broadcasting. Whereas this Article also includes the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them. This is totally related to the interactive online communication on the Internet and claims that it is not important whether the members of the public reach that work at the same time that the author makes available it to the public or not. The time and place of

¹²⁵ ARIKAN Dr. Ayşe Saadet, "İnternetin Fikri ve Sınai Haklar Üzerindeki Etkisi", Uluslararası İnternet Hukuku Sempozyumu, 21-22 Mayıs 2001, İzmir, Dokuz Eylül Üniversitesi Yayını, İzmir 2002. p. 91.

access to work is not determining the right and is not affecting the exclusiveness of this right of communication to the public.

The second paragraph of Article 3 outlines the related rights, provided that the right of communication to the public is also valid for performers, of fixations of their performances, for phonogram producers, of their phonograms, for the producers of the first fixations of films, of the original and copies of their films and for broadcasting organizations, of fixations of their broadcasts. These broadcasts can be transmitted by wire or over the air, including by cable or satellite.

In the third paragraph of Article 3 it is stated that the rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article. This is an escape clause for the service providers that only provide infrastructure from the position of infringing the communication right of the holder.¹²⁶

Article 4 lies down the provisions concerning the distribution right. Accordingly, authors have the exclusive right to authorize or prohibit the distribution of their original works or copies to the public.

¹²⁶ ARIKAN 95.

Article 4(1) of the EC Directive requires Member States to provide authors, in respect of their works or of copies thereof with the exclusive right to any form of distribution to the public by sale or otherwise.¹²⁷ So that the distribution act is not limited by a single form and it covers Internet and any kind of interactive platform. In addition to this, the phrase of “sale or otherwise”¹²⁸ used in the first paragraph of Article 4 means that distribution right covers both sale and rental. This Article refers only to authors as the right of holders of related rights authorizing the distribution of tangible media is provided by Directive 92/100¹²⁹ (rental right, lending right and other related rights). Article 3(1) of Directive 92/100 defines lending as making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public. This lending right does not include every non-profit loan and only accepts loans for the public libraries and public institutions.

Article 4 states that the distribution right of the original or copies of the work can only be exhausted within the Community if the first sale or other

¹²⁷ HAYES David L., “Internet Copyright; Advanced Copyright Issues on the Internet Part II”, Computer Law & Security Report Vol. 17 No.1, 2001 pp. 3-10.

¹²⁸ Article 4(1) states; “Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise.”

¹²⁹ Council Directive of 19 November 1992, on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346/61

transfer of ownership is realized in the Community with the consent of the rightholder.¹³⁰ In the EU, the exhaustion of distribution rights is realized by the first sale within the European market.¹³¹ According to this principle, publishers can not prohibit the resale of books. However, the holder of the communication rights may prohibit secondary markets in those works. This prevents resale of their services, supporting the effectiveness of any differential pricing employed.

In Community exhaustion, the exhaustion copyright is realized with the free movement of goods that embody a protected work, when the right of distributions has been exercised in one Member State. , then the tangible copy of the work may be distributed commercially throughout the Community. Exhaustion is confined to the right of distribution and may not be applied to the right of reproduction proper, to the right of communication to the public or to rental right, the latter two acts being considered under the heading of the provision of services and not that of the movement of goods.”¹³²

In addition to this, it is stated in Recital 29 that rights in services, particularly those supplied on-demand, can not be exhausted by a sale within

¹³⁰ The Directive, on the contrary, decides against international exhaustion and opts for Community exhaustion only (the same solution as in Directive 91/250 on computer programs: Article 4c, Directive 92/100 on rental right and lending right; Articles 1 and 9, and Directive 96/9 on databases).

¹³¹ Recital 28 of the EU Copyright Directive.

¹³² KREVER 9.

the EU. According to the Recital 29, unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every online service is in fact an act which should be subject to authorization where the copyright or related right so provides. So when a copyrighted material is presented to the interactive use on the Internet, such a service does not cause the exhaustion of the right of distribution. On the contrary, if Internet is used as a delivery platform for electronic commerce, then exhaustion of the right of distribution occurs. Therefore when a work is sold and only supplied via the Internet then the exhaustion occurs.¹³³

Article 5 lists the exceptions and limitations to the provisions of reproduction occurred from the use of technology and the new electronic environment. During the proposal period, Article 5 has been critiqued due to its non-mandatory list of exceptions and limitations. The determination of the exceptions to copyright in EU is done in accordance with the provisions of the international treaties –the Berne Convention and the WTO Agreement. Exceptions and limitations which conform to the so-called “three-step test” of Berne Convention (Article 9 (2)); the exception (i) must apply only to certain

¹³³ LEHMANN, 524, footnote 21.

special cases, (ii) must not conflict with the normal exploitation of the work nor (iii) unreasonably prejudice the legitimate interests of the author¹³⁴

The first paragraph outlines the exceptions that Member States are obliged to apply in their national law, the second paragraph gives the list of optional exceptions left to the discretion of Member States. According to the Article 5, if the purpose of the act of temporary reproduction which is a fundamental (essential and integral) part of a technological process is to enable transmission in a network between third parties by an intermediary or a lawful use of the work copyrighted, it can be exempted from the provisions of Article 2.¹³⁵ However, the main criterion here is that this act should not have an independent economic significance. This is to ensure that there should be a fair balance between different types of rightholders and consumers. It should also be noted that according to Article 5, providing communications facilities does not by itself qualify as making a communication. This exception is very much related to the responsibilities of Internet Service Providers running services of Web caches. According to the provisions of Article 5(1) of the Directive technical

¹³⁴ PHILIPS, FIRTH 206.

¹³⁵ ARIKAN 93.

acts of reproduction, in routers and servers of the Internet are not regarded as the infringing act as long as their technical nature is assured.¹³⁶

Moreover, Member States may provide for exceptions or limitations to the reproduction right for the reproductions on paper or any similar medium, affected by the use of any kind of photographic technique or by some other process having similar effects, covering digital technologies. Recital 33 of the Copyright Directive prevents proxies from altering cached data, and mandates “widely recognized and used” technology that provides information on access to data by users to rightholders.

Exceptions to reproduction right listed in second and third paragraph of Article 5. The five possible exceptions are: photocopying (except sheet music); non-commercial private use (fair compensation should be paid); non-commercial acts by libraries, educational establishments, museums and archives; ephemeral recordings made by and for broadcasting organizations (exceptional documentary character should be ensured); and non-commercial reproduction of broadcasts by social institutions (fair compensation should be paid). Article 5(2)(b) states that reproductions on any medium made by a natural person for private use, either directly nor indirectly commercial should be subject to the rightholders’ consent or a fair compensation. This provision

¹³⁶ LEHMANN 524.

supports the understanding that any kind reproduction made on the Internet for personal use, with a direct or indirect commercial dimension should be subject to consent of rightholder or a fair compensation should be paid. However, it should be noted that the right of fair compensation is not a right of remuneration gained by the copyright protection, but a right to be compensated where the exception is prejudicial to the right-holder.

Recital 35 details the case of minimal damage. In such a case, payment is not required. However, Directive gives the Member States to have to right of requiring payment of fair compensation if it is necessary for the effective implementation of the copyright protection. This means that what fair compensation is determined by the Member States at the national level.

Exceptions for unrestricted use are given in Article 5(3) and they are related to both the reproduction and communication rights. The implementation of these exceptions remains under the discretion power of Member States. These exceptions are important for the social policies of the Union where EU believes all necessary measures should be taken in order to reach a content society. It is also vital for the exception that the acts listed in Article 5(3) should

be non-commercial. Accordingly, Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3.¹³⁷

The exemption related to the use in connection with the demonstration or repair of equipment can be evaluated as an exemption introduced for the hardware and computer program production. In addition to this, exemption associated with the analogue use is totally related to the cultural and social aspects of the Member States' domestic markets.

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- a) ¹³⁷ the purposes of teaching and scientific research (as long as the source, including the author's name, is indicated);
 - b) use by disabled persons; news reporting (published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character);
 - c) quotations for purposes such as criticism or review;
 - d) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
 - e) use of political speeches as well as extracts of public lectures;
 - f) use during religious celebrations or official celebrations organized by a public authority;
 - g) use of works of architecture or sculpture, made to be located permanently in public places;
 - h) use for the purpose of advertising the public exhibition or sale of artistic works;
 - i) caricature, parody or pastiche;
 - j) use in connection with the demonstration or repair of equipment;
 - k) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
 - l) use by communication or making available, for the purpose of research or private study,
 - m) use in certain other cases of minor importance where exceptions or limitations already exist under national law provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community.

Article 5.4 permits any exceptions to the reproduction right provided in Articles 5.2 and 5.3 to be applied to the distribution right to the extent justified by the purpose of the authorized act of reproduction. This means that Member States should act logically when applying extra exemptions and should respect the harmonization objectives of the EU.

Article 5(5) limits copyright exceptions to “special cases” which do not conflict with “normal exploitation” of copyright materials or “unreasonably prejudice” legitimate rights held. Recital 44 states that exceptions should be exercised in accordance with international obligations. Therefore, Member States should implement exemptions in line with the globally accepted principles of copyright protection. This means that the application of the copyright protection should meet the conditions set by the Berne Convention¹³⁸ which are also relevant for the new economic environment. There are three conditions introduced by the Berne Convention and this is called as the ‘three-step test’ principle. Accordingly the exceptions must be applied only in special cases; the exceptions must not conflict with normal exploitation of the work; and

¹³⁸ The “three-step test” from the Berne convention and TRIPS is included in Article 5.5. For three-step test see also DUSOLLIER, POULLET, BUYDENS 11, RICKETSON, BARRISTER 20-21.

the exceptions must not unreasonably prejudice the legitimate interests of right-holders.”¹³⁹

b) Management of Digital Rights

Before the adoption of the Copyright Directive, technological measures were addressed in other directives on the legal protection of computer programs and conditional access.¹⁴⁰ Article 7 of the Computer Program Directive requires that Member States adopt remedies against anyone who puts into circulation or possesses for commercial purpose any means of which the sole purpose is to facilitate the unauthorized removal or the circumvention of any technical device which may have been applied to protect a computer program.¹⁴¹

Whereas the Conditional Access Directive¹⁴² bans the business of trafficking in illicit devices which are defined as “equipment or computer program designed or adapted to give access to a protected service in an

¹³⁹ KREVER 11.

¹⁴⁰ CUNARD, HILL, BARLAS 72.

¹⁴¹ CUNARD, HILL, BARLAS 82.

¹⁴² Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access, Official Journal L 320/54, 28/11/1998. The Conditional Access Directive was adopted in 1998 to protect access to and remuneration for various kinds of services delivered electronically and through means of conditional access. It applies to online services, as well as to television and radio broadcasting, whether by wire or over the air (including by satellite), as well as “information society services.” (Article 2(a)).

intelligible form without the authorization of the service provider and requires Member States to abolish the manufacturing, sale and rental of such devices, and their possession for commercial purposes, as well as their installation, maintenance or replacement and commercial promotion.¹⁴³

According to Article 6, Member States have to provide adequate legal protection against the circumvention of any effective technological measures, irrespective of whether there is an infringement or not. However, it is noted that the user must know or have reasonable grounds to know if he is causing such circumvention.

Currently, the unauthorized uses of the illicit copies of pre-recorded CDs, the duplication of computer programs, the unlicensed reception of broadcasts and the cable diffusion and hacking into valuable and confidential databases are regarded as the most frustrating problems in the digital environment.¹⁴⁴ Software counterfeiters operate on a commercial scale in most parts of the world, particularly in developing countries, involving small scale manufacturers

¹⁴³ CUNARD, HILL, BARLAS 83.

¹⁴⁴ PHILIPS, FIRTH 11-12.

using relatively low-cost technology for the duplication of software using recordable CD burners.¹⁴⁵

It is a common approach that there is a need for a sophisticated technological measure requiring firstly the protection of law but mostly help the protection of copyright on the net. The recent E-Content Plus program introduced as a grant scheme to boost electronic business focuses on the expansion of the use of digital right management in line with the legal framework.

In the second paragraph of Article 6, the protection against the circumvention of technological measures is extended to certain acts, namely; manufacturing, importing, distribution, sale, rental or advertisement of circumvention devices or services and their possession for commercial purposes. Recital 49 provides that States have the right to apply further ban on private possession of circumvention devices, if it is necessary. The most crucial part of this provision is that it is irrelevant whether the purpose of the device is copyright infringement or not.

¹⁴⁵ BLAKENEY Michael, "Guidebook on Enforcement of Intellectual Property Rights", p. 12, WIPO administers a Cooperation for Development Program to enable developing countries all over the world to establish or modernize intellectual property systems and to combat counterfeiting and piracy.

Article 6(3) defines “technological measures”. According to the provisions of this Directive “technological measures” means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorized by the rightholder of any copyright or any right related to copyright. Simply, any mechanism used for restricting acts which are not authorized by a rightholder is regarded as technological measures. However, it is also noted in Article 6(3) that technological measures should be deemed “effective” where the use of a protected work is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or a copy control mechanism.

In addition to the protections listed above, Recital 48 brings limitations to Member States on the extension of protection for technical measures in order to safeguard the normal operation of electronic equipments and their technological development. Recital 48 also states that implementations should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. Finally for Recital 48, legal protection for technical measures “should not hinder research into cryptography.”

Article 6.4 specifies the measures that should be applied with the exceptions in Article 5. Article 6(4) does not provide protection against liability for circumvention offences however it calls for rightholders to take voluntary

measures to allow the exercise of certain exceptions by the way of agreements signed between rightholders and other parties concerned. The main idea is to facilitate the reproduction right exceptions in Article 5.2 and reproduction and communication rights exceptions in Article 5.3 by guaranteeing the rightholders right to restrict the number of private copies to be made. The technological measures applied voluntarily by rightholders in the implementation of voluntary agreements are also protected.

When the rightholders are unable to implement the voluntary measures, Member States are obliged to take appropriate measures. However on-demand services which are defined in the Recitals 25 and 53 as agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them may cause problems on the calculation of fair compensation. According to the Recital 35, during the calculation of fair compensation, the factors affecting it should be taken into consideration. Furthermore, Recital 52 safeguards the commercial interests of the rightholder against the unwanted consequences of exemptions for private digital reproduction.

Article 7 sets the obligations related to the electronic rights management information. Electronic rights management information is any kind of data provided by rightholders in order to identify that work, its author or the terms and conditions of access to it.

According to the second paragraph of Article 7, electronic rights management information should be related to the copy of a protected work or communication to the public of it.¹⁴⁶

The first paragraph of Article 7 outlines the acts against which Member States should provide for adequate legal protection.¹⁴⁷ Those acts are; removal or alteration of any electronic rights-management information and the distribution, importation for distribution, broadcasting, communication or making available to the public of works. However it should be noted that rights management systems should be in line with the principles of privacy set by the Data Protection Directive.

The most significant aspect of Article 7 is that the acts stated above should be performed knowingly; meaning that intent is the key element in determining the adequate legal protection.

¹⁴⁶ For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

¹⁴⁷ ARIKAN 98.

c) Common Provisions

Article 8 obligates Member States to provide effective, proportionate and dissuasive sanctions which are parallel to the 3-step-test of Article 9(2) of Berne Convention and remedies in respect of infringements of the rights and obligations set out in the Copyright Directive. Member States are entitled to take all the measures necessary to ensure that those sanctions and remedies are applied fully. Additionally, Member States are obliged to ensure that rightholders have the right to bring actions for damages and apply for an injunction against intermediaries¹⁴⁸ whose services are used by a third party to infringe a copyright or related right. The Directive is in compliance with the the provisions of the WIPO treaties, to take adequate legal steps to prevent circumvention of technological measures designed to ensure respect for or the identification of copyright and related rights associated with the reproduced or communicated work, and respect for the sui generis right of database producers.¹⁴⁹ Accordingly, Recital 58 states that rightholders can obtain injunctive relief and

¹⁴⁸ Despite the mandatory exception in Article 5.1(a) for online services, Article 8.3 and Recital 59 require that rightholders must also be able to apply for an injunction against an intermediary whose services are being used to infringe their rights. Article 12 of the E-Commerce Directive³⁴ provides a “mere conduit” defense for intermediaries, but this may be overridden by a court or administrative authority action. Recital 16 states that the Copyright Directive should be implemented without prejudice to the liability provisions of the E-Commerce Directive.

¹⁴⁹ KREVER 5.

apply for seizure of infringing materials and circumvention devices, including devices, products or components referred to in Article 6(2).

In case of intermediaries, Article 8(3) provides that it is possible to apply for injunctive relief against intermediaries whose services are used by a third party to infringe a copyright. This is particularly relevant for the service providers offering hosting services.”¹⁵⁰ This issue is analyzed in detail in the Liability of the Online Intermediaries Chapter.

Article 9 ensures that existing legal provisions related to intellectual property rights¹⁵¹ shall not be affected by the Copyright Directive. It states in Recital 50 that provisions on reverse engineering for computer program compatibility in the Computer program Directive shall also not be affected. This means that the circumvention of technical measures protecting computer program for developing compatible computer program, and the development of devices that perform such circumvention, will not be prohibited in implementing Articles 6(1) and 6(2).

¹⁵⁰ LEHMANN 529.

¹⁵¹ This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

The administrative provisions stated in Articles 10-15 are related to the implementation of the Copyright Directive. Accordingly, the provisions set by this Directive shall be applied without prejudice to any acts concluded and rights acquired before 22 December 2002. This is the retrospective effect of the Directive. There are also some technical adaptations and amendments¹⁵². The deadline for implementation and entry into force is 22 December 2002 and there will be a review in every three years.

The Commission is entitled to submit a report by 22 December 2004 to the European Parliament, the Council and the Economic and Social Committee on the application and the effects of the Directive within the context of the developments in the digital environment. Copyright Directive also establishes a contact committee which is composed of representatives of the competent authorities of the Member States and chaired by a representative of the Commission. The role of contact committee will be examining the impact of the Directive on the functioning of the internal market, organizing consultations on

¹⁵² Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public. However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society(11) the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

the Directive, facilitating the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments; and acting as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

d) Implementation of Copyright Directive

Directive foresees 19 months for implementation by Member States however, only Denmark and Greece met this deadline. As a consequence of this delay, on 14 July 2003 the European Commission announced that it has decided to send reasoned opinions to Belgium, Germany, Spain, France, Ireland, Luxembourg, the Netherlands, Portugal, Finland, Sweden and the UK for failure to implement the Copyright Directive by 22 December 2002.¹⁵³ In UK, on 31 October 2003, the Copyright and Related Rights Regulations 2003 which implement EC Directive 2001/29/EC on the Harmonization of Certain Aspects of Copyright in the Information Society came into force.¹⁵⁴ For the three European States; Belgium, Finland, and Sweden that still have not implemented the

¹⁵³ Press Release, accessed: 25.9.2003, available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/03/1005|0|RAPID&lg=EN&display=

¹⁵⁴ COOK, Trevor, "UK implementation of the Copyright in the Information Society Directive", Computer Law & Security Report Vol. 20 No. 1, 2004 pp. 17-21.

Copyright Directive, the current approach of the European Commission consists of warning and threatening with fines.¹⁵⁵

3. The Complementary Legislations to Copyright Protection: Protection of Databases and Computer Program

Information society brought up the challenge of building a balanced and coherent legal framework that takes account of the changes in the economic and socio-cultural environment while at the same time safeguarding the fundamental rights and freedoms in the digital world. Intellectual property is one of those founding rights.

In the last decade, the legal framework concerning intellectual property rights in EU was analyzed and new legislations were put into effect in order to cover new technologies and to meet the needs of the information society targeted. However, in reality adoption of laws tailored to the needs of information society is not sufficient as it is already apparent that the simplicity of digital copying has led to the infringement of copyrights on a much larger scale than it was considered possible just several years ago. Therefore effective enforcement of legal measures should be guaranteed to prevent illicit acts.

¹⁵⁵ US and European Governments Step Up Digital Copyright Efforts, March 24, 2005, DRM Watch.com, accessed on 24.03.2005.

Copyright and related rights in the Member States of the European Union depend increasingly on Community law adopted in the form of ‘Directives’¹⁵⁶, which requires Member States to attain certain objectives by ‘transposing’ the related text into their law or national regulations in accordance with their constitutional procedure.

In the field of copyright and related rights in information society, two Directives have already been adopted and transposed. These Directives concern the legal protection of computer programs and the legal protection of databases. (Hereafter “Database Directive” and “Computer program Directive”)

a) Directive 96/9 of the European Parliament and of the Council on the Legal Protection of the Databases¹⁵⁷

Since databases were regarded as one of the vital tools in the development of an information market within the EU and the amount of information generated and processed is highly dependent on the investments in modern information storage and processing systems, in the second half of the 90’s, a need of introducing a stable and an uniform legal framework for the protection of the rights of makers of databases had become more visible.

¹⁵⁶ Directives are explained briefly in Chapter 2.

¹⁵⁷ O.J. 1996, L77/20.

In accordance with this need, in 1996, the EU adopted a Directive on the legal protection of databases¹⁵⁸ in order to prevent the negative effects of the differences in the legal protection of databases offered by the legislation of the Member States. This Directive was aiming at the efficient functioning of the internal market and achieving harmonization of the copyright protection for databases in particular the freedom of natural and legal persons providing online database goods and services. The main aim of the Directive is to protect the natural and legal persons that invest considerable human, technical and financial resources in the creation of databases from the illicit acts of unauthorized copying, extraction and the use of the database, giving rise to serious economic consequences.¹⁵⁹

The basis of this Directive was the Green Paper on Copyright and the Challenge of Technology, published by the European Commission in 1988.¹⁶⁰ In this Green Paper, the Commission debated the idea that copyright might not be adequate for protecting database producers and invited the interested parties to express their views. In 1991, the Commission began to reevaluate the legal status of databases, in the process of formulating an overall strategy for

¹⁵⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases Official Journal L 077 , 27/03/1996 pp. 0020 – 0028.

¹⁵⁹ DUMORT, Alain, DRYDEN, John, “The Economics of the Information Society”, Luxembourg:Office for Official Publications of the European Communities, 1997, p. 26.

¹⁶⁰ Green Paper on Copyright and the Challenge of Technology, published by the European Commission in 1988, COM(88) 172 final.

information technologies under the Information Market Policy Action Program¹⁶¹ (IMPACT).¹⁶²

On the 13th of May, 1992, the Commission presented its initial proposal to the Council for a framework Directive on the legal protection of databases. The proposal was prepared in relation to the comments of the interested parties and particularly in line with the international applications. Until the date of the enactment of the Directive, for four years, European decision-making process continued with its entire means and a large number of amendments were made on the initial proposal. Finally on the 11th of March 1996, the Directive 96/9 of the European Parliament and of the Council on the Legal Protection of the Databases¹⁶³ was put into effect obligating the Member States to implement the provisions of the Directive by the 1st of January, 1998 (Article 16 (1)). Only a few states have met this deadline, but by now every EU member has adopted the Directive in its national legislation.

This Directive introduced a sui generis regime for database protection that enable database creators have the right to prevent the extraction of the whole or a substantial part of the contents of the database for a period of 15

¹⁶¹ Report on the IMPACT Program: Main Events and Developments in the Electronic Information Services Market, COM (93) 156 final, 1991.

¹⁶² REICHMAN J.H., SAMUELSON Pamela, "Intellectual Property Rights in Data?" Vanderbilt Law Review, .Vo.51 January, 1997.

¹⁶³ O.J. 1996, L77/20.

years.¹⁶⁴ However, this approach has caused arguments on the protection method which protects investment rather than the original creative expression.¹⁶⁵

(1) *The Basic Provisions of the Directive 96/9 of the European Parliament and of the Council on the Legal Protection of the Databases*¹⁶⁶

In order to harmonize the legal framework establishing the copyright protection, the Directive introduces a unique definition of database as a starting point. As database is more than a mere collection of simple data, most of the time it is rather a compilation of works.¹⁶⁷ The quantity or a collection of data is used for the amount of information stored in a computer which can process this information and retrieve from information in a case of a call, whereas a collection of work is used for the materials arranged, stored and accessed by electronic means. The electronic materials necessary for the operation of the

¹⁶⁴ Bilgi Toplumuna Doğru- Taslak Rapor, 398.

¹⁶⁵ Integrating Intellectual Property Rights and Development Policy 108, GORDON 628.

¹⁶⁶ O.J. 1996, L77/20.

¹⁶⁷ Encyclopedia or multimedia CD fall within the scope of the database definition in the framework of Database Directive.

database include index or system for obtaining and presenting the information.¹⁶⁸

Article 1(2) of the Directive defines the database as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.¹⁶⁹ As the main aim of this Directive is to provide an appropriate and an uniform level of legal protection to solely databases in any form whether electronic or non-electronic; “paper-based” (such as telephone directories, and hybrid databases using microfilm), computer programs used in the making or operation of databases accessible by electronic means are not included within the copyright protection area provided by the Directive.¹⁷⁰ However, it should be noted that in most of the cases the data gathered together to form a database are not the data collected from the outside world, but instead a “synthetic data which is already presented and accessible in the real world. The most common example of synthetic data is a telephone number.¹⁷¹

¹⁶⁸ LIPTON D Jacqueline, “Security Interests in Electronic Databases”, *International Journal of Law and Information Technology*, Vol. 9, No.1, p. 67.

¹⁶⁹ GARZANITI Laurent, “Telecommunications Broadcasting and the Internet: EU Competition Law and Regulation”, Sweet & Maxwell, 2000, (para. 1-163), p. 63.

¹⁷⁰ See, Bilgi Toplumuna Doğru- Taslak Rapor 398, DUMORT, DRYDEN 26.

¹⁷¹ MAURER, Stephen M., HUGENHOLTZ P. Bernet, ONSRUD Harlan J., “Europe’s Database Experiment”, *Science* Vol. 294, accessed: 10.04.2003, available at www.sciencemag.org and at <http://ivir.nl/publications/hugenholtz/maurer.pdf>.

Even though the nature of the elements¹⁷² included in a database is irrelevant for protection¹⁷³, there is a requirement that the data should be arranged in a systematic or methodical way. It is known that systematic structures exist for all collections which are accessible by electronic means. According to the Jeremy and Firth, a computer database differs from a paper compilation in three important aspects.¹⁷⁴ First of all, there is a difference in the nature of the data collected. Computer databases include all kind of digital data. Secondly, in computer databases the system provides reconfigurability meaning that the data can be organized quantitatively and qualitatively. Thirdly, computer databases present a much more efficient system of storage by offering a wide range of manipulation possibilities. In paper compilations, the physical modification of quantities of data is economically impracticable.

The Explanatory Memorandum describes the contents of the database as information in the widest sense of that term. Therefore the definition of database covers literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and

¹⁷² A database may include raw data as well as copyrightable works. However, the existence of a right does not additionally create a separate right in single information items.

¹⁷³ IPR Helpdesk, Database Protection in the EU, p.1, accessed: 16.8.2003, available at [www.ipr-helpdesk.org/documents/docsPublicacion/pdf_xml/8_databseProtectionEU\[0000000650_00J.pdf](http://www.ipr-helpdesk.org/documents/docsPublicacion/pdf_xml/8_databseProtectionEU[0000000650_00J.pdf)

¹⁷⁴ PHILIPS, FIRTH 369.

data and collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed. In general database protection covers all creative and non-creative databases as the protection granted depends upon two different legal grounds;¹⁷⁵ the protection provided for the author's own intellectual creation¹⁷⁶ (creative databases) and the *sui generis* protection provided for the qualitative and/or quantitative investment in database. Non-creative databases¹⁷⁷ are the databases which do not demonstrate an original or creative selection, arrangement or element to obtain legal protection.

However, a recording or an audiovisual, cinematographic, literary or musical work does not fall within the scope of this Directive as a collection of moving images together constituting a movie film is not a database. A database will contain independent elements if the information has some meaning of its own. By contrast, a film which is a collection of still frames will not constitute a database subject to protection as the single elements have no such independent meaning if taken out of the "collections" context.¹⁷⁸ To name a few of well-known electronic databases; the database of Napster Inc's community of

¹⁷⁵ GROSSE RUSE Henning, "Electronic Agents and the Legal Protection of Non-creative Databases", International Journal of Law and Technology, Vol.9 No.3 pp. 297-298.

¹⁷⁶ GARZANITI, (para. 1-164), 63.

¹⁷⁷ GROSSE RUSE 295-326.

¹⁷⁸ IPR Helpdesk, Database Protection in the EU, p. 1.

shared Mp3¹⁷⁹ music files, online versions of telephone directories, online information about the time schedules of various transportation vehicles, databases of electronic commerce ventures like Amazon.¹⁸⁰

Besides according to Recital 21, it is not necessary for those materials to be stored physically in an organized manner. This means that a collection of unorganized data on a hard disk or other digital medium would qualify as a database if combined with database management computer program enabling retrieval of the data. Conversely, a diskette with neatly arranged data, but without a searching algorithm, does not constitute a database.¹⁸¹

In addition to this, computer programs called electronic agents¹⁸² performing the tasks like statistical analysis¹⁸³, maintenance and updating of hypertext structure and resource directory¹⁸⁴ accomplish the gathering of data from the Internet to build up searchable databases that fall within the scope of

¹⁷⁹ MP3 file, an online audio standard, is a compressed audio file of CD quality, recorded from CD to a hard drive. MP3 format makes it easier to transfer audio tracks over the Internet because it drastically reduces upload and download times.

¹⁸⁰ LIPTON .68.

¹⁸¹ HUGENHOLTZ, Prof. P.Bernet, "The New Database Right: Early Case Law from Europe" Paper presented at Ninth Annual Conference on International IP Law & Policy, Fordham University School of Law, New York, 19-20 April 2001, accessed: 15.8.2003, available at <http://www.ivir.nl/publications/hughholtz/fordham2001.html>.

¹⁸² GROSSE RUSE 296-297.

¹⁸³ Statistical analyses include acts like counting the number of Web servers and the documents per server etc.

¹⁸⁴ Automatic browsing by computer programs.

copyright protection. In this regard, databases produced by electronic agents can also be subject to the provisions of EU Database Directive. Moreover, websites containing a collection of data arranged in a systematic or methodical way, are considered eligible for protection as a database as they serve as searchable databases most of the time.¹⁸⁵

Article 4 of the Directive explains the database authorship which is a very crucial part of the copyright protection. Accordingly, the author of a database is a natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the author of a database can also be a legal person designated as the right-holder by that legislation (Article 4 (1)). However, Database Directive does not provide for the transfer of the user rights relating to a copyrightable database to an employer by an employee who has created the database upon the instructions given by his employer.¹⁸⁶ This is left to the discretion of the Member States.

In case that the collective works are recognized by the legislation of a Member State, the economic rights will be owned by the person holding the copyright (Article 4 (2)). In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly (Article 4 (3)).

¹⁸⁵ GROSSE RUSE 303.

¹⁸⁶ GARZANITI, (para. 1-165), 63.

The criteria to determine whether a database should be protected by copyright were shaped with the approach that the selection or the arrangement of the contents of the database should be the author's own intellectual creation.¹⁸⁷ Originality in the sense of the author's intellectual creation is the main determinant of the eligibility of the database for the copyright protection.

Copyright protection for databases is very similar to the traditional copyright law.¹⁸⁸ The author of a database is given a set of economic and moral rights. Article 5 outlines the acts that the author of a database has, such as the exclusive right to carry out or to authorize as a part of the copyright protection.

According to the Article 5 (a) the author has the right of temporary or permanent reproduction by any means and in any form, in whole or in part. Secondly, the author has the right to determine the translation, adaptation, arrangement and any other alteration of the database subject to the protection (Article 5 (b)). Thirdly, as one of the most market-oriented aspects of copyright protection, the author has the right to carry out or to authorize any form of distribution to the public of the database or of copies thereof. The author has the right to control the distribution of works also in physical form (i.e. on CD-

¹⁸⁷ Ibid, (para. 1-164), 63.

¹⁸⁸ Ibid, (para. 1-166), 64.

ROM).¹⁸⁹ His distribution right, in accordance with European judicature, will be exhausted after the first sale of a physical copy, so that copies of a database which have been put on the market with the authors' consent can circulate freely within the EU by exhausting the right to control resale of that copy within the EU (Article 5 (c)). Lastly, the author controls any communication, display or performance to the public (Article 5 (d)).

In Article 6, Directive brings into light some exemptions to the exclusive acts of the authors relying upon the principle of lawful user. The first paragraph of Article 6 states that the performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part. This provision is designed to facilitate the access and the use of databases in accordance with the principle of dissemination of information in the knowledge society.

In addition to the exemptions established for the lawful user, Article 6 also presents Member States an option of limitations on the rights set out in

¹⁸⁹ IPR Helpdesk, Database Protection in the EU, 2.

Article 5.¹⁹⁰ In cases of reproduction for private purposes of a non-electronic database, Member States have the right of applying restrictions. Also where there exists the sole purpose of illustration for teaching or scientific research, Member States may provide the use of the database without prior authorization as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved. Evidently in case of public security Member States have the right to apply the necessary limitations.

(2) *Sui Generis Right for Database Protection*

The Directive protects the database via copyright and introduces a new sui generis right.¹⁹¹ It is a right designed to develop the efficient functioning of the internal market and to minimize the effects of the intellectual property right challenges in the knowledge society.

Sui generis right takes its roots from the perspective of guarding the substantial investment made. However, the Directive does not define “substantial investment” and does not determine a minimal amount of investment required for the sui generis right.

¹⁹⁰ GARZANITI, (para. 1-167), 64.

¹⁹¹ See, PHILIPS, FIRTH, 170, DUSOLLIER, POULLET, BUYDENS, 6, 8, GARZANITI, (para. 1-170 to 1-176), 65-66.

The natural objective of the sui generis right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database as the maker of a database is the person who takes the initiative and the risk of investing.¹⁹² Nevertheless, sui generis right should not have negative effects on the market by distorting the fair competition.

Especially, in the interests of competition between suppliers of information products and services, the protection by the sui generis right must be applied with great care and should not be a facilitator of the abuses of a dominant position.

The legal framework for intellectual property rights should encourage the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value but also should be in line with the competition rules in effect.

Accordingly, Member States provide a right for the maker of a database who is a national of a Member State or who has his habitual residence in the territory of the Community.¹⁹³ . Sui generis right also includes the companies

¹⁹² This provision excludes subcontractors in particular from the definition of the database-maker.

¹⁹³ The beneficiaries of protection under the sui generis right are given in Article 11 of the Database Directive. See, GARZANITI, (para. 1-171), 65.

and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community (Article 11 (2))¹⁹⁴.

This sui generis right shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent *extraction* and/or *re-utilization* of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database (Article 7 (1)). Accordingly, Recital 40 indicates that such investment may consist not only in the form of financial resources, but also as expending of time, effort and energy.¹⁹⁵

Investment can be qualitative like the number of employees or quantitative like time, energy and effort given to the project. According to Article 7 (1), the substantial investment is to be made 'in either the obtaining, verification or presentation of the contents' of the database. The word "obtaining" is used for the collection of data, works or other materials comprising the database as "verification" refers to the checking, correcting and updating of data already existing in the database. "Presentation" is related to retrieval and

¹⁹⁴ When a company or a firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State in order to benefit from the sui generis right.

¹⁹⁵ GOTZEN Frank, "International Protection of Non-creative Databases", UNESCO Copyright Bulletin, Volume XXXV, No. 2, 2001 p. 40.

communication of the compiled data, such as the digitalization of analogue files, the creation of a thesaurus or the design of a user interface.¹⁹⁶

The terminology used in the first paragraph is outlined in the second paragraph of Article 7 in order to create a unique understanding of the acts related to sui generis right. *Extraction* means any kind of permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form.

Re-utilization is any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by online or other forms of transmission. The first sale of a copy of a database within the Community by the right-holder or with his consent will eventually exhaust the right to control resale of that copy within the Community. However, it should be noted that public lending is not an act of extraction or re-utilization (Article 7 (2)).

Sui generis right can be transferred, assigned or granted under contractual license (Article 7 (3)) and is irrespective of the eligibility of that database for protection by copyright or by other rights (Article 7 (4)). This means that the protection of databases by the sui generis right is without

¹⁹⁶ HUGENHOLTZ.

prejudice to existing rights over their contents. In addition, where an author or the holder of a related right permits some of his works or subject matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject matter. Yet, the consent of the author or the holder of the related right is needed. In such a case, without the sui generis right of the maker of the database, a third party may make use of the content. However, it should be noted that those works or subject matter are neither extracted from the database nor re-utilized. Moreover, a lawful user of a database which is made available to the public may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the legitimate interests of the maker of the database. On the other hand, a lawful user may have the right to extract and/or re-utilize only a part of the database in line with the authorization of the author.

Article 8(1) of the Directive provides that the maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part. In the occurrence of online transmission, the right to prohibit re-utilization is not exhausted as the database itself or as a material copy of the database but it is made by the addressee of the transmission with the consent of the right-holder.

For on-screen display of the contents of a database, the act should also be subject to the authorization by the right-holder.

Article 9 outlines the exceptional cases where the sui generis right will not be required. In this context, Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents.

Article 10 sets the provisions regarding the term of protection provided by the sui generis right. Sui generis right is valid from the date of completion of the making of the database and expires fifteen years from the first of January of the year following the date of completion (Article 10 (1)). When the database is made available to public, the term of protection will expire fifteen years from the first of January of the year following the date when the database was first made available to the public (Article 10 (2)). According to Article 10 (3), 'any substantial change, evaluated qualitatively or quantitatively, to the contents of the database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own terms of protection'.

Directive also covers some important aspects of the database protection and categorizes the content subject to the legal protection. Accordingly, the compilation of several recordings of musical performances on a CD does not come within the scope of the Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the *sui generis* right. Databases such as thesaurus and indexation systems are also covered by this Directive.

(3) *Implementation of the Database Directive*

The Directive created a unique two-tier protection scheme of electronic and non-electronic databases. Member States are required to protect databases by copyright as intellectual creations, and by *introducing* a right *sui generis* to prevent unauthorized extraction or reutilization of the contents of a database, the so-called 'database right'.

The deadline for implementation of the Directive has expired on 1 January 1998. Only Germany, Sweden, the United Kingdom and Austria have met this deadline. Most Member States have completed the transposition

process between 1998 and 2000.¹⁹⁷ When the lawsuits in Europe are analyzed, it is seen that at least 50% of all lawsuits have been brought by the tiny minority of companies that own telephone listings, sporting event dates, concert times, and broadcast schedules.¹⁹⁸

b) The Decisions of European Court of Justice on Database Protection

On 9 November 2004, the European Court of Justice (ECJ) gave its first judgments on database right with a reference to the preliminary ruling concerning the interpretation Database Directive 96/9/EC¹⁹⁹. Those judgments include the British Horseracing Board Ltd v William Hill Organization Ltd and the Fixtures Marketing Case.²⁰⁰

¹⁹⁷ HUGENHOLTZ. See also related websites; <http://www.ladas.com/BULLETTINS/2002/0202Bulletin/UKDatabaseProtectionRight.html> (accessed 12.1.2004) and http://www.legalis.net/cgi-iddn/french/affiche-jnet.cgi?droite=decisions/bases_donnees/arret_ca_versailles_110402.htm (accessed 2.1.2004)

¹⁹⁸ MAURER, Stephen M., HUGENHOLTZ P. Bernet, ONSRUD Harlan J., "Europe's Database Experiment", Science Vol.294, accessed: 10.04.2003, available at www.sciencemag.org and at <http://ivir.nl/publications/hughholtz/maurer.pdf>.

¹⁹⁹ Judgment of the Court (Grand Chamber), 9 November 2004 (Case C-203/02).

²⁰⁰ Fixtures Marketing Ltd v. Oy Veikkaus Ab; Case C-203/02, The British Horseracing Board Ltd and Others v. The William Hill Organization Ltd; Case C-338/02, Fixtures Marketing Ltd v. Svenska Spel AB; Case C-444/02, Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou AE (OPAP), all judgments were delivered by the European Court of Justice Grand Chamber on 9 November 2004. The judgments are accessible from http://curia.eu.int/en/content/juris/index_form.htm.

European Court of Justice provided ruling about the interpretation of provisions of the Database Directive in compliance with Article 234 EU Treaty which provides a mechanism for national courts of the EU Member States to refer particular questions of EU law to the European Court of Justice. Article 234 states that the Court of Justice shall have jurisdiction to give preliminary rulings concerning the interpretation of the EU Treaty; the validity and interpretation of acts of the institutions of the Community and of the European Central Bank; the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. When such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. This also applies to the questions raised in a case pending before a court or tribunal of a Member State against whose decisions and when there is no judicial remedy under national law.

(1) ***British Horseracing Board Ltd v William Hill Organization Ltd***

The *British Horseracing Board Ltd v William Hill Organization Ltd*²⁰¹ is a very symbolic case for defining the scope of database right as it bears an important ruling on the application of the Database Directive.²⁰²

In this case, the scope of protection for databases to the distinction between investment in creation and collection of data is tried to be identified with special emphasis to the share price information or where the collection is automated. The most important aspect of his case is its tendency to find a balance between the protection of databases under the sui generis right in the meaning of compensation of authors for their works and the progress of science and the useful arts.²⁰³ The judgment in the *British Horseracing Board Ltd v William Hill Organization Ltd* confirms that indirect as well as direct acts can constitute extraction and reutilization and also that exhaustion of rights does not apply to re-utilization.

²⁰¹ *The British Horseracing Board Ltd and Others v. The William Hill Organization Ltd*; Case C-338/02. The judgment is accessible from the ECJ website at http://curia.eu.int/en/content/juris/index_form.htm.

²⁰² PHILIPS, FIRTH, 362. See also; "Case Report Sui Generis Database Right: The Court of Appeal's Reference to the European Court Of Justice In *British Horseracing Board and Others v William Hill Organization Limited*", *Computer Law & Security Report* Vol. 18 No. 6, 2002, pp. 346-438, "EDITORIAL: European Court of Justice Interprets Key Aspect of Database Directive", *Computer Law & Security Report* (2005) 21, p.1-2, KEMP Richard, MEREDITH David, GIBBONS Caspar, "Database right and the ECJ judgment in *BHB v. William Hill: Dark horse or non-starter?*", *Computer Law & Security Report* (2005) 21, pp. 108-118

²⁰³ "EDITORIAL: European Court of Justice Interprets Key Aspect of Database Directive", 2.

The British Horseracing Board Ltd (BHB) manage the horse racing industry in the United Kingdom and compile and maintain the BHB database which contains a large amount of information supplied by horse owners, trainers, horse race organizers and others involved in the racing industry. The database contains information on the pedigrees of some one million horses, and 'pre-race information' on races to be held in the United Kingdom consisting of horse-racing calendars, fixtures and information on race horses, jockeys, trainers and on owners, the name, place and date of the race concerned, the distance over which the race is to be run, the criteria for eligibility to enter the race, the date by which entries must be received, the entry fee payable and the amount of money the racecourse is to contribute to the prize money for the race. The BHB database contains essential information not only for those directly involved in horse racing but also for radio and television broadcasters and for bookmakers and their clients. The expenses of the company were £16m a year, a part of which was accounted for by its database of horse and race information. The cost of running the BHB database is approximately £4 million per annum. The fees charged to third parties for the use of the information in the database cover about a quarter of that amount.

The database of Horseracing Board containing substantial sums of data of years is kept updated and is available only for the subscribers to an online service. Weatherbys Group Ltd (WG) is the company which compiles and maintains the BHB database by performing three principal functions; (i) the

registration of information concerning owners, trainers, jockeys and horses and of the records the performances of those horses in each race; (ii) making decisions on adding and handicapping for the horses entered for the various races; (iii) compiling the lists of horses running in the races. WG performs all of these three functions by its own call centre, manned by about 30 operators, which indeed is a considerable investment. The telephone calls are recorded and the identity and status of the person entering the horse and whether the characteristics of the horse meet the criteria for entry to the race are then checked. After the checks, the entries are published provisionally. In order to join the race, the trainer must confirm the horse's participation by telephone by declaring it the day before the race at the latest. The operators must then ascertain whether the horse can be authorized to run the race in the light of the number of declarations already recorded. A central computer then allocates a saddle cloth number to each horse and determines the stall from which it will start. The final list of runners is published the day before the race.

The database is accessible on the Internet site operated jointly by BHB and WG. A part of its contents is also published weekly in the BHB's official journal. Some part of the contents of the database is also made available to Racing Pages Ltd, a company jointly controlled by WG and the Press Association, which forwards data to its various subscribers, including some bookmakers, in the form of a 'Declarations Feed', a day before the race. Satellite Information Services Limited ('SIS') is authorized by Racing Pages to

transmit data to its own subscribers in the form of a 'raw data feed' ('RDF'). The RDF includes a large amount of information, in particular, the names of the horses running in the races, the names of the jockeys, the saddle cloth numbers and the weight for each horse. Through the newspapers and the Ceefax and Teletext services, the names of the runners in a particular race are made available to the public during the course of the afternoon before the race.

William Hill, which is a subscriber to both the Declarations Feed and the RDF, is one of the leading providers of off-course bookmaking services in the United Kingdom, to both UK and international customers. It launched an on-line betting service on two Internet sites. Those interested can use these sites to find out what horses are running in which races at which racecourses and what odds are offered by William Hill, by making use of information derived from the Board's database. The information displayed on William Hill's Internet sites is obtained, first, from newspapers published the day before the race and, second, from the RDF supplied by SIS on the morning of the race. However, the information displayed on William Hill's Internet sites represents a very small proportion of the total amount of data on the BHB database: the names of all the horses in the race, the date, time and/or name of the race and the name of the race course where the race will be held. The horse races and the lists of runners are not arranged on William Hill's Internet sites in the same way as in the BHB database.

In March 2000 the BHB and Others brought proceedings against William Hill in the High Court of Justice of England and Wales, Chancery Division, alleging that William Hill infringed their sui generis right. The allegations were as follows; (i) the daily use by William Hill of racing data taken from the newspapers or the RDF is an extraction or re-utilization of a substantial part of the contents of the BHB database which is contrary to Article 7(1) of the Database Directive; (ii) even if the individual extracts made by William Hill are not substantial they should be prohibited under Article 7(5) of the Database Directive.

The High Court of Justice ruled for BHB in a judgment of 9 February 2001. The judgment was depending on the approach that 'what is worth copying is worth protecting' of the UK courts in copyright-type cases.²⁰⁴ William Hill appealed to the Court of Appeal. The Board sued William Hill for infringement of database right by repeated and systematic extraction and re-utilization of some certain parts of the database. Court decided on behalf of Board.

The Court of Appeal decided to stay proceedings and refer questions to the European Court of Justice for a preliminary ruling in order to clarify the problems of interpretation of the Directive. The Court formulated 11 questions under Article 234 EU Treaty. The referred questions were focused on (i) the

²⁰⁴ KEMP, MEREDITH, GIBBONS, 112.

evaluation of the limits of the substantial part of the contents of the database in line with Article 7(1) of the Database Directive providing for specific protection, called a *sui generis* right, for the maker of a database within the meaning of Article 1(2) of the Database Directive. (qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents); (ii) the meaning of “extraction” in Article 7 of the Database Directive with the questions whether it is limited to the transfer of the contents of the database directly from the database to another medium, or whether it also includes the transfer of works, data or other materials which are derived indirectly from the database, without having direct access to the database; (iii) the meaning of “re-utilization” in Article 7 of the Database Directive limited to the making available to the public of the contents of the database directly from the database, whether it includes the making available to the public of works, data or other materials which are derived indirectly from the database, without having direct access to the database and (iv) whether Article 10(3) of the Database Directive means that, whenever there is a “substantial change” to the contents of a database, qualifying the resulting database for its own term of protection, the resulting database must be considered to be a new, separate database, including for the purposes of Article 7(5).

European Court of Justice, in the light of the above question ruled that the expression “investment in ... the obtaining ... of the contents” of a database in Article 7(1) of Directive 96/9/EC should be understood to refer to the

resources used to seek out existing independent materials and collect them in the database and the scope of investment of a database does not include the resources used for the creation of materials which make up the contents of a database.

The Court explained in its ruling that the expression 'investment in ... the ... verification ... of the contents' of a database in Article 7(1) of Directive 96/9 must be understood to refer to the resources used, with a view to ensuring the reliability of the information contained in that database, to monitor the accuracy of the materials collected when the database was created and during its operation. The resources used for verification during the stage of creation of materials which are subsequently collected in a database do not fall within that definition, meaning that the protection of databases cover the database process not the processing of the data gathered together to form the database. Therefore the resources used to draw up a list of horses in a race and to carry out checks in that connection do not constitute investment in the obtaining and verification of the contents of the database in which that list appears.

The Court in its ruling analyzed the the terms 'extraction' and 're-utilization' and came to the point that those terms should be interpreted as referring to any unauthorized act of appropriation and distribution to the public of the whole or a part of the contents of a database, excluding the direct access. The Court evaluated the case as the contents of a database were made accessible to the public by its maker or with his consent does not affect the right

of the maker to prevent acts of extraction and/or re-utilization of the whole or a substantial part of the contents of a database.

For the question of 'substantial part, the Court stated in its decision that the volume of data extracted from the database and/or re-utilized and must be assessed in relation to the total volume of the contents of the database. Meaning that the scale of the investment in the obtaining, verification or presentation of the contents of the subject of the act of extraction and/or re-utilization, regardless of whether that subject represents a quantitatively substantial part of the general contents of the protected database. In identifying the substantial part, the Court came to conclusion that any part which does not fulfill the definition of a substantial part, evaluated both quantitatively and qualitatively, falls within the definition of an insubstantial part of the contents of a database.

Lastly, the Court states that the prohibition laid down by Article 7(5) of Directive 96/9 for the unauthorized acts of extraction or re-utilization covers also the cumulative effect of making available to the public, without the authorization of the maker of the database and the whole or a substantial part of the contents of that database and thereby seriously prejudice the investment by the maker.

(2) ***Fixtures Marketing Ltd v Oy Veikkaus Ab***

Fixtures Marketing case is about the exploitation of the fixture lists for the top English and Scottish football leagues outside the United Kingdom.²⁰⁵ The fixture lists are drawn up at the start of each season by the organizers of the leagues; they are stored electronically and set out in printed booklets. The preparation of those fixture lists requires a number of factors to be taken into account, such as the need to ensure the alternation of home and away matches, the need to ensure that several clubs from the same town are not playing at home on the same day, the constraints arising in connection with international fixtures, whether other public events are taking place and the availability of policing. The activities of the Football League altogether account for a cost of around £2.3 million per year.

The infringement occurred when three defendants in the Fixtures Marketing Cases organized pools betting in Finland, Sweden and Greece and used data about English and Scottish football league matches without license from Fixtures Marketing.

²⁰⁵ Fixtures Marketing Ltd v. Oy Veikkaus Ab; Case C-203/02, Fixtures Marketing Ltd v. Svenska Spel AB; Case C-444/02, Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou AE (OPAP). The decision is available at http://curia.eu.int/en/content/juris/index_form.htm

For example in Finland, Veikkaus, the company that has the exclusive right to organize gambling activities in Finland, collected data regarding around 400 matches each week from the Internet, newspapers or directly from the football clubs and checks its correctness from various sources and used the fixtures in its own website. Veikkaus' annual turnover from betting on league football matches in England amounts to several tens of millions of euros.

Fixtures Marketing sued for infringement in the local national courts. The cases are referred to the European Court of Justice and the judgment is given in all three cases on 9 November 2004. The following questions were referred to the Court for a preliminary ruling; (i) may the requirement in Article 7(1) of the Directive for a link between the investment and the making of the database be interpreted in the sense that the "obtaining" referred to in Article 7(1) and the investment directed at it refers, in the present case, to investment which is directed at the determination of the dates of the matches and the match pairings themselves and, when the criteria for granting protection are appraised, does the drawing up of the fixture list include investment which is not relevant? (ii) is the object of the directive to provide protection in such a way that persons other than the authors of the fixture list may not, without authorization, use the data in that fixture list for betting or other commercial purposes? (iii) for the purposes of the Directive, does this unauthorized use relate to a substantial part, evaluated qualitatively and/or quantitatively, of the database, having regard to the fact that, of the data in the fixture list, on each occasion only data necessary for one

week is used in the weekly pools coupons, and the fact that the data relating to the matches is obtained and verified from sources other than the maker of the database continuously throughout the season?’

In each of these three cases the ECJ analyzed the scope of database right and explained the terms ‘obtaining, verifying or presenting’ and had come to the conclusion that protection of databases promote and protect investment in data storage and processing systems which contribute to the development of an information market.²⁰⁶

In the light of the above questions, the Court of Justice made a ruling similar to the *British Horseracing Board Ltd v William Hill Organization Ltd* and stated that the expression ‘investment in ... the obtaining ... of the contents’ of a database in Article 7(1) of Directive 96/9/EC must be understood to refer to the resources used to seek out existing independent materials and collect them in the database and it does not include the resources used for the creation of materials which make up the contents of a database. In the context of drawing up a fixture list for the purpose of organizing football league fixtures, does not cover the resources used to establish the dates, times and the team pairings for the various matches in the league.

²⁰⁶ KEMP, MEREDITH, GIBBONS 111

c) Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs²⁰⁷

The need for a Computer Programs Directive was first announced in the Commission White Paper entitled "Completing the Internal Market"²⁰⁸ in 1985²⁰⁹ and followed by a comprehensive consultation exercise undertaken in the context of the "Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action" in 1988.²¹⁰ These efforts paved the way for a proposal for a Directive of April 1989 providing harmonization of Member States' legal provisions in computer program protection by defining a minimum level of protection and by forming a balance between the interests of rightholders, their competitors and of users. The proposed legal framework on the protection of computer programs had foreseen the protection to computer programs under copyright law as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works by giving exclusive rights to protected persons, setting the conditions for protection and by also restricting the acts requiring authorization of the rightholder.

²⁰⁷ OJ L 122, 17.05.1991.

²⁰⁸ COM (85) 310 final.

²⁰⁹ KAYPAKOĞLU, Serhat, "Bilgisayar Programlarının Korunması, İpekçi Yayıncılık, 1997, p. 12.

²¹⁰ Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action"COM(88) 172 final, 10.11.1988.

The main aim of the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs was to establish legal protection of computer programs in Member States. However, it did not provide for total harmonization and left some issues regarding national measures which do not affect the proper functioning of the Internal Market to the discretionary powers of the Member States.

d) Basic Provisions of Computer Program Directive

It should be noted that the Directive did not define the notion of a computer program. However, in the preamble it outlines what a computer program should include in order to be defined as such. Accordingly, the term 'computer program' is to include programs in any form, including those which are incorporated into hardware and the preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage.

In the IPR Helpdesk Computer Program Copyright²¹¹ document of European Union, computer program is defined as programs that are given a set of instructions in a language that computers understand. According to Jeremy

²¹¹ IPR Helpdesk Computer program Copyright, p1, accessed: 10.3.2003, available at [http://www.ipr-helpdesk.org/documentos/Publicacion/pdf-xml/8_computer_programcopyright0000001105_00\].pdf](http://www.ipr-helpdesk.org/documentos/Publicacion/pdf-xml/8_computer_programcopyright0000001105_00].pdf)

and Firth, a program is simultaneously symbolic and functional.²¹² A program records instructions for carrying out a task that a computer is instructed to carry out. Computer program should be loaded, reproduced and translated within the computer in order to be executed. These programs are called computer program to distinguish them from the physical objects that make up a computer which are called hardware, such as microchips, processors, the keyboard, etc. IPR Helpdesk Computer program Copyright document gives main some certain examples of computer program.²¹³ As Microsoft Windows and Linux are the examples for operating systems, the major computer program that organize all of the other computer programs, web browsers like Microsoft Explorer or word processors like Microsoft Office are the examples of computer program for general, everyday use. There is also specialized computer program, such as computer-aided design computer program, account computer program or the computer program that makes the Internet work, such as the web server computer program which sends web pages to the web browser of the Internet user on demand.

²¹² JEREMY, FIRTH 348.

²¹³ IPR Helpdesk Computer Program Copyright, 1-2.

There are two technical terms used in computer program copyright; source code and object code.²¹⁴ Source code is a computer program in the form written by a programmer whereas object code is a computer program converted into the form in which a computer would run it. A special computer program which is called as compiler is used to convert source code into object code. The act of converting source code into object code is called "compilation" while converting object code into source code is called "decompilation".²¹⁵ As compilation is technically easy; decompilation, is technically more difficult. Both forms are protected under the computer program copyright. However, computer languages are not themselves pieces of computer program. In addition to this, a computer program which is incorporated into the design of a silicon chip is also protected as computer program.²¹⁶

Article 1 of the Directive sets out to define the scope of copyright protection granted for computer programs. Accordingly, all computer programs, falling within the definition given in the preamble²¹⁷, would be protected by copyright as literary works. Ideas and principles which underlie any element of a

²¹⁴ See, IPR Helpdesk Computer program Copyright, p1-2, Bilgi Toplumuna Doğru- Taslak Rapor 393.

²¹⁵ IPR Helpdesk Computer program Copyright and the Computer Programmer, 2, ATEŞ 386.

²¹⁶ IPR Helpdesk Computer program Copyright 1-2.

²¹⁷ Computer programs are to be protected as literary works within the meaning of Article 2 of the Berne Convention. It complies also with Article 4 of the WIPO Copyright Treaty (WCT) and with the Article 10 (1) of the TRIPS Agreement.

computer program, including those which underlie its interfaces, are not protected by copyright under the Directive.

The most important aspect of protection is stated in Article 1(3). Under this provision originality is the prerequisite for copyright protection and it is the only criterion applied to determine eligibility for protection. The program must be the "own intellectual creation of its author" meaning that a computer program would be protected, only if it is original in the sense that it is the author's own intellectual creation.

"Six of the Member States (Belgium, Germany, Greece, Ireland, Italy and Spain) have complied with the requirements of this Article, Germany has expressly incorporated Article 1 (3) and has thus abandoned the "Inkassoprogramm" case law of its Supreme Court which previously required the existence of a (high) level of creativity ("Schöpfungshöhe"). This changed level of originality has since then been confirmed by constant case law and the German eligibility criterion has thus been brought in line with the Directive's terms."²¹⁸

Article 2 includes three cases of authorship; namely individual authorship, joint authorship and employees' works. According to Article 2, the author of a computer program is a natural person or group of natural persons who has created the program. This means that the programmer who writes the program owns the copyright and in case there is more than one programmer,

²¹⁸ Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs.8.

the Directive provides for co-ownership. It is left to the discretionary powers of the Member States to decide whether legal persons are designated as the rightholder under that legislation or not. For collective works, Directive states that the person who is considered by the legislation of the Member State to have created the work would be deemed to be its author.

Concerning joint authorship, Article 2(2) provides that for computer programs created by a group of natural persons jointly, there would be a joint-ownership of the exclusive rights.

The third paragraph of Article 2 brings into the light the issue of employers' rights on the computer program. This is a very important provision as it is very common that the employees who create a computer program as a part of their professional work believe strongly that the economic rights of that program remains within. However, when a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively would be entitled to exercise all economic rights in the program created. The execution of this right can only be altered by the way of a contract signed between the employer and the employee. An important case occurs when a programmer modifies a program written by another programmer. In such a case, the modification requires the permission

of the rights owner.²¹⁹ Another problem can rise from the job change. If a programmer changes his job, and writes a similar program to that of he had written in his primary work, in his new office, the outcome would be the first company suing the second one for copyright infringement.²²⁰ When the case is brought before the court, the court would examine the two programs to figure out how similar they are in the framework of the copyrightable parts.

Article 3 states that computer program protection would be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works. Therefore in order to apply this provision all Member States should have explicitly brought computer programs under copyright protection as a literary work. This also complies with the TRIPS.

Article 4 outlines the acts which are left to the authorization of the rightholder. Those acts are given in three groups; reproduction (Article 4 (a)), translation, adaptation, arrangement or any other alteration of a program (Article 4 (b)) and any form of distribution to the public, including rental (Article 4 (c)).

Under Article 4(a), the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole is a restricted act. When loading, displaying, running, transmitting or storing a

²¹⁹ IPR Helpdesk Computer Program Copyright 3.

²²⁰ IPR Helpdesk Computer Program Copyright and the Computer Programmer 2-3

computer program, if there is a need of reproduction, the rightholder should authorize this. Without the authorization of the rightholder, none of the acts stated above can be realized. Austria, Denmark, Finland, Portugal and Sweden included "loading, displaying, running, transmission or storage of the computer program" within the scope of the reproduction right, in line with the provisions of the WIPO Internet Treaties (Article 1 (4) of the WCT) stating that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.²²¹

According to the provisions of Article 4(b), the translation, adaptation, arrangement and any other alteration of a computer program is subject to the authorization of the rightholder. This provision is important for the prevention of piracy. The development of digitization facilitated the counterfeiting and piracy of computer programs. A European survey held by the Alliance Against Contraband (AAC) on organized crime in counterfeiting and piracy identified software as one of industries that the penetration of organized crime is appalling.²²² Today there are several groups concerned with counterfeiting and piracy such as Alliance Against Counterfeiting and Piracy (AACP)²²³, the

²²¹ Report on the Implementation and Effects of Directive 91/250/EEC on the Legal Protection of Computer Programs 11.

²²² BLAKENEY, 11. The results of the survey are available at www.wco.org

²²³ The Alliance provides a single voice for the music, audio-visual, retail, brand manufacturing and business and games software industries in preventing intellectual property theft in the UK. www.aacp.org.uk

International Association for the Protection of Industrial Property (AIPPI)²²⁴, the Business Software Alliance (BSA)²²⁵, The Entertainment Software Alliance (ESA)²²⁶, Software and Information Industry Association (SIIA)²²⁷

Under Article 4(c), the right of distribution to the public, including the rental²²⁸ right is adhered to the authorization of the rightholder. Article 4(c) also covers Community exhaustion by establishing an exclusive distribution right which is subject to Community exhaustion where the first sale of the program was made in the Community. However, the exception of the right to control further rental of the program or a copy is still remained in the rightholder. The main problem concerning distribution to the public is that the implicit restriction of parallel imports of computer programs into the EU has not been expressly implemented by Denmark, Finland, the Netherlands and Portugal. It is to be noted, however, that as a consequence of case law construing the Dutch

²²⁴ AIPPI is the world's leading international non-governmental, non-profit organization for the protection of intellectual property (patents, trademarks, copyrights, designs, computer software, integrated circuits, and unfair competition). www.aippi.org

²²⁵ BSA is the voice of the world's commercial software industry. BSA members include Adobe, Apple, Autodesk, Avid, Bentley Systems, Borland, CNC Software/Mastercam, Internet Security Systems, Macromedia, Microsoft, Network Associates and Symantec. www.bsa.org

²²⁶ The ESA Online Enforcement Program monitors the Internet (websites, FTP sites, newsgroups, IRC channels, chat rooms, forums, etc.) for instances of piracy of its members' products and notifies ISPs of the presence of infringing product on sites which they are hosting. www.theesa.com

²²⁷ SIIA is the principal trade association for the software and digital content industry. <http://www.sii.net>

²²⁸ the term 'rental' means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive.

copyright statute in the light of the Directive Community exhaustion is now likewise applied in the Netherlands. According to the President of the district court of The Hague in the Novell case, the Dutch copyright statute which does not provide any rules on exhaustion, must be construed as far as possible in accordance with the provisions of the Directive. Under these circumstances he arrived at the conclusion that as of 1 September 1994 a copyright regime has to be applied for computer programs in the Netherlands which provides for Community exhaustion only.”²²⁹

Article 5 gives the exceptions to the restricted acts stated in Article 4. According to the Article 5(1) in the absence of specific contractual provisions, the restricted acts, with the exception of distribution and rental, does not necessitate authorization by the rightholder where those restricted acts are required for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including error correction. The term “lawful acquirer” categorizes the persons having the right to use the program in question including purchaser, licensee, renter or a person authorized to use the program.²³⁰

²²⁹ Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs 12.

²³⁰ Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs 12.

Article 5(2) provides that making of a back-up copy by a person having a right to use the computer program can not be prevented by a contract if it is necessary for that use.

According to the Article 5(3), the person having a right to use a copy of a computer program would be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

According to the Directive, if a computer program is acquired lawfully, with the rights owner's permission, then it can be used it for intended purposes and the errors in the program can be corrected.²³¹ This also covers the allowance for back-up copy.

e) Decompilation²³²

Under Article 6(1), the authorization of the rightholder is not required when reproduction of the code and translation of its form within the meaning of

²³¹ IPR Helpdesk Computer Program Copyright and the Computer Programmer 3.

²³² Translating from object or machine code into higher level languages so that the program's operation may be examined or adapted.

Article 4 (a) (reproduction) and (b) (translation, adaptation, arrangement or any other alteration of a program) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs. This means that the authorization of the rightholder to decompile a program will not be needed if decompilation is necessary to achieve the interoperability of an independently created computer program and therefore decompilation for legitimate purposes cannot be restricted by a contract.²³³

According to Jeremy and Firth, there are three types of computer programs; systems programs, application programs and interoperable programs.²³⁴ As system programs make a computer operate, application programs enable the computer user to perform tasks through the operation of computer. Whereas interoperable programs enable the applications program to communicate with the systems programs by providing an interface between them. Under Article 6 (1), interfaces do not fall within the infringements as they are necessary and indispensable for the inter-operability of the system.

²³³ ROWLAND Diane, CAMPBELL Andrew, "Supply of Computer program: Copyright and Contract Issues", *International Journal of Law and Information Technology*, Vol. 10 No. 1, Oxford University Press 2002, p. 37.

²³⁴ PHILIPS, FIRTH 355.

It should also be noted that the provisions of Article 6(1)(b) obliges that the information necessary to achieve interoperability has not previously been readily available to the persons involved in acts of reproduction and alteration where these acts are confined to the parts of the original program which are necessary to achieve interoperability and reverse engineering.

Article 6(2) lists the criteria regarding what kind of information would be permitted. Accordingly, information should not be used for goals other than to achieve the interoperability of the independently created computer program (Article 6(2)(a)) or should be given to others, except when it is necessary for the interoperability of the independently created computer program (Article 6(2)(b)) or should to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright (Article 6(2)(c)).

Article 6(3) sets the limitations of decompilation and states that the provision of this Directive should be in line with the provisions of the Berne Convention for the protection of Literary and Artistic Works. It should be noted that the application of the provisions of this Directive has to comply with the rightholder's legitimate interests and the normal exploitation of the computer program.

However, Article 6(3) concerning the limitation of the decompilation exception has been omitted in six Member States (Austria, Denmark, Finland, Netherlands, Sweden and UK). This limitation ensures that the decompilation exception shall not be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with a normal exploitation of the computer program.²³⁵

f) Provisions Related to Protection Measures

Article 7 (1) specifies the acts against which Member States have to provide "appropriate remedies in accordance with their national legislation". These acts are putting into circulation of infringing copies of a computer program or possession for commercial purposes of infringing copies of a computer program and putting them into circulation, or possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal of technical protection devices which may have been applied to protect a computer program.

Under Article 7 (2) any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State

²³⁵ Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs 13.

concerned. In addition to this Article 7(3) provides the legal ground for the seizure of any means permitting facilitating the unauthorized removal or circumvention of technical protection devices.

“In relation to Article 7 a number of important court decisions have been noted. In a German landmark decision it was ruled that the altering of the programming of a computer program protected with a hardware lock (dongle) in order to remove the program protection constitutes an act of copyright infringement. (Karlsruhe Court of Appeals, [1996] WRP 587; confirmed by Federal Supreme Court (BGH) [1996] CR 737)²³⁶

According to Article 8(1) protection for computer programs will be granted for the life of the author and for fifty years after his death or after the death of the last surviving author. If the computer program in question is an anonymous or pseudonymous work, the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. This provision is also valid for cases where a legal person is designated as the author by national legislation.

Article 9(1) states that the provisions of this Directive would be without prejudice to any other legal provisions such as those concerning patent rights,

²³⁶ Report on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs 14.

trade-marks, unfair competition, trade secrets, protection of semi-conductor products or the law of contract.

g) Moral Rights in Computer program Copyright

The moral rights of the computer program copyright holder are not covered by the Directive. In order to clarify the moral rights issues subject to computer program copyright, European Union published an explanatory document called IPR Helpdesk Computer program Copyright and the Computer Programmer.²³⁷ In this Document EU defends the idea that as the concept of artistic integrity may make sense for a poem or a painting; for a computer program, it has hardly been found practical. According to this Document in Europe legislators have greatly limited the scope of moral rights in computer program and the issue has never been an important one. However, paternity right is the most significant moral right in the context of computer program as it gives the creator the right to be named as the author of a work on all copies of it that are distributed. Therefore in a collective work, all the programmers who have contributed to the computer program should be listed in the distribution²³⁸

²³⁷ IPR Helpdesk Computer Program Copyright and the Computer Programmer 5-6.

²³⁸ IPR Helpdesk Computer Program Copyright and the Computer Programmer 6.

h) The Implementation of the Computer program Directive

Only three Member States; Denmark, Italy, and the U.K. had met the implementation deadline of January 1, 1993, however as all of the Member States have adopted the required provisions of the Computer program Directive, Western Europe has seen a reduction in the piracy of computer programs from an average rate of 78 percent in 1990 to 34 percent in 2000.²³⁹

²³⁹ HOEREN, para. 27.

IV. COPYRIGHT PROTECTION IN TURKEY

A. The Scope of Copyright Protection in Turkey

The main legislation in the field of copyright protection in Turkey is the Law on Intellectual and Artistic Works No. 5846²⁴⁰ (date of approval: 5.12.1951) which is amended by five subsequent Laws in order to meet the requirements of the developments in the global copyright regulation and application.²⁴¹ This Law regulates economic and moral rights of the copyright holder.²⁴²

The most of the legal developments in copyright protection are achieved as a part of Turkey's harmonization with the EU in advance of the customs union. In Association Council Decision No 1/95 determining the procedures and principles of the customs union between Turkey and the European Union, intellectual property was one of the areas that Turkey was obliged to align her legal framework with EU. Turkey undertook to harmonize intellectual property rights with EU under Article 29 of the Association Council Decision No 1/95. In

²⁴⁰ 5846 Sayılı Fikir ve Sanat Eserleri Kanunu, RG 7931, 13.12.1951.

²⁴¹ Law No. 2936 Amending Several Provisions of the Law No.5848 on Intellectual and Artistic Works. (date of approval: 1.11.1983, RG 18210, 3.11.1983); Law No. 4110 amending Several Provisions of the Law No.5848 on Intellectual and Artistic Works (date of approval: 7.6.1995, RG 22311, 12.6.1995); Law No. 4630 Amending Several Provisions of the Law No. 5848 on Intellectual and Artistic Works (date of approval: 21.2.2001, RG 24335, 3.3.2001), Law No. 5101 Amending Several Law (date of approval: 3.3.2004, RG 25400, 12.3.2004).

²⁴² KAÇAK, Nazif, "Açıklamalı-İçtihatlı Fikir ve Sanat Eserleri Kanunu", Kartal Yayınevi, Nakara, 2004, p. 30.

line with the provisions of Annex No 8 of Association Council Decision No 1/95 on intellectual, industrial and commercial property rights, many legal arrangements have been realized within the framework of the targeted arrangements for the harmonization of Turkish legislation with international norms, and the commitments undertaken by Turkey.²⁴³ In the evaluation report of 1998 prepared by the WTO, it was highlighted that Turkey had to make considerable progress for updating and harmonizing its legislation with universally acclaimed principles.²⁴⁴ The amendments introduced by the Law No.4630 were put into effect in order to ensure full alignment with the EU *acquis*, Bern and Rome Conventions and the provisions of the TRIPS.

²⁴³ Turkey acceded to the Paris Text of the Bern Convention on the Protection of Literary and Artistic Works (Law No 4417); Rome Convention on the Protection of Performing Artists, Phonogram Producers and Broadcasting Enterprises (Law No 4116); Stockholm Text of Paris Convention on the Protection of Industrial Property (Cabinet Decree No 94/5903); Nice Agreement on the International Classification of the Goods and Services for the Purposes of Establishing Registration of Marks (Cabinet Decree No 95/7094); The Approval of Turkey's Accession to the Patent Cooperation Treaty (Law No 4115); Vienna Agreement on the International Classification of the Figurative Elements of Trademarks (Cabinet Decree No 95/7094); Strasbourg Agreement on the International Patent Classification (Cabinet Decree No 95/7094); Protocol Relating to the Madrid Agreement concerning International Registration of Marks (Cabinet Decree No 97/9731); Locarno Agreement on Establishing International Classification of Industrial Designs (Cabinet Decree No 97/9731); Budapest Agreement on International Recognition of the Deposit of Micro-organisms for The Purposes of Patent Procedure (Cabinet Decree No 97/9731); European Patent Convention and Annexes Thereof on Issuance of European Patents (Law No 4504).

²⁴⁴ WTO Turkey Review 1998; available at www.wto.org/english/tratop_e/tpr_e/tp83.html; retrieved 12.10.2004.

In the framework of the Action Plan of “Taking Measures to Protect Intellectual Property Rights in the Digital Environment”²⁴⁵ new provisions are introduced to secure the copyright protection on the Internet. Lately, Law No. 5101 has come into force in March 2004, making amendments to the Law on Intellectual and Artistic Works with the purposes of preventing piracy and solving conflicts between collecting societies and users.²⁴⁶ This Law has significant features concerning Internet and introduced provisions on Internet service providers’ liability and on the protection of sui generis database.²⁴⁷

Currently, after the recent amendments, even if Turkey is not a signatory of the WIPO Internet Treaties yet, the rights provided for the copyright owners are pursuant to those that are provided by the international legal framework.²⁴⁸ However, the process of accession to the WIPO Copyrights Treaty and the WIPO Performances and Phonograms Treaty is still pending. Due to this, in the 2004 Regular Report on Turkey, the European Commission reminded that Turkey has to continue to make considerable progress for updating and

²⁴⁵ “e-Dönüşüm Türkiye Projesi 2003-2004 KDEP Uygulama Sonuçları ve 2005 Eylem Planı”, Bilgi Toplumu Dairesi, www.bilgitoplumu.gov.tr, Mart 2005, p. 16, available at <http://ekutup.dpt.gov.tr/plan/aep/e-dtr/2005.pdf>

²⁴⁶ For detailed information on this Law; SULUK, Cahit, “Yeni Fikir ve Sanat Eserleri Kanunu, Telif Hakları ve Korsanlıkla Mücadele”, Hayat Yayınları, İstanbul, Nisan 2004.

²⁴⁷ 2004 Regular Report on Turkey; Progress Towards Accession, SEC (2004)/20, COM (2004) 656 Final, Brussels 6.10.2004, p. 65.

²⁴⁸ TURKEKUL, Erdem, “Bilgi Toplumunda Fikri Haklar”, Güncel Hukuk Dergisi, Sayı 6, Haziran, 2004, pp.26-28

harmonizing its legislation with universally acclaimed principles.²⁴⁹ Accordingly, in the 2005 Program of the Eighth Five Year Development Plan (2001-2005) of Turkey, it is foreseen that the preparatory work for the participation of Turkey in WIPO Internet Treaties will be concluded.²⁵⁰

1. The Legal Framework of Copyright Protection in Law on Intellectual and Artistic Works

The major parts in copyright protection are the works subject to protection, the rights associated with the copyrighted works, ownership, limits and exceptions.²⁵¹ There are six main parts in the Law on Intellectual and Artistic Works No. 5846 (thereafter FSEK). The first part (article 1-7) gives the aim and scope of the Law and outlines the intellectual and artistic works that are subject to protection whereas the second (Article 8-12) sets the provisions for ownership and the third (Article 13-47) provides the intellectual rights. The fourth part is on contracts as the fifth part (Article 66-79) bears provisions on legal cases. Last part (Article 80-91) covers some certain provisions on neighboring rights (Article 80-87), conflict of laws (Article 88 – the scope and the

²⁴⁹ 2004 Regular Report on Turkey Progress Towards Accession, SEC (2004)20, COM (2004) 656 Final, Brussels 6.10.2004, p.65.

²⁵⁰ 2005 Program of the Eighth Five Year Development Plan (2001-2005), p.106, available at <http://ekutup.dpt.gov.tr/program/2005.pdf>

²⁵¹ GORDON Wendy J., “Boston University School of Law, Working Paper Series, Law and Economics Working Paper No. 03-10”, Chapter 28: Intellectual Property, p. 618, <http://www.bu.edu/law/faculty/papersp621>

provisions of this Article is discussed in detail in the last chapter of the thesis) and provisions on the entry into force of the law.

The objective and the scope of FSEK are given in Article 1²⁵² and Article 1/A respectively. Accordingly the aim of the Law is to identify and protect the economic and moral rights of the owners of intellectual and artistic products, the performers, phonogramers and the broadcasters and to organize the conditions of benefiting from those products and to determine the sanctions for the cases for distortion. The scope of the Law is set in Article 1/A²⁵³ and covers the moral and economic rights of the owners of intellectual and artistic products, the performers, phonogramers and the broadcasters, the principles and the procedures of those rights, the jurisdiction, sanctions and the mission, competence and the liability of the Ministry of Culture and Tourism²⁵⁴.

²⁵² Amended by Law No. 4630, Article 1, 21/2/2001.

²⁵³ Amended by Law No. 4630, Article 2, 21/2/2001.

²⁵⁴ With the amendment of Law No.5101, the Ministry of Culture under the definition of “the ministry” is changed as the Ministry of Culture and Tourism.

2. The Concept of Copyrightable Works in Law on Intellectual and Artistic Works

The first legal definition concerning copyrightable works was presented in the Copyright Law of 1910 (Hakkı Telif Kanunu). It had a very limited scope providing protection only to books, writings, paintings, pamphlets, sculptures, plans, maps, architectural, geographical, topographical and scientific three-dimensional works and musical works.²⁵⁵ The legal protection in the modern sense is set by the Law on Intellectual and Artistic Works (FSEK) in 1931.

FSEK was acquainted with the Berne Convention²⁵⁶ by introducing a list of the intellectual and artistic works and which would be subject to protection with a general categorization. Accordingly; intellectual and artistic works that are protected under the Law are all kinds of intellectual and artistic products that fall within the types of scientific, literary, musical, fine art and cinema works bearing the particular individuality of the owner of the work.²⁵⁷ There is a certain critical discussion about this phrase as each of the type of art does not create an alternative for the other and totally constitute independent forms the “and”

²⁵⁵ USLU, Ramazan; “Türk Fikir ve Sanat Hukukunda Eser Kavramı”, Seçkin Yayınevi, Ankara 2003; pp. 24-25; KAÇAK 34.

²⁵⁶ Footnote 34, p.16.

²⁵⁷ TEKİNALP 91; USLU 27-28.

between fine art and cinema works should be “or”.²⁵⁸ In FSEK “work” represents a limited scope by only adhering to intellectual and artistic works. However, the terminology “product” has a more broad scope and covers the neighboring rights as well.²⁵⁹

It is clearly understood from FSEK that there main criterion for the work is to be subject to the protection. Accordingly, the work should contain the particularity of its owner, should be formed to present the particularity of its owner, should fall within the categories that are outlined in FSEK and lastly should be a product of an intellectual attempt.²⁶⁰ The intellectual attempt criterion paves the way for discussions on works that are realized with the help of the computers. The artistic, musical or graphical works that are created by using computers fall within the category of the works protected under the Law as long as they do not constitute a common work that can be created by everyone. Those works should bear the intellectual attempt and particular creativity of its owner.²⁶¹

The rule of *numerus clausus* is applicable in FSEK in determining the categorization of the types of the works. This means that there is a limited

²⁵⁸ TEKİNALP 91.

²⁵⁹ Ibid.

²⁶⁰ TEKİNALP 91; USLU 39-50.

²⁶¹ TEKİNALP 99.

scope of works by only adhering to the ones stated in the law.²⁶² There cannot be a new type introduced other than the ones given. These four main categories are presented in Article 2 to 5; scientific and literary works (Article 2); musical works (Article 3), fine art works (Article 4), and cinema works (Article 5).

The *numerus clausus* principle is applicable for the works that fall within the categories given above. In this context, Law No. 4110 puts in computer program and preparatory designs of computer program under the category of scientific and literary works.²⁶³

In the introductory part off the Law No.4110, it is stated that computer programs are included under the category of scientific and literary works in compliance with the laws of the other countries. The amendment by Law No.4110 introduced computer programs to Turkish copyright protection, nearly with the same wording of EU Computer program Directive in line with the harmonization process to EU legislation foreseen in the Association Council Decision 1/95. With this amendment, the preparatory works of computer program creation processes which will naturally result in being a computer program are also covered by the law.²⁶⁴ As the function of a computer program

²⁶² KAÇAK 36; TEKİNALP 100; USLU 53.

²⁶³ Kaypakoğlu, Serhat, "Bilgisayar Programlarının Hukuki Korunması, İpekçi Yayıncılık, 1997, p. 59; TEKİNALP 103; USLU 102, 113.

²⁶⁴ TOPALOĞLU, Mustafa, "Bilgisayar Programları Üzerindeki Haklar ve Bu Hakların Korunması", Türkiye Bilişim Vakfı, İstanbul, 1997, pp. 85-91.

is to provide the communication of the computer system with the other components and the users, the computer program components called interfaces which enable this interaction and connection and the interfaces' ability which is called interoperability, to functionally interconnect and interact should also be subject to intellectual property protection and therefore are also covered by the Law.

Article 1/B of the Law defines computer programs, interface, and interoperability in order to create a uniform understanding in the provisions concerning information society. According to this definition computer program (Article 1/B (g)) is the set of computer instructions that are organized to provide a computer system to make a special process or a work and the preparatory works that would provide the formation and the development of this set of instructions. Interface (Article 1/B (h)) is the part of program that forms the interactive connection and interaction between the hardware and the computer program of the computer. Interoperability (Article 1/B (i)) is defined as the ability of computer programs functioning together and interaction and the ability of using the information exchanged interactively.

In the first line of the first paragraph of Article 2 of FSEK, it is stated that computer programs defined in all forms and the preparatory designs of those under the circumstance that they will result in computer program in the next

phase are considered as scientific and literary works. The judgment of the State Council²⁶⁵ dated 25.09.2002 confirms this approach by stating that computer program is regarded as a literary work under international agreements that Turkey is a signatory of and states that the Article 10 of TRIPS and the Article 4 of WIPO Intellectual Rights Agreement which restates that computer program is protected under Article 2 of Berne Convention accepts computer program as literary works. This also complies with the scope of the Computer program Directive of European Union.

In the judgment of the State Council dated 25.09.2002, it is stated that the international regulation decisions on the issue of Intellectual Property are examined and following Articles relating to the protection of computer programs are found out two main articles; the Article 10 of the TRIPS providing that according to the Bern Agreement, the computer programs whether in source or objective code format are protected as literary product and the Article 4 of the WIPO Copyright Treaty, dated 1996, stating that computer programs are protected as literary products within the Article 2 of the Bern Agreement. Referring to these Articles in the international agreements and the amendments made in the Law No.5846 (FSEK), the State Council acknowledges that

²⁶⁵ Danıştay 10. Daire. 25.09.2003 – 2002/837, available at the database of www.kazanci.com.tr

protection shall be applied to computer programs as they are accepted as literary product.

Under the same decision, the question whether computer programs are considered to be industrial products or not, is also answered. In the judgment of the State Council it is stated that considering that the industrial product means products produced to be partly or totally processed with manual labor or with the aid of machines, equipment, assembly or any other agent or forces in its content, quality, form and property, it is not possible to arrive at a decision that accepts computer programs within this definition. Moreover, no research or evaluation has been made in terms of the international applications and agreements that support the evaluation of the computer programs within this extent.

In Article 2 of FSEK, the computer program's preparation designs are protected under copyright. The criterion for the protection of preparatory designs²⁶⁶ of computer program is the necessity that the next progressive level of this design should be the computer program itself.²⁶⁷ The protection of the preparatory works of the computer program depends upon the progressive creation of the computer program as the following item. Therefore it is

²⁶⁶ KAYPAKOĞLU 61-64.

²⁶⁷ KAYPAKOĞLU 61 TEKİNALP 103; USLU 113.

necessary to understand the preparation of the computer program and to outline the procedures of the creation process. Accordingly, as in any of the works that are subject to the copyright protection, computer program creation is also initiated on the need and the aim of such a identified work. Computer program creation is a very complex and sophisticated work as it covers various digitized codes written in different computer languages and a rationalized system that runs. The computer program creation process can be outlined in five phases.²⁶⁸ The first phase is defining the product with a special aim of competitiveness. This is the first phase of an intellectual creation. However, as it is only a thought, it is not protected under the copyright umbrella. The second phase is the general design which is the planning of the computer program in general terms. The inter-design phase is the third phase that details the general design and gives the full and comprehensive rationale of the program. Thus these two phases are not covered by the copyright as it only constitutes the module scheme of the computer program on paper. The following phase is the fourth phase that falls within the protection of computer program under copyright in compliance with the provisions of FSEK. In this phase the detailed design is made by dividing the design into codable units taking part in flowcharts and this is the phase that the actual writing of the program starts.

²⁶⁸ KAYPAKOĞLU 62

Article 2 of FSEK, states that for the protection of preparatory designs²⁶⁹ of computer program, it is necessary that the next progressive level of this design should be the computer program itself. After this coding as the phase comes and in coding the computer program is totally written and concluded as a product to be used and marketed.

Contrary to the preparatory work of a computer program the interface is not protected. In the last paragraph of Article 2 of FSEK it is stated that the ideas and principles that form a basis for a certain part of a computer program shall not be regarded as works, including the ideas and principles that form a basis for interface. In the recitals of Article 1 of Law 4110 the function of computer program is defined as the communication and operation of a computer system with the other components and users.²⁷⁰ As interface is only considered as certain control units that enable the connection between the central servers and the machines working under their control, it is only a component of the computer program.²⁷¹ However, there should be clear distinction to be made between interface and the ideas and principles that form a basis for interface. Due to advances in computer program development, some interfaces may also fall in the scope of copyright protection if they constitute a

²⁶⁹ KAYPAKOĞLU 61-64.

²⁷⁰ KAYPAKOĞLU 67, TEKİNALP, 105.

²⁷¹ EROĞLU 3.

unique modular part of the computer program, especially in open computer program development. The borders of protection should be determined very carefully in new technology regulations as most of the contemporary technologies are due to change in a considerably short-time and therefore legislations dependent on current technologies may fail to interpret the situation.

A question appears when the websites are taken into consideration; should they be protected under the copyright law or not. According to the Law, it is clear that any kind of work that falls within the scope of the works listed in FSEK and works presented on a website may eventually be subject to protection emerging from the nature of copyright protection.²⁷² Websites are platforms that the rightholders use as the mediums of publishing or communicating to the public the works that are protected by copyright. From another point of view, websites also provide databases that run behind and may also be considered as reproductions when the use of the database is taken into account.²⁷³ On the other hand, not only the data presented on the website but also the website itself, as a part artistic and scientific production may also be a part of the copyright protection under the scope of the reproduction right.²⁷⁴

²⁷² TURKEKUL 582

²⁷³ ERDİL, İşleme Eserler, 73.

²⁷⁴ Ibid.

There are two cases to present the approach of Turkish courts to this issue of web presence and can be viewed as the examples of this dilemma. In the “Official Journal”²⁷⁵ case, the representative of the plaintiff alleged that in accordance with the relevant law and the regulations the sole license to publish the Official Journal by any means belonged to the plaintiff and therefore the defendant publishing the Official Journal on his website without any contracts signed, violated the rights of the plaintiff. In the plea interposed by the defendant’s attorney it was stated that the publishing of Official Journal did not belong exclusively to the plaintiff and claimed that the service given under the name of Electronic Journal has been a copyrighted work which did not bear any competition goal with the plaintiff. Moreover, the counsel for defendant argued that the publishing of the Official Journal has been a public service and therefore there would not be any aim of making profit out of it. The counsel for defendant supported that the publication of the Official Journal was not under the monopoly of the claimant exclusively, the service under the name of electronic journal was a copyright product, there was no intention of competition with the claimant and moreover, there was no need to acquire a permission as the publication of the Official Newspaper was a public service and would not

²⁷⁵ Y.11HD., E.2000/2638, K.2000/5836, T.22.6.2000, available at the database of www.kazanci.com.tr

pursue any profit. The counsel for defendant demanded the rejection of the lawsuit.

The Court, by taking into consideration; the evidences, allegations of the both parties and the reports of the experts, decided that the case should be subject to the provisions of the intellectual property law FSEK. The court added that the defendant published the "Electronic Official Journal" by way of re-writing it with a computer by spending money, time and effort on it without using any of the facilitators like photocopying or scanning and transferred it to the Internet environment by copying it on mediums other than paper, like hard disk or floppy disk. In the conclusion the court stated that the act of the defendant did not cause any unfair competition and therefore it rejected the case by confirming that publication of the content of the Official Journal through copying it on instruments such as disc, hard disc and then placing it on the Internet environment do not create unfair competition. The decision was appealed by the claimant attorney. Considering the information and documents in the case file, no point against the Procedure and Legislation has been found in the way the evidence the court decision had been based upon was being argued and evaluated. Thus, all the rejection appeals of the claimant's attorney were rejected and the decision was ratified. With the rejection of the all appeal rejections of the claimant's attorney, the decision found to be complying with the Regulation and Legislation was decided to be ratified.

The case “Turkish Odysse”²⁷⁶ is about the use of a map of Turkey which was deemed to be an original work of the writer and the publisher of the book “Turkish Odysse” and its original website as well, without prior consent in a magazine called “Penet”. The representative of the plaintiff alleged that the defendant copied the map which was an original work of the plaintiff, from the website and used it. The defendant claimed that the map had no identical character and was not copied from the plaintiff’s website. Moreover, the defendant asserted that all the data used in Internet environment are anonymous.

The claimant attorney demanded 500.000.000 TL for moral indemnity from the defendants who used the unique Turkey map in the “Penet” magazine without taking any permission from the claimants who are the author and the publisher of the presentation book of “Turkish Odysse” and the Internet web page with the same name.

The case was appealed and the court demanded a further report on the originality of the map subject to copying. Since the map being a product to benefit from the protection of the copyright depends on the determination of the intellectual and creative value added by its creator, the court had taken into

²⁷⁶ Y.11.HD., E.2002/8275, K.2002/8839, T.11.10.2002, available at www.kazanci.com.tr

consideration the acts of how a map is created, whether the map that is the case issue reflects the property of its owner and if it reflects, what there are should be reported. It has been decided that the collected evidence and the expert written report, the map has a scientific value, and it was copied without permission by the defendants so that 300.000.000 TL moral indemnity would be paid. The defendants' attorney appealed the decision alleging that FSEK accepts the product as every kind of intellectual and art product that is part of any kind of science, literature, music, fine arts and cinema that contains the property of the product owner. Even though it is inferred from Article 2 (3) of FSEK that every kind of map is considered a product, to determine whether it is a product that can benefit from the protection of the law, it is necessary to determine whether it holds the property of its owner along with the evaluation of this decision. The opinion of three experts was taken into consideration; one stated that every kind of map could benefit from the law, and therefore the map in question should be considered as a unique product reflecting the property of the owner. The other two experts expressed that the map did not have any uniqueness. In this respect, the Court decided to create a new expert council that including a cartography specialist. The defendant's attorney alleged that the decision statement was not correct as a result of incomplete examination, and thus, it was required that the appeal rejection of the defendant attorney should be accepted, and the decision should be cancelled. On 11.10.2002, it was unanimously decided the decision would be cancelled in benefit of the

defendant and there was no necessity to examine the appeal rejections of the claimant, and return of the paid appeal cash fee to the one who appealed.

The court did not mention anything on the situation of the data presented on the Internet. However, as the only issue to be considered for the settlement was the originality of the work, then it is clearly seen that the Court did not take into consideration the claims that the data presented on a website becomes anonymous.

3. The Aspects of Ownership in Copyright Protection

Article 8 of FSEK states that the owner of a work is who creates it.²⁷⁷ FSEK provides the terminology owner of the work for the author or the creator of the work. However, this creates confusion as the rightholder shall not be the author always. It is a fact that in such a legislation where the subjectivity of the work for copyright protection is dependent on bearing the characteristics of its author, the owner of the work may create misunderstandings. In the international regulatory framework, Berne and the WIPO Treaties, the author is used rather than the owner of the work expression. Again, for the reproductions,

²⁷⁷ The owner of the work may transfer the economic rights introduced by the law to a third party in accordance with the period, location and the scope of the right provided in the relevant legislation. (Article 48 of FSEK). TEKİNALP 125-135, KAYPAKOĞLU 55-56.

the owner of a work is the one who reproduces without prejudice to the rights of the owner of the original work.

Most of the disputes arise from the identification of the owner in copyrighted works if the work is created more than one person. Article 9 of FSEK sets out the provisions regarding the situations where there exists more than one owner. In such a case, the Article abides that if there is a possibility that the product created by more than one person, can be partitioned, than each of the creators will be considered as the owner of the part they have created individually. Unless the contrary is accepted, each of the creators has to ask for the contribution of the others for the modification or the publication of the whole of the work. If one of the parties does not join the act asked for without a just reason, then the court may give permission. The same rule also applies for the use of the economic rights.

Article 10 specifies the situation where the work which is created by the participation of more than one person bears an integrated character with no possibility of partitioning. In such a case the owner of the work is considered as the union of the people who have created it. A joint work should be result of the creative contribution and efforts of the people involved in the creation of the work in question. Article 10(1) of FSEK accepts the concept of “common product” with the rule of “the owner of the product is the union of those who give birth to it, if the product created with the contribution of more than a person has a united formation”. For fulfilling common product claim, a product needs to be

created with the creative effort and contributions of more than one person. Therefore quality of the effort and the contribution should be taken into consideration rather than the quantity. For to be one of the creators of the work, there should be participation to the formation of the work in practice and creative effort.²⁷⁸ This complies with the provision of Article 10(3) which states that the technical services and the assistance for appendages do not constitute as contributions to the creation. Article 10 also states that the union of the creators will be subject to the provisions of an unincorporated company. Where one of the creators does not give permission to a joint act without a just reasoning, permission may be obtained through the decision of the court. Each of the owners has the right to act individually in case of violation of the interests of the unity.

In the case *Erdoğan vs. Zarif*, the issue of creative efforts and contributions is clearly explained.²⁷⁹ In this case, the plaintiff Zarif alleges that the archive screenings and the translations of some of the documents should constitute the formation of a joint ownership over the book of the defendant. However, it is understood that the defendants do not have any creative effort and contribution to the preparation of the product of the claimant Erdoğan. The

²⁷⁸ ERDİL, Evgin, "İçtihatlı ve Gerekçeli Fikir ve Sanat Eserleri Kanunu, Vedat Kitapçılık, İstanbul, 2004, p. 33.

²⁷⁹ Y.4HD. E.1991/5141, K.1992/11254, T.22.10.1992, available at the database of www.kazanci.com.tr

defendant Zarif scanned the State archives and sent the documents sometimes by translating to author Hamit; and the others helped by typing what Hamit has prepared and collecting documents. The defendants cannot prove that they had creative contributions and efforts to the product. Actually, the defendants do not have any claims for calling their own efforts and contributions as creative effort. Just as, the statements of claimant Zarif in his letter to defendant Erdem on 29 November 1986 proves that the contribution is not creative but assisting. In the letter it is stated that they cannot say that they wrote the book together, they were helping, and their help was as such; typing the notes that Hamit put together the notes he wrote from time to time. Therefore it should be noted that the claimants have the right to an acquisition based on an agreement for assistance and they can petition for a debt case but not for intellectual property.

The court stated that in order to talk about a common product, it is necessary that the product be created with the common effort and contributions of more than one person. It is not important that the effort and contributions are more or less; there should at least be creative effort and contribution. Therefore, the effort and contribution should not be in quantity but in quality. Only leading and helping is insufficient for a common product. In order to create an art product, "one needs to contribute to its formation with creative and active effort". Under the situation of assisting the creation of a product, although not creative, the effort depends on the creative effort. A common product cannot be an issue under the conditions of a technical artist drawing what he is given, an assistant

collecting bibliographical material for a professor who will write a book, an assistant of a sculptor preparing the form according to the model given. Thus, in the Article 10 (3) of FSEK, it is explained that the technical aids and aids for details for creating a product cannot be considered a contributive effort. The aid in such conditions can be display the relationship of a product agreement.

With the Law No.4630 there arrived an amendment to FSEK appeared on the scene, stating that for the works created by the participation of more than one person and bearing an integrated character with no possibility of partitioning, the rights emerging from the work shall be used by a natural person or a legal entity that acts on behalf of all of the owners unless the contrary is foreseen in any other act in force or stated in a contract or in service conditions. In the motives of this amendment, it is mentioned that even though the creators of the work are natural persons, there are practical problems appearing when the people working in public establishments and institutions create works on behalf of those try to use the rights provided for the owner of the works.²⁸⁰ Therefore this amendment is made in order to set the legal ground for the use of those rights by natural persons and legal entities that bring together the creators.

²⁸⁰ ERDİL 33-34.

Ownership is an important issue for technology based creations, especially in computer program business as most of the case computer program creation is a group work financed by an institution. In such a case, in accordance with the provisions of FSEK which comply with those of EU, the works produced in the course of employment will be subject to copyright protection on behalf of the employer, meaning that the employer is the owner of an intellectual product if this product is created by an employee as a part of his work definition. This is also valid for website creation for the cases that the person building the website is also the owner of it.²⁸¹ In the EU Database Directive copyright remains an appropriate form of exclusive right for authors who have created databases and in determining whether a database should be protected by copyright; it should be noted that the selection or the arrangement of the contents of the database is the author's own intellectual creation.²⁸²

The second paragraph of Article 18 of FSEK states that the rights over works that the workers produce in the course of employment as a part of their jobs are owned by those who employ them or who determine it, unless the contrary is understood from the scope of the work or from the special contract between them. The provision of Article 18 totally complies with those of EU

²⁸¹ TURKEKUL 583.

²⁸² Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Recitals 5-15.

directive and provides the essential legal ground for the investor's ownership in computer programs, and also underlines the fact that any kind of copying from the original work by the employee, alleging that it is his own creation is a violation of the rights of the owner. In computer programs creation, the investor who is the owner of the business shall be the owner of the copyright as the employees will be doing this computer program development job as a part of their work definition that they are paid for.

Article 11 of FSEK states that the person who puts his name on the published work, shall be accepted as the owner of the work, unless the contrary is proven. The amendment by the Law No.4110 inserted radio-television to the coverage of the platforms that the owner of the work will be introduced to the public. This amendment as mentioned in the motives of the Law,²⁸³ is done in order to include the mass-media to the scope of Law. However, the wording of the amendment does not precisely cover Internet.

For the cases regarding "no owner name mentioned works", Article 12 sets out the conditions and states that where the owner of the published work is not known, the publisher of the copies of the work will eventually have the right to use the rights of the owner. For computer programs; how to put the name of the owner of the work is one of the issues on the tray. As most of the time,

²⁸³ ERDIL 34.

computer program development is a team work; it is very difficult to figure out who is the main programmer.²⁸⁴

Article 13 assures that the economic and the moral rights of the owners of the intellectual and artistic works are covered by FSEK. In Article 18 it is clearly stated that the right to use the economic rights belongs to the owner of the work, exclusively. Economic rights provide a guarantee to the owner for benefiting from the economic aspects of the work during the term of protection provided by the relevant Law.²⁸⁵ However it should also be noted that there is a time limitation for the economic rights provided to the owner of the work (Article 26 of FSEK).²⁸⁶ Article 27 foresees a life-time protection for the owner of the work with a subsequent 70 years of protection to be provided after the death of the owner.

Article 20 states that the sole person who has right to benefit from the works which are not communicated to the public, is the owner of the work exclusively. The economic rights for the works which are communicated to the public are the right of reproduction, the right of dissemination, the right of broadcasting and the right of public performance.

²⁸⁴ TOPALOĞLU 47.

²⁸⁵ GORDON 622.

²⁸⁶ TEKİNALP 152-153.

Communication to the public is given under the moral rights title in the Law as the timing and the method of this communication act may violate the reputation and the honor of the owner of the work if it is done inappropriately. Therefore it is the right of the owner to prohibit this act of communicating to the public the original or the reproduced work in case of a written permission. This provision is inserted to the Law by the amendments made in Law. No.4630.

For the cases where the owner of the work does not prefer to put his name on the work while publishing or communicating it to the public, Article 15 provides the essential legal ground for such a choice. However, it should be noted that the copies of the original work and the reproductions should in any way assert the name or a sign of the owner of the original work and the type of the work if it is a copy or a reproduction should also be clearly mentioned. When there is a dispute between the parties on the identification of the owner, the original owner may ask the court for the detection of his rights.

It should also be noted that according to Article 16 any kind of modification, summary or appending to the original work on behalf of the owner cannot be made without the prior consent of the owner. There is only one exception. The person, who reproduces, copies, publishes broadcasts or distributes the work with the consent of its owner or as abided by the law, may perform the necessary modifications that should be undertaken for the technique of reproduction, copying, broadcasting and distribution without an

exclusive permission of the owner. However, the owner has still the right to prohibit those acts if they violate the honor and reputation.

Article 17 bears a provision regarding the computer programs in line with the rights of the owner and provides the owner, under the circumstances of attaining the protection conditions, the right to demand to use the original program temporarily, for a short time from the actual possessor of the work. This provision enables the computer programmer to use the original program with the consent of the actual possessor for a given period in order to create a new program taking its roots from the actual program or make a reproduction of it. The main concern is to protect the rights of the possessor however the owner, even though the property of the program is under the control of the possessor which may indeed be transferred with a license or a contract, may use the code for another program in such a case.

The owner of the work has the right to give licenses in compliance with the right of transferring economic rights to third parties as foreseen in Article 48. License provides the owner to transfer some of his economic rights to a third party and is regulated by Article 56 in FSEK. According to Article 56, there are two types of licenses in Turkish law; simple license and full license. If the license does not prevent the economic right owner to give the identical license to other people, than it is a simple license. When the license belongs to only one person it is a full license. A full license is the transfer of some or whole of the economic rights of the owner of the work to the licensee. In case of a full

license the licensee has no difference from the economic right owner in practice. The license is a means of saving and the full license owner has the identical rights of work owner, and is the owner of the neighboring rights including suing for compensation and for the prevention of a violation. In the State Council's decision²⁸⁷ it is stated that "Complete license" is the allocation to the license owner of the use and exploitation of the authority partly or totally that is exclusive to the material right of the product owner that is separated from the material right. This license is separated from the "simple license" by being not given to others. The owners of the complete license can sue to prevent the encroachment of the material right owners and sue for indemnity. And if they don't, they can be responsible to material right owner or product owner because of the losses created.

4. The Provisions of FSEK Concerning Copyright Protection in Digital Environment

a) Reproduction Right

Article 6 of FSEK lists the products that fall within the category of reproductions. Reproduction right allows the author or a third party to reproduce

²⁸⁷ Y.11.HD., E.1998/9958, K.1999/3423, T.11.3.1999, available at the database www.kazanci.com.tr

an artistic or intellectual work, in whole or in part, on whatever medium and in any form, with the prior consent of its author. Article 21 gives the exclusive right to benefit from the work by way of reproduction to the owner of the work. The Law No. 4110 and Law No. 4630 introduced two new concepts to the scope of reproduction right.²⁸⁸ Computer programs and databases are also considered within the scope of Article 6 with two amendments of Law No.41130 and the Law 4630 made in the law on intellectual and artistic works. Those amendments are the reflections of technological developments posing new forms of exploitation to which the current law on copyright should be adapted and supplemented to respond. In the preamble of the Law No. 4110, it is stated that database creation has become very common in Turkey due to the technological developments and databases are regarded as one of the requirements of information society in commercializing and enhancing the mobility the data.²⁸⁹ In the motives of Law No.4630, it is mentioned that this amendment is done in accordance with Article 10(2) of TRIPS which introduces the phrases of “can be read with a device or in other form”. This adaptation of the TRIPS Article is done with the purpose of distinguishing the databases which are formed as a result of reproduction from other adaptations and reproductions.²⁹⁰

²⁸⁸ KACAK 74.

²⁸⁹ ERDİL 21.

²⁹⁰ Ibid.

According to Article 6(10), the adaptation, arrangement and any modification of a computer program shall be considered as a reproduction as long as the copyright holder has given consent to those who realize those acts. The act of decompilation (reverse engineering) which is the conversion of the source code to the objective code and the re-writing of a computer program written with any programming language with a higher level programming language are both the acts of reproduction.²⁹¹ Those acts constitute reproductions of the computer program as to the level that they maintain the connection between the original and reproduced work, showing that the subsequent computer program is a reproduction of the original one.²⁹² The most common reproductions of computer programs are; adaptation of the programming language (for example; from BASIC to COBOL), decompilation, processing a written program to create a new one, modifications on a given program and compiling of the preparatory equipment.²⁹³

For the databases, Article 6(11) states that databases which can be read with a device or in any other form and which are established as a result of compilations of selected data and materials in accordance with a certain purpose and with an exclusive plan are also considered reproductions as long

²⁹¹ TOPALOĞLU 49, ERDİL, İşleme Eserler, 71.

²⁹² ERDİL, İşleme Eserler, 47.

²⁹³ ERDİL, İşleme Eserler, 72, TEKİNALP 122-123.

as they do not distort the rights of the copyright holder and they bear the individuality characteristics of the reproducer.²⁹⁴ However, it should also be noted that the reproduction right of databases does not cover the copyright protection of the data taking part in the compilation. This complies totally with the approach of EU in its Database Directive.

The most crucial part of database protection under the reproductions is the criteria that will determine which of the databases should be subject to protection and which are not. In the doctrine there are two approaches to this issue, effort and creativity.²⁹⁵ The first one claims that due to the efforts given to the creation of a database, it should be protected by a copyright even if it does not bear any originality. Whereas the second approach, supports that the databases that bear creativity and originality should be protected and in relation to this view, the databases that will be protected will be designed in accordance with the original coordination and organization of data selected. Particularly, Tekinalp points out three characteristics that a database should have to attain copyright protection; (i) the compiled materials should be data which can be used for analysis and evaluation; (ii) data should be selected and compiled with a proper purpose; (iii) the data should be selected and compiled in accordance

²⁹⁴ ERDİL, İşleme Eserler, 72-27.

²⁹⁵ ERDİL, İşleme Eserler, 74.

with an flowchart that includes the code system and the detailed scheme of the program developed prior to the writing of the program.²⁹⁶

b) Right of Communication to the Public

In Article 7 of FSEK, it is stated that once a work is communicated to the public with the consent of its copyright owner it becomes public. Article 7 concludes that a work shall be presumed published if it is communicated to the public with the consent of its copyright owner by the sale, distribution and putting into the market in an other form, of the copies of the original work. Once the dissemination right of a computer program is transferred, generally the right of communicating it to the public is also transferred.

The act of communication to the public, its exact time and conditions are set by the copyright holder (FSEK Article 14(1)). Protection period begins with the date of communication to the public and lasts for 70 years (FSEK Article 27). This is also valid for computer programs even though 70 years is quite long term for copyright protection of programs when the rapid out-of-date character of the programs is taken into consideration.²⁹⁷ However, in case of databases,

²⁹⁶ TEKİNALP 123.

²⁹⁷ TOPALOĞLU 94.

the protection provided to the database producer is 15 years.²⁹⁸ This is mostly dependent on the fact that technological developments pave the way to certain revolutionary improvements and result in rapid changes in the methods and technologies used.

FSEK Additional Article 8²⁹⁹ states that the database producer who has made a certain investment quantitatively and qualitatively to the creation, verification or to the presentation of the content of a database has the right to transfer the whole or a substantial part of the database content to another environment, permanently or temporarily, in any form and with any device and has also the right to distribute, sell, rent and communicate to the public in any way. This right is valid for 15 years from the date of being public and it should also be note that any kind of quantitative and qualitative additions, deductions and alterations which necessitate new investment and create a considerable change in the content of the database, generate a new database which will eventually bear its own protection. This means that as long as the content of the database is changed in compliance with the conditions set in the Additional Article 8, it will be considered totally a new database and will therefore be provided protection from the date of the changed database's communication to the public.

²⁹⁸ KAÇAK, 84.

²⁹⁹ As amended by Articel 26 of Law. No.5101.

In the motives of Law No.5101 it is stated that with the Additional Article 8, arrangements that aim at providing the “sui generis” protection to databases are made in accordance with the legal harmonization with the EU *acquis communautaire*.³⁰⁰

In EU Copyright Directive, the right of communication to the public is evaluated in a broader sense covering all communication to the public not present at the place where the communication originates, consequently including transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.³⁰¹ The EU aims at lessening the legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and provides the copyright holders an exclusive right to make available to the public copyright works by way of “interactive on-demand transmissions” which is Internet.

The Turkish intellectual property law does not provide a detailed definition of “communication to the public” and does not clarify whether the concept of “communication to the public covers” interactive on-demand transmissions, namely Internet. However, the provision concerning

³⁰⁰ ERDİL 256.

³⁰¹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Recital 23 and Article 3(2).

communication to the public does not introduce a limitation to this act, either. Therefore it should also be considered that the phrase “putting into the market in another form” can naturally be understood as covering interactive on-demand transmissions. In addition to this, the last paragraph of Article 7 refers to the Article 3(2) of Press Law No.5680 as to be regarded legally binding for the works communicate to the public.

c) The right of dissemination³⁰²

According to Article 23 of FSEK³⁰³; the right of renting, lending, selling or distributing by other means the original work or its copies belongs exclusively to the owner of the work. It should be noted that the dissemination through rental or lending of a work or its copies shall not cause the extended copying of the work that will infringe the owner’s right of copying.

Article 23(2) bears the provisions concerning the principle of exhaustion in the Turkish law.³⁰⁴ In European Union exhaustion is confined to the right of distribution and for the Community exhaustion the copy of the work should be

³⁰² This right is titled as the right of distribution in EU legal framework however, it is used as right of dissemination in the Turkish legal documents, covering also the right of distribution under the same title.

³⁰³ It is stated in the motives of Law No.4630 that the provisions of Article 23 are rearranged in compliance with the provisions of the Council Directive 92/100/EEC.

³⁰⁴ TOPALOĞLU 54.

distributed commercially throughout the Community.³⁰⁵ Accordingly, for the copies that are made abroad, bringing the copies to the domestic market and benefiting from them by the way of dissemination is an exclusive right of the owner of the work. In line with this provision, the copies of the original work made abroad cannot be imported without the prior consent of the owner of the work or the person having the right of dissemination with the permission of the owner of the work. This is an important provision for the sale and the marketing of the computer programs as the copying process in a country where the reproduction is highly developed will facilitate the distribution of the program in another country after turning into a commercial entity.³⁰⁶

For the computer programs, the rights on the program will exhaust in accordance with the personal use of the person who has bought that program, whereas, when the intellectual property is incorporated in a material medium like a floppy or a CD-ROM, then the national exhaustion will occur with the first sale in Turkey.³⁰⁷ The exhaustion depends on the personal use because of the nature of the computer program. The right of dissemination is defined as placing a work into the market. It is a very crucial economic right of the owner of the work and constitutes one of the problematic areas of digital environment. When

³⁰⁵ KREVER 9.

³⁰⁶ TOPALOĞLU 53.

³⁰⁷ ASLAN Adem, "Türk ve AB Hukukunda Fikri Mülkiyet Haklarının Tükenmesi", Beta, İstanbul, 2004, pp. 204-205.

Internet is used as a delivery platform for electronic commerce and when a work is sold and only supplied via the Internet, then there is exhaustion.³⁰⁸ Computer programs which are available in soft forms, sold directly from Internet by downloading to the user's computer, are used by installing to the personal computer. The license of the computer programs allows the person to install it only to one computer. In case of double or triple installment, the password accompanying the product is not recognized by the system and the installation does not proceed. Therefore once a computer program is installed to a personal computer it is exhausted. However, once a computer program is incorporated in a material medium like a floppy or a CD-ROM, then it turns into a hard product meaning that literally even if the product sold is the software itself, the product is in the form of a CD which bears the same conditions of exhaustion valid for any product stands physically in the market. In compliance for the national exhaustion rules available for physical goods, the exhaustion will occur with the first sale in Turkey.³⁰⁹

d) The right of public performance

According to Article 24, the right of benefiting from a work by public performance like reading, playing and showing, directly or by the use of devices

³⁰⁸ LEHMANN, 524, footnote 21.

³⁰⁹ ASLAN 204-205.

that transfer sign, voice or images where the public can be present belongs to the owner of the work. In addition the transfer of a work from the place to be communicated to the public to another place by the use of technical devices also belongs to the owner of the work.

The phrase “use of technical devices” extends the scope of the traditional understanding of public performance whereas the difference between the direct and indirect performance occurs from the fact that indirect performance bears the ability of being repeated “rebroadcasted”.³¹⁰ Internet can be one of the platforms of public performance when the indirect performance and the ability of repeatability are considered. In that regard, computer programs may be subject to indirect public performance when the Internet is used as a device to transfer.³¹¹ However, it should also be mentioned that with the introduction of the broadband³¹², Internet becomes also a platform of direct public performance but it is much more close to the scope of broadcasting right rather than public performance.

³¹⁰ ATEŞ, 192, KENDİGELEN, Abuzer, BOZBEL Savaş, “Telif Hakları Açısından İnternette Veri Paylaşımı”, Edt. ATAMER Yeşim, “İnternet ve Hukuk”, İstanbul Bilgi Üniversitesi Yayınları, İstanbul Ocak 2004. pp.500-503, p. 516,

³¹¹ TOPALOĞLU 55.

³¹² Broadband is a high speed Internet access including technologies of DSL (Internet access over copper subscriber lines), ADSL (Asymmetric Digital Subscriber Line) and Integrated Services Digital Network (ISDN).

e) The right of communication to the public by devices used for sign, voice or image transfer (the right of broadcasting)

The right of broadcasting is connected with the transmission by wired or wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite, or by digital transmission and subject to the authorization of the owner of the work. Article 25, as amended by Law No. 4630, states that the transmission of an original work or its copies by devices used for the transfer of sign, voice and/or image by radio-television, satellite and by wired means like cable or by wireless means or digital transmission is an exclusive right of the owner of the work.

Additionally right of communication to public of the work by the way of re-transmission of it by the other broadcasting establishments is also the exclusive right of the owner. Furthermore the owner of the work also bears the right of permitting or prohibiting the sale of the original work or its copies through wire or wireless means or public distribution or communicating to the public by other means and communicating to the public by means of providing access to his work to the natural people from a place and at a time individually chosen by them.³¹³

³¹³ ATEŞ 192-193.

Accordingly, putting a work on a website to the access of third parties or presenting a work downloaded to a personal computer to the use of third parties through a file sharing platform on the Internet shall be accepted as communicating to the public of a work to the natural people from a place and at a time individually chosen by them.³¹⁴ This is important for peer to peer file sharing acts as Internet provides the users the opportunity to download files from other computers connected to the Internet and to the file sharing platform by using a program that will allow them to show and to see the files to be download and share the files by making them available to the users of that platform at any time they want. So this act violates the right of communication to the public as any of those users has the consent of the owner of the work.³¹⁵

This provision targets at interactive online communication on the Internet and complies with those of the EU Copyright Directive which includes the making available to the public of the works in such a way that the members of the public may access them from a place and at a time individually chosen by them.³¹⁶ On the other hand, the provisions of Article 25 also correspond to those of Article 11 and bis 11 of Berne and Article 9 of TRIPS. It is stated in the

³¹⁴ KENDİGELEN, BOZBEL 519.

³¹⁵ TURKEKUL 586.

³¹⁶ Article 8 of EU Copyright Directive sets out the provisions regarding the right of communication to the public.

motives of Law No.4630 that the amendments are made in accordance with the provisions of Article 8 of WIPO Copyright Treaty.³¹⁷

f) The right of copying

Article 22 of FSEK states that, the right of; whole or partial, direct or indirect, permanent or temporary copying of an original work or a copy of a work, in any form or by any means, belongs exclusively to the owner of the work. In this regard, in a decision taken by the Court of Appeal³¹⁸ concerning the use of a computer database without a license it is stated that this act falls within the scope of Article 22 as it concludes in saving the program in a computer other than the licensed one. In this case the attorney of the plaintiff alleged that the computer program named Progress of which the plaintiff was the authorized distributor in Turkey had been used without license by the defendant and demanded only compensation as the defendant was not using that program any more. The attorney of the defendant claimed that the computer program subject to the legal proceeding was developed by another company named M. which was not involved in this case. The court, relying on the evidences decided that the plaintiff faced injury due to the unauthorized use. The plaintiff appealed the case. In the appeal, it is stated that in accordance with Article 2 of FSEK

³¹⁷ ERDİL 72, ATEŞ 189-193.

³¹⁸ Y.11.HD; 15.05.2001, 1804/4344, available at the database of www.kazanci.com.tr

computer programs are accepted as intellectual products, however, Article 8 of FSEK states that the owner of a work is the person who creates it. The unauthorized use of the computer programs is an illicit act pursuant to the Article 22 of FSEK providing that the unauthorized installment, downloading and storing of a computer program infringes the copying right and the right of copying is given exclusively to the owner of the work. In this case, the plaintiff is not the owner of the work; he is the distributor of the work in question. Therefore, in accordance with Article 52 of FSEK underlying that the contracts of economic rights should be written form and the scope of the contract should be identified under special topics, the court has come to the conclusion that the case should be reevaluated with the contract taken into consideration.

For the digital environment the second paragraph of Article 22 has a special provision asserting that the recording of a work to any kind of device, already known or which will be developed in the future, providing sign, voice and image transfer and replay will also be considered as copying. Copying in that sense, covers the temporary copying of a computer program in compliance with the necessities of the program and also includes the installment, running, and saving of the program.³¹⁹ For the digital copies, it should also be noted that Article 83 of FSEK prohibiting the use of copies of a work, copied with the name

³¹⁹ TOPALOĞLU 50.

and the signs, bears an important provision for digital copies as a part of the unfair competition as the use of these digital copies will distort the competition.³²⁰

The copying right is rearranged with the amendment by the Law No.4110 in accordance with the critical need of protecting the rights of the owner violated and has become easily infringed due to the developments in technology that enable rapid and low-cost/no-cost copying over Internet. It is stated in the motives of the Law No. 4630 that the phrases “in any form or method” and “direct or indirect” are added to the Article with the sole aim of providing a wider coverage which will also include the different materials that the works as copied and as well as different methods of copying that progress technologically.³²¹

This is a crucial provision for the copying acts on the Internet and sets the legal ground for the infringements of copyrights realized by peer to peer file sharing over the Internet, especially the MP3 format music recordings which enable the user minimize the size of the digitized music file. Not only the digitization but also saving the file to proxy server or to RAM are accepted as a means of copying under FSEK.³²² Therefore this provision’s applicability bears a

³²⁰ POROY, Reha, YASAMAN; Hamdi, “Ticari İşletme Hukuku”, 10. Bası, Vedat Kitapçılık, Ekim 2004, p. 291 para 388.

³²¹ ERDİL 65, KENDİGELEN, BOZBEL 511.

³²² KENDİGELEN, BOZBEL 511-512.

significant role for the future of the music industry. In that sense Article 84 can be reviewed as providing the person who has the right of copying and distributing a sign, image or a voice on a device that is used for transferring those with a commercial purpose, may prohibit a third party copying and distributing the same sign, image or voice by using the same device.

Caching³²³, which is a technical process depending on storing a cache in the user's computer for the prompt opening of the websites demanded by the user, constitutes another problematic issue of copying in the digital environment. In paragraph 33 of the preamble of EU Directive 2001/29/EC³²⁴ on the harmonization of certain aspects of copyright and related rights in the information society, caching is accepted as a legal and technically obligatory³²⁵ copying act as long as it enables transmission systems to function efficiently, and does not interfere with the lawful use of technology to obtain data on the use of the information. The legality of caching derives from need for efficient functioning and the lawful use technology. The use of technology will be considered lawful only if it is authorized by the rightholder or not restricted by

³²³ Caching is storing data in a cache, in a form of replication in which information learned during a previous transaction is used to process later transactions. Definitions available at www.techdictionary.com

³²⁴ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Official Journal L 167 , 22/06/2001pp. 0010 – 0019.

³²⁵ TOSUN 542.

the law. According to the provisions of FSEK, under Article 22, caching is regarded as one of the issues to be subject to the work owner's right of copying, as it is stated in the law that the recording of a work to any kind of device, already known or which will be developed in the future, providing sign, voice and image transfer and replay will also be considered as copying.³²⁶ This provision simply outlines that caching is a copying act but tries to establish a flexible regime by not clearly identifying the technology or the machinery used. As long an act is considered as copying then it necessitates the consent of the owner for the realization of copying. However, caching is a technical process that is undertaken by the program itself in order to increase the access speed to the Internet sites visited. Therefore caching cannot be considered as a normal copying act. In EU caching is accepted as a technical copying which is done only for better technological functioning and which is used to increase the speed and the efficiency of Internet access. Therefore in compliance with the EU legal framework, the provisions regarding caching in Turkish law should be reevaluated and in cases regarding caching this copying act should not be considered as infringing the copyright.

In particular, digital copying and distribution of digital copies on the Internet constitute different acts and should be analyzed as individual acts of

³²⁶ TOSUN 541-553.

infringement. Copying can be described as a technical process which provides identical replication of a work and for most of the cases the right of dissemination pursues the act of copying, as two totally different rights.³²⁷ In this case, the plaintiff alleged that the song that he wrote lyrics for and performed by its composer was copied with small negligible changes the lyrics with a different title, and performed and distributed in his album. The State Council's decision stated that this act is both a violation of copying and the distribution right of the owner and infringes both the moral and the economic rights of the copyright holder.

The problem occurs when it is observed that the illegal copying of a work is most of the time followed by the illegal distribution of it. Naturally, if one person copies a protected work solely for his own use, this act is exempted and not considered as an infringement as long as it is a personal use. However, distribution of the work is against the personal use clause.

The case "Turkish Odysse"³²⁸ is a case that gathers infringements of both copying and dissemination. The case is about the use of a map of Turkey which was deemed to be an original work of the writer and the publisher of the book "Turkish Odysse" and its original website as well, without prior consent in a

³²⁷ Y.11.HD., E.2000/7797, K.2000/9773, T.07.12.2000, available at the database of www.kazanci.com.tr

³²⁸ See p.144.

magazine called “Penet”. The representative of the plaintiff alleged that the defendant copied the map which was an original work of the plaintiff, from the website and used it. The court decided that the economic rights of copying and dissemination and the moral right of notification of name of the copyright holder are violated and conceded the defendant should be liable for compensation.

g) The Private Use Exception

The most important exception for the problems arising from digital environment is the exception concerning private use. Article 38 of FSEK states that it is possible to copy all of the artistic and intellectual works for private use as long as there is not any aim of profit-making. This kind of copying is not contradictory to the normal benefiting from the work and does not violate the rights of the owner of the work.

Basically, this provision provides a person the legal right to digitalize and copy a file or image or voice from a CD to a computer for personal use unless that person does not make available that copied digital file to the use of third parties over Internet.³²⁹

Copying is important when the nature and the economic aspects of computer programs are taken into consideration. In the motives of the

³²⁹ KENDİGELEN, BOZBEL 521-522, TEKİNALP 115.

amendment by the Law No.4110³³⁰ it is stated that the technological developments increased the options for making private copying and materialized the need to make legislations that will regulate the personal use of computer programs. Usually when a computer program is installed, there appears an “End-User License Agreement” that outlines the rights and obligations relating to the running and using the program with the basic condition that this program shall be used by the person who bought it for his personal use.³³¹ The person installing this program should accept the agreement in order to be able to use it. In Turkey there is not a special provision for such an agreement however Article 38 of FSEK provides the legal ground and outlines the rights concerning the computer programs and the limits of personal use.³³²

Article 38 permits the copying and reproduction of the computer program by the person who legally acquired it for the cases where this act is necessary for the appropriate use of the computer program including correcting of the errors. In particular, the legal acquirement of the program constitutes the vital feature of the personal use.³³³ It should be noted that contractual provisions

³³⁰ ERDİL 96.

³³¹ ASLAN 204, KENDİGELEN, BOZBEL 520,

³³² ASLAN 204, TOPALOĞLU 51.

³³³ KENDİGELEN, BOZBEL 520.

preventing the person who legally acquired the computer program from installing, running and correcting the errors are null and void. In the EU Database Directive, “lawful acquirer” and “the person having the right to use a copy of a computer” are the parties who can realize the acts of copying, reproduction and correcting.³³⁴

As stated in Article 38, it is the right of the person who legally acquired the computer program to make a back-up copy.³³⁵ This also cannot be prevented with a contract. The rights of the person who legally acquired the computer program covers the acts of installment, running, transferring and saving the program as well as observing, detecting, and testing the program in order to find out the ideas and principles lying behind any part of the computer program. This is not a totally limitless area however; such a freedom given to the user should be used for increasing the effectiveness of the program.³³⁶

For the cases where the decompilation of the code and the copying of the computer program and copying of the code for processing are obligatory for to attain the necessary information for the interoperability of the computer program with other programs, Article 38 authorizes these acts only if the criteria presented are realized. Accordingly, those acts should be realized by a licensee

³³⁴ ATEŞ 381.

³³⁵ ASLAN 204. TOPALOĞLU 52.

³³⁶ TOPALOĞLU 49.

or another person who has the right to use a copy of the computer program in his own computer other than the licensee's or by an authorized person who has the right to realize those acts on behalf of them. The second criterion affirms that the information necessary for interoperability shall not be presented to the use of the people listed above. Interoperability is the ability of a computer program to function and interact with other programs or computers in the network. Thirdly, those acts will only be limited to the parts of the program which are necessary for interoperability.³³⁷

The provisions of Article 38 do not allow the information gained by the acts of decompilation of the code and copying of the computer program and copying of the code for processing, to be used for purposes other than providing the interoperability of an independently created computer program. This information shall also not be given to other people unless there is a necessity for the interoperability of an independently created computer program. It should also be noted that, naturally, this information shall not be used for developing, creating and marketing a similar computer program that will definitely violate the intellectual property rights.

Article 72 of FSEK covers the acts of reproduction and use of the computer programs without authorization anticipating penalties of imprisonment

³³⁷ ATEŞ 386-398.

from 3 months to 2 years and fine from 5 billion to 50 billion TL or both in line with the injury.

h) An Unpublished Reference Case Concerning Copyright Protection on the Internet³³⁸

This case is a recent unpublished case on the copyright protection on the Internet. The parties involve an ISP, a content service provider and a writer. It is a significantly interesting case as it covers all potentially liable parties on such an illicit act.

In the case, the claimant with his petition expressed that he had been a highly known writer who published a book named “Çocuk İsimleri Sözlüğü-Dictionary of Child Names” by Papirüs Publishing found out that his work of art had been published without permission on the Internet by the defendant, and thus, the defendant had violated his rights born with the FSEK. The claimant demanded material and moral indemnity.

The writer claimed that his book had been published on the Internet Web page of the ISP and the website is clicked under the title of Health, another website on baby health and care is accessed. This is a website of a content

³³⁸ The text includes the translations of the official case documents.

provider, a partner of the ISP. Both in the entrance page and in all the sub pages phrases like “This site is a Content Partner of the ISP” can be found. When the baby names section is clicked under this baby website, a page titled baby names can be reached. Under this page; “Source: Metin Celal, Dictionary of Child Names” phrase can be found. In this page, under the Child Names section, when “Boy” or “Girl” phrases are clicked, a page where all the names from A to Z can be reached. When these pages are examined, it can be seen that the book is quoted almost totally. The book is published illicitly in the website of the content provider and reached from the website belonging to the ISP.

The ISP alleged that that it had only given a link to the website and would not be responsible even though the content provider’s website is published under the name and logo of the ISP. The attorney of the ISP, defended that the work had not been used by his client, and the Internet web site had belonged to another defendant, and no antagonism could be felt against his client that is the service provider.

The content provider claimed that, the so-called book had not belonged to the claimant; it was made of quotations from other places, and thus would not be considered as a work of intellectual production and as a result, the law suit was unnecessary and the demanded indemnity was excessive.

The evidence in the evidence list of the parties was collected, summoned in a different work file, the agreement between the Publisher and the claimant was displayed, an expert examination was done to evaluate the claims and defenses and the expert council on 30.01.2003 stated in its common report that the owner of the so-called book was the claimant, the indemnity that could be demanded according to the 68 Art of FSEK by the claimant could be 1.965.600.000 TL, and the moral indemnity could be provided due to the violation of moral rights.

The rejection to the report by the claimant and the reasons stated in the report are evaluated with the collected evidence and the rejection was not accepted. The antagonism rejection made by the ISP was also not accepted by the Court. A decision is given regarding the acceptance of the lawsuit, partly acceptance of the material and moral indemnities. The Court, decided that the book belonging to the claimant was a reproduction, the demanded material indemnity according to the 68 article of FSEK.

The decision has been appealed by all defendants separately. The Court of Appeal has decided that with the rejection of the appeal of the defendant attorneys, the decision was ratified.

V. LIABILITY OF ONLINE INTERMEDIARIES IN COPYRIGHT PROTECTION

The liability for infringement of copyrighted works disseminated over the Internet without authorization has always been one of the most crucial issues on the Internet law. Most of the arguments claim that the legal description of the uses of copyrighted works in an electronic context should safeguard and confirm the rights of their creators in the digital environment. However it is very common that copyrightable works are copied, distributed or displayed without authorization. Furthermore, it is very difficult to determine who the real infringer is as in case of Internet there is always wide range of providers performing between the parties such as between the content creator and the consumer or the hosting service provider and the access provider.³³⁹ The liability in case of infringement is a very complex issue. The question of who is responsible for copyright infringement online needs to be answered.

Content is an important factor in distinguishing the liability on the Internet. Every kind of textual, audio-visual or graphical data presented on the Internet is considered as content. In defining the content, there is a distinction between the

³³⁹ KOELMAN, Kamiel J., "Online Intermediary Liability", Edt. HUGENHOLTZ Bernt P., "Copyright and Electronic Commerce; Legal Aspects of Electronic Copyright Management", Kluwer Law International, 2000, p. 7.

one's own content and the other's content.³⁴⁰ One's own content is the content that the person puts on the Internet by himself and naturally of which he is liable of, whereas the other's content is under the liability of the person who puts it therein unless a third party alters, copies, distributes or reproduces the content without authorization and thereby infringes the copyright owners' moral and economic rights.

The main issue in liability is to determine the scope of it as liability occurs as a problem emerging from the nature of the Internet allowing many different parties to involve in the process of a transmission of a work. The determination of liability is required in two cases; when the service provider itself is found to have engaged in copyright infringement like unauthorized copying or when the service provider is found responsible for contributing to or making possible the act of infringement by another person.

In the early years of Internet, the liability issue was regarded as a problem that is totally related to the Internet Service Providers (ISPs) that perform hosting and Internet access. The traditional ISP liability was emerging from the file-spaces that are made available to the subscribers on the ISPs' servers, in accordance with the contracts signed between the ISPs and its

³⁴⁰ TEKİNALP 299.

users. In case of subscribers using the space given to them as a part of their contract with the ISPs accompanied to the service of Internet access, downloading, storing and uploading illegal copies of copyrighted works was recognized as a problem to be solved in line with the provision of liability. It was necessary to identify whether the ISP was fairly only a “host” without knowledge of providing access to infringing works or not. With the introduction of new variety of online intermediaries that undertake the acts of hosting, storage or transmission of information on the Internet, there occurred to a need to specify the liability of the online intermediaries and to assign a more expanded definition for those agents.

Currently the expression of online intermediaries include not only ISPs in the traditional understanding that solely provide hosting and access but also online sellers and the distributors of goods and services, both virtual and non-virtual, like Amazon, the dating websites, online auction sites like eBay, portal sites that gather information on a selected issue in detail or that cover general information on many different issues, computer program and game providers like Microsoft or Nintendo that make whole computer programs or bug patches available for download online, virtual information providers, aggregators which are the sites providing links to a variety of sites, digital forms of traditional media organizations, universities, libraries and archives offering access to digital content, search engines like Yahoo!, chat-rooms; weblog or online diary sites

like Blogger, mailing list moderators and websites of individuals and institutions including content provided by a third party or hyperlinks to that content.³⁴¹

A. The Acts Challenging the Liability of Online Intermediaries

In order to figure out the liability, first the acts causing infringement should be identified. There are two types of infringement; direct and indirect.³⁴² Direct infringement is accepted as the actual act of violation of the copyright whereas the indirect infringement is contributory. Indirect infringement covers acts of supplying assistance, materials and equipments a part of technical means. For example in the Sony Music Entertainment (UK) Ltd. & Others v EasyInternetcafe Ltd. Case, Easy-Internetcafes were found guilty of copyright infringement by allowing customers to download music and burn CDs at their chain of Internet cafes.³⁴³ EasyInternetcafes have agreed to pay costs and damages totalling £210,000 to the British record industry in compliance with the decision of the High Court judgment.³⁴⁴

³⁴¹ WAELDE Charlotte, EDWARDS Lilian, "Online Intermediaries and Liability for Copyright Infringement", WIPO Seminar on Copyright and Internet Intermediaries, Geneva, April 18, 2005, WIPO/IIS/05/1, p. 6.

³⁴² KOELMAN 16-17.

³⁴³ SHERWIN, Adam, The Times, 29 January 2003, available at www.timesonline.co.uk/law

³⁴⁴ "Damages Awarded in EasyInternetcafe Litigation", available at <http://media.guardian.co.uk/newmedia/story/0,7496,933184,00.html>

The clarification of intermediary liability arising from various different acts of infringement of copyrighted material distributed on the Internet requires the identification of some certain acts that fall under the scope of the liability of the online intermediaries. In this context, there are three main acts that need to be clarified; caching, peer-to-peer (P2P) file sharing and linking. The most vital one is P2P file sharing as it has direct negative economic effects on the copyright owners.

Caching is one of the firstly realized acts for which the definition of the scope of the liability is to needed. Caching is a technical process which enables ISPs to make local copies of remote web pages in the users computers in order to speed up the delivery of those pages on the subsequent request of the users. It needed to be determined whether caching was making unauthorized copies of copyrighted work or not. Today, the generally accepted approach in both European and Turkish legal framework supports the idea that caching is a technical process that is used for increasing the speed of opening a website with the sole aim of efficiency on the net, and therefore does not violate copyright.

The second issue is linking³⁴⁵ which means providing a hyperlink to a site where the illegal content is available. Linking bears greater significance as the Internet deepens in content and becomes manageable only via search engines. The most crucial part of linking emerges from the nature of Internet enabling unlimited hyperlinks which can be generated automatically by locational tools such as search engines. Every time a user requests a search, search engines browse unlimited number of unknown sites of unknown content and direct the search owner to those that fit the search.

Shetland Times v Wills constitutes a very good example for linking.³⁴⁶ The *Shetland Times* was a newspaper published originally hard copy. The owner of this newspaper established an Internet site for the newspaper in order to give the news written in the hardcopy newspaper to the online users. The site was designed with a front page containing headlines from the newspaper upon which the users clicked to access the stories. In 1995, the editor of the newspaper had fallen out with the owner and opened a site called *The Shetland News* which provided news on the Internet. After a year, the *Shetland News* Internet website included headlines of *Shetland Times* as hypertext links. Those

³⁴⁵ A link is a connection between the content of two different files or between different parts of a single file. A link may lead either to another file in the same web site, or to a file on a different computer located elsewhere on the Internet.

³⁴⁶ EDWARDS, WAELDE 185-194.

hypertext links were providing access to the stories on The Shetland Times website. Subsequently, The Shetland Times sued the Shetland News alleging that there was an infringement of copyright. The main thought lying under the suit was that the Shetland Times was planning to sell advertising spaces on its front page which with the hyperlinks provided by the Shetland News, the users bypass. The case was settled with the decision that the headline texts had copyright and copying them for reproduction was an infringement. As a consequence it was decided that the stories that The Shetland News hyperlinked would contain the legend stating “A Shetland Times Story” and would provide link to the main page of the newspaper.

The last issue arises from the increasing number of unauthorized music, computer program and movies copied, downloaded, uploaded and made available on the Internet through the use of P2P file sharing platforms and computer program. The infringement of copyright appears as a complex liability problem as in most of the cases illegal copy is stored or transferred without the knowledge of the Internet access provider who only gives access to it or the hosting provider whose servers only store the it. In the P2P file sharing platforms where the system is centralized, it is easy to appoint both the owner of the platform and the person that uploads copyrighted work to the system as the liable party, as it is easy to identify the. However the developments in technology help the platforms to acquire new P2P file sharing computer

program where it is totally impossible to identify the infringing parties due to the multifaceted, multileveled character of the program.

1. The Role of Online Intermediaries in P2P File Sharing

P2P technology has emerged as a new efficient way of transferring data online, in any form, by facilitating the collaboration among geographically dispersed users. However P2P technology has started to be the nightmare of the copyright owners as it is started to be used for the unauthorized sharing of digital music and movie files on the Internet through P2P networks.

With the computer hardware that makes available music tracks to be copied from a CD-Rom and transferred to and stored in a computer, making copies of digital music files in compressed digital versions like MP3 format, without the authorization of the copyright owner has become very easy and inexpensive.

Today, in copyright liability, the most important aspect is to identify the liable party in use of P2P file sharing which enables unlimited availability and distribution of a copyrighted work to millions of online people. Since the unauthorized mass distribution of copyrighted works via P2P file sharing computer program over the Internet has began in 1999, the world wide music

record sales have fallen 22%³⁴⁷ and P2P file sharing has become one of the most fiercely debated issues regarding the copyright due to its negative effects in the music industry. The illegal P2P file transfer infringes the current copyright system, however the successful informative campaigns³⁴⁸ raise public awareness against illegal file-swapping and inform the users on the legal services which allow consumers get music online via a range of payment methods, including paid-for downloads and subscription, from online sites³⁴⁹. Achieving legitimate online music business is the main concern of the copyright owners. Research Company Jupiter Research has estimated that sales of online music will increase exponentially from less than \$80 million in 2003 to \$3.3 billion in 2008 and account for over 25% of US music spending.³⁵⁰ In IFPI Digital Music Report 2005 it is estimated that the digital music market was worth US\$330 million in 2004, and is expecting it to double in value in 2005.³⁵¹ According to the IFPI Online Music Report 2004³⁵² which is the recording

³⁴⁷ WRAGG Barney, "Universal Music Online", WIPO Seminar On Copyright and Internet Intermediaries, Geneva, April 18, 2005, WIPO/IIS/05/4A, p. 7.

³⁴⁸ For more information see the website of the campaign www.pro-music.org

³⁴⁹ Such as MSN Music Club, Virgin Downloads, Tiscali Music Club, HMV Digital Downloads, Fnac, TDC Musik, Karstadt and MTV.

³⁵⁰ EICTA Position Paper on Digital Content Distribution and Digital Rights Management (DRM), p.2, available at www.euractiv.com/ndbtext/infosoc/ecitadrmpositionpaper21nov2003.pdf, accessed 14.01.2004.

³⁵¹ IFPI Digital Music Report 2005, www.ifpi.org, also available at <http://www.streamingmedia.com/europe2000/busiday2.asp>

³⁵² Press release of 22 January 2004 on IFPI Online Music Report, accessed 3.2.2004, available at www.ifpi.org/site-content/press/20040122.html

industry's first comprehensive global progress report on the growth of legitimate online music business, in Europe, half million people are already signed up to more than 30 different legal sites. In the Report it is stated that the anti-piracy campaign also dented Internet piracy levels worldwide and the number of illegally circulating files have fallen over the last nine months by 20% to 800 million in January 2004. In this significant decrease, judgments of the national courts have also played a major role.

Generally, the intermediaries that enable or assist in downloading and uploading of files, both legal and illegal, by means of P2P computer program are the actual writers of the P2P computer program or the websites from which P2P computer program can be downloaded by its users. In this context, the websites that provide the use of P2P file sharing computer program programs, such as Napster.com, iMesh.com and BitTorrent.com, become the major actors of liability questions.

It should be noted that P2P intermediaries do not themselves host files that infringe copyright but they simply enable the users who have downloaded P2P computer program to exchange and to share files that contain works protected by copyright. There are trackers and seeders in P2P file sharing.³⁵³

³⁵³ WAELDE, EDWARDS 9.

The trackers are the central computers which keep track of all the users downloading a particular file and allow them to find each other whereas the seeders are the users leaving the file available for sharing after having finished the downloading of it. In uploading a work on to the Internet, the main question is to determine whether the intermediaries or the service providers who enable Internet connection are liable for infringements or not.³⁵⁴ According to the provision of communication to the public in Copyright Directive, online distribution which is known as webcasting, broadcasting and cable programs fall within the scope of protection. Under the right of communication provision of the Copyright Directive, service providers who solely provide physical means of access are considered as immune from the liability. This means that Internet service providers that provide only Internet access are not liable for the infringement caused by uploading.

A legitimate P2P file transfer should allow the copyright owners to have the right to choose the criteria of communication to the public including when and how their works are to be distributed, provide control of the copyrighted material for the prevention of the unauthorized utilization or distribution and should provide mechanisms to ensure that the copyright holders are

³⁵⁴ STEPHANBLOME Markus, "Internet Provider Liability for Copyright Infringement under German and European Law", UNESCO Copyright Bulletin, Volume XXXV, No. 2, 2001, p. 5.

compensated at agreed rates.³⁵⁵ Digital rights management technologies are used commonly to control of the copyrighted material for the prevention of the unauthorized utilization or distribution. Today there are many successful online distribution channels of music and video which are protected by digital rights management technologies. Digital rights management enables to create a protection provided both by technology and legislation. The pay-per-download service launched by On Demand Distribution (OD2) in the UK, Germany, France, Italy, Spain and Belgium is considered as an example of the new approach where the copyrighted material is protected by both technological and legal means. This is a business-to-business service, presenting content providers access to a selection of retail outlets on the Internet. OD2 is one of the most advanced online services available in Europe. It uses Microsoft's DRM system with usage rules for content providers. Microsoft's DRM system enables rightholders to control what the end-user is able to do with the digital product such as making a CD copy. Whereas Rhapsody which is an Internet-based 'jukebox' giving its subscribed customers unlimited access to thousands of albums right from PCs, uses a proprietary DRM to protect its catalog from unauthorized access and reproduction.

³⁵⁵ WRAGG 5.

2. The Models of P2P File Sharing

There are four main models of P2P sharing offered by the online intermediaries.³⁵⁶ In the first model the P2P intermediary makes available a centralized index covering all the files stored and available for uploading on the various users' individual computers, from its own website.³⁵⁷ Napster.com site which stands as a reference case for the intermediary liability was developed on this type of system. In Napster³⁵⁸ case for the first time a site is found liable for copyright infringement for not hosting the illicit content but for directing the users towards it. After the prosecution, the new version of the controversial Napster service; Napster 2.0 is developed as a legal, recording industry-sanctioned, pay-to-play online store.

The second model is developed after the Napster case and focuses on the prevention of such an infringing act and the possible penalties. In this model there is not a centralized index offered to the users but there is a decentralized

³⁵⁶ WAELDE, EDWARDS 8-9.

³⁵⁷ MEMİŞ 46

³⁵⁸ In the Napster case, the music industry plaintiffs admitted that Napster did not, itself, make or distribute any or their copyrighted works but was liable for contributory and vicarious infringement for not only enjoying a financial benefit but also bearing the right and ability to supervise the infringing conduct by blocking users' access to its service. That ruling was appealed and affirmed by the Ninth Circuit Court of Appeals, in 12.02.2001. For further information on Napster Case; KENDİGELEN, Abuzer, BOZBEL Savaş, "Telif Hakları Açısından İnternette Veri Paylaşımı", Edt. ATAMER Yeşim, "İnternet ve Hukuk", İstanbul Bilgi Üniversitesi Yayınları, İstanbul Ocak 2004. pp. 500-503. For the legal analysis of the users of Napster; MEMİŞ, pp. 68-72.

system where each user has an index only of those files stored on his computer.³⁵⁹ When a user searches for a file, he sends out a request which is passed from user to user of the P2P computer program, until a positive response is found. The file is downloaded after it is negotiated by the computer program between the user who has the file and the user who made the request. Kazaa.com and Grokster.com are the well-known examples of this model. It should be noted that in this system the unauthorized P2P file sharing is facilitated thereby encouraging the copyright infringement.

The Supreme Court of the Netherlands has considered the liability of the makers of the Kazaa computer program for infringement of copyright in works exchanged between its users. In *Buma/Stemra (Netherlands Music Works Union) v Kazaa* case³⁶⁰ the Court found out that Kazaa was not liable for copyright infringement in music or films swapped on its computer program.³⁶¹ The Court stated that the act of infringing copyright had been performed but by the users of the system not by Kazaa. The Court in its decision asserted that the provider of the P2P computer program will not be liable as such to the extent that such provider does not make any works public or provide them

³⁵⁹ MEMİŞ 47-50

³⁶⁰ Court of Appeal of Amsterdam, 28 March 2002, *Kazaa v. Buma/Stemra*, No. 1370/01SKG. See *M Magazine*, Winter 2002, MCPS/PRS, available at www.mcps.co.uk

³⁶¹ WAELDE, EDWARDS 42-43, KENDİGELEN, BOZBEL, 503-505.

publicly himself. Furthermore, during the investigations it is understood that Kazaa is mostly used for sharing the MS Word files and the autonomous character of the Kazaa computer program is also used by the amateur young photograph artists who want to disseminate their artwork. In the Kazaa case the Court focused on the question on what is the extend of copyright protection for the dissemination of P2P computer program and concluded that the provider of P2P file sharing computer program as the one at issue cannot be itself held liable for the infringement of copyright when the infringing acts are realized by the users.

The third model is the BitTorrent.com. In this model, the users of BitTorrent find lists of "torrent" sites using ordinary websites such as the Pirate Bay.com. In this system the file is not just downloaded by one user from another identified user, but it can be obtained from any other user who is sharing that file. Furthermore the file is split into parts, meaning that each of the parts can be transferred independently and downloaded from different sources. This increases not only the number of users downloading the files but also the number of the parts of downloadable files. In the system every downloader using BitTorrent is also an uploader and that two way interaction provides a very impressive transfer speed for the users and support not only small but also large file downloading. From the copyright protection view, opposite to the indexed models, in the BitTorrent model it is indeed very difficult to identify any one file copied directly from any particular single user. Moreover the files

divided into many small parts do not include the copyrighted content but only indicate the possible downloader.

The last model is the Freenet model which enables files to be downloaded and uploaded in small parts from multiple sources. Files are encrypted to prevent the identification of what file is uploaded or stored. It is impossible to know the origin of the file or by whom it is forwarded due to Freenet's anonymous and decentralized character.

The most critical part a pure P2P file-sharing system is that it creates a platform of unlimited unidentifiable online users where the vendor of the file-sharing tool has no direct involvement in the copying or transmission of the files being shared. Furthermore in a widely-used public P2P file-sharing environment, there is a great possibility that some of the end-users will be engaged in infringing activities, as in most of the cases the copyright owners will not be authorizing distribution of their works via the P2P file sharing platforms. Eventually, in such a case the users of the system will be directly violating one or more of the copyright owner's exclusive rights.³⁶² In this context, in determining whether the P2P intermediaries accountable for copyright infringement or not, the copyright holders have sued not only the owners of

³⁶² LOHMANN Fred von, "What Peer-to-Peer Developers Need to Know about Copyright Law", <http://news.dmusic.com/print/14333>, September 29, 2004, accessed: 20 May 2005.

those platforms but also the users of those websites; the uploaders and downloaders and initiated law suits against them in UK, Germany, France, Austria and the Netherlands.³⁶³ In March 2003, the BPI (British Phonographic Industry representing the recording industry in the UK.) sent a letter to every University in the UK warning that they would face criminal sanctions if they further would continue to collude in the illegal downloading of music files.³⁶⁴ Most recently, in March 2005, a 28-year-old school teacher has been fined 10,200 Euro for being as one of the biggest serial uploaders in the country, offering an estimated 10,000 tracks for download.³⁶⁵

B. The Legal Aspects of Liability of Online Intermediaries

The global approaches to regulating online intermediaries can be divided into three categories: the total liability approach, the self regulation/total immunity approach and the limitation of liability/notify and takedown approach.³⁶⁶

³⁶³ WAELDE, EDWARDS 47.

³⁶⁴ "BPI Target Universities Over Illegal Downloads", 27 March 2003, available at www.timesonline.co.uk/student

³⁶⁵ "French Court Imposes Heavy Fine for Uploading", 02.03.2005, available at <http://www.smh.com.au/news/Breaking/Teacher-fined-836410200-for-downloading-music/2005/02/03/1107228807818.html>

and <http://www.nme.com/news/111277.htm>

³⁶⁶ WAELDE, EDWARDS 19-22.

The total liability approach makes the intermediaries liable unless they fulfill their duty of safeguarding the rights of the copyright holders. In this approach when the service provider which offers hosting was found to be hosting MP3 files that infringe copyright, it would be found as liable as the user who placed the MP3 and would not have the chance of defense by virtue of being an intermediary. This is a very strict system and practically unworkable.

The self regulation and total immunity approach allows ISPs act as the editors and the filters of the content. Such a system requires total immunity from liability for the ISPs in respect of the content they carry and host. The most important example of total immunity regulation in global legislation is the US regime; Communications Decency Act 1996 (CDA).³⁶⁷

The limitation of liability/notify and takedown approach is the approach that is undertaken by the European Union in the Electronic Commerce Directive. This system depends on the understanding that there should be a balance in determining the liability of the online intermediaries in compliance with identified risks and immunity. Notice and take down procedure implies that the service providers which are not liable of the content, should assist the protection of the copyrights on the Internet by providing technical support. This

³⁶⁷ WAELDE, EDWARDS 20.

technical support can be explained as the act of blocking the access to the infringing content and taking it down. The major problem of notice and take down regime is its liberal nature that leaves the decision of taking down after a notification is made, directly to the service providers without any court prosecution.³⁶⁸

1. Liability of Online Intermediaries in the EU Legal Framework

The European approach to liability is established by two directives; Copyright Directive and the Electronic Commerce Directive with a view to find a clear framework of rules relevant to the issue of liability of intermediaries for copyright and relating rights infringements at Community level.

The liability provisions provided in the Electronic Commerce Directive is not specific to copyright protection; however, bear a more general approach to the content liability. In Electronic Commerce Directive a balance between privacy of subscribers and the responsibility to cooperate with the copyright holders is tried to be reached.

³⁶⁸ UÇKAN, Özgür, BECENİ Yasin, "Bilişim-İletişim Teknolojileri ve Ceza Hukuku", Edt. ATAMER Yeşim, "İnternet ve Hukuk", İstanbul Bilgi Üniversitesi Yayınları, İstanbul Ocak 2004. pp. 401-402.

However in both of the Directives, the criminal sanctions for the copyright infringements are left to the jurisdiction of the Member States' national law even though in the international intellectual property protection rules introduced by TRIPS urge WTO members to impose criminal sanctions, like imprisonment, for people who counterfeit goods for commercial gain. There appears a problem in P2P file sharing, as the criminalizing the act of file sharing may end up in the prosecution of an ordinary consumer making copies for his own, as harshly as a person making and selling millions of copies of CDs. European Bureau of Consumers Unions state their reservation on the criminalization of file copying by a consumer downloading music from the Internet to make a private copy for personal and non-commercial use and defend that in such a case the consumer should not be prosecuted at all.³⁶⁹

a) Liability in Electronic Commerce Directive

The Electronic Commerce Directive defines the intermediaries as the information society services providers. An "information society service" is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of a service. The phrase 'at a distance': points out that the service is provided without the parties

³⁶⁹ EU prepares to debate P-to-P file-sharing, Monday 9 February 2004, Computerweekly.com, accessed: 23.05.2005.

being simultaneously present whereas 'by electronic means': means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means. The phrase 'at the individual request of a recipient of services': means that the service is provided through the transmission of data on individual request.

This definition introduces a more general liability regime than the traditional ISP based one. Recital 18 of the Directive states that information society services cover various economic, online activities such as selling goods online, offering on-line information or commercial communications, providing tools allowing for search, access and retrieval of data; services consisting of transmission of information via communication networks, providing access to a communication network or hosting information provided by a recipient of the service, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by electronic mail. Accordingly, the liability regime includes the electronic commerce sites, online information and search tools and telecommunications, cable and mobile communications

companies offering network access services, individually on-demand services like video-on-demand and email.³⁷⁰

In Recital 42 it is stated that the exemptions from liability established in Electronic Commerce Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient. This is a technical, automatic and passive process which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored.

In the European Union ISPs are offered full immunity in cases of mere conduit. This is in line with the understanding reached in the WIPO Copyright Treaty. In the agreed statement to the WCT, it is stated that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.³⁷¹ Article 12 (1) of the Directive asserts that a service provider can benefit from the exemptions for mere conduit when they fulfill the criteria

³⁷⁰ WAELDE, EDWARDS 11-12.

³⁷¹ WIPO Survey, 44.

provided in the Article. Accordingly, ISPs should not initiate the transmission, select the receiver of the transmission or modify the information contained in the transmission in order to preserve the immunity from the liability. In such a case, law regards the ISPs as a common carrier like a post office offering automatic, intermediate, and transient storage service. The manipulations having technical nature which take place in the course of the transmission are not covered by the Directive as they do not alter the integrity of the information contained in the transmission.

The conflict between IFPI and the Belgian Telenet³⁷² constitutes a recent example for mere conduit. The IFPI, the international representative of the recording industry, has initiated legal proceedings against the Belgian ISP Telenet alleging that there is unauthorized distribution of music via Usenet newsgroups and demanded the blocking of the access to the newsgroups in Telenet's news service which are known to be used for distributing illegal music files. The Telenet ISP claimed that providing Usenet services is a mere conduit activity in which Telenet does not control the content of data that are being transported over the network by its customers and therefore in accordance with the provisions of the Electronic Commerce Directive, Telenet cannot be held liable for giving access to infringing MP3s. The Belgian Internet Service

³⁷² IFPI sues Belgian ISP over Usenet, 11 February 2004, available at www.edri.org/edriagram/number2.3/usenet, Retrieved 24 March 2005.

Providers Association (ISPA) in its statement concerning the allegations on Telenet supported the Telenet due to the fact that it did not initiate the transmission, select the recipients, and did not select or modify the newsgroup content which is being transmitted. The conflict is seeking settlement outside the Court, with its preferred outcome a Protocol that would describe how the IFPI, the Ministry of Justice and ISPA will handle future manifestations of illegal content in newsgroups.³⁷³

In accordance with Electronic Commerce Directive's Article 13, a service provider can benefit from the exemption for caching when he is not involved with the information transmitted. Article 13 states that an ISP will not be held liable for the automatic, intermediate, and temporary storage of information that is carried out for the sole purpose of making more efficient the onward transmission of the information to other recipients of the service upon their request. The automatic transfer of website information held on a server, regularly used by the recipients may constitute an example of caching.³⁷⁴ For attaining exemption the service provider should no way be modifying the information transmitted and should comply with conditions on access to the

³⁷³ WAELDE, EDWARDS 26.

³⁷⁴ PEARCE, PLATTEN 372.

information and the rules regarding the updating of the information, specified in a manner widely recognized and used by industry.

Furthermore the provider should not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information. In addition, the provider should act expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement. Accordingly, immunity is provided for taking down cached copies once they obtain actual knowledge that the original source of the information has been removed or access to it disabled, or removal or blocking of access has been ordered by a competent court or authority. Provision concerning caching enable search engines to maintain copies of material locally to assist searchers even when they have moved on the original site, and mirror sites set up to reduce the demand on a single site offering popular pages.³⁷⁵

The liability issues concerning hosting are laid down in Article 14. According to Article 14 (1) when an information society service consists of

³⁷⁵ WAELDE, EDWARDS 23.

storage of information provided by a recipient of the service who can be any natural or legal person using the information society service for private or professional reasons, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service. However, this exemption will be dependent on the conditions that the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent. Furthermore, the provider, upon obtaining such knowledge or awareness, should act expeditiously to remove or to disable access to the information in question.

Under Article 14, information society service providers are exempted from liability in respect of the storage of information provided by a recipient of their services, as long as they do not have the actual knowledge of illegal activity or illegitimate nature of the content in question. This is immunity from the criminal liability.

For the claims for damages that fall within the civil liability information society service providers are considered immune as long as they do not have the actual knowledge and are not aware of facts and circumstances from which the illegal activity or information is apparent. However, Article 14 (2) provides that content is shall not be treated as originating from a third party if that

recipient acts under the authority or control of the information society service provider.

Although Article 12 (1), Article 13 (1) and Article (14) (1) provide exemption of liability in cases of mere conduit, Article 12 (3), Article 13 (3) and Article (14) (3) give the court or administrative authority of a Member State, the right to obligate the service provider to terminate or prevent infringement in accordance with its legal systems and not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information.

In accordance with this provision, Italy has made transferring content via the Internet through P2P file sharing websites or computer program without the permission of the copyright holder a criminal offence with jail sentences on anyone caught uploading or downloading unauthorized copyright material to and from the Internet whether for financial gain or not.³⁷⁶ Those found guilty of the unauthorized distribution of copyrighted material will be subject to a fine of between 154 Euro and 1.032 Euro, a jail sentence of between six months and three years, the confiscation of their hardware and computer program, and the

³⁷⁶ Italy Approves Jail for P2P Users, 20.05.2004, available at www.theregister.co.uk/2004/05/20/italy_p2p_law, accessed 4.04.2005.

revelation of their misdeeds in Italy's two national newspapers, La Repubblica and Corriere della Sera.

On the contrary to Italy's severe punishment approach, Spain, Austria, Lichtenstein and Portugal have extended intermediary immunities to cover linking liability.³⁷⁷ In the First Report on the Application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market on 21.11.2003³⁷⁸, it is stated that some Member States prefer to provide for limitations on the liability of providers of hyperlinks and search engines. This move is evaluated as incentives for investment and innovation and for the enhancement of the development of e-commerce by providing additional legal clarity for service providers. However, there are two recent rulings of German and Norwegian Courts, finding out that linking constitutes a copyright infringing act and a liability issue of the service provider.

The latest German ruling on linking constitutes an opposite attitude. In May 2005, the First-Instance District Court of Munich has ruled that German website Heise.de has violated the country's copyright legislation by linking to

³⁷⁷ WAELDE, EDWARDS 24.

³⁷⁸ First Report on the application of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, 21.11.2003, COM(2003) 702 Final.

SlySoft's website which is the maker of ANYDVD, a computer program product that allows cracking the copyright protection found on most DVD-Video discs, and CloneCD, a tool that allows backing up virtually all of the copy protected audio CDs.³⁷⁹ Even though the website defended itself by pointing out to the freedom of speech, the court ruled that in this case the protection of intellectual property creates the major concern and decided that enabling direct linking via the website of SlySoft facilitated the finding of the files and thus increased the threat of copyright violations significantly. The court stated that the linking to copyright infringing tools is illegally in Germany and ruled that the Heise Zeitschriften Verlag, the owner company of the website is subject to pay 500,000 euros in damages to the music industry. Interestingly, the Court also informed that publishing articles about copyright infringing tools is legal in Germany, in relation to the freedom of speech.

In March 2005, the Norwegian Supreme Court has found a student running a website linking to free digital music files liable for copyright infringement even though third parties provided the infringing material.³⁸⁰

³⁷⁹ Links to Piracy Tools Ruled Illegal in Germany, Music Business Journal, May 2005 Issue, available at <http://www.heise.de/english/newsticker/news/58315>, accessed 05.05.2005.

³⁸⁰ "Norwegian Supreme Court Finds Link Site Owner Liable for Copyright Infringements", available at http://www.out-law.com/php/page.php?page_id=mplinksbreachcop1107172121&area=news

Norwegian subsidiaries of Sony Music and Universal Music, sued the student and the student was fined 100,000Kroner (£ 8,000) for abetting an illegal act.

The notice and take down regime in EU is also given in Article 14. Accordingly, Article 14(1)(b) of the Directive introduces that the provider of an information society service, consisting of the storage of information, upon obtaining such knowledge or awareness, should act expeditiously to remove or to disable access to the information to retain the exemption from liability. In Recital 46 it is stated that the removal or disabling of access has to be undertaken in the observance of the procedures established for this purpose at national level meaning that the Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information. In line with this provision, EU Member States approach differently to the issue. In Belgium, take down of content by an ISP must be authorized not by a full court but by a state prosecutor whereas in Italy and Spain, Electronic Commerce Directive oriented regulations foresee that a competent body should determine the legality of disputed content.³⁸¹

³⁸¹ WAELDE, EDWARDS 32-33.

However, in practice notice and take down is not carried out precisely by the ISPs and the removal of the content or the disabling access is done without prior investigation. The research carried out by Sjoera Nas at Bits of Freedom, a digital human rights group in the Netherlands targets to observe the notice and take down tendency of the ISPs in Netherlands.³⁸² In the research Nas, pretending to be a copyright owner and a complainant, asked 10 Dutch ISPs to remove works by Multatuli, a Dutch writer who died in 1860. The works of the writer were in the public domain. Seven ISPs took down the text without checking it out; one failed to respond to the complaint, only one examined the text of and informed that it was in the public domain and the last one one forwarded the complaint to the website owner. The takedown hit rate was 70%.

There are also different types of online protection tools like a webpage on copyright information with the sole aim of user education, search of the infringing items, personal information requests and notice computer program that are preferred by the online intermediaries in order to increase the control of the illegal use of the copyrighted works and to increase the notice and take down process. The VeRO program that eBay, one of the world's biggest global online trading platform with about 40 million daily product listings, uses, enables

³⁸² For further information; <http://www.bof.nl/docs/researchpaperSANE.pdf> and http://Isolum.typepad.com/copyfutures/2004/10/multatuli_proje.html

right owners to request the removal of the infringing items including music and computer program from the website, free of charge since 1997.³⁸³

Article 15 provides that Member States of the European Union may not impose a general obligation on ISPs to monitor the information or data which is transmitted or stored through their services. However, Member States may establish obligations for information society service providers to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service. Member States may also demand the providers to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements. Contrary to this provision, enabling Member States to gather information for identification of the people taking part in infringing act, the Higher Regional Court of Frankfurt has ruled that ISPs are not obligated to reveal the names and addresses of the Internet users offering downloads of music files on the Internet even though this violates the copyrights or other rights of third parties.³⁸⁴ The Court noted that the ISPs only provide technical access to the Internet and does not generally have any obligation to

³⁸³ NIKULA Jyrki, "Protecting Intellectual Property in the Online World", WIPO Seminar On Copyright and Internet Intermediaries, Geneva, April 18, 2005, WIPO/IIS/05/6, p. 5

³⁸⁴ Case Reference: 11 U 51/04. "German Court Clears ISPs of Liability for Infringing Uses by Third Parties", available at <http://www.heise.de/english/newsticker/news/55580>

inspect the data being sent through their network and therefore are obliged only to block access for the cases that they are informed of the illegal content.

Article 21 of the Directive foresees a re-examination process which requires the Commission to submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of the provisions of the Directive in every two years in order to analyze the need for proposals concerning the liability of providers of hyperlinks and location tool services, "notice and take down" procedures and the attribution of liability following the taking down of content and also for the additional conditions for the exemption from liability, provided for in Articles 12 and 13.

b) Liability in the Copyright Directive

In the EU, even though there is not a special legislation concerning file transfer, some provisions of the Copyright Directive include this act. As the Copyright Directive targets the harmonization of the authors' right of communication to the public regardless of where this takes place under Article 3, this right covers any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.³⁸⁵ The on-demand transmission of copyrighted works over networks falls within the scope of the

³⁸⁵ MEMİŞ 69.

rights given by this Directive. This also includes the right of making available all forms of transmissions of music online. However, Directive does not provide that the first sale doctrine, which is referred to as exhaustion of rights can be applied to the online delivery of music.³⁸⁶

Article 5 (1) of the Copyright Directive provides exemption for caching. Accordingly, the temporary acts of reproduction which are transient or incidental and which are integral and essential parts of a technological process, bearing the sole purpose of enabling a transmission in a network between third parties by an intermediary are exempted from copyright protection. In cases lawful use, again the temporary acts of reproduction which are transient or incidental and which are integral and essential parts of a technological process are exempted. However, the acts of reproduction concerned should have no separate economic value of their own.

Recital 33 states that the exception in Article 5 (1) should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data

³⁸⁶ GERVAIS 1403-1404.

on the use of the information. A use should be considered lawful where it is authorized by the rightholder or not restricted by law. This provision is totally in compliance with the provisions of the Electronic Commerce Directive which establishes a limited liability regime for the online intermediaries.

2. Liability of Online Intermediaries in the Turkish Legal Framework

In Turkish law, there are two types of liability; the liability in a contract, emerging from the provisions of a contract and the liability falling out of a contract.³⁸⁷ The conditions that prevail over the liability are also applied in case of liability of the online intermediaries.³⁸⁸

The copyright infringement on the Internet is considered as a tort and therefore it requires the elements causing the tort.³⁸⁹ The tort can be defined in two groups; the acts in opposition to the contract³⁹⁰ (Article 96 of the Turkish Code of Obligations), and the torts in narrow sense which does not arise from a contract but from the general provisions of the Code.³⁹¹ The elements of liability in tort include the acts in opposition to the law, injury, fault and the causal

³⁸⁷ TEKİNALP 300

³⁸⁸ TEKİNALP 299

³⁸⁹ Ibid.

³⁹⁰ For information on contracts in Turkish Code of Obligations, YAVUZ Cevdet, "Türk Borçlar Hukuku Özel Hükümler", Genişletilmiş 5. Bası, Beta, İstanbul, 1997.

³⁹¹ REİSOĞLU, Safa, "Borçlar Hukuku, Genel Hükümler", Onyedinci Bası, Beta, 2005, p. 138.

relation.³⁹² Those four elements derive from Article 41 of the Turkish Code of Obligations stating that the party that causes the injury of the other party tortiously, on purpose, or in negligence or in recklessness, is subject to the compensation of that injury. In addition to this, Article 70 of FSEK covers the rights of prosecution for compensation of damages for pain and suffering and of the damages for pecuniary loss occurred as a result of tort.

The liability in tort derives firstly from acts in opposition to the law. The acts in opposition to the law are defined as the acts that contradict the written or non-written rules for the protection of personal property in economic and moral terms, including copyright.³⁹³ Accordingly, when the acts of copyright infringement on the Internet, undertaken by the online intermediaries are taken into consideration, it is seen that the acts are certainly in opposition to the law. The clause of opposition to the law will diminish in cases of public competence, the use of a right deriving from private law, the consent of the infringed party, scientific criticisms, self defense, state of necessity, use of force to protect one's own right, damage intentionally with an unmoral act.³⁹⁴

³⁹² REİSOĞLU 139.

³⁹³ REİSOĞLU 140.

³⁹⁴ REİSOĞLU 141-145.

In accordance with Article 41, also injury should be identified in order to claim liability in an act. In tort, injury is the state of difference occurred between the actual situation and the situation how it would be if the tort would not have been realized.³⁹⁵ The injury may be in actual terms or in terms of profit loss. Accordingly, in case of copyright infringement on the Internet, there appears injury both in the economic and moral rights of the copyright owners, therefore the online intermediaries that involve in such acts, will then be held liable of the injury thereof.

The fault establishes another aspect of liability in tort. The Turkish Code of Obligations foresee that a person injuring a party with an act opposite to the law, will only be assumed liable for the compensation if there is fault.³⁹⁶ Fault may occur due to intention or negligence. Both cases are subject to compensation. Accordingly, if an ISP does not take down the infringing content after being notified by the copyright owner, due to negligence, it will also be held liable of tort.

When the liability of the online intermediaries is analyzed in the framework of the elements of liability in tort, it is seen that that without the positive act of Internet service providers, it is impossible to join the Internet and

³⁹⁵ REİSOĞLU 146.

³⁹⁶ Ibid.

to act illicitly.³⁹⁷ The negative result is reached by gathering the diverse acts of diverse parties together, which may fall within the casual relation. Casual relation depends upon the connection between the act opposition to the law and the injury. This is an important factor when P2P file sharing is considered. In P2P file sharing, there exists a casual relation between the owners of the platforms that enable the users to download the P2P computer program for file sharing and the copyright infringements occurring due to the distribution of the digital copies by the users of that platform. Similarly, there is also a casual relation between the users of the system and the dissemination of the unauthorized digital copies of music files.

The liability of the online intermediaries should also be evaluated under the joint liability emphasized in Articles 50 and 51 of the Turkish Code of Obligations. Article 50 covers the cases where more than one person causes injury with joint fault, whereas Article 51 includes the situation where more than one person is held liable for the same injury due to several reasons, even though they are not jointly caused that injury. The joint liability arising in Article 50 emerges from cooperation and consensus between the parties that cause injury by an act in opposition to the law with a joint fault. In such a case, all of

³⁹⁷ MEMİŞ, 162.

the parties involved will be liable for the compensation.³⁹⁸ When the online intermediaries are taken into consideration, this provision sets the essential legal ground for liability in linking. For the cases where there is not an evidence of cooperation between the parties who are involved in the same acts in opposition to law which result in the same injury, the parties involved will fall under the scope of Article 41, pursuant to the liability deriving from causal relation and will be liable of the entire injury.³⁹⁹ This provision may be applicable for the copyright infringements cause by the parties that disseminate the unauthorized digital copies of music files on the P2P file sharing platforms. For the ISPs that provide hosting, the joint liable clause will be valid for the cases where the ISP has the knowledge that the content stored is illicit and does not take the necessary measures.

a) The Liability of Online Intermediaries under Turkish Copyright Protection

In Turkish legal framework, the liability of the online intermediaries is provided by the latest amendments of the FSEK. The Additional Article 4 included in 2004 sets the rules governing the liability issue on the Internet. Additional Article 4 states that; in case of the infringements of the copyright

³⁹⁸ REİSOĞLU, 178, MEMİŞ, 153.

³⁹⁹ REİSOĞLU, 179-180

holders, by the service and the content providers that use transmitting devices including the digital medium, the infringed works shall then be taken down due to the notice of their owners. Accordingly, when compared with the EU legal framework including the liability of the intermediaries, similarly, this Article provides notice and take down procedure which is relying on the prior notice of the copyright holder.

The terminology used for the online intermediaries and grouped in two different names; the service providers and the information content providers, creates confusion. The text shows that service providers are deemed to be the access providers whereas information content provider should be regarded as any of the other online intermediaries that provide services other than access. Even though the approach is parallel to the EU, the problem arises from the use of information and content together as substantiating phrases to expand the scope of the services provided and remain as one of the deficits of this Law.

Additional Article 4 explains the notice and take down regime in detail. When the copyright owner, a natural or a legal person it may be, realizes an infringement, the Law anticipates the owner to inform the information content provider and ask for bringing to an end the infringement in question in three days. In case of the continuity of the infringement, upon a notice made to the Attorney of Republic, the service provider is asked to stop the services provided to the information content provider in three days. The services shall only be re-

provided to the information content provider after the take down process is realized.

The most criticized part of this Article is its obligatory attitude towards the service providers that obliges them to deliver a list containing the names of the information content providers that they provide services therein, to the Ministry of Culture and Tourism. This is an incredibly bureaucratic paper work which is totally against the nature of the Internet where every single thing is in digital formats. Furthermore both the service and the information content providers are compelled to present every kind of information and document to the Ministry in condition of a demand. This part of the Article resembles to the application of US for the liability issue of the intermediaries on the Internet, however lacks practicability when the obligatory elements are taken into consideration.⁴⁰⁰

For the parties that realize the acts of infringement on purpose and without authorization and for the information content providers that continue the infringement, Additional Article 4 foresees the application of the provisions of Article 72 of FSEK. This paragraph is included to the text by the amendments made in 2004 in order to clarify the penalties that the information content and service providers are subject to and falls within the criminal liability. Those

⁴⁰⁰ ERDEM, "Bilgi Toplumunda Fikri Haklar" 28.

penalties include imprisonment from 3 months to 2 years and a fine from 5 billion to 50 billion TL or both in line with the injury. However, this provision regarding the penalties is very hard to attain as in most of the cases the service providers do not provide content and the content providers are located in foreign countries, remaining unidentified.⁴⁰¹

b) Liability in P2P File Sharing under the Copyright Protection

The P2P file sharing constitutes both the infringement of economic and the moral rights of the copyright holder under FSEK. The digitalization of an art work does not prevent the continuity of the protection provided by the Law. As the use of P2P file sharing computer program requires the transformation of the music file into a digitalized format, is not an act of reproduction, P2P file sharing does not infringe the right of reproduction.

When the act of P2P file sharing is analyzed, surprisingly it is seen that this act infringes the right of copying at utmost level. The digitalization of a work is basically falls within the act of copying. Therefore under Article 22, the person realizing the act of copying will be held responsible as long as this act does not conflict with the personal use clause in Article 38 of FSEK which enables the users to make copies of their own under the condition of non-commercial use.

⁴⁰¹ SULUK 194.

So there should be a distinction between the limits of personal use. The person transforming music work into digital format; into MP3 for personal use will not be held liable for copyright infringement unless he disseminates this file on the Internet to third parties over P2P computer program platforms.

The most challenging part of liability in P2P file sharing emerges when the digital formatted music works are distributed on the Internet. Under Article 23 of FSEK, act of dissemination is an illicit act. Furthermore this act also falls within the category of communication public under Article 24 of FSEK and naturally infringes the copyright. However, will a person downloading a music file from a P2P file sharing platform for his personal use be regarded as an infringer, this is the question. In accordance with the personal use clause in the Law, it is true that any person that performs copying for personal use may not be considered as the infringing party as long as he does not upload any file to the system and becomes a distributor, as well. In Turkey, still there is not a commonly approved solution for this. Therefore the cases in EU may form samples for the future cases in Turkey.

The most welcomed approach is be to pretend the P2P computer program platforms as the access providers, claiming that they do not distribute any illegal content and they do not have knowledge or control over the files in

transaction.⁴⁰² This approach offers immunity from liability to the P2P computer program providers as long as the system is not functioning with centralized index methodology.

The liability of the users of the P2P file sharing platforms depends upon the status of the user. The user will be liable unless remains passive and does not make digital copies to disseminate. This is the same situation when a print out of a website that is subject to copyright protection is made and distributed via photocopying. The personal use clause should be determined in compliance with the facts that if every single user makes a copy of a protected work for personal use, there will be a huge economic loss of the copyright owner as well as the moral due to the communication to the public and the integrity of the work principles in copyright protection.⁴⁰³ Therefore on the Internet, the consent of the copyright owner is an important aspect.

⁴⁰² KENDİGELEN, BOZBEL 526.

⁴⁰³ TEKİNALP 115.

VI. INTERNATIONAL JURISDICTION IN COPYRIGHT PROTECTION

A. The Concept of International Jurisdiction in Copyright Protection

Copyright protection laws are generally applied and enforced nationally. Even though there are several treaties like Berne, WIPO and TRIPS that provide minimum levels of protection, through a process of harmonization, significant differences still exist between the laws of the countries. The technological developments that pave the way for rapid and easy copyright infringement bring into the light the need of an enforcement which is global or at least regional. The examples of such acts include disputes between a copyright owner residing in one country and Internet users residing in other countries who are accused of digital copying and making available, on servers located in multiple jurisdictions, copyrighted material for download by any person anywhere in the world, without permission.⁴⁰⁴

As it is very difficult to attain a unique protection of copyright, the infringement with trans-border nature maintains its position in the scope of private international law issues; remained under the jurisdiction of the courts dealing with the acts taking place in foreign countries. The objectives of private

⁴⁰⁴ WIPO, Intellectual Property on the Internet: A Survey of Issues 113.

international law include the providing justice, attaining the security of the legal transactions, the prior knowledge of the applicable law which increases trust, the protection of the structure and the general interests of the society and the achievement of harmonization in international decisions.⁴⁰⁵

Private international law consists of two main issues to be clarified; (i) which nation's courts have jurisdiction over disputes involving a foreign element and which conditions need to be met for decisions of foreign courts to be recognized and enforced within a country (jurisdiction and the recognition and enforcement of judgments); (ii) which nation's laws are to be applied to govern the substance of legal relationships involving a foreign element (applicable law). Therefore in international law issues the main questions will be the applicable law in respect of such acts and the rules concerning recognition and enforcement of foreign judgments.⁴⁰⁶ In case of conflict of laws, a decision should be made on which law or system should govern the case.⁴⁰⁷

⁴⁰⁵ ÇELİKEL, Aysel, "Milletlerarası Özel Hukuk", Yenilenmiş Yedinci Bası, Beta, İstanbul, Mayıs 2004, pp. 29-32.

⁴⁰⁶ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Milletlerarası Yetkisi", Beta, 2003, p. 5, WIPO, Intellectual Property on the Internet: A Suvery of Issues 114

⁴⁰⁷ LEE 7.

1. The Foreign Element

At the national level, questions of jurisdiction, applicable law and recognition and enforcement of foreign judgments have been resolved by reference to private international law. Private international law does not constitute of rights and obligations between States but on the contrary, it is municipal law and aims at regulating conduct between private parties. Therefore each country has its own set of private international law rules. International private law introduces the provisions for the jurisdictional disputes and sets the rules concerning the relations between different nationals, the determination of whose law will be applied and which of the nation's court will proceed.⁴⁰⁸

The international dimension of the law derives from the presence of a foreign element in the case. The foreign element in a case shows the connection of a relationship to a different legal system other than the law of the country that the legal jurisdiction will be sought. There are several cases where the foreign element appears⁴⁰⁹. These include; when one of the persons involved in a case being a foreigner or having a domicile in a foreign country or has a permanent domicile in a foreign country; when the subject matter of a dispute is in a foreign country; when the legal transaction subject to dispute is

⁴⁰⁸ GÖZÜBÜYÜK, Şeref, "Hukuka Giriş", 20th Edition, Turan Kitabevi, Ankara, 2004, p. 29.

⁴⁰⁹ ÇELİKEL 7-8.

realized in a foreign country; when the contract subject to dispute is performed in a foreign country; when the parties of the contract subject to dispute agree to apply a foreign law and when the tort subject to dispute is realized in a foreign country.

2. Territoriality Principle

The principle of territoriality is used to determine the area of practice in relation to the geographical location and the limit of the effect of the act. In nature of intellectual property law is "territorial," because of its geographical scope of application, defined by and restricted to the boundaries of the each nation. The determination of the area of practice is called "territorialite juridique" focusing on the material application whereas the determination of the limits of the application of the relevant norms before the foreign courts.⁴¹⁰ In intellectual property rights the principle of territoriality shows the connection between the rights and the country that those rights exist in.⁴¹¹ The Berne Convention for the Protection of Literary and Artistic Works, is governed by the principle of territoriality, leaving the scope and content of the rights at the discretion of

⁴¹⁰ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi", 46. For further information on territoriality, ERDEM Bahadır B., "Fikri Haklarda Ülkesellik Prensipleri", Prof. Dr. Nihal Uluocak'a Armağan, İÜHF Eğitim-Öğretim ve Yardımlaşma Vakfı Yayınları", İstanbul 1999, pp. 39-54.

⁴¹¹ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 47.

national legislatures.⁴¹² Accordingly, the presence, scope and the termination of the intellectual property rights are determined by the law of the country that the protection over the intellectual property is demanded. The principle of territoriality provides the country to determine under which circumstances the intellectual property rights shall be presented or terminated when the protection is demanded from her. This clearly shows that the scope of the intellectual property protection depends on solely to the country that the protection is demanded from and this protection shall only be valid in the territory of the country in question, independent form the protection provided by the third countries. In case of copyrights, the principle of territoriality leaves its place to the principle of universality in line with the nature of the copyright protection which does not have registration process like in patents or trademarks.⁴¹³. However, contrary to this universally accepted principle, Article 8 of the Cinema, Video and Music Works Law⁴¹⁴ requires registration for cinema and music works. This provision is in line with Article 13 of FSEK regulating the rights of the owner and aims at the pursuit of the economic rights.⁴¹⁵

⁴¹² EINHORN, Talia, "The Impact of the WTO Agreement on TRIPS (Trade-Related Aspects of Intellectual Property Rights) On EC Law: A Challenge to Regionalism", *Common Market Law Review* 35, 1998, p. 1070.

⁴¹³ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 50, *TEKİNALP* 43.

⁴¹⁴ Law No.3257, RG 7.2.1986, S.1902.

⁴¹⁵ *SULUK*; 22.

3. The Principle of Law of Domicile

There are three binding rules for personal statute in international private law; citizenship, domicile and the accustomed dwelling house.⁴¹⁶ The citizenship bind cannot be altered easily and forms the closest bind with a person in international private law. It is very easy to identify the citizenship bind as it derives from the law of the country from which a person's citizenship is.

The domicile is the place that a person resides in actually for habitation. In the law of domicile, the closest binding point is taken as the place of domicile that a person resides in for a long period of time regardless of what his citizenship is. For the infringements of copyright there are two distinctive approaches to the jurisdiction place, the place of the wrongful act or the domicile of the defendant. The law of domicile is used both in EU and Turkey for copyright protection under the international private law.

The accustomed dwelling house is the actual place where one resides in. However, this place should bear permanent in characteristics and should not be a temporary. Citizenship and domicile are determined in accordance with a given legal order, however the accustomed dwelling house is not a legal concept and therefore subject to material evidences for identification.

⁴¹⁶ ÇELİKEL.168.

B. The Jurisdiction of Courts on Copyright Protection in European Union

In Europe the international jurisdiction of the courts is regulated by the Regulation (EC) No.44/2001 of 22 December 2000 on Jurisdiction and the recognition and Enforcement of Judgments in Civil and Commercial Matters⁴¹⁷ which supersedes the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁴¹⁸ by and the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters⁴¹⁹.

The main aim of all of these regulations is to provide the mutual recognition and the enforcement of the jurisdictions in any of the Member State of the EU. This objective emerges from the EU ideal of forming business confidence by encouraging the right and fair functioning of the Single Market and most importantly by creating uniform rules for jurisdiction that will pave the way for a transparent system of court competencies between the Member States. In the preamble of the Council Regulation No.44/2001, in Recital 2 it is

⁴¹⁷ WIPO, Intellectual Property On The Internet: A Survey Of Issues, 117.

⁴¹⁸ Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of October 30, 1978, OJ L. 304/77, 30 October 1978.

<http://curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm>

⁴¹⁹ Lugano Convention and Corresponding Protocols,

http://www.curia.eu.int/common/recdoc/convention/en/c-textes/_lug-textes.htm

stated that certain differences between the national rules governing the jurisdiction and recognition of the judgments hamper the sound operation of the internal market. Therefore provisions unifying the rules of conflict of jurisdiction in civil and commercial matters and simplifying the formalities are essential.

Creating a legal European area requires free movement of court decisions. The free movement of court decisions is referred to in the Council Regulation No.44/2001 in Recitals 6 and 10. Recital 6 states that for attaining the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate to have a Community legal instrument which is binding and directly applicable, whereas Recital 10 assigns that the judgments given in a Member State bound by the Regulation shall be recognized and enforced in another Member State, even if the judgment debtor is domiciled in a third State.

1. Brussels and Lugano Conventions

The Brussels Convention dated 27 September, 1968 is not a legislation of EU but a multilateral agreement providing uniform conflict of law rules in civil and commercial matters excluding revenue, customs or administrative matters, rights in property arising from matrimonial relationships, wills and successions,

bankruptcy, social security and arbitration. The right of interpretation of the Convention is given to the Court of Justice of European Communities with the Protocols annexed to the Brussels Convention.⁴²⁰

Currently, the Brussels Convention is in force only for the application of provisions governing jurisdiction and the recognition and enforcement of judgments in Denmark. Article 68 of the Regulation No.44/2001, states that the Council Regulation supersedes the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of the Convention and which are excluded from this Regulation pursuant to the Article 299 of the Treaty. Denmark stays outside the scope of the Regulation No.44/2001, since Denmark did not accept the Articles 1 and 2 of the Annexed Protocol to the Maastricht and Amsterdam Treaties and therefore is not subject to the provisions of the Regulation No.44/2001.⁴²¹

For the disputes of copyright infringements Article 5 of the Brussels Convention provides that the case will be brought before the court of the place where the infringement is occurred. However, also this right is subject to the limits of the Convention, meaning that only the contracting states will be

⁴²⁰ OJ 1978 L 304 p.97.

⁴²¹ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi", 78. Further information SAKMAR, Ata, EKŞİ Nuray, "Hukuki ve Ticari Konularda Mahkemelerin Milletlerarası Yetkisi ve Mahkeme Kararlarının Tanınması ve Tenfizi Hakkında AB Konseyi Tüzüğü", MHB, Y.22, S.2, 2002, Prof. Dr. Ergin Nomer'e Armağan.

covered by this provision. Regarding the copyright protection, the first paragraph of Article 5 which outlines the cases regarding the contract, shall be taken as a reference for special jurisdiction.⁴²² According to Article 5(1), when there exist a dispute raising from the transfer of copyright or from a license contract, determination of the location of the courts will be subject to international jurisdiction rules. This provision provides the defendant to use its litigation right both in the general jurisdiction courts of his domicile as stated in Article 2 or in the special jurisdiction courts that have international jurisdiction as stated in Article 5(1).

Article 16 of the Brussels Convention covers the provisions regarding courts that have exclusive jurisdiction. Accordingly, in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the contracting state in which the deposit or registration has been applied for, has taken place or is under the terms of an international convention to have taken place. However, this article only binds the intellectual property necessitating registration, therefore does not apply to copyright protection.

⁴²² ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 59

The Lugano Convention on 16.9.1988 extends the provisions of the Brussels Convention to the Member States of the European Free Trade Association (EFTA)⁴²³. Lugano Convention is approved on 16 September, 1988 and put into effect on 1 May, 1992 after Norway, Sweden, Finland, France, Italy, Netherlands, Luxemburg and Portugal have ratified it. The Lugano Convention bears almost the same provisions of Brussels Convention and maintains the same text flow. The major difference between Brussels and arises from the role of European Court of Justice which provides interpretative support to Brussels. Lugano Convention is accepted as the “parallel convention” to the Brussels, however this could only be attained by the realization of the comparable interpretation. This, points out the need to cover also the former interpretations of the Court of Justice on the provisions of the Brussels Convention.⁴²⁴ Therefore the contracting states agreed on Protocol 2 annexed to the Lugano Convention which foresees the courts of each contracting state to pay due account to the principles laid down any relevant decision delivered by the courts of the other contracting states when applying and interpreting the provisions of the Lugano Convention (Article 1).

⁴²³ EFTA comprises four Member States: Iceland, Liechtenstein, Norway and Switzerland. For more information on EFTA, see <http://www.efta.int>.

⁴²⁴ ERDEM, “Fikri Hukukta Türk Mahkemelerinin Yetkisi” 76.

From the perspective of copyright protection Lugano Convention provides exactly the same provisions of Brussels Convention. This means that the domicile of the defendant shall be considered as the place of jurisdiction and the persons, who are the nationals of the contracting states, may be sued in any of those states regardless of their nationality.

2. The Council Regulation (EC) No.44/2001

The Council Regulation (EC) No.44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters aims at diminishing the differences between the national rules governing jurisdiction and the recognition of judgments. The Council Regulation (EC) No.44/2001 entered into force on 1 March 2002, being directly applicable and superseded the Brussels Convention. However it should be mentioned this Regulation bear acceptable provisions with only one differing provision related to pending the case before the court for the proceedings involving the same cause of action and between the same parties brought in the courts of different contracting states.⁴²⁵ In such a case, the courts other than the court first seized shall of its own motion stay its proceedings until the jurisdiction of the court first seized is established. When the jurisdiction of the court first

⁴²⁵ ERDEM, Bahadır, "Medeni ve Ticareri Hukuk Davalarında Mahkemelerin Yetkisi ve Mahkeme Kararlarının Tanınması ve Tenfizine İlişkin Avrupa Konseyi Tüzüğü", Bilgi Toplumunda Hukuk, Ünal Tekinalp'e Armağan, Cilt II, Beta, İstanbul, 2003, p. 1026.

seized is established, then the other court shall decline jurisdiction in favour of the first court.

The provisions of this Regulation apply to the territories of the Member States. There are two possible cases for Turkey to adopt this Regulation. The first one is the natural outcome of her membership to the EU which will eventually make Turkey put into effect all of the EU regulations in accordance with the direct applicability principle. The second one is to hold a bilateral agreement with EU on the enforcement of the provisions of the Council Regulation (EC) No.44/2001 which will lead to the application of the Regulation's provisions in both the territories of EU and Turkey.

As the provisions of this Regulation apply to the territories of the Member States, only the cases with connections between the Member States are subject to the provisions of the Regulation and therefore result in European courts applying the rules of this Regulation when the defendant is domiciled in one of the Member States. Recital 9 clarifies the situation when the defendant is not domiciled in a Member State. Accordingly, when a defendant is not domiciled in a Member State, he will be subject to the national rules of jurisdiction applicable in the territory of the Member State of the court seized. This provision takes its roots from the jurisdiction of European Court of Justice, under the Brussels

Convention, given for a German consumer demanding to sue an American citizen who was not domiciled in a Member State.⁴²⁶ The Court of Justice stated in its decision that the jurisdiction could only be attained in cases where the defendant is domiciled in a Member State or should be treated as if he were domiciled. This decision is in line with the provisions of Brussels Convention given in Article 13 which simply anticipates that the branches, agencies or other establishments which are domiciled in a Member State but where the main party is not, in case of a dispute arising from the operations of those entities, the party shall then be considered as to be domiciled in that Member State. So the key factor is the domicile of the defendant.

The scope of the Council Regulation given in Article 1 covers all the main civil and commercial matters, resembling precisely to the coverage of the Brussels and the Lugano Conventions. The only difference arises from the more detailed feature of the Council Regulation regarding the provisions on jurisdiction of business contracts.⁴²⁷ The Regulation covers the cases that involve at least one foreign element.

The general jurisdiction rules are set in Articles 2, 3 and 4 of the Council Regulation. General jurisdiction of the courts of a country is based on the

⁴²⁶ ECJ, 1994 p.767.

⁴²⁷ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 81.

domicile of the defendant. Accordingly, the persons domiciled in one of the members of the European Union, can be sued in the courts of that member state regardless of their nationality. Article 2 provides that the courts of the state where the person is domiciled in will have the right of jurisdiction over the case. In order to determine whether the person is domiciled in the state or not, the court will apply its internal law. Article 2(2) states that the persons who are not nationals of the member state they are domiciled, shall be subject to the rules of jurisdiction applicable to the nationals of that state. According to these two articles, once a case is brought before the court, the court will decide first on the location where the person is domiciled by applying its own rules.⁴²⁸ When the defendant is a legal person, the headquarters of the company will be considered as the location of its domicile. For the cases where there is more than one defendant, Article 6(1) states that the person who is one of the number of defendants, domiciled in a Member State may also be sued in the courts for the place where any of the defendants is domiciled. However, this provision is only limited to the Member States. For the persons domiciled in a non-Member State, the court of the non-Member State shall not have the right of jurisdiction.

Article 3 provides that the persons domiciled in a member state may be sued in the courts of the other member states only for the cases given in the

⁴²⁸ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 58, 61, LEE 14-15.

Council Regulation. Article 4 states that when the defendant is not domiciled in a member state, the jurisdiction of the courts of each member state shall be determined by the law of that member state in accordance with Article 22 and 23 which set the provisions concerning exclusive jurisdiction and prorogation of jurisdiction relatively. Accordingly, a plaintiff domiciled in any of the Member States may sue the defendant who is not domiciled in any of the Member States, in accordance with the jurisdiction rules applicable in that Member State, as if he were a citizen of that Member State.⁴²⁹

The identification of the place of jurisdiction is laid down by the Articles 59 and 60. According to Article 59, the determination of whether the person is domiciled in the Member State or not shall be made by the courts applying the Member State's internal law. For the companies and legal persons, Article 60 provides that the place of domicile will be considered as the place where it has the statutory seat or central administration or the principal place of business. The second paragraph of Article 60, clarifies that for United Kingdom and Ireland statutory seat means the registered office or when there is no such an office anywhere, the place of incorporation or the place under the law of which the formation took place. Lastly, Article 60(3), states that to determine whether

⁴²⁹ ERDEM "Medeni ve Ticareri Hukuk Davalarında Mahkemelerin Yetkisi ve Mahkeme Kararlarının Tanınması ve Tenfizine İlişkin Avrupa Konseyi Tüzüğü" p. 1013.

a trust is domiciled in the Member States whose courts are seized the matter, the court then shall apply its rules of private international law.

Article 5(1) and 5(3) of the Council Regulation set the rules on matters relating to a contract and tort, delict or quasi-delict and are used to determine the courts that bear jurisdiction over the case. Accordingly, for the matters relating to a contract, the courts in the place of performance of the obligation in question will have jurisdiction whereas in tort, delict or quasi-delict, the courts for the place where the harmful event occurred or may occur will bear jurisdiction. The distinction in Article 5(3) from that of the Brussels Convention is that not only the place where the harmful event occurred but also place where the harmful event may occur is taken into the scope of the jurisdiction.⁴³⁰

In the Council Regulation the special jurisdiction of the courts are given in Article 5, parallel to the Brussels Convention however with a slight difference that the jurisdiction relating to contracts stated in Article 5(1) is explained in detailed in the further Articles 18, 29 20 and 21 which deal with the jurisdiction over individual contracts of employment. Those articles bear importance for the cases where the work subject to copyright protection is created by an employee, for example computer program developed for the employer. For the

⁴³⁰ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 85

copyright protection the first paragraph of Article 5 which outlines the cases regarding the contract, shall be taken as a reference for special jurisdiction. According to this provision (Article 5(1)), when there exist a dispute raising from the transfer of copyright or from a license contract, determination of the location of the courts will be subject to international jurisdiction rules. This provision provides the defendant to use its litigation right both in the general jurisdiction courts of his domicile as stated in Article 2 or in the special jurisdiction courts that have international jurisdiction as stated in Article 5(1).

In cases of tort, delict or quasi-delict, Article 5(3) provides the person domiciled in a contracting state to use his right of litigation in the contracting state where the harmful event occurred. In such a case, the defendant will have both the general jurisdiction choice of Article 2 and the special jurisdiction right of Article 5(3).⁴³¹ For the disputes of copyright infringements Article 5(3) is used generally as it provides the case to be brought before the court of the place where the infringement is occurred. However, also this right is subject to the limits of the Regulation, meaning that only the contracting states will be covered by this provision.⁴³²

⁴³¹ MORRISON Alex, GILLIES, Lorna, European Rules of Jurisdiction in Copyright Matters, 16th BILETA Annual Conference, April 9th - 10th, 2001.

⁴³² WIPO International Conference on Intellectual Property and Electronic Business, Tehran, January 15 and 16, 2002, p.2.

In defining the jurisdiction for tort, EU adopts the principle of the law of the state that has the closest relation with the case.⁴³³ The European Court of Justice, clarifies the “place that the harmful event occurred” in Case Bier BV v. Mines de Potasse d’Alsace SA.⁴³⁴ The decision of the European Court of Justice states that the place that the harmful event occurred should be interpreted as both the place that the harmful event is realized and if it is different, also as the place that the event causing the realization of harmful event is occurred. This presents the plaintiff a choice of jurisdiction both in the country where the allegedly infringing act was committed and in the country where the injury arose. The European Court of Justice’s decision in the case of Shevill v. Presse Alliance S.A, clarifies the competences of the courts for the damages and states that the courts of the places where the damage was occurred only have power to award compensation for damages suffered by the plaintiff within their own countries, however, when the action is brought against the defendant in a court of the country of its establishment, those courts will then have the power to grant a fuller extent of damages, not restricted to those suffered in the forum.

⁴³³ ULUOCAK, Nihal, “Milletlerarası Haksız Fiiller Konusunda Avrupa Birliği’ndeki Son Gelişmeler ve Birleşik Krallığın Yeni Düzenlemesi”, Bilgi Toplumunda Hukuk, Ünal Tekinalp’e Armağan, Cilt II, Beta, İstanbul, 2003, p.113-114.

⁴³⁴ ECR [1976], Decision No.21/76, p.1735.

Article 18 states that where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall in disputes arising out of the operations of the branch, agency or establishment be deemed to be domiciled in that Member State.

The provisions concerning the prorogation of jurisdiction are given in Article 23 of the Brussels Convention. Accordingly, when the parties, one or more of who is domiciled in a contracting state have agreed that a court or the courts of a contracting state shall have jurisdiction to settle the dispute, for the disputes arising from that particular legal relationship those courts will have exclusive jurisdiction.

For the employer domiciled in a Member State, the court having the jurisdiction is given in Article 29 and it will be the Member State where he is domiciled or in another Member State where the employee habitually carries out his work or carried out for the last time, or for the cases where the employee does not habitually carry out his work, the place of the business where the engaged employee is/was situated. Moreover it is stated in Article 20 that an employer may bring proceeding only in the courts of the Member State where the employee is domiciled. However, it is provided in Article 21 that the provisions laid down in Articles 18, 19 and 20, may be departed from only by an

agreement on jurisdiction which is entered into after the dispute has arisen or which allows the employee to bring proceeding in the courts other than those indicated in Articles 18, 19 and 20.

The provisions concerning the proceedings involving the same cause of action and between the same parties brought in the courts of different Member States and related actions are given in Articles 27-30, including the same rules of the Brussels Convention. The prorogation of jurisdiction is provided in Article 23, with the only difference from the Brussels Convention which is the inclusion of any communication by electronic means which provides a durable record of the agreement shall be equivalent to “writing” (Article 23(2)). This is a provision that complies with the requirements of the digital world.⁴³⁵ Lastly, the provisional, including protective measures are given in Article 30, parallel to those stated in Brussels Convention.

3. The International Jurisdiction in Electronic Commerce Directive

The Electronic Commerce Directive complies with the Articles 61(c) and 65 of the Amsterdam Treaty promoting the judicial cooperation in civil matters

⁴³⁵ ERDEM, “Fikri Hukukta Türk Mahkemelerinin Yetkisi” 87.

that have cross-border implications.⁴³⁶ However, the Directive does not aim at establishing additional rules on the private international law. In Recital 23 of the Electronic Commerce Directive it is stated that the Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; and the provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive. In compliance with this approach, Directive tries to establish a common European cyberspace that intends for the requirement that the Member States do not discriminate via their national laws against the service providers in other states and the provisions of the Council Regulation (EC) No.44/2001 of 22 December 2000 on Jurisdiction and the recognition and Enforcement of Judgments in Civil and Commercial Matters continue to be applied.⁴³⁷ The approach of the Electronic Commerce Directive to the use private international law in information society based problems supports the court of the defendant's domicile principle.⁴³⁸

⁴³⁶ PEARCE, PLATTEN, p.374, TEKİNALP, Gülgören, "AT Hukukunda Milletlerarası Özel Hukuka Ait Gelişmeler, Hukuk Seçiminin Kısıtlanması ve MÖHUK," Bilgi Toplumunda Hukuk, Ünal Tekinalp'e Armağan, Cilt II, Beta, İstanbul, 2003, p.1095.

⁴³⁷ PEARCE, PLATTEN 369.

⁴³⁸ TEKİNALP, Gülgören 1102.

Accordingly, Article 2 (h) of the Directive introduces a new expression called “coordinated field”. Coordinated field is used for the requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. As mentioned in Recital 21 the scope of the coordinated field covers only requirements relating to on-line activities such as; on-line information, on-line advertising, on-line shopping and on-line contracting. So the coordinated field defines the scope of the legal requirements applicable only to the information society service providers.

In Article 3 it is stated that each Member State should ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field and Member States are not allowed, for reasons falling within the coordinated field, to restrict the freedom to provide information society services from another Member State. This provision foresees a common European application where the Member States will not be allowed to impose their own domestic legal requirements which exceed those required by this Directive, on the service providers from other Member States. Article 3 (3) and (4) provides derogations from Article 3 in cases of general

exemptions including the intellectual property rights and for the specific cases regarding the public order, health, security and the protection of consumers.⁴³⁹

Article 3 can be evaluated as binding for the courts as it obligates the courts to accept the validity of the information society services offered by a service provider established in another Member State, regardless of whether these services are provided solely in the territory of that Member State or are received in the other Member States.⁴⁴⁰ Furthermore the Directive does not deliver any provision on the choice of law and leave the parties free to choose the law applicable to the contract.⁴⁴¹

C. The System of International Jurisdiction in Turkey

The Law on International Private Law and Law of Procedure, No. 2675⁴⁴² (Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun - MÖHUK) sets the rules concerning the applicable law and recognition and enforcement of foreign judgments in Articles 27-30. While adjusting the international jurisdiction of Turkish courts, MÖHUK refers to the jurisdiction of municipal law to provide international jurisdiction to a court that has already jurisdiction on a case in

⁴³⁹ PEARCE, PLATTEN 370.

⁴⁴⁰ PEARCE, PLATTEN 375.

⁴⁴¹ Ibid.

⁴⁴² RG. 22.06.1982 – 17701.

compliance with the rules of laws in force like Law on the Law of Procedure Courts (Hukuk Usulü Mahkemeleri Kanunu - HMUK) or Civil Law.⁴⁴³ This provides MÖHUK a mixed system of international jurisdiction which foresees complementary rules of international jurisdiction for the legislations concerning national jurisdiction in order to enhance the determination of jurisdiction of the courts in case of an international dispute according to the municipal laws supplemented by the rules of international jurisdiction only for the cases where rules of national jurisdiction are unsatisfactory or insufficient.⁴⁴⁴

According to the rule of general jurisdiction which is the rule of jurisdiction applied for all cases, HMUK Article 9(1) provides that each case shall be the subject of the court of the place where the defendant is domiciled unless a contrary provision is presented in the law. HMUK Article 9(1) states that each case shall be prosecuted in the court of the domicile of the defendant and for the cases where the defendant does not have domicile in Turkey, the last place of the defendant's domicile in Turkey shall be regarded as the place of the court. This provision sets the general jurisdiction court for all of the cases and

⁴⁴³ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 7.

⁴⁴⁴ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 7.

the cases where the law sets the absolute jurisdiction court are considered as exceptions.⁴⁴⁵

For torts, the Turkish international procedural law foresees that both the courts of the place of tort (*lex loci delicti commissi*) and the place where the act of tort is realized have international jurisdiction.⁴⁴⁶ In general for the obligations deriving from torts, the uncertainty of which law to be applied is solved by the law of the place of where the tort happened.⁴⁴⁷ However, the place of where the tort is realized should be clarified. There are two places; the actual place of tort or the place where the injury is occurred. For the material law this choice does not bear importance, whereas for the conflict of laws there is a certain need for the determination of the place.⁴⁴⁸ The Turkish law accepts the place where the injury has occurred. In cases where the place of the tort and the injuries are totally in different countries, then the applicable law shall be the law of the place of the damage.⁴⁴⁹ This is an important provision for the copyright infringements on the Internet. The place of injury is the actual place where the element subject to protection is located. If the place that the defendant is domiciled is not known,

⁴⁴⁵ ÇELİKEL 319.

⁴⁴⁶ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 62-63.

⁴⁴⁷ NOMER Prof. Dr. Engin, ŞANLI Prof. Dr.Cemal, "Devletler Hususi Hukuku", 12. Bası, Beta, İstanbul, 2003, p. 307.

⁴⁴⁸ NOMER; ŞANLI 308.

⁴⁴⁹ NOMER, ŞANLI 308.

then the last place that the defendant is domiciled in Turkey will be considered as the place of the court and in compliance with Article 27 of MÖHUK to the municipal law, the court shall have the international jurisdiction. Article 27 of MÖHUK states that the international jurisdiction of the Turkish courts shall be identified by the municipal law. International jurisdiction determines the competence of a national court in cases having foreign element.⁴⁵⁰ This international jurisdiction rule will also be valid for the exclusive jurisdiction which is determined for only a special group of cases by different laws.⁴⁵¹

In November 2004, a recent draft law introduced to update the MÖHUK in order to modernize the law which has been in force for more than 20 years. In the statement made by the Prime Ministry Press Room, the need of a new law which will be able to cope with the economic, social and political developments is clearly mentioned. The draft MÖHUK covers special provisions regarding the international jurisdiction in intellectual property protection. Accordingly, Article 23 (b) of the draft law sets the law applicable to the intellectual property stating that the intellectual property rights shall be subject to the law of the country under the law of which the protection is demanded. Parties may decide on the application of the court law after the infringement for the demands deriving from

⁴⁵⁰ ÇELİKEL 317.

⁴⁵¹ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 11

the infringement of the intellectual property right. This provision is proposed in order to harmonize the Turkish code with the other international regulations and also complies with the territoriality principle in Turkish applicable law. The second paragraph of the proposed Article outsets a limited choice of law which can be attained once the infringement occurred.

The draft law also provides regulations for the contracts of intellectual property under Article 24 (d). Accordingly the contracts of intellectual property shall be subject to the law that the parties have chosen. In case that the parties have not realized the choice of law, the law of the business of party that transfers the intellectual property right or the use of that right, if it is not available then the domicile of party that transfers the intellectual property right or the use of that right shall be applied. However under the given conditions if there is a law that has closer relations with the contract, the contract shall then be subject to that law. For the intellectual property contracts regarding the works that are created on the course of employment, the law applicable to the business contract shall be applied. In this proposed Article, the main aim is to provide an unlimited choice of law to the parties. For contracts the domicile of the copyright holder will be decisive in the cases where the business place is not available.

1. The International Jurisdiction on Copyright Protection in Turkey

The copyright protection in Turkey is regulated by the FSEK and the provisions relating to the international jurisdiction in copyright protection in Turkey are given in Articles 66-70 under the titles of; the litigation of removal of injury, restraint of injury, litigations related to the economic and moral rights and to the identification of the owner.⁴⁵²

The litigation of removal of injury is an action taken in case of an infringement of the economic and moral rights of the work owner that is already realized or started to be realized.⁴⁵³ In such a case, the most important distinction is the fact that the infringement act had resulted in some distortion. Article 66 states that the person whose economic and moral rights are infringed may sue the infringer by the litigation of the removal of injury.⁴⁵⁴ The defendant of such a case is the person that realizes the infringement; however Article 66(2) asserts that when such an act is carried out by the representative of the enterprise or the carried out by the representative of the enterprise or the employee, then the litigation may also be against the owner of the enterprise.

⁴⁵² ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 177-190.

⁴⁵³ TEKİNALP 260-265.

⁴⁵⁴ ERDİL 141.

The last paragraph of Article 66 identifies the place of the court that the litigation will be made by stating that the owner of the work may litigate the removal and the restraint of injury in the place where he domiciles. The litigation of removal of injury may also be realized in the court of the defendant's domicile in accordance with the general jurisdiction rule of HMUK Article 9.⁴⁵⁵ With reference to Article 27 of MÖHUK, the rule that the court of the place of tort may also be considered as the court having the jurisdiction (Article 21 of HUMK) provides the court an international jurisdiction on the case.⁴⁵⁶

The provisions concerning the litigations related to the infringement of moral rights are given Article 67 and outline the cases which may provide a ground for the litigation. Accordingly, the acts of the communication to the public of an original work without the consent of its owner, the use of the owners name without permission, the misuse and the erroneous use of the owners name, the incorrect referring to the owner in use of the work or not referring at all and altering of the work without the prior consent of the owner, may be sued by the owner.

Article 68 of FSEK provides the right of litigation in cases of the infringements of the economic rights of the owner. This article makes a distinction between

⁴⁵⁵ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 183.

⁴⁵⁶ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 184.

the infringements other than copying in the first paragraph and regulates the illegal copying in the second paragraph. Article 68(1) states that the translation of the work without the consent of the owner, the overprinting and the reproduction of the work apart from the contractual terms and the broadcasting of the work in devices like radio or television are the acts that the owner may file a suit for.

Article 69 sets the provisions on restraint of injury for the cases where the owner of the work may sue for the prevention of the infringement. The provisions of the litigation of removal of injury are referred as valid, meaning that the court having the jurisdiction is the court of the domicile of the work owner.⁴⁵⁷

The compensation suits are laid down in Article 70 of FSEK (the economic rights) and Article 71 (moral rights). In the compensation suits the jurisdiction of the court is not set exclusively as did in the litigations of removal and restraint of injury. The doctrine suggest that even though the place of the court having the jurisdiction is not mentioned individually in the provisions relating to the compensation suits, the place of the work owner's domicile principle should also be applied to the compensation suits.⁴⁵⁸ The last provision regarding the

⁴⁵⁷ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 185.

⁴⁵⁸ ERDEM, "Fikri Hukukta Türk Mahkemelerinin Yetkisi" 188, EREL 308, TEKİNALP 289.

international jurisdiction is the suits related to the identification of the work owner.

a) The Tribunals Specialized on Intellectual Property

The tribunals specialized on intellectual property are established in accordance with the certain need of the efficient enforcement of the intellectual property law in Turkey. Parallel to the ratification of the international conventions in intellectual property protection, there appeared a significant necessity for founding the tribunals that will solely be specialized on intellectual property and guarantee the right functioning of the legal system.

These tribunals are established by the Law No.4630, dated 21.2.2001 which amends Article 76 of FSEK and foresees the establishment of the tribunals in accordance with the Customs Union with the EU. The first Intellectual Property Tribunal is founded in Istanbul in 2001 however it took 2 years to get into the track the second one which is in Ankara due to the lack of specialized professionals on intellectual property law.

The main reason of the establishment of the specialized tribunals is to settle the disputes in accordance with the relevant legal framework in a reasonable time. In such a case, the need for the examination of the experts will be satisfied by the databases built by the tribunal. These databases are considered to be scientific and objective and are deemed to be prepared by the

administrative units working on the intellectual property rights. Currently, there are totally 3 tribunals in act, 2 in Istanbul and 1 in Ankara. The statistical data shows that there is a certain need for new tribunals to be established.⁴⁵⁹

D. International Jurisdiction in Copyright Protection on the Internet

The law on the jurisdiction over a transaction having a cross-border nature constitutes one of the vital concerns of the private international law. The problems occur when more than one nation involves in the settlement of dispute and eventually a need of an agreement for setting the common rules to decide the matters of jurisdiction arises. When the international jurisdiction is considered for the copyright protection, in the majority of countries, the national rule applies for the courts of the state in which the defendant is domiciled or has his place of business. This principle is accepted under both EU and the Turkish codes and does not create a significant issue as long as the infringements in question are realized in the physical world. However the Internet challenges the existing rules due to the fact that physical boundaries and location are totally irrelevant. Internet is in conflict with the territoriality principle. The problem arises when the acts infringing the copyrights occur in the digital environment; on the Internet. When there exists a website establishing a connection with

⁴⁵⁹ ARIKAN Serdar, Ankara Fikri ve Sınai Haklar Hukuk Mahkemesi Hakimi, "Fikri ve Sınai Haklar Hukuk Mahkemeleri", 9-10. Eylül.2004, Ankara, available at www.adalet.gov.tr

every country in the world, in case of an infringement which courts should have jurisdiction over the dispute?⁴⁶⁰ This question has become the core of the Internet related copyright infringements at the multilateral level, as an issue of the private international law which deals with the jurisdiction and the applicable law.

The Internet has no territorial boundaries. It is multi-jurisdictional. It promotes and intensifies cross-border relationships, raising complex questions of jurisdiction and applicable law. It is accessible from almost any place that has the necessary telecommunications infrastructure. Websites contain text such as articles, pictures or images, photos, movies, music and even collections of information; the databases which are all subject to copyright protection. As websites are accessible from all over the world, the protected content placed on a website is also accessible. In such a case, the approach of EU is determined in accordance with the Brussels Convention which is superseded by the Council Regulation 44/2001. Accordingly, in EU the plaintiff may take legal action in the country in which the alleged infringer operates his websites, whereas he may also choose any other European jurisdiction.⁴⁶¹ The businesses using Internet to dispense their services within the EU would be subject to the jurisdiction of the

⁴⁶⁰ WIPO, Intellectual Property on the Internet: A Survey of Issues, p.115.

⁴⁶¹ WIPO International Conference on Intellectual Property and Electronic Business, Tehran, January 15 and 16, 2002, p.3

courts in the users' home country rather than the country of origin. Similarly in Turkey, the law foresees that for the cases the place of the tort and the damage are totally in different countries, as on the Internet, the applicable law shall be taken as the law of the place of the damage. So, for the copyright infringements on the Internet, the international jurisdiction will be given to the court of the place where the damage of the infringing act is occurred.

The enforcement of international agreements to preserve the uniform rules of private international law in the context of Internet is a general objective in order to harmonize the national laws of the states. In the current situation concerning the cybercrime, although there are various national regulations⁴⁶² on cybercrime, there exists only one international convention that provides harmonizing rules which is the Cybercrime Convention of the European Commission.

Under the Cybercrime Convention the approaches to the governance of cyberspace can be outlined as the criminalization and the establishment of a common legal regime by supporting and ratification of international treaties, improving formal and informal cooperation at national, regional and global

⁴⁶² In the e-Convergence Action Plan 2005 of Turkey, one of the actions to be undertaken under the Legal Infrastructure title is the preparation of a new code on cybercrime.

levels, establishing 24/7 network and support system to increase the regional capability and providing public education on the cyber-ethics.

1. European Council's Convention on Cybercrime and International Jurisdiction in Copyright Protection

The Council of Europe's Convention on Cybercrime⁴⁶³ is the first international treaty that exclusively covers the issues rising from computer crimes and aims at achieving international harmonization. It is regarded as a model for harmonization of international jurisdiction in computer crimes and an attempt to provide a governance model of cybercrime.⁴⁶⁴ Convention on Cybercrime introduces criminal substantive and procedural requirements to be implemented by the signatories and provides a platform for mutual international cooperation.⁴⁶⁵ The total number of signatories not followed by ratifications is 32 whereas the total number of ratifications is 10. The Convention is put into force on July 1, 2004 with the ratification of the six COE members.⁴⁶⁶

⁴⁶³ Convention on Cybercrime, <http://conventions.coe.int/Treaty/en/Treaties/Html/185.htm>

⁴⁶⁴ For the discussions on cybercrime see also TANILIR, Niyazi, "İnternet Suçları ve Bireysel Mahremiyet", *Liberte Yayınları* No.61, Ocak 2002.

⁴⁶⁵ FLANAGAN, Anne, "The Law and Computer Crime: Reading the Script of Crime", *International Journal of Law and Information Technology*, Vol.13, No.1, Oxford University Press, 2005, p.9.

⁴⁶⁶ A detailed table of signatory and ratified countries is given in Annex 2. Turkey has not signed the Convention, yet.

The technological developments have paved the way for the emergence of new types of crime as well as the commission of traditional crimes by means of new technologies. In the light of these new issues, the Convention aims at harmonizing the domestic criminal substantive law elements of offences and connected provisions in the area of cyber-crime by providing for domestic criminal procedural law powers necessary for the investigation and prosecution of such offences committed by means of a computer system or evidence in relation to which is in electronic form and setting up a fast and effective regime of international co-operation.

As the infringements of copyright, are among the most commonly committed offences on the Internet, the Convention includes this issue under the Title 4 – offences related to infringements of copyright and related rights. Article 10 of the Convention provides provisions regarding the offences related to infringements of copyright and related rights. Accordingly, each signatory state is expected to adopt the necessary measures concerning the infringement of copyright under its domestic law pursuant to the obligations of the given international treaties⁴⁶⁷, as long as such acts are committed willfully, on a

⁴⁶⁷ Paris Act of 24 July 1971 of the Bern Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Copyright Treaty, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome (Rome Convention), the Agreement on Trade-Related Aspects of Intellectual Property Rights and the WIPO Performances and Phonograms Treaty.

commercial scale and by means of a computer system. These three criteria; intentional realization of the act, commercial benefit and the use of computer systems are the main sources of interpretation of an act under the copyright infringement. The acts should fulfill the above criteria in order to be subject to the provisions of the Convention on copyright protection. However, it is also possible for the signatories to apply further measures for acts of copyright infringement that go beyond the threshold of commercial scale and to criminalize them as well.⁴⁶⁸ In Article 10(3) the Convention on Cybercrime provides the signatory states the right to not to apply the obligation to criminalize infringements of copyright and related rights pursuant to obligations undertaken in the Convention in case that other effective remedies are available in the domestic law.

Regarding the international jurisdiction, the Convention establishes a series of criteria for jurisdiction over the criminal offences emerging from copyright infringements. The jurisdiction section of the Convention on Cybercrime bears great importance as it is the only legal document that outlines the conditions of international jurisdiction for the offences realized over the Internet.

⁴⁶⁸ In the Explanatory Report to the Convention it is stated that the commercial scale criterion is in line with Article 61 of the TRIPS Agreement requiring criminal sanctions in copyright matters only in the case of "piracy on a commercial scale" Explanatory Report to the Convention on Cybercrime, para 114, <http://conventions.coe.int/treaty/EN/Reports/html/185.htm>

Article 22⁴⁶⁹ states that each signatory state should adopt the measures necessary to establish jurisdiction over any offence established in accordance with Articles 2 – 11, when the offence is committed in its territory; or on board a ship flying the flag of that Party; or on board an aircraft registered under the laws of that Party; or by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State. This provision is in line with the territoriality principle.⁴⁷⁰ According to this provision, every single signatory state shall be punishing the commission of crimes established in this Convention if they are

⁴⁶⁹ Article 22 – Jurisdiction

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with Articles 2 – 11 of this Convention, when the offence is committed :

- a. in its territory; or
- b. on board a ship flying the flag of that Party; or
- c. on board an aircraft registered under the laws of that Party; or
- d. by one of its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.

2. Each Party may reserve the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs (1) b – (1) d of this article or any part thereof.

3. Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in Article 24, paragraph (1) of this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.

4. This Convention does not exclude any criminal jurisdiction exercised in accordance with domestic law.

5. When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.

⁴⁷⁰ Explanatory Report to the Convention on Cybercrime, para 223.

committed in its territory, provided that ships and aircraft are also considered to be an extension of the territory of the state⁴⁷¹. A state would assert territorial jurisdiction in case that there is a copyright infringement fulfilling the criteria of the Convention and thereby admitted as a criminal offence only if the act of copyright infringement is realized within its territory. For the offences realized in a ship or aircraft that is not located in the territory of the relevant State at the time of the commission of the crime, the location of the offence will be determined as the territory of the flag.

In the Explanatory Report of the Convention it is stated that territorial jurisdiction covers also offences involving satellites registered in the relevant state's name.⁴⁷² According to the Explanatory Report, for the location of offences stated in Article 22 (1)(a), (b) and (c) the jurisdiction of the relevant state will be available if the transmission originates or terminates in one of the locations specified therein. Further, if the offence involving a satellite communication is committed by a Party's national outside the territorial jurisdiction of any State, the jurisdictional basis will be established in compliance with Article 22 (1)(d).

⁴⁷¹ Ibid para 235.

⁴⁷² Ibid para 234.

The Explanatory Report explains Article 22 (1) (d) based upon the principle of nationality which obligates the nationals of a State to comply with the domestic law even when they are outside its territory.⁴⁷³ Accordingly, if a national commits an offence abroad, the State is obliged to have the ability to prosecute it if the conduct is also an offence under the law of the State in which it was committed or the conduct has taken place outside the territorial jurisdiction of any State.

Article 22 (2) allows the signatory States to make reservations to the jurisdiction grounds laid down in Article 22 (1) (b), (c), and (d). No reservation is permitted with respect to the establishment of territorial jurisdiction regarding the obligation to establish jurisdiction for the cases falling under the principle of "aut dedere aut judicare" (extradite or prosecute) where that party has refused to extradite the alleged offender on the basis of his nationality and the offender is present on its territory. Jurisdiction should ensure that the parties that refuse to extradite a national, must have the legal ability to undertake investigations and proceedings domestically instead, if sought by the Party that requested extradition pursuant to the requirements of extradition.

⁴⁷³ Ibid para 236.

VII. CONCLUSION

All copyright systems are established with the same universal objectives; the protection of the creator's work, the remuneration for the creator and the achievement of development both in social and innovative terms. Copyright protection supports and regulates the creative process while at the same time ensures the legal platform of dissemination of the copyrighted material.

Today the major challenges to copyright protection emerge from the illicit consumption of copyrighted works in digital form, mainly on the Internet. Advances in digital technology enabling the digitalization of the intellectual and artistic content poses in serious copyright infringements including; digital copying, online exploiting, distributing and modifying the copyrighted work without the authorization of the copyright owner. These acts result in significant economic loss for the copyright owners, due to the unauthorized copying and redistribution of their works on the Internet. The unresolved disputes over digital copyright concentrate on the respective rights of copyright owners and consumers of entertainment products such as music and movies and of computer program. "P2P" networks are considered as the primary source of copyright infringement.

The virtual and borderless nature of the digital era necessitates globally acclaimed and applied laws more than national-based codes similar to that of

EU. In the EU the whole idea lying beneath the choice of directives for the legal structure of information society, including copyrights, is built upon a very similar observation; the need for general frameworks rather than strict applications.

Legalization of the digital environment is obviously a process that needs evolution in accordance with the technological developments that pave the way for various new infringement methods and therefore should not be regarded as a work to be completed easily. The concept of copyright and related rights is defined in each country's legislation differently. However, the basic concepts concerning copyright protection on the Internet are largely consistent with the provisions of major international conventions including; the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement), the WIPO Copyright Treaty of 1996 and the WIPO Performances and Phonograms Treaty of 1996. All of those legislations accept that the elements of technology namely, databases, software and digitalized artistic and intellectual works fall under the scope of copyrightable works and should be protected. The most updated legal framework is provided by the WIPO Internet Treaties which also forms the legal background of EU legislation. Turkey has not signed WIPO Internet Treaties yet however, the provisions included in the copyright protection undertaken by the recent amendments show that the current Turkish copyright legislation regarding the copyright protection on the Internet is in line with them.

EU approach to copyright protection foresees a balance between the protective measures and the social consequences of the implementation of those provisions. There are three directives that manage to harmonize copyright protection in the digital environment; European Parliament and Council Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (Copyright Directive), Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, and Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases. These directives try to meet the need for legislations deliberated in accordance with the realities and the possibilities of the technological developments.

Even though the EU Directives are presented in 1990's, the first European Court of Justice Decision came almost a decade later, on the 9th of November 2004. The European Court of Justice gave its first judgments on database right in the British Horseracing Board Ltd v William Hill Organization Ltd and the Fixtures Marketing Cases. British Horseracing Board Ltd v William Hill Organization Ltd Case is a landmark case for defining the scope of database right as it bears an important ruling on the application of the Database Directive. In this case, the scope of protection for databases to the distinction between investment in creation and collection of data is tried to be identified with special emphasis to the share price information or where the collection is automated. One important aspect of his case is its tendency to find a balance between the

protection of databases in the meaning of compensation of authors for their works and the progress of science. The judgment in the *British Horseracing Board Ltd v William Hill Organization Ltd* confirms that indirect as well as direct acts can constitute extraction and reutilization and also that exhaustion of rights does not apply to reutilization. Accordingly, reutilization of the data used in the original database does not constitute an infringement whereas the reutilization of the database does. In addition to this, an extraction of a database which maintains the originality of the database is also considered as an infringement of copyright.

The main legislation in the field of copyright protection in Turkey is the Law on Intellectual and Artistic Works No. 5846 which is amended by five subsequent Laws in order to meet the requirements of the developments in the global copyright regulation and application. Most of the legal developments in copyright protection are achieved as a part of Turkey's harmonization with the EU in advance of the customs union. Currently, after the recent amendments, the rights provided for the copyright owners are pursuant to those that are provided by the international legal framework. There are three important cases to present the approach of Turkish courts to this issue of web presence and can be viewed as the examples. The first case "Turkish Odysse" is about the use of a map of Turkey which was deemed to be an original work of the writer and the publisher of the book "Turkish Odysse" and its original website as well, without prior consent, in a magazine called "Penet". Since the map being a product to

benefit from the protection of the copyright depends on the determination of the intellectual and creative value added by its creator, the court had taken into consideration the acts of how a map is created, whether the map reflects the property of its owner. It has been decided that the map has a scientific value, and it was copied without permission by the defendants. The court did not mention anything on the situation of the data presented on the Internet. However, as the only issue to be considered for the settlement was the originality of the work, then it is clearly seen that the Court did not hold the claims that the data presented on a website becomes anonymous. The second case is not about a direct copyright issue but rather is an indirect one focused on the re-utilization of the content on the web and it is symbolic because it bears digital mediums in it. The "Official Journal case is about the publishing of the Turkish Official Journal in a website by way of re-writing it with a computer by spending money, time and effort on it without using any of the facilitators like photocopying or scanning and transferred it to the Internet environment by copying it on mediums other than paper, like hard disk or floppy disk. In the conclusion the court stated that the act of the defendant did not cause any unfair competition and therefore it rejected the case by confirming that publication of the content of the Official Journal through copying it on instruments such as disc, hard disc and then placing it on the Internet environment do not create unfair competition. Thirdly, there is a recent unpublished case on the copyright protection on the Internet given in the thesis

and this case has a significant value for the Turkish copyright protection on the Internet as it involves an ISP, a content service provider and a writer, all potentially liable parties on such an illicit act and it is totally a copyright dispute. Accordingly, the baby names book of a writer is totally copied and published on a website of a company without prior consent and without reference to the writer. The Court decided that the book used in website caused a reproduction and the demanded material indemnity.

As seen in the third (unpublished) case, there can be several different parties involved in an illicit act. In such a case the liability for infringement of copyrighted works disseminated over the Internet without authorization becomes a very complex issue. The question of who is responsible for copyright infringement online needs to be answered. In the early years of Internet, the liability issue was regarded as a problem that is totally related to the Internet Service Providers (ISPs) that perform hosting and Internet access. However today, with the introduction of new variety of online intermediaries that undertake the acts of hosting, storage or transmission of information on the Internet, there occurred to a need to specify the liability of the online intermediaries and to assign a more expanded definition for those agents.

The global approaches to regulating online intermediaries can be divided into three categories: the total liability approach, the self regulation/total immunity approach and the limitation of liability/notify and takedown approach. The

limitation of liability/notify and “take down” approach is the approach that is undertaken by the European Union in the Electronic Commerce Directive. This system depends on the understanding that there should be a balance in determining the liability of the online intermediaries in compliance with identified risks and immunity. It is necessary to provide immunity to an online intermediary that is willing to remove the illicit content from its website just after the notification is done. Notice and take down procedure implies that the service providers which are not liable of the content, should assist the protection of the copyrights on the Internet by providing technical support.

In Turkish legal framework, the liability of the online intermediaries is provided by the latest amendments of the Law on Intellectual and Artistic Works. The Additional Article 4 included in 2004 sets the rules governing the liability issue on the Internet. Additional Article 4 states that; in case of the infringements of the copyright holders, by the service and the content providers that use transmitting devices including the digital medium, the infringed works shall then be “taken down” due to the notice of their owners. Accordingly, when compared with the EU legal framework including the liability of the intermediaries, similarly, this Article provides notice and take down procedure which is relying on the prior notice of the copyright holder.

When the major acts causing debatable situations for liability are considered; “caching” stands as one of the firstly realized acts for which the definition of the

scope of the liability is to needed. Caching is a technical process which enables ISPs to make local copies of remote web pages in the users computers in order to speed up the delivery of those pages on the subsequent request of the users. The generally accepted approach in both European and Turkish legal framework supports the idea that “caching” is a technical process that is used for increasing the speed of opening a website with the sole aim of efficiency on the net, and therefore does not violate copyright.

The second issue of liability is “linking” which means providing a hyperlink to a site where the illegal content is available. “Linking” bears greater significance as the Internet deepens in content and becomes manageable only via search engines. The last issue arises from the increasing number of unauthorized music, computer program and movies copied, downloaded, uploaded and made available on the Internet through the use of “P2P” file sharing platforms and computer program. The infringement of copyright appears as a complex liability problem as in most of the cases illegal copy is stored or transferred without the knowledge of the Internet access provider who only gives access to it or the hosting provider whose servers only store the it. A legitimate “P2P” file transfer should allow the copyright owners to have the right to choose the criteria of communication to the public including when and how their works are to be distributed, provide control of the copyrighted material for the prevention of the unauthorized utilization or distribution and should provide mechanisms to ensure that the copyright holders are compensated at agreed rates.

When there is an illegitimate “P2P” transfer, the main problem will not only be to identify the liable party but also to identify the law applicable. Copyright protection laws are generally applied and enforced nationally. Even though there are several treaties like Berne, WIPO and TRIPS that provide minimum levels of protection, through a process of harmonization, significant differences still exist between the laws of the countries. The technological developments that pave the way for rapid and easy copyright infringement bring into the light the need of an enforcement which is global or at least regional. The examples of such acts include disputes between a copyright owner residing in one country and Internet users residing in other countries who are accused of digital copying and making available, on servers located in multiple jurisdictions, copyrighted material for download by any person anywhere in the world, without permission. When the international jurisdiction is considered for the copyright protection, in the majority of countries, the national rule applies for the courts of the state in which the defendant is domiciled or has his place of business. This principle is accepted under both EU and the Turkish codes and does not create a significant issue as long as the infringements in question are realized in the physical world. However the Internet challenges the existing rules due to the fact that physical boundaries and location are totally irrelevant. Internet is in conflict with the territoriality principle. In such a case, the approach of EU is determined in accordance with the Brussels Convention which is superseded by the Council Regulation 44/2001. Accordingly, in EU the plaintiff may take legal

action in the country in which the alleged infringer operates his websites, whereas he may also choose any other European jurisdiction. The businesses using Internet to dispense their services within the EU would be subject to the jurisdiction of the courts in the users' home country rather than the country of origin. Similarly in Turkey, the law foresees that for the cases the place of the tort and the damage are totally in different countries, as on the Internet, the applicable law shall be taken as the law of the place of the damage. So, for the copyright infringements on the Internet, the international jurisdiction will be given to the court of the place where the damage of the infringing act is occurred.

ANNEX

EU DIRECTIVES

Copyright Directive

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

O.J. L 167, 22/06/2001, p. 0010 – 0019.

Database Directive

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

O.J. L 077, 27/03/1996, p. 0020 – 0028.

Software Directive

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs

O.J.L 122 , 17/05/1991, p. 0042 – 0046.

WIPO INTERNET TREATIES

WIPO Copyright Treaty (WCT) Geneva (1996), OJ L 89/8, 11.4.2000.

WIPO Performances And Phonograms Treaty (WPPT) Geneva (1996), OJ L 89/15, 11.4.2000.

EXTRACTS

Lausanne Treaty

Section IV - Industrial, Literary and Artistic Property

Trade-Related Aspects of Intellectual Property Rights, Annex 1C, Marrakesh Agreement Establishing the World Trade Organization (1994). (Article 10)

TURKSIH LAW ON COPYRIGHT PROTECTION

Law on Intellectual and Artistic Works No. 5846 (text with the recent amendments)

EU DIRECTIVES

DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 22 MAY 2001 ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,
Having regard to the Treaty establishing the European Community, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission(1),

Having regard to the opinion of the Economic and Social Committee(2),

Acting in accordance with the procedure laid down in Article 251 of the Treaty(3),

Whereas:

(1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.

(3) The proposed harmonisation will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.

(6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.

(7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, whilst differences not adversely affecting the functioning of the internal market need not be removed or prevented.

(8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.

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

(13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential insofar as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.

(14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.

(15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the "WIPO Copyright Treaty" and the "WIPO Performances and Phonograms Treaty", dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the so-called "digital agenda", and improve the means to fight piracy world-wide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

(16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ("Directive on electronic commerce")(4), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant inter alia to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.

(17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.

(18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.

(19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.

(20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC(5), 92/100/EEC(6), 93/83/EEC(7), 93/98/EEC(8) and 96/9/EC(9), and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.

(21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.

(22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.

(23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at

the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.

(24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.

(25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.

(26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.

(27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.

(28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.

(29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.

(30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.

(31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.

(32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.

(33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which

enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.

(34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

(36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.

(37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.

(38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audio-visual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.

(39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.

(40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.

(41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.

(42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.

(43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.

(44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such

exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

(45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law.

(46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.

(47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.

(48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the sui generis right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.

(49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.

(50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.

(51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.

(52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

(53) The protection of technological measures should ensure a secure environment for the provision of interactive on-demand services, in such a way that members of the public may access works or other subject-matter from a place and at a time individually chosen by them. Where such services are governed by contractual arrangements, the first and second subparagraphs of Article 6(4) should not apply. Non-interactive forms of online use should remain subject to those provisions.

(54) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.

(55) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia* their authorisation when putting works or other subject-matter on networks.

(56) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.

(57) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and the free movement of such data⁽¹⁰⁾.

(58) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.

(59) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.

(60) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.

(61) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.
2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:
 - (a) the legal protection of computer programs;
 - (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
 - (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
 - (d) the term of protection of copyright and certain related rights;
 - (e) the legal protection of databases.

CHAPTER II RIGHTS AND EXCEPTIONS

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.
2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:
 - (a) for performers, of fixations of their performances;
 - (b) for phonogram producers, of their phonograms;
 - (c) for the producers of the first fixations of films, of the original and copies of their films;
 - (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.
3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.
2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
 - (a) a transmission in a network between third parties by an intermediary, or
 - (b) a lawful use
 of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.
2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;
- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- (i) incidental inclusion of a work or other subject-matter in other material;
- (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the demonstration or repair of equipment;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;
- (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in

certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III

PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

(a) are promoted, advertised or marketed for the purpose of circumvention of, or

(b) have only a limited commercially significant purpose or use other than to circumvent, or

(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,
any effective technological measures.

3. For the purposes of this Directive, the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

Article 7

Obligations concerning rights-management information

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

(a) the removal or alteration of any electronic rights-management information;

(b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority,

if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this

Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

COMMON PROVISIONS

Article 8

Sanctions and remedies

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Article 9

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

Article 10

Application over time

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on 22 December 2002, protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before 22 December 2002.

Article 11

Technical adaptations

1. Directive 92/100/EEC is hereby amended as follows:

(a) Article 7 shall be deleted;

(b) Article 10(3) shall be replaced by the following: "3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder."

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following: "2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society(11) the rights of producers of phonograms are no longer protected on 22 December 2002, this paragraph shall not have the effect of protecting those rights anew."

Article 12

Final provisions

1. Not later than 22 December 2004 and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

(a) to examine the impact of this Directive on the functioning of the internal market, and to highlight any difficulties;

(b) to organise consultations on all questions deriving from the application of this Directive;

(c) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;

(d) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 22 December 2002. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 15

Addressees

This Directive is addressed to the Member States.

Done at Brussels, 22 May 2001.

For the European Parliament

The President

N. Fontaine

For the Council

The President

M. Winberg

(1) OJ C 108, 7.4.1998, p. 6 and

OJ C 180, 25.6.1999, p. 6.

(2) OJ C 407, 28.12.1998, p. 30.

(3) Opinion of the European Parliament of 10 February 1999 (OJ C 150, 28.5.1999, p. 171), Council Common Position of 28 September 2000 (OJ C 344, 1.12.2000, p. 1) and Decision of the European Parliament of 14 February 2001 (not yet published in the Official Journal). Council Decision of 9 April 2001.

(4) OJ L 178, 17.7.2000, p. 1.

(5) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.

(6) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain

rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.

(7) Council 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 (OJ L 248, 6.10.1993, p. 15).

(8) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).

(9) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

(10) OJ L 281, 23.11.1995, p. 31.

(11) OJ L 167, 22.6.2001, p. 10.

DIRECTIVE 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 MARCH 1996 ON THE LEGAL PROTECTION OF DATABASES

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty establishing the European Community, and in particular Article 57 (2), 66 and 100a thereof, Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Acting in accordance with the procedure laid down in Article 189b of the Treaty (3),

(1) Whereas databases are at present not sufficiently protected in all Member States by existing legislation; whereas such protection, where it exists, has different attributes;

(2) Whereas such differences in the legal protection of databases offered by the legislation of the Member States have direct negative effects on the functioning of the internal market as regards databases and in particular on the freedom of natural and legal persons to provide on-line database goods and services on the basis of harmonized legal arrangements throughout the Community; whereas such differences could well become more pronounced as Member States introduce new legislation in this field, which is now taking on an increasingly international dimension;

(3) Whereas existing differences distorting the functioning of the internal market need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the internal market or the development of an information market within the Community need not be removed or prevented from arising;

(4) Whereas copyright protection for databases exists in varying forms in the Member States according to legislation or case-law, and whereas, if differences in legislation in the scope and conditions of protection remain between the Member States, such unharmonized intellectual property rights can have the effect of preventing the free movement of goods or services within the Community;

(5) Whereas copyright remains an appropriate form of exclusive right for authors who have created databases;

(6) Whereas, nevertheless, in the absence of a harmonized system of unfair-competition legislation or of case-law, other measures are required in addition to prevent the unauthorized extraction and/or re-utilization of the contents of a database;

(7) Whereas the making of databases requires the investment of considerable human, technical and financial resources while such databases can be copied or accessed at a fraction of the cost needed to design them independently;

(8) Whereas the unauthorized extraction and/or re-utilization of the contents of a database constitute acts which can have serious economic and technical consequences;

(9) Whereas databases are a vital tool in the development of an information market within the Community; whereas this tool will also be of use in many other fields;

(10) Whereas the exponential growth, in the Community and worldwide, in the amount of information generated and processed annually in all sectors of commerce and industry calls for investment in all the Member States in advanced information processing systems;

(11) Whereas there is at present a very great imbalance in the level of investment in the database sector both as between the Member States and between the Community and the world's largest database-producing third countries;

(12) Whereas such an investment in modern information storage and processing systems will not take place within the Community unless a stable and uniform legal protection regime is introduced for the protection of the rights of makers of databases;

(13) Whereas this Directive protects collections, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or electro-optical processes or analogous processes;

(14) Whereas protection under this Directive should be extended to cover non-electronic databases;

(15) Whereas the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database;

(16) Whereas no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied;

(17) Whereas the term 'database' should be understood to include literary, artistic, musical or other collections of works or collections of other material such as texts, sound, images, numbers, facts, and data; whereas it should cover collections of independent works, data or other materials which are systematically or methodically arranged and can be individually accessed; whereas this means that a

recording or an audiovisual, cinematographic, literary or musical work as such does not fall within the scope of this Directive;

(18) Whereas this Directive is without prejudice to the freedom of authors to decide whether, or in what manner, they will allow their works to be included in a database, in particular whether or not the authorization given is exclusive; whereas the protection of databases by the sui generis right is without prejudice to existing rights over their contents, and whereas in particular where an author or the holder of a related right permits some of his works or subject matter to be included in a database pursuant to a non-exclusive agreement, a third party may make use of those works or subject matter subject to the required consent of the author or of the holder of the related right without the sui generis right of the maker of the database being invoked to prevent him doing so, on condition that those works or subject matter are neither extracted from the database nor re-utilized on the basis thereof;

(19) Whereas, as a rule, the compilation of several recordings of musical performances on a CD does not come within the scope of this Directive, both because, as a compilation, it does not meet the conditions for copyright protection and because it does not represent a substantial enough investment to be eligible under the sui generis right;

(20) Whereas protection under this Directive may also apply to the materials necessary for the operation or consultation of certain databases such as thesaurus and indexation systems;

(21) Whereas the protection provided for in this Directive relates to databases in which works, data or other materials have been arranged systematically or methodically; whereas it is not necessary for those materials to have been physically stored in an organized manner;

(22) Whereas electronic databases within the meaning of this Directive may also include devices such as CD-ROM and CD-i;

(23) Whereas the term 'database' should not be taken to extend to computer programs used in the making or operation of a database, which are protected by Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (4);

(24) Whereas the rental and lending of databases in the field of copyright and related rights are governed exclusively by Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (5);

(25) Whereas the term of copyright is already governed by Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (6);

(26) Whereas works protected by copyright and subject matter protected by related rights, which are incorporated into a database, remain nevertheless protected by the respective exclusive rights and may not be incorporated into, or extracted from, the database without the permission of the rightholder or his successors in title;

(27) Whereas copyright in such works and related rights in subject matter thus incorporated into a database are in no way affected by the existence of a separate right in the selection or arrangement of these works and subject matter in a database;

(28) Whereas the moral rights of the natural person who created the database belong to the author and should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works; whereas such moral rights remain outside the scope of this Directive;

(29) Whereas the arrangements applicable to databases created by employees are left to the discretion of the Member States; whereas, therefore nothing in this Directive prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract;

(30) Whereas the author's exclusive rights should include the right to determine the way in which his work is exploited and by whom, and in particular to control the distribution of his work to unauthorized persons;

(31) Whereas the copyright protection of databases includes making databases available by means other than the distribution of copies;

(32) Whereas Member States are required to ensure that their national provisions are at least materially equivalent in the case of such acts subject to restrictions as are provided for by this Directive;

(33) Whereas the question of exhaustion of the right of distribution does not arise in the case of on-line databases, which come within the field of provision of services; whereas this also applies with regard to a material copy of such a database made by the user of such a service with the consent of the rightholder; whereas, unlike CD-ROM or CD-i, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which will have to be subject to authorization where the copyright so provides;

(34) Whereas, nevertheless, once the rightholder has chosen to make available a copy of the database to a user, whether by an on-line service or by other means of distribution, that lawful user must be able to access and use the database for the purposes and in the way set out in the agreement with the rightholder, even if such access and use necessitate performance of otherwise restricted acts;

(35) Whereas a list should be drawn up of exceptions to restricted acts, taking into account the fact that copyright as covered by this Directive applies only to the selection or arrangements of the contents of a database; whereas Member States should be given the option of providing for such exceptions in certain cases; whereas, however, this option should be exercised in accordance with the Berne Convention and to the extent that the exceptions relate to the structure of the database; whereas a distinction should be drawn between exceptions for private use and exceptions for reproduction for private purposes, which concerns provisions under national legislation of some Member States on levies on blank media or recording equipment;

(36) Whereas the term 'scientific research' within the meaning of this Directive covers both the natural sciences and the human sciences;

(37) Whereas Article 10 (1) of the Berne Convention is not affected by this Directive;

(38) Whereas the increasing use of digital recording technology exposes the database maker to the risk that the contents of his database may be copied and rearranged electronically, without his authorization, to produce a database of identical content which, however, does not infringe any copyright in the arrangement of his database;

(39) Whereas, in addition to aiming to protect the copyright in the original selection or arrangement of the contents of a database, this Directive seeks to safeguard the position of makers of databases against misappropriation of the results of the financial and professional investment made in obtaining and collection the contents by protecting the whole or substantial parts of a database against certain acts by a user or competitor;

(40) Whereas the object of this sui generis right is to ensure protection of any investment in obtaining, verifying or presenting the contents of a database for the limited duration of the right; whereas such investment may consist in the deployment of financial resources and/or the expending of time, effort and energy;

(41) Whereas the objective of the sui generis right is to give the maker of a database the option of preventing the unauthorized extraction and/or re-utilization of all or a substantial part of the contents of that database; whereas the maker of a database is the person who takes the initiative and the risk of investing; whereas this excludes subcontractors in particular from the definition of maker;

(42) Whereas the special right to prevent unauthorized extraction and/or re-utilization relates to acts by the user which go beyond his legitimate rights and thereby harm the investment; whereas the right to prohibit extraction and/or re-utilization of all or a substantial part of the contents relates not only to the manufacture of a parasitical competing product but also to any user who, through his acts, causes significant detriment, evaluated qualitatively or quantitatively, to the investment;

(43) Whereas, in the case of on-line transmission, the right to prohibit re-utilization is not exhausted either as regards the database or as regards a material copy of the database or of part thereof made by the addressee of the transmission with the consent of the rightholder;

(44) Whereas, when on-screen display of the contents of a database necessitates the permanent or temporary transfer of all or a substantial part of such contents to another medium, that act should be subject to authorization by the rightholder;

(45) Whereas the right to prevent unauthorized extraction and/or re-utilization does not in any way constitute an extension of copyright protection to mere facts or data;

(46) Whereas the existence of a right to prevent the unauthorized extraction and/or re-utilization of the whole or a substantial part of works, data or materials from a database should not give rise to the creation of a new right in the works, data or materials themselves;

(47) Whereas, in the interests of competition between suppliers of information products and services, protection by the sui generis right must not be afforded in such a way as to facilitate abuses of a dominant position, in particular as regards the creation and distribution of new products and services which have an intellectual, documentary, technical, economic or commercial added value; whereas, therefore, the provisions of this Directive are without prejudice to the application of Community or national competition rules;

(48) Whereas the objective of this Directive, which is to afford an appropriate and uniform level of protection of databases as a means to secure the remuneration of the maker of the database, is different from the aim of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (7), which is to guarantee free circulation of personal data on the

basis of harmonized rules designed to protect fundamental rights, notably the right to privacy which is recognized in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas the provisions of this Directive are without prejudice to data protection legislation;

(49) Whereas, notwithstanding the right to prevent extraction and/or re-utilization of all or a substantial part of a database, it should be laid down that the maker of a database or rightholder may not prevent a lawful user of the database from extracting and re-utilizing insubstantial parts; whereas, however, that user may not unreasonably prejudice either the legitimate interests of the holder of the sui generis right or the holder of copyright or a related right in respect of the works or subject matter contained in the database;

(50) Whereas the Member States should be given the option of providing for exceptions to the right to prevent the unauthorized extraction and/or re-utilization of a substantial part of the contents of a database in the case of extraction for private purposes, for the purposes of illustration for teaching or scientific research, or where extraction and/or re-utilization are/is carried out in the interests of public security or for the purposes of an administrative or judicial procedure; whereas such operations must not prejudice the exclusive rights of the maker to exploit the database and their purpose must not be commercial;

(51) Whereas the Member States, where they avail themselves of the option to permit a lawful user of a database to extract a substantial part of the contents for the purposes of illustration for teaching or scientific research, may limit that permission to certain categories of teaching or scientific research institution;

(52) Whereas those Member States which have specific rules providing for a right comparable to the sui generis right provided for in this Directive should be permitted to retain, as far as the new right is concerned, the exceptions traditionally specified by such rules;

(53) Whereas the burden of proof regarding the date of completion of the making of a database lies with the maker of the database;

(54) Whereas the burden of proof that the criteria exist for concluding that a substantial modification of the contents of a database is to be regarded as a substantial new investment lies with the maker of the database resulting from such investment;

(55) Whereas a substantial new investment involving a new term of protection may include a substantial verification of the contents of the database;

(56) Whereas the right to prevent unauthorized extraction and/or re-utilization in respect of a database should apply to databases whose makers are nationals or habitual residents of third countries or to those produced by legal persons not established in a Member State, within the meaning of the Treaty, only if such third countries offer comparable protection to databases produced by nationals of a Member State or persons who have their habitual residence in the territory of the Community;

(57) Whereas, in addition to remedies provided under the legislation of the Member States for infringements of copyright or other rights, Member States should provide for appropriate remedies against unauthorized extraction and/or re-utilization of the contents of a database;

(58) Whereas, in addition to the protection given under this Directive to the structure of the database by copyright, and to its contents against unauthorized extraction and/or re-utilization under the sui generis right, other legal provisions in the Member States relevant to the supply of database goods and services continue to apply;

(59) Whereas this Directive is without prejudice to the application to databases composed of audiovisual works of any rules recognized by a Member State's legislation concerning the broadcasting of audiovisual programmes;

(60) Whereas some Member States currently protect under copyright arrangements databases which do not meet the criteria for eligibility for copyright protection laid down in this Directive; whereas, even if the databases concerned are eligible for protection under the right laid down in this Directive to prevent unauthorized extraction and/or re-utilization of their contents, the term of protection under that right is considerably shorter than that which they enjoy under the national arrangements currently in force; whereas harmonization of the criteria for determining whether a database is to be protected by copyright may not have the effect of reducing the term of protection currently enjoyed by the rightholders concerned; whereas a derogation should be laid down to that effect; whereas the effects of such derogation must be confined to the territories of the Member States concerned,

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of databases in any form.
2. For the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.
3. Protection under this Directive shall not apply to computer programs used in the making or operation of databases accessible by electronic means.

Article 2

Limitations on the scope

This Directive shall apply without prejudice to Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) the term of protection of copyright and certain related rights.

CHAPTER II

COPYRIGHT

Article 3

Object of protection

1. In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection.
2. The copyright protection of databases provided for by this Directive shall not extend to their contents and shall be without prejudice to any rights subsisting in those contents themselves.

Article 4

Database authorship

1. The author of a database shall be the natural person or group of natural persons who created the base or, where the legislation of the Member States so permits, the legal person designated as the rightholder by that legislation.
2. Where collective works are recognized by the legislation of a Member State, the economic rights shall be owned by the person holding the copyright.
3. In respect of a database created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

Article 5

Restricted acts

In respect of the expression of the database which is protectable by copyright, the author of a database shall have the exclusive right to carry out or to authorize:

- (a) temporary or permanent reproduction by any means and in any form, in whole or in part;
- (b) translation, adaptation, arrangement and any other alteration;
- (c) any form of distribution to the public of the database or of copies thereof. The first sale in the Community of a copy of the database by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;
- (d) any communication, display or performance to the public;
- (e) any reproduction, distribution, communication, display or performance to the public of the results of the acts referred to in (b).

Article 6

Exceptions to restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

- (a) in the case of reproduction for private purposes of a non-electronic database;
- (b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;
- (d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the rightholder's legitimate interests or conflicts with normal exploitation of the database.

CHAPTER III

SUI GENERIS RIGHT

Article 7

Object of protection

1. Member States shall provide for a right for the maker of a database which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents to prevent extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database.

2. For the purposes of this Chapter:

- (a) 'extraction' shall mean the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;
- (b) 're-utilization' shall mean any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission. The first sale of a copy of a database within the Community by the rightholder or with his consent shall exhaust the right to control resale of that copy within the Community;

Public lending is not an act of extraction or re-utilization.

3. The right referred to in paragraph 1 may be transferred, assigned or granted under contractual licence.

4. The right provided for in paragraph 1 shall apply irrespective of the eligibility of that database for protection by copyright or by other rights. Moreover, it shall apply irrespective of eligibility of the contents of that database for protection by copyright or by other rights. Protection of databases under the right provided for in paragraph 1 shall be without prejudice to rights existing in respect of their contents.

5. The repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

Article 8

Rights and obligations of lawful users

1. The maker of a database which is made available to the public in whatever manner may not prevent a lawful user of the database from extracting and/or re-utilizing insubstantial parts of its contents, evaluated qualitatively and/or quantitatively, for any purposes whatsoever. Where the lawful user is authorized to extract and/or re-utilize only part of the database, this paragraph shall apply only to that part.

2. A lawful user of a database which is made available to the public in whatever manner may not perform acts which conflict with normal exploitation of the database or unreasonably prejudice the

legitimate interests of the maker of the database.

3. A lawful user of a database which is made available to the public in any manner may not cause prejudice to the holder of a copyright or related right in respect of the works or subject matter contained in the database.

Article 9

Exceptions to the sui generis right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

- (a) in the case of extraction for private purposes of the contents of a non-electronic database;
- (b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Article 10

Term of protection

1. The right provided for in Article 7 shall run from the date of completion of the making of the database. It shall expire fifteen years from the first of January of the year following the date of completion.

2. In the case of a database which is made available to the public in whatever manner before expiry of the period provided for in paragraph 1, the term of protection by that right shall expire fifteen years from the first of January of the year following the date when the database was first made available to the public.

3. Any substantial change, evaluated qualitatively or quantitatively, to the contents of a database, including any substantial change resulting from the accumulation of successive additions, deletions or alterations, which would result in the database being considered to be a substantial new investment, evaluated qualitatively or quantitatively, shall qualify the database resulting from that investment for its own term of protection.

Article 11

Beneficiaries of protection under the sui generis right

1. The right provided for in Article 7 shall apply to database whose makers or rightholders are nationals of a Member State or who have their habitual residence in the territory of the Community.

2. Paragraph 1 shall also apply to companies and firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community; however, where such a company or firm has only its registered office in the territory of the Community, its operations must be genuinely linked on an ongoing basis with the economy of a Member State.

3. Agreements extending the right provided for in Article 7 to databases made in third countries and falling outside the provisions of paragraphs 1 and 2 shall be concluded by the Council acting on a proposal from the Commission. The term of any protection extended to databases by virtue of that procedure shall not exceed that available pursuant to Article 10.

CHAPTER IV

COMMON PROVISIONS

Article 12

Remedies

Member States shall provide appropriate remedies in respect of infringements of the rights provided for in this Directive.

Article 13

Continued application of other legal provisions

This Directive shall be without prejudice to provisions concerning in particular copyright, rights related to copyright or any other rights or obligations subsisting in the data, works or other materials incorporated into a database, patent rights, trade marks, design rights, the protection of national treasures, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, and the law of contract.

Article 14

Application over time

1. Protection pursuant to this Directive as regards copyright shall also be available in respect of databases created prior to the date referred to in Article 16 (1) which on that date fulfil the requirements laid down in this Directive as regards copyright protection of databases.
2. Notwithstanding paragraph 1, where a database protected under copyright arrangements in a Member State on the date of publication of this Directive does not fulfil the eligibility criteria for copyright protection laid down in Article 3 (1), this Directive shall not result in any curtailing in that Member State of the remaining term of protection afforded under those arrangements.
3. Protection pursuant to the provisions of this Directive as regards the right provided for in Article 7 shall also be available in respect of databases the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1) and which on that date fulfil the requirements laid down in Article 7.
4. The protection provided for in paragraphs 1 and 3 shall be without prejudice to any acts concluded and rights acquired before the date referred to in those paragraphs.
5. In the case of a database the making of which was completed not more than fifteen years prior to the date referred to in Article 16 (1), the term of protection by the right provided for in Article 7 shall expire fifteen years from the first of January following that date.

Article 15

Binding nature of certain provisions

Any contractual provision contrary to Articles 6 (1) and 8 shall be null and void.

Article 16

Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1998.
When Member States adopt these provisions, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.
2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive.
3. Not later than at the end of the third year after the date referred to in paragraph 1, and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, inter alia, on the basis of specific information supplied by the Member States, it shall examine in particular the application of the sui generis right, including Articles 8 and 9, and shall verify especially whether the application of this right has led to abuse of a dominant position or other interference with free competition which would justify appropriate measures being taken, including the establishment of non-voluntary licensing arrangements. Where necessary, it shall submit proposals for adjustment of this Directive in line with developments in the area of databases.

Article 17

This Directive is addressed to the Member States.

Done at Strasbourg, 11 March 1996.

For the European Parliament

The President

K. HÄNSCH For the Council

The President

L. DINI

(1) OJ No C 156, 23. 6. 1992, p. 4 and
OJ No C 308, 15. 11. 1993, p. 1.

(2) OJ No C 19, 25. 1. 1993, p. 3.

(3) Opinion of the European Parliament of 23 June 1993 (OJ No C 194, 19. 7. 1993, p. 144), Common Position of the Council of 10 July 1995 (OJ No C 288, 30. 10. 1995, p. 14), Decision of the European Parliament of 14 December 1995 (OJ No C 17, 22 1. 1996) and Council Decision of 26 February 1996.

(4) OJ No L 122, 17. 5. 1991, p. 42. Directive as last amended by Directive 93/98/EEC (OJ No L 290, 24. 11. 1993, p. 9.)

(5) OJ No L 346, 27. 11. 1992, p. 61.

(6) OJ No L 290, 24. 11. 1993, p. 9.

(7) OJ No L 281, 23. 11. 1995, p. 31.

DIRECTIVE OF 14 MAY 1991 ON THE LEGAL PROTECTION OF COMPUTER PROGRAMS (91/250/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In cooperation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas computer programs are at present not clearly protected in all Member States by existing legislation and such protection, where it exists, has different attributes;

Whereas the development of computer programs requires the investment of considerable human, technical and financial resources while computer programs can be copied at a fraction of the cost needed to develop them independently;

Whereas computer programs are playing an increasingly important role in a broad range of industries and computer program technology can accordingly be considered as being of fundamental importance for the Community's industrial development;

Whereas certain differences in the legal protection of computer programs offered by the laws of the Member States have direct and negative effects on the functioning of the common market as regards computer programs and such differences could well become greater as Member States introduce new legislation on this subject;

Whereas existing differences having such effects need to be removed and new ones prevented from arising, while differences not adversely affecting the functioning of the common market to a substantial degree need not be removed or prevented from arising;

Whereas the Community's legal framework on the protection of computer programs can accordingly in the first instance be limited to establishing that Member States should accord protection to computer programs under copyright law as literary works and, further, to establishing who and what should be protected, the exclusive rights on which protected persons should be able to rely in order to authorize or prohibit certain acts and for how long the protection should apply;

Whereas, for the purpose of this Directive, the term 'computer program' shall include programs in any form, including those which are incorporated into hardware; whereas this term also includes preparatory design work leading to the development of a computer program provided that the nature of the preparatory work is such that a computer program can result from it at a later stage;

Whereas, in respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied;

Whereas the Community is fully committed to the promotion of international standardization;

Whereas the function of a computer program is to communicate and work together with other components of a computer system and with users and, for this purpose, a logical and, where appropriate, physical interconnection and interaction is required to permit all elements of software and hardware to work with other software and hardware and with users in all the ways in which they are intended to function;

Whereas the parts of the program which provide for such interconnection and interaction between elements of software and hardware are generally known as 'interfaces';

Whereas this functional interconnection and interaction is generally known as 'interoperability'; whereas such interoperability can be defined as the ability to exchange information and mutually to use the information which has been exchanged;

Whereas, for the avoidance of doubt, it has to be made clear that only the expression of a computer

program is protected and that ideas and principles which underlie any element of a program, including those which underlie its interfaces, are not protected by copyright under this Directive;

Whereas, in accordance with this principle of copyright, to the extent that logic, algorithms and programming languages comprise ideas and principles, those ideas and principles are not protected under this Directive;

Whereas, in accordance with the legislation and jurisprudence of the Member States and the international copyright conventions, the expression of those ideas and principles is to be protected by copyright;

Whereas, for the purposes of this Directive, the term 'rental' means the making available for use, for a limited period of time and for profit-making purposes, of a computer program or a copy thereof; whereas this term does not include public lending, which, accordingly, remains outside the scope of this Directive;

Whereas the exclusive rights of the author to prevent the unauthorized reproduction of his work have to be subject to a limited exception in the case of a computer program to allow the reproduction technically necessary for the use of that program by the lawful acquirer;

Whereas this means that the acts of loading and running necessary for the use of a copy of a program which has been lawfully acquired, and the act of correction of its errors, may not be prohibited by contract; whereas, in the absence of specific contractual provisions, including when a copy of the program has been sold, any other act necessary for the use of the copy of a program may be performed in accordance with its intended purpose by a lawful acquirer of that copy;

Whereas a person having a right to use a computer program should not be prevented from performing acts necessary to observe, study or test the functioning of the program, provided that these acts do not infringe the copyright in the program;

Whereas the unauthorized reproduction, translation, adaptation or transformation of the form of the code in which a copy of a computer program has been made available constitutes an infringement of the exclusive rights of the author;

Whereas, nevertheless, circumstances may exist when such a reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the necessary information to achieve the interoperability of an independently created program with other programs;

Whereas it has therefore to be considered that in these limited circumstances only, performance of the acts of reproduction and translation by or on behalf of a person having a right to use a copy of the program is legitimate and compatible with fair practice and must therefore be deemed not to require the authorization of the rightholder;

Whereas an objective of this exception is to make it possible to connect all components of a computer system, including those of different manufacturers, so that they can work together;

Whereas such an exception to the author's exclusive rights may not be used in a way which prejudices the legitimate interests of the rightholder or which conflicts with a normal exploitation of the program;

Whereas, in order to remain in accordance with the provisions of the Berne Convention for the Protection of Literary and Artistic Works, the term of protection should be the life of the author and fifty years from the first of January of the year following the year of his death or, in the case of an anonymous or pseudonymous work, 50 years from the first of January of the year following the year in which the work is first published;

Whereas protection of computer programs under copyright laws should be without prejudice to the application, in appropriate cases, of other forms of protection; whereas, however, any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) should be null and void;

Whereas the provisions of this Directive are without prejudice to the application of the competition rules under Articles 85 and 86 of the Treaty if a dominant supplier refuses to make information available which is necessary for interoperability as defined in this Directive;

Whereas the provisions of this Directive should be without prejudice to specific requirements of Community law already enacted in respect of the publication of interfaces in the telecommunications sector or Council Decisions relating to standardization in the field of information technology and telecommunication;

Whereas this Directive does not affect derogations provided for under national legislation in accordance with the Berne Convention on points not covered by this Directive,

HAS ADOPTED THIS DIRECTIVE:

Article 1 Object of protection

1. In accordance with the provisions of this Directive, Member States shall protect computer programs,

by copyright, as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. For the purposes of this Directive, the term 'computer programs' shall include their preparatory design material.

2. Protection in accordance with this Directive shall apply to the expression in any form of a computer program. Ideas and principles which underlie any element of a computer program, including those which underlie its interfaces, are not protected by copyright under this Directive.

3. A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection.

Article 2 Authorship of computer programs

1. The author of a computer program shall be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rightholder by that legislation. Where collective works are recognized by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.

2. In respect of a computer program created by a group of natural persons jointly, the exclusive rights shall be owned jointly.

3. Where a computer program is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the program so created, unless otherwise provided by contract.

Article 3 Beneficiaries of protection

Protection shall be granted to all natural or legal persons eligible under national copyright legislation as applied to literary works.

Article 4 Restricted Acts

Subject to the provisions of Articles 5 and 6, the exclusive rights of the rightholder within the meaning of Article 2, shall include the right to do or to authorize:

(a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole. Insofar as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the rightholder;

(b) the translation, adaptation, arrangement and any other alteration of a computer program and the reproduction of the results thereof, without prejudice to the rights of the person who alters the program;

(c) any form of distribution to the public, including the rental, of the original computer program or of copies thereof. The first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy, with the exception of the right to control further rental of the program or a copy thereof.

Article 5 Exceptions to the restricted acts

1. In the absence of specific contractual provisions, the acts referred to in Article 4 (a) and (b) shall not require authorization by the rightholder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.

2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract insofar as it is necessary for that use.

3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of the rightholder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Article 6 Decompilation

1. The authorization of the rightholder shall not be required where reproduction of the code and translation of its form within the meaning of Article 4 (a) and (b) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:

(a) these acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;

(b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in subparagraph (a); and (c) these acts are confined to the parts of the original program which are necessary to achieve interoperability.

2. The provisions of paragraph 1 shall not permit the information obtained through its application:

(a) to be used for goals other than to achieve the interoperability of the independently created computer program;

(b) to be given to others, except when necessary for the interoperability of the independently created

computer program; or (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.

3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

Article 7 Special measures of protection

1. Without prejudice to the provisions of Articles 4, 5 and 6, Member States shall provide, in accordance with their national legislation, appropriate remedies against a person committing any of the acts listed in subparagraphs (a), (b) and (c) below:

(a) any act of putting into circulation a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(b) the possession, for commercial purposes, of a copy of a computer program knowing, or having reason to believe, that it is an infringing copy;

(c) any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program.

2. Any infringing copy of a computer program shall be liable to seizure in accordance with the legislation of the Member State concerned.

3. Member States may provide for the seizure of any means referred to in paragraph 1 (c).

Article 8 Term of protection

1. Protection shall be granted for the life of the author and for fifty years after his death or after the death of the last surviving author; where the computer program is an anonymous or pseudonymous work, or where a legal person is designated as the author by national legislation in accordance with Article 2 (1), the term of protection shall be fifty years from the time that the computer program is first lawfully made available to the public. The term of protection shall be deemed to begin on the first of January of the year following the abovementioned events.

2. Member States which already have a term of protection longer than that provided for in paragraph 1 are allowed to maintain their present term until such time as the term of protection for copyright works is harmonized by Community law in a more general way.

Article 9 Continued application of other legal provisions

1. The provisions of this Directive shall be without prejudice to any other legal provisions such as those concerning patent rights, trade-marks, unfair competition, trade secrets, protection of semiconductor products or the law of contract. Any contractual provisions contrary to Article 6 or to the exceptions provided for in Article 5 (2) and (3) shall be null and void.

2. The provisions of this Directive shall apply also to programs created before 1 January 1993 without prejudice to any acts concluded and rights acquired before that date.

Article 10 Final provisions

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 1 January 1993.

When Member States adopt these measures, the latter shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the provisions of national law which they adopt in the field governed by this Directive.

Article 11

This Directive is addressed to the Member States.

Done at Brussels, 14 May 1991. For the Council The President J. F. POOS

(1) OJ No C 91, 12. 4. 1989, p. 4; and OJ No C 320, 20. 12. 1990, p. 22.

(2) No C 231, 17. 9. 1990, p. 78; and Decision of 17 April 1991. yet published in the Official Journal).

(3) OJ No C 329, 30. 12. 1989, p. 4

WIPO INTERNET TREATIES

WIPO COPYRIGHT TREATY

(WCT)

Geneva (1996)

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.²

Article 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.³

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.⁴

Article 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.⁵

Article 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.⁶

Article 7

Right of Rental

(1) Authors of

- (i) computer programs;
- (ii) cinematographic works; and
- (iii) works embodied in phonograms, as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

- (i) in the case of computer programs, where the program itself is not the essential object of the rental; and
- (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.⁷⁸

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.⁹

Article 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.¹⁰

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 12

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.¹¹

Article 13**Application in Time**

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14**Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 15**Assembly**

(1)

(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)

(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)

(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 16**International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 17**Eligibility for Becoming Party to the Treaty**

(1) Any Member State of WIPO may become party to this Treaty.

(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 18**Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 19

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 20

Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 21

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 22

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

Article 23

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 24

Languages of the Treaty

- (1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
- (2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 25

Depositary

The Director General of WIPO is the depositary of this Treaty.

¹ *Entry into force*: March 6, 2002.

Source: International Bureau of WIPO.

Note: The agreed statements of the Diplomatic Conference that adopted the Treaty (WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions) concerning certain provisions of the WCT are reproduced in endnotes below.

² **Agreed statements concerning Article 1(4)**: The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention.

³ **Agreed statements concerning Article 3** : It is understood that in applying Article 3 of this Treaty, the expression "country of the Union" in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression "country outside the Union" in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that "this Convention" in Articles 2(8) , 2*bis*(2) , 3 , 4 and 5 of the Berne Convention will be read as if it were a

reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a “national of one of the countries of the Union” will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.

⁴ **Agreed statements concerning Article 4:** The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

⁵ **Agreed statements concerning Article 5:** The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

⁶ **Agreed statements concerning Articles 6 and 7:** As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

⁷ **Agreed statements concerning Articles 6 and 7:** As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

⁸ **Agreed statements concerning Article 7:** It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

⁹ **Agreed statements concerning Article 8 :** It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2) .

¹⁰ **Agreed statement concerning Article 10:** It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

¹¹ **Agreed statements concerning Article 12:** It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

WIPO PERFORMANCES AND PHONOGRAMS TREATY

(WPPT)

Geneva (1996)

PREAMBLE

THE CONTRACTING PARTIES,

DESIRING to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

RECOGNISING the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

RECOGNISING the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

RECOGNISING the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

HAVE AGREED AS FOLLOWS:

CHAPTER I

GENERAL PROVISIONS

Article 1

Relation to other conventions

1. Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms

and Broadcasting Organisations done in Rome, October 26, 1961 (hereinafter the 'Rome Convention').

2. Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provisions of this Treaty may be interpreted as prejudicing such protection.

3. This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

Article 2

Definitions

For the purposes of this Treaty:

(a) 'performers' are actors, singers, musicians, dancers, and other persons who act, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) 'phonogram' means the fixation of the sounds of a performance or of other sounds, or of representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(c) 'fixation' means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) 'producer of a phonogram' means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) 'publication' of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

(f) 'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also 'broadcasting'; transmission of encrypted signals is 'broadcasting' where the means for decrypting are provided to the public by the broadcasting organisation or with its consent;

(g) 'communication to the public' of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, 'communication to the public' includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of protection under this Treaty

1. Contracting Parties shall accord the protection provided under this treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

2. The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

3. Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Directory-General of the World Intellectual Property Organisation (WIPO).

Article 4

National treatment

1. Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

2. The obligation provided for in paragraph 1 does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

CHAPTER II

RIGHTS OF PERFORMERS

Article 5

Moral rights of performers

1. Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms,

have the right to claim to be identified as the performer of this performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of this performances that would be prejudicial to his reputation.

2. The rights granted to a performer in accordance with paragraph 1 shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

3. The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6

Economic rights of performers in their unfixed performances

Performers shall enjoy the exclusive right of authorising, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 7

Right of reproduction

Performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performance fixed in phonograms, in any manner or form.

Article 8

Right of distribution

1. Performers shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

2. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership of the original or a copy of the performance with the authorisation of the performer.

Article 9

Right of rental

1. Performers shall enjoy the exclusive of authorising the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorisation by the performer.

2. Notwithstanding the provisions of paragraph 1, a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

3. Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Directory-General of the World Intellectual Property Organisation (WIPO).

Article 4

National treatment

1. Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

2. The obligation provided for in paragraph 1 does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

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have the right to claim to be identified as the performer of this performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of this performances that would be prejudicial to his reputation.

2. The rights granted to a performer in accordance with paragraph 1 shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorised by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

3. The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

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Performers shall enjoy the exclusive right of authorising, as regards their performances:

(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and

(ii) the fixation of their unfixed performances.

Article 7

Right of reproduction

Performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performance fixed in phonograms, in any manner or form.

Article 8

Right of distribution

1. Performers shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

2. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership of the original or a copy of the performance with the authorisation of the performer.

Article 9

Right of rental

1. Performers shall enjoy the exclusive of authorising the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorisation by the performer.

2. Notwithstanding the provisions of paragraph 1, a Contracting Party that, on April 15, 1994, had and continues

to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Article 10

Right of making available of fixed performances

Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place at a time individually chosen by them.

CHAPTER III

RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 11

Right of reproduction

Producers of phonograms shall enjoy the exclusive right of authorising the direct or indirect reproduction of their phonograms, in any manner or form.

Article 12

Right of distribution

1. Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

2. Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph 1 applies after the first sale or other transfer of ownership to the original or a copy of the phonogram with the authorising of the producer of the phonogram.

*Article 13***Right of rental**

1. Producers of phonograms shall enjoy the exclusive right of authorising the commercial rental to the public of the original and copies of their phonograms, even after distribution of them by, or pursuant to, authorisation by the producer.

2. Notwithstanding the provisions of paragraph 1, a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of producers of phonograms.

*Article 14***Right of making available of phonograms**

Producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

CHAPTER IV

COMMON PROVISIONS*Article 15***Right to remuneration for broadcasting and communication to the public**

1. Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

2. Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

3. Any Contracting Party may, in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions of paragraph 1 only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

4. For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

*Article 16***Limitations and exceptions**

1. Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

2. Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

*Article 17***Term of protection**

1. The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

2. The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

*Article 18***Obligations concerning technological measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers

of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorised by the performers or the producers of phonogram concerned or permitted by law.

Article 19

Obligations concerning rights management information

1. Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performance, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

2. As used in this Article, 'rights management information' means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication on making of a fixed performance or a phonogram to the public.

Article 20

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Article 21

Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

Article 22

Application in time

1. Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

2. Notwithstanding paragraph 1, a Contracting party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

Article 23

Provisions on enforcement of rights

1. Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

2. Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditions remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

CHAPTER V

ADMINISTRATIVE AND FINAL CLAUSES

Article 24

Assembly

1. (a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

2. (a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organisations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

3. (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

4. The Assembly shall meet in ordinary session once every two years upon convocation by the Director-General of WIPO.

5. The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 25

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 26

Eligibility for becoming Party to the Treaty

1. Any Member State of WIPO may become Party to this Treaty.

2. The Assembly may decide to admit any intergovernmental organisation to become Party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorised, in accordance with its internal procedures, to become Party to this Treaty.

3. The European Community, having made the Declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become Party to this Treaty.

Article 27

Rights and obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 28

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 29

Entry into force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director-General of WIPO.

Article 30

Effective date of becoming Party to the Treaty

This Treaty shall bind:

(i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director-General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organisation that is admitted to become Party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 31

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director-General of WIPO. Any denunciation shall take effect one year from the date on which the Director-General of WIPO received the notification.

Article 32

Languages of the Treaty

1. This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

2. An official text in any language other than those referred to in paragraph 1 shall be established by the Director-General of WIPO on the request of an interested party, after consultation with all the

interested parties. For the purposes of this paragraph, ‘interested party’ means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organisation that may become Party to this Treaty, if one of its official languages is involved.

Article 33

Depositary

The Director-General of WIPO is the depositary of this Treaty.

Agreed statements

Concerning Article 1(2)

It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorisation is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorisation of the author does not cease to exist because the authorisation of the performer or producer is also required, and vice versa. It is further understood that nothing in article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

Concerning Article 2(b)

It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

Concerning Articles 2(e), 8, 9, 12 and 13

As used in these Articles, the expressions ‘copies’ and ‘original and copies’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 3(2)

For the application of Article 3(2), it is understood that fixation means the finalisation of the master tape (‘bande-mère’).

Concerning Article 3

It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to ‘national of another Contracting state’ will, when applied to this Treaty, mean, in regard to an intergovernmental organisation that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organisation.

Concerning Articles 7, 11 and 16

The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.

Concerning Article 15

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Concerning Article 15

It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

Concerning Article 16

The agreed statement concerning Article 10 (on limitations and exceptions of the WIPO Copyright Treaty) is applicable *mutatis mutandis* also to Article 16 (on limitations and exceptions) of the WIPO Performances and Phonograms Treaty.

Concerning Article 19

The agreed statement concerning Article 12 (on obligations concerning rights management information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on obligations concerning rights management information) of the WIPO Performance and Phonograms Treaty.

EXTRACTS

LAUSANNE TREATY**SECTION IV.****INDUSTRIAL, LITERARY AND ARTISTIC PROPERTY****ARTICLE 86.**

Subject to the stipulations of the present Treaty, rights of industrial, literary and artistic property as they existed on the 1st August, 1914, in accordance with the law of each of the contracting countries, shall be re-established or restored as from the coming into force of the present Treaty in the territories of the High Contracting Parties in favour of the persons entitled to the benefit of them at the moment when the state of war commenced, or of their legal representatives. Equally, rights which, but for the war, could have been acquired during the war, by means of an application legally made for the protection of industrial property or of the publication of a literary or artistic work, shall be recognised and established in favour of those persons who would have been entitled thereto, from the coming into force of the present Treaty.

Without prejudice to the rights which are required to be restored in accordance with the above provision, all acts (including the grant of licences) done by virtue of the special measures taken during the war by a legislative, executive or administrative authority of an Allied Power in regard to the rights of Turkish nationals in respect of industrial, literary or artistic property, shall remain in force and continue to have their full effect. This provision applies mutatis mutandis to corresponding measures taken by Turkish authorities in regard to the rights of the nationals of any Allied Power.

ARTICLE 87.

A minimum of one year from the coming into force of the present Treaty shall be granted, without surtax or penalty of any kind, to Turkish nationals in the territory of each of the other Contracting Powers, and to the nationals of these Powers in Turkey, within which they may accomplish any act, fulfil any formality, pay any fees, and generally satisfy any obligation prescribed by the laws and regulations of the respective States for preserving or obtaining or opposing the grant of rights to industrial property which had already been acquired on the 1st August, 1914, or which, but for the war, might have been acquired since that date by means of an application made before or during the war. Rights to industrial property which have lapsed by reason of any failure to accomplish any act, fulfil any formality, or pay any fees shall be revived, but subject, in the case of patents and designs, to the adoption of such measures as each Power may deem reasonably necessary for the protection of the rights of third parties who have exploited or made use of patents or designs since they had lapsed. The period from the 1st August, 1914, until the coming into force of the present Treaty shall be excluded in calculating the time within which a patent has to be exploited or a trade-mark or design used, and it is further agreed that no patent, trade-mark or design in force on the 1st August, 1914, shall be subject to revocation or cancellation by reason only of the failure to exploit such patent or use such trade-mark or design, for two years after the coming into force of the present Treaty.

ARTICLE 88.

No action shall be brought and no claim made on the one hand by Turkish nationals or persons residing or carrying on business in Turkey, and on the other hand by nationals of the Allied Powers or persons residing or carrying on their business in the territory of these Powers, nor by third parties having derived title during the war from such persons, by reason of any occurrence which has taken place within the territory of the other party, between the date of the beginning of a state of war and that of the coming into force of the present Treaty, which might have been held to constitute an infringement of rights of industrial property or rights of literary or artistic property either existing at any time during the war, or revived under the provisions of Article 86.

Among the occurrences referred to above are included the use by the Governments of the High Contracting Parties, or by any person acting on their behalf, or with their consent, of rights of industrial, literary or artistic property, as well as the sale, the offering for sale or the use of products, apparatus, or any articles whatsoever to which these rights apply.

ARTICLE 89.

Licences for the use of industrial property, or for the reproduction of literary or artistic works, granted before the war by or to nationals of the Allied Powers or persons residing in their territories or carrying on business therein, on the one hand, to or by Turkish nationals on the other hand, shall be considered as cancelled as from the date of the beginning of a state of war between Turkey and the Allied Power concerned. But in any case, the former beneficiary of a licence of this kind shall have the right within a period of six months from the coming into force of the present Treaty to require from the proprietor of the rights the grant of a new licence, the conditions of which, in default of agreement between the parties, shall be fixed by the Mixed Arbitral Tribunal referred to in Section V of this Part.

The Tribunal shall have the power, where the circumstances demand it, to fix at the same time the amount which it considers fair payment for the use of the property during the war.

ARTICLE 90

The inhabitants of territories detached from Turkey under the present Treaty shall, notwithstanding this transfer and the change of nationality consequent thereon, continue in complete enjoyment in Turkey of all the rights in industrial, literary and artistic property to which they were entitled under Ottoman law at the time of transfer.

Rights of industrial, literary and artistic property which are in existence in territories detached from Turkey under the present Treaty at the time of separation, or which are re-established or restored by the provisions of Article 86, shall be recognised by the State to which the said territory is transferred, and shall remain in existence in that territory for the same period of time as that which they would have enjoyed under Ottoman law.

ARTICLE 91

All grants of patents and registrations of trade-marks, as well as all registrations of transfers or assignments of patents or trade marks which have been duly made since the 30th October, 1918, by the Imperial Ottoman Government at Constantinople or elsewhere, shall be submitted to the Turkish Government and registered, if the parties concerned make an application within three months from the coming into force of the present Treaty. Such registration shall have effect as from the date of the original registration.

TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, ANNEX 1C, AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION (1994) (ARTICLE 10)

Article 10: Computer Programs and Compilations of Data

1. Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971).

2. Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself.

TURKISH LAW ON COPYRIGHT PROTECTION

LAW ON INTELLECTUAL AND ARTISTIC WORKS NO. 5846*

PART ONE

ARTISTIC AND INTELLECTUAL WORKS

A) Objective

Art.1- (Amendment: 21.2. 2001- 4630/1) The purpose of this law is to determine and protect the moral and fiscal rights of the authors who create artistic and intellectual works, artist performing or interpreting these works, producers phonograms that make the first fixation of voices and producers that make the first fixation of movies and radio-television organizations, whereas it also arranges the utilization conditions of these products and designates the law sanctions in case of utilization contrary to projected basis and procedure.

Extent

Art.1a- (Addition: 21.2.2001- 4630/2) This law comprises the moral and fiscal rights that authors creating artistic and intellectual works, artists performing or interpreting these works, phonogram producers that make the first fixation of voices and producers that make the first fixation of movies and radio-television organizations possess on their works, related principles and procedures of dispositions, means of verdict, sanctions and the responsibility, authority and duty of the Ministry of Culture.

Definitions

Art.1b- (Addition: 21.2.2001- 4630/2) The following definitions refer to:

* The English translation of the Law is undertaken by the Ministry of Culture and Tourism, available at www.kultur.gov.tr

- a) The Work: All kinds of artistic and intellectual products of science and literary, music, artistry or cinematography, which are carrying the mark of its author, are deemed work.
- b) The author of the work: The natural person that creates the work
- c) Derivative Works: Intellectual and artistic works created on the basis of another work which bear the mark of the processor and which are comparably not independent.
- d) Collective Works: The work that came into body as a result of an intellectual creativity and made up of numbers of arrangements and selections like encyclopedias and anthologies, on condition that all the rights of the original work shall remain unaffected.
- e) Fixation: The recording procedure of voices of voice performances or voices and images in a manner that could be reproduced and transmitted.
- f) Phonogram: Physical environment where the voices in a performance or other voices or voice performances fixed. The voice fixations of audiovisual works like cinematographic works are excluded.
- g) Computer Program: The computer command system arranged to ensure a computer system to make a specific operation or work and the preparation providing the creation and development of this command system.
- h) Interface: Program sections that compose the interaction and connection between the computer hardware and components of the printer.
- i) Interoperability: Functional cooperation and interaction of the computer program sections and capability of mutual usage of the information issue of exchange.
- j) Connected Rights: The rights of the movie producer who makes the first fixations of movies and holders of neighboring rights, without prejudice to the moral and fiscal rights of the author of the work.
- k) Neighboring rights: The rights of artists interpreting, presenting, describing, singing, playing and performing a work in several other ways in an original manner, without prejudice to the moral and fiscal rights of the author and with the consent of the holder of the rights, phonogram producers making the first fixation of the voices produced by a performance and other voices and radio-television organizations.

B) Types of Artistic and Intellectual Works

I. Scientific and Literary Works

Art. 2- (Amendment: 7.6.1995- 4110/2) The following shall be deemed scientific or literary works:

1. all works of language and writing in any form of expression, and computer programs expressed in any form and their preparatory materials therefor if they subsequently lead to a program;
2. all types of dance, choreographic works in writing, dumb show and similar theatrical works without words;
3. all types of photographic works of a technical or scientific nature, all types of maps, plans, projects, sketches, drawings, three-dimensional works relating to geography and topography, all types of architectural and urban designs and projects, architectural models, industrial, environmental and theatrical designs and projects, not being of an aesthetic nature.

Concepts or principles on which any element of a computer program is based, including those on which its interface is based, shall not be deemed works.

II. Musical Works

Art. 3. All kinds of musical compositions, with or without words, shall be deemed musical works.

III. Artistic Works

Art. 4. (Amendment: 7.6.1995-4110/2) The following works, having an esthetical value, shall be deemed artistic works:

1. paintings in oil or water colors, drawings, pastels, engravings, scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar method, calligraphy, silk screen printing;
2. sculptures, reliefs and carvings;
3. works of architecture;
4. handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs;
5. photographic works;
6. graphic works;
7. caricatures;
8. typefaces.

The use of sketches, drawings, models, designs and the like as industrial designs shall not affect their status as intellectual and artistic works.

IV. Cinematographic Works

Art.5. (Amendment: 21.2.2001- 4630/3) Cinematographic works are animated serials of images related with each other like movies of aesthetic, scientific, educative or technical nature or movies related with

daily events or cinema movies which shall be broadcasted by related electronic and mechanical tools as a silent movie or sound motion picture, regardless of the material it has been fixed.

C) Derivative Works

Art. 6. Intellectual and artistic works created on the basis of an existing work and which are not independent of such work shall be deemed derivative works. The principal types of such works are:

1. translations;
2. adaptations of novels, short stories, poems or plays to a different form;
3. adaptation of a musical, artistic, scientific or literary work for incorporation in a film or transformation for the purposes of filming or broadcasting by radio or television;
4. musical arrangements and synchronizations;
5. transforming artistic works from one form to another;
6. assembling all the works of one author or all his works of one kind as a collection;
7. compilation of selections or anthologies of numerous works for a specific purpose and in accordance with a specific plan;
8. editing, by scientific investigation and study, of an unpublished work for publication (ordinary transcriptions and facsimiles that are not the result of scientific investigation and study shall be excluded);
9. annotations, critiques and abridgments of a work of another person.

Derivative works bearing the imprint of the person who has created them shall be deemed works under this Law;

10. (Addition: 7.6.1995- 4110/3) Adaptation, editing or any modification of a computer program;

11. (Addition: 7.6.1995- 4110/3) Databases obtained by the selection and compilation of materials and data in accordance with a particular plan and databases legible by a tool or other kinds of databases. (The protection provided in this case shall not be extended to protect the data and material contained in the database).

(Amendment: 21.2.2001- 4630/3) The derivations that bear the imprint of the person who has created them and that have been composed with no prejudice to the rights of the author of the original work are deemed work according to this Law.

D. Works Made Public and Published Works

Art. 7. A work made available to the public with the consent of the right holder shall be deemed to have been made public.

A work shall be deemed to have been published if the copies thereof obtained by reproduction of the original are made available to the public with the consent of the right holder by means of selling, distributing or otherwise making commercially available.

The provisions of Article 3 (2) of the Press Code, No. 5680, shall remain unaffected.

PART TWO

THE AUTHOR

A. Definition

I. General

Art. 8- (Amendment: 21.2.2001- 4630/5) The author of a work is the person who has created it. The author of a derivative work is who processes that work without prejudice to the rights of the author of the original work.

In cinematographic works, the director, composer of the original music, the scriptwriter and the dialogwriter shall be deemed as joint authors of the work. In cinematographic works that have been created by the usage of technic of animation, the animator shall also be deemed as one of the joint authors.

II. More Than One Author

Art. 9. If a work created by more than one person can be divided into parts, each such person shall be deemed the author of the part created by him.

Unless otherwise agreed by contract, each person who has contributed to the creation of a collective work may request the other persons to cooperate in the modification or publication of the whole work. If any person refuses to participate, without good reason, permission may be granted by the court. The same provision shall apply to the exercise of economic rights.

III. Community of Authors

Art. 10. If a work created by the contributions of more than one person constitutes an indivisible whole, the community of authors shall be deemed the author.

The provisions on ordinary partnership shall apply to such community. If one of the authors refuses, without good reason, to consent to a common transaction, the court may grant such permission. Each of the joint authors may act independently in the event of infringement of the rights of the community.

Technical services or assistance in detailed matters rendered with respect to the creation of a work shall not be deemed a basis for participation in such community.

(Addition: 21.2.2001- 4630/6) If a work created by the contributions of more than one person constitutes an indivisible whole, unless the concluded otherwise in an agreement or in service conditions or in a law which is in force in the preparation period of the work, the rights of a work shall be exercised by natural or legal person that gathers the authors. All rights related with the cinematographic work shall remain unaffected.

B. Presumption of Authorship

I. Works on Which the Name of the Author is Given

Art. 11. The person whose name or whose known pseudonym is given as that of the author on published copies of a work or on the original of an artistic work shall be deemed the author of such work, unless proved otherwise.

(Amendment: 7.6.1995- 4110 /5)The person habitually introduced as the author in the usual manner at lectures or performances on public premises or broadcasts by radio and television shall be deemed the author of the work concerned, unless another person is deemed the author by presumption under the first paragraph.

II. Anonymous Works

Art. 12. Where the name of the author of a published work is not revealed in accordance with Article 11, the rights and prerogatives of the author shall be exercised by the publisher, in his own name, or, if the name of the publisher is not known, by the person reproducing the work.

Where the author is deemed to be unknown under the second paragraph of Article 11, such prerogatives shall be exercised by the person giving the lecture or by the person who has caused the performance to be given.

The provisions applying to simple proxy shall apply to relations between the persons authorized under this Article and the right holders, unless otherwise agreed by contract.

PART THREE

INTELLECTUAL RIGHTS

A. Rights of the Author

I. General

Art. 13. The economic and moral rights of authors in their intellectual and artistic works shall be protected as set out by this Law.

The rights and prerogatives afforded to authors shall extend to the entire work and to each of its parts. (Addition: 21.2.2001- 4630/7)The authors and producers of cinematographic and musical works shall make the registrations and enterings of their works for the aim of protecting their fiscal and moral rights from every infringement, providing easiness of proof in case of determination of their authorship and ensuring their authorization of utilization related with economic rights, without the purpose of asserting rights. The authorizations of utilizations related to works and economic rights shall be registered to the same end upon the authors' request in other groups of work. The procedures and principles of registration and entry shall be issued by regulation to be published by the Ministry of Culture.

II. Moral Rights

(1) Right of Communication to the Public

Art. 14. The author of a work shall have the exclusive right to decide whether his work shall be communicated to the public or not and to decide the time and manner of such communication.

The author shall have the exclusive right to disclose the contents of a work of which the whole or an essential part have not been published or the main outline of, which has not been made available to the public in any manner.

(Amendment : 21.2.2001- 4630/ 8) If the manner of communication or publication of a work is detrimental to the honor or reputation of the author, the author shall be entitled to prohibit the communication or publication of the original work or of an adaptation of such work, regardless of any previous written authorization. Renunciation of this right by contract shall be null and void. The authorized party's right to sue for indemnity shall remain unaffected.

(2) Right to Be Named

Art. 15. The right to decide whether a work should be communicated to the public or published under his own name, under a pseudonym, or anonymously shall belong exclusively to the author.

The name or mark of the author shall be shown clearly, in the agreed or usual manner, on reproductions of an artistic work and on the original and reproductions of an adaptation, and it shall be clearly shown whether the work produced is a copy or an adaptation.

In the event of a dispute concerning the identity of the person who has created the work, or if another person claims to be the author of the work, the true author may institute proceedings to have his rights recognized.

(Addition: 7.6.1995- 4110/6) In architectural buildings that have work qualifications, the name of the author shall be indelibly inscribed on a visible part of the work using material considered suitable by the author, at his written request.

(3) Prohibition of Modification

Art. 16. No abbreviations, additions or other modifications may be made to a work or to the name of its author without his consent.

A person who adapts, communicates to the public, reproduces, publishes, performs or otherwise presents a work in any manner as authorized by law or by the author may make reasonable modifications as required by the technique of adaptation, production, performance or publication, without special authorization by the author.

(Amendment: 21.2.2001- 4630/ 9) The author's right to prohibit any modification that is detrimental to the nature of his work or to his honor and reputation shall remain unaffected, even if he has given his unconditional approval. Renunciation of this right by contract shall be null and void.

(4) Rights of the Author against the Owner of a Work and the Holder of the Rights

Art.17- (Amendment: 21.2.2001- 4630/ 10) Under necessary conditions, the author shall exercise the right to demand temporary usage of artistic works included in the item and item 2 of article 4 and he/she shall make the same demand for the works written in hand scripts of writers and composers included in the first item of article 2 and article 3. This right of the author shall be explained to the ones who buy or obtain the work by the help of catalogs of auctions and sells, by the people who make the commerce of the work.

(Amendment: 7.6.1995-.4110/ 7)The owner of the original of a work may dispose of it within the limits of the contract he has concluded with the author provided he does not mutilate or destroy the work or prejudice the legitimate interests of the author.

(Addition: 7.6.1995-. 4110/ 7) If a copy is unique and original, the author may request that the copy concerned be made available for use in a retrospective exhibition, covering all his productive phases, subject to the necessary precautions for its subsequent return.

(5) Exercise of Rights

(a) General

Art. 18- (Amendment: 21.2.2001- 4630/ 11) The right to exercise the financial rights exclusively belongs to the author.

Unless otherwise is understood from the private contract or from the content of the job, the rights of a work created by functionaries, messengers and workers while doing their proper jobs are exercised by the people who employ or assign them. This rule is also available for the ones under the control of natural persons.

The producer or publisher of a work may solely exercise the financial rights of a work according to the contract concluded by the author.

(b) Persons Eligible to Exercise Rights

Art. 19. If an author has not provided for the manner in which the rights afforded him by the first paragraphs of Articles 14 and 15 are to be exercised or has not entrusted another person with their exercise, those rights shall be exercised after his death by his executor or, if no executor has been appointed, successively by the surviving spouse, his children, his legatees, his parents, his brothers and sisters.

(Amendment: 21.2.2001- 4630/ 12) After the death of the author, the people set out in the preceding paragraph may exercise the rights afforded to the author in their own name rights for a time period of 70 years according to third paragraphs of Articles 14, 15 and 16.

If the author or the right holders under the first and second paragraphs do not exercise their rights, any person who acquires from the author or from his successor in title an economic right may, provided he proves a legitimate interest, exercise in his own name the rights afforded the author under the third paragraphs of Articles 14, 15 and 16.

Where more than one person holds such rights and those persons are unable to agree on an action, the court shall settle the dispute in summary proceedings, according to the presumed intentions of the author.

(Amendment: 1.11.1983-2936/ 2) If there are no right holders under Article 18 or the preceding paragraphs or if there are right holders and they do not exercise their rights or if the terms laid down in the second paragraph have expired, the Ministry of Culture may exercise in its own name the rights afforded the author under the third paragraphs of Articles 14, 15 and 16 where it deems such exercise of importance for national culture.

III. Economic Rights

(1) General

Art. 20- (Amendment: 1.11.1983-2936/ 3) The author shall have the exclusive right to exploit in any manner whatsoever a work which has not yet been made public. The exclusive right afforded the author to exploit a work that has been made public shall comprise exclusively the rights afforded as economic rights by this Law. The various economic rights shall each be distinct. Exercise of one right shall not affect exercise of the other rights.

Where the author is a member of a professional association, his economic rights shall be exercised by the association and royalties shall be collected, revenue distributed and works managed as set out in the written authorization certificate.

The principles and rules relating to the authorization certificate shall be specified by regulations to be issued by the Ministry of Culture.

The holder of rights in an adaptation may only exercise the economic rights afforded him in such capacity to the extent to which the author of the original work so permits, except where the adaptation is free.

(2) Types of Economic Rights

(a) Right of Adaptation

Art. 21. The author shall have the exclusive right to exploit his work by adaptation.

(b) Reproduction

Art.22- (Amendment: 21.2.2001- 4630/ 13) The author shall have the exclusive right to exploit his work by reproducing the original or an adaptation, by any kind of method or procedure, in part or in whole, directly or indirectly, permanently or temporarily.

Reproduction of a second copy of original works or the recording of works on devices permitting the transmission and reproduction of signs, sounds and images, or on other known or future mediums, or recordings of sounds and music, as also the application of plans, projects and sketches of architectural works, shall be deemed reproduction. The same provision shall apply to engravings or moldings.

The right of reproduction shall also extend to loading, displaying, running, transmission and storage of a computer program where such acts require the temporary reproduction of the computer program.

(c) Right of Distribution

Art. 23- (Amendment: 21.2.2001- 4630/ 14) The author shall have the exclusive right to distribute, rent or place on sale or setting his original work or reproductions commercially available in any manner. The right of importing the copies reproduced abroad with the consent of the author and benefiting from these copies by distribution exclusively remains with the author.

The copies reproduced abroad shall not be imported without the permission of the author and/or the person who holds the right of distribution.

On condition that the right of rental and the right of public lending are possessed by the author, exercising the right of distribution afforded to the right holder as the resale of certain copies after the first sale or distribution on the territory by revolving ownership shall not violate the right of distribution afforded to the author.

The distribution of a work or its reproduced copies by rental and lending shall not cause widespread reproduction of the work in a manner that may endanger the right of reproduction of the author.

The principles and rules related to this article shall be arranged by a regulation to be issued by the Ministry of Culture.

(d) Right of Performance

Art. 24. The author shall have the exclusive right of performance of his work by reciting, playing, dancing or showing the original or an adaptation on public premises either live or by means of devices permitting the transmission of signs, sounds or images.

The author shall also have the right of transmission of the performance from the premises on which the live performance to the public takes place to any other location by means of any technical device whatsoever.

(Addition: 1.11.1983-2936/ 4)The right of performance may not be exercised by other natural or legal persons without the written permission of the author or, if the author is a member of a professional association, the permission of such professional association in accordance with the rights set out in the authorization certificate. However, the provisions of Articles 33 and 34 shall remain unaffected.

(e) Right of Broadcasting

Art.25- (Amendment: 21.2.2001- 4630/ 15) The right of broadcasting the original work or the reproduced copies by means of organizations broadcasting by wires or by wireless broadcasting organizations like radio-television, satellite and cable broadcasting by devices used for transmitting signs, sounds and/or images included digital transmission, and the right of communicating these works

to the public by rebroadcasting by different broadcasting organizations after obtaining materials from the previous broadcasts exclusively belongs to the author of the work.

The author shall have the right to give permission or to prohibit the sale, distribution or presentation of his original work or reproduced copies to the public by devices working with wires and by wireless devices and the transmission of these works to the public by providing communication in the places and on the time that may have been set up by the natural persons.

The distribution and presentation of works arranged with this article shall not violate the authors' rights of distribution.

(3) Term of Protection

(a) General

Art. 26. The economic rights afforded to authors shall be limited in time. Except for the cases under Articles 46 and 47, any person may exploit the economic rights afforded the author after expiry of the term of protection.

The terms of protection applicable to the original and to adaptations of a work shall be independent of each other.

This provision shall also apply to works under the first paragraph of Article 9. The term of protection shall not start to run until the work has been made public.

For works that are published in installments, the publication date of the last installment shall be deemed the date on which the work was made public. For works comprising several consecutive volumes published at intervals and for works such as bulletins, magazines, periodicals and annuals, the date of publication shall be the date of publication of each volume or issue.

Terms of protection that start to run on the date on which the work has been made public shall be calculated from the first day of the year following the year during which the work has been made public for the first time or is deemed to have been made public under the fourth paragraph.

Terms of protection starting to run on the date of the author's death shall be calculated from the first day of the year following the year of the author's death. In the cases referred to in the first paragraph of Article 10, the term of protection shall start to run with the death of the last surviving joint author.

(b) Duration of Term of Protection

Art. 27- (Amendment: 7.6.1995-4110/ 10) The term of protection shall last for the lifetime of the author and for 70 years after his death. (Addition: 21.2.2001-4630/16) This term shall expire 70 years after the death of last joint-author in case of the existence of more than one author.

The term of protection for works, which have been first made public after the death of the author, shall be 70 years after his death.

The term of protection in the cases referred to in the first paragraph of Article 12 shall be 70 years from the date on which the work has been made public, unless the author reveals his true name before expiry of such term.

If the holder of the rights in the original work is a legal person, the term of protection shall be 70 years as from the date on which the work has been made public.

(c) Term of Protection for Translations into Turkish

Art.28. (Has been repealed: 21.2.2001-4630/36-b)

(d) Term of Protection for Handicraft, Minor Works of Art, Photographic and Cinematographic Works

Art. 29. (Has been repealed: 21.2.2001-4630/36-c)

B. Limitations

I. For Reasons of Public Policy

Art. 30. The rights afforded authors shall not prevent a work from being used as evidence in court or before other authorities or from being the subject matter of penal or criminal proceedings. Photographs may be reproduced and published in any form by the authorities or on their instructions for reasons of public policy or for judicial reasons without the author's consent.

The general rules of public policy that forbid the putting of a work into commercial circulation by any means, its performance or exploitation in any form, or subjecting them to authorization or controls, shall remain unaffected.

II. In the Interest of the Public

(1) Legislation and Court Decisions

Art. 31. The reproduction, diffusion, adaptation or use in any other manner of laws, bylaws, regulations, notifications, circulars and court decisions that have been officially published or promulgated shall be permissible.

(2) Speeches

Art. 32. The reproduction, public recitation or broadcasting by radio or other means of speeches and addresses given in the Grand National Assembly or at other official assemblies and meetings, or in

courts of law or at public meetings, shall be permissible for the purpose of giving news and information.

Where the nature of the event or of the situation does not so require, the names of the speakers need not be given.

For purposes other than those mentioned in the first paragraph, the right to reproduce or publish speeches and addresses shall belong to their authors.

(3) Free Performances

Art.33- (Amendment: 7.6.1995-4110/ 13) Published works may be freely performed in every education and instruction institution for the purposes of direct education and instruction and without any purpose of direct or indirect profit, if the name of the author and the title of the work are cited in usual manner.

(4) Selected and Collected Works for Educational and Instructional Purposes

Art.34. (Amendment: 7.6.1995- 4110/13) Reproducing selected and collected works from published musical, scientific and literary works and from publicly exhibited works of art clearly made for the purposes of education and instruction within the necessary limits of the purpose, shall be permissible. Work passages of the kind referred to in item 3 of article 2 and items 1 and 5 of the first paragraph of article 4 may solely be quoted for illustrating contents of the selected or collected work. However, this possibility may not be used in a way that would unreasonably prejudice the legitimate interests of the right holder or would conflict with normal exploitation of the work.

The provisions of the first paragraph shall also be applied to (school-radio) broadcasts exclusively prepared for schools and approved by the Ministry of Education.

(Amendment: 21.2.2001- 4630/18) Reproducing selected and collected work from published musical, scientific and literary works and from publicly exhibited works of art for a purpose other than education and instruction is only permissible with the permission of the author.

In all such cases, the title of the work and the name of the author shall be cited in the usual manner.

(5) Freedom of Quotation

Art. 35. The following uses shall be permissible:

1. the quotation of a few sentences or passages from an already published work in an independent work of science or literature;
2. the use of certain elements of a published musical work, such as themes, passages or ideas, in an independent musical work;
3. the reproduction of artistic works that have been made public and of other published works in a scientific work to the extent that such reproduction is justified for the purpose of explaining the text;
4. showing by projection or other means of artistic works that have been made public where such showing accompanies a lecture and serves the purpose of explaining the subject.

The fact that a quotation has been made must be clearly shown. In scientific works, it shall be necessary to mention not only the title of a work and the name of the author but also the passage from which the quoted part has been taken.

(6) Contents of Newspapers

Art. 36. Subject to Article 15 of the Press Code, news of the day and information communicated to the public by the press or radio may be freely quoted.

Except where the right to quote from articles or features on social, political or economic issues of the day published in newspapers or reviews has been expressly reserved, they may be freely quoted in their original or modified form in other newspapers or periodicals and may be broadcast or disseminated by any other means.

Even where the right to quote is reserved, it shall be permissible to reproduce such articles and features in the form of an abridged press review or to broadcast or disseminate them in any other manner.

In all such cases, mention must be made of the name, the issue and the date of the newspaper, of the periodical, of the agency and of any other source from which the quotations have been made, together with the name, the pseudonym or the mark of the author of the articles.

(7) Interviews

Art. 37. (Amendment: 21.2.2001- 4630/ 19) It shall be permissible to record on devices permitting the transmission of signs, sounds or images passages from intellectual and artistic works relating to current events, provided it is done in the nature of an interview. The reproduction, dissemination, performance and broadcasting by radio of passages quoted in such a manner shall be permissible. This freedom shall not be exercised in a manner of prejudicing the legitimate interests or in a contrary manner to the usual exploitation of the work.

III. In the Interest of Individuals

(1) Personal Use

Art. 38- (Amendment: 7.6.1995- 4110/ 14) It shall be permissible to reproduce intellectual and artistic works for personal use not involving purposes of publication or exploitation for profit. However, such reproduction may not unreasonably prejudice the legitimate interests of right holders or conflict with normal exploitation of a work.

The second item has been repealed. (21.2.2001- 4630/ 36-d)

In the absence of specific contractual provisions, the reproduction and adaptation of a computer program by the lawful acquirer shall be permissible where necessary for the use of the computer program in accordance with its intended purpose, including for error correction.

The loading, running and error correction of a computer program by a person who has lawfully acquired the program may not be prohibited by contract. The making of a backup copy by a person having the right to use the computer program may not be prevented by contract insofar as it is necessary to ensure such use.

It shall be permissible for a person who has acquired the right to use a computer program to observe, analyze or test the functioning of the program in order to determine the ideas and principles underlying any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Where reproduction of the code and translation of its form within the meaning of reproduction and adaptation of the computer program are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, the performing of such acts shall be permissible, provided that the following conditions are met:

1. these acts are performed by the licensee or by another person having a right to use a copy of the program or on their behalf by a person authorized to do so;
2. the information necessary to achieve interoperability shall not be made available to the persons specified in item 1;
3. these acts are confined to the parts of the program which are necessary to achieve interoperability.

The provisions of the above paragraph shall not permit information obtained through its application:

1. to be used for purposes other than to achieve the interoperability of the independently created computer program;
2. to be given to others, except where necessary for the interoperability of the independently created computer program;
3. to be used for the development, production or marketing of a computer program substantially similar in its expression or for any other act which infringes copyright.

The provisions of the sixth and seventh paragraphs may not be interpreted in such a way that their publication conflicts with the normal exploitation of the program or unreasonably prejudices the right holder's legitimate interests.

(2) Rights of Composers

Art. 39. (Has been repealed: 21.2.2001- 4630/ 36-e)

(3) Reproduction of Exhibited Works

Art. 40. Works of art permanently situated on public streets, avenues or squares may be reproduced, publicly projected on a screen or broadcast by radio or similar means in the form of drawings, graphics, photographs and the like. In the case of works of architecture, permission shall extend to their exterior form only. Artistic works may be publicly exhibited by their owners or with their consent, unless the author has expressly prohibited such exhibition.

Works to be sold by auction may be exhibited to the public. It shall be permissible to reproduce and publish in catalogs, guides and similar printed matter works exhibited on public premises or to be sold by auction by the organizers of the exhibition or auction.

The name of the author may be omitted in such cases unless it is customary to include the name.

(4) Use on Public Premises of Recordings, Video Cassettes and Audio Cassettes

Art.41-(Amendment: 21.2.2001- 4630/ 20) It is permissible to affix bands on recordings, audiocassettes and/or videocassettes for the usage in public places that the entrance is free of charge or is not available free of charge, for a purpose of benefit.

The ministry of Culture of related professional association shall give the bands after the contract which gives the performing permission is concluded between the user and authors or related professional association of authors.

In case of the recordings, videocassettes and audiocassettes do not carry the necessary band; this may be an issue of prejudice to the financial right.

IV. Rights Belonging to the Government

(1) Creation of Professional Associations

Art.42- (Amendment: 21.2.2001- 4630/ 21) Authors and holders of neighboring rights may establish more than one professional association in accordance within the framework of bylaws and uniform

statutes issued by the Ministry of Culture and approved by the Council of Ministers in order to protect mutual interests, to provide management and assertion of their rights afforded by this Law and to ensure the collection and distribution of the fees to the right holders.

If the number of real persons is 4 times larger than the number of permanent members of the obligatory organs for authors and performing artists, and if the number of real and legal persons who have the quality to be members is 2 times larger than the number of permanent members of those organs, these persons shall have recourse to the Ministry for having permission to operate as a professional association. After having this permission, professional associations may start operating once they are established. 110

(Amendment: 21.2.2001- 4630/ 22) To create another professional association in the same field, the legal and natural persons having the quality to be 1/3 of the complete number of members of the professional association created in the same field who has the maximum number of members, and being no less than the number of charter members mentioned in the paragraph above, should have recourse to the Ministry in order to take the operating permission. In case of the Ministry approves and gives the permission, they may start operating. Each association may operate by creating branch offices according to their needs. At least 2 professional associations coexisting in the same field may establish a federation in the framework of the principles and procedures issued by the bylaws and uniform statutes drawn up by the Ministry. There may be solely one federation in each field.

The professional associations and the federation shall constitute civil law legal persons. Their members shall not be required to invest capital and shall not participate in the profits and losses nor in the legal liability.

The uniform statutes of the professional associations and the federation shall require as compulsory organs a general assembly, a board of directors, a board of audit, a technical and scientific committee and a court of honor. Regulations drawn up by the Ministry of Culture, after obtaining the views of the bodies concerned, shall govern the foundation of associations and of the federation, control and inspection thereof, the minimum number of members required to constitute the first general assemblies, the composition of other optional organs and committees and the number of their members and the members' duties, conditions for membership, resigning membership and discharge from membership, designation of regions where branches may be opened, relations with official public organizations at home and abroad, with natural persons and civil law legal persons, rights and powers in such relations, monetary relations with members, distribution of royalties and compensation collected and other principles and rules.

Article 21, second paragraph, Articles 30, 37, 40, 42, 43, 44, 45, 48, 65, 66, 67, 68, 69, 70 and 90 of the Law on Companies, No. 2908, dated October 4, 1983, shall apply, together with the criminal provisions, to the professional associations and the federation to be established in accordance with this Article.

(Amendment: 21.2.2001- 4630/ 21) Right of holders of the neighboring rights approved by this law, shall not be exercised by another association, foundation and alike except the professional association that have been created according to this article. The provisions of this article like membership, number of charter members and complete number of members are also compulsory for the professional association that have been created prior to the entry into force of this Law. Each professional association should adapt to the principles of this article within 6 months beginning from the laws coming in to force. The professional associations that fail to comply with this provision shall be deemed to have been dissolved on expiry of the initial year.

(2) Broadcasting Royalties

Art. 43- (Amendment: 21.2.2001- 4630/ 22) Radio- television organs shall obtain permission of the authors, related with the published work that they make use of.

Radio- television organs and organs making satellite and cable broadcast and organs that are broadcasting and/or transmitting by present technical means or which will broadcast and/ or transmit by the technical means to be found in the future shall obtain permission by concluding a collective agreement with the authors and/or holders of the neighboring rights or with the professional association of the author according to Article 52, and shall pay the royalties related to these exploitations to the author and/or to the holders of the neighboring rights or the professional association of the author.

The principles and procedures related with the exploitation of the work shall be arranged by a regulation that should be issued after the consultation of professional associations about the Supreme comitee of radio- television, by the Ministry of Culture.

(3) Identification of Intellectual and Artistic Works

Art. 44-(Amendment: 7.6.1995-4110/18) The holders of economic rights and the manufacturers and printers of devices permitting the reproduction of intellectual and artistic works by means of signs,

sounds and images shall be jointly responsible for placing an identification sign and a serial number on all copies of a work to be reproduced in accordance with this Law and offered for sale, distributed or placed in commercial circulation in any other manner.

(Amendment: 21.2.2001- 4630/ 23) Natural and legal persons who produce or import any kind of blank video cassette, audio cassette, computer disc, compact disc and DVD for commercial purposes shall be required to deposit the sum of the month by issuing an amount which will be determined by the Council of Ministers, not exceeding 3% of the production or importation costs, in a special account to be opened in a national bank in the name of the Ministry of Culture each month by depositing the amount of the preceding month latest in the first half of the following month.

(Amendment: 21.2.2001- 4630/ 23) The Ministry shall use this amount on the activities for empowering the system of intellectual rights and sustaining the protection of the cultural heritage in the territory and abroad. The procedures and principles related with the distribution and exploitation of this amount shall be issued by a regulation to be published by the Ministry of Culture.

The Ministry of Culture shall issue a regulation setting out the principles and rules for the signs and serial numbers to be placed on copies of intellectual and artistic works depending on whether they are to be used for private performance or performance on public premises, confiscation of copies not bearing such signs and serial numbers, the person to whom the number of copies made and distributed is to be notified and other related matters.

(4) Resale Royalty Right

Art. 45. If, after the sale by the author or his heirs, the original of an artistic work referred to in items 1 and 2 of Article 4 or of the manuscript of a work in the author's or composer's own hand referred to in item 1 of Article 2 or in Article 3 are resold during the period of protection, either at an exhibition or public auction or in a shop where such articles are generally sold, and if there is a substantial difference between the price of the last sale and of the preceding one, the seller in the latter transaction may be required, by decree, to pay an appropriate portion of the difference in price to the author or, if the author is dead, to his spouse and heirs to the second degree inclusive according to the rules of inheritance, and in the absence of heirs, to the professional association.

The decree shall:

1. stipulate a royalty rate to be determined in proportion to the difference in price, but which shall not exceed 10% of such difference;
2. stipulate that sale prices not exceeding the amount laid down in the tariff shall not be subject to royalties;
3. state which branch of the professional association is to be concerned, depending on the nature of the work.

The owner of the establishment where the sale takes place shall be jointly and separately liable with the seller.

In the event of a forced sale, the royalty shall be paid only after all other debts have been settled in full.

The time limit for payment of the royalty shall be five years from the sale that gave rise to the obligation.

(5) Right of Use by the State

Art. 46- (Amended: 1.11.1983-2936/10 md.) Works that are unpublished or have not been made public and whose author has not expressly prohibited reproduction and publication, kept in public libraries, museums or similar institutions, shall belong to the public institution or establishment in which they are kept, provided the term of protection for economic rights has expired. The Ministry of Culture shall draw up a regulation, after consultation with the establishments concerned, to determine the authority from which permission is to be obtained by the public institutions and establishments and by persons and establishments wishing to use such works for scientific or other purposes, the fees to be paid for using them, the cultural aims on which such fees are to be spent and other matters.

(6) Expropriation

Art. 47. The economic rights in a work deemed to be of importance to the culture of the country may be expropriated, by decree, prior to expiry of the term of protection, on payment of equitable remuneration to the right holders.

(Amendment: 21.2.2001- 4630/ 24) A decision to expropriate may only be taken if the work is created in Turkey or published outside of Turkey by Turkish nationals, and if copies of the published work have been out of print for a period of two years and it appears unlikely that a new edition may be published within a reasonable period.

The decree shall:

1. state the title of the work and the name of its author;
2. state the price payable to persons whose rights are expropriated;

3. state the name of the authority or institution which is to exercise the economic rights;
4. state the cultural purpose to be served by the proceeds after the remuneration has been paid.

PART FOUR

CONTRACTS AND TRANSFERS

A. Transfer Inter Vivos

I. First Transfer

Art. 48. The author or his heirs may transfer to others the economic rights afforded them by law, either in whole or subject to limitations as regards duration, place or contents, gratuitously or for consideration.

The right to use the economic rights may also be transferred to others.

Transfers of the kinds referred to in the preceding paragraphs shall be null and void if they relate to works to be created or completed in the future.

II. Subsequent Transfer

Art. 49. A person who has acquired from the author or his heirs an economic right or a license to exercise such right may transfer such right or license only with the written consent of the author or his heirs.

The consent of the author or his heirs shall also be required by a person acquiring the right of adaptation by transfer.

III. Contracts

(1) Works to Be Created

Art. 50. The provisions concerning the various kinds of transfer referred to in Articles 48 and 49 shall also apply to contracts for works to be created in the future.

Such contracts, whether they relate to all or some of the author's works to be created in the future, may be terminated by either contracting party on one year's notice.

Such contracts shall be automatically canceled if the author dies before completing the work or loses the capacity to complete the work or if completion of the work becomes impossible through no fault of his own. This rule shall also apply when the other party is declared bankrupt or is unable to exercise the economic rights transferred to him under the contract or exercise of those rights becomes impossible through no fault of his own.

(2) Prospective Future Rights

Art. 51. Contracts concerning the transfer of economic rights or the exercise by others of rights which may be granted to the author by future legislation shall be null and void. The same provision shall apply to contracts for the renunciation of transfer of rights which may arise from future legislation extending the scope or duration of economic rights.

IV. Form of Contract

Art. 52. Contracts and transfers concerning economic rights shall be in writing and the rights that constitute their subject matter shall be specified.

V. Guarantees

(1) Existence of Right

Art. 53. The person transferring an economic right or granting a license to use such right shall guarantee to the transferee, in accordance with Articles 169 and 171 of the Code of Obligations, that the right exists.

Any claim arising from unlawful acts or unjust enrichment shall remain unaffected.

(2) Lack of Title

Art. 54. A person acquiring economic rights or a license to exercise such rights from a person who is not authorized to effect such transfer shall not be protected even if he acted in good faith.

A person who transfers an economic right or grants a license to exercise such right to another person without having title to do so shall be liable to pay compensation for the damages arising from the fact that the transfer was null and void, unless he is able to prove that the other person was aware or ought to have been aware that he had no such title. If found guilty, the court may award greater compensation if warranted.

Any claim arising from unlawful acts or unjust enrichment shall remain unaffected.

VI. Rules of Interpretation

(1) Scope

Art. 55. Unless otherwise agreed, transfer of an economic right or the grant of a license shall not extend to translation or other adaptation of a work.

(2) Licenses

Art. 56. A license which does not prohibit the holder of economic rights from granting the same license to other persons shall constitute a non-exclusive license and a license limited to one person only shall constitute an exclusive license.

Unless otherwise laid down by law or contract, all licenses shall be deemed non-exclusive. The provisions on leases shall apply to non-exclusive licenses and the provisions on usufruct shall apply to exclusive licenses.

(3) Transfer of Ownership

Art. 57. Transfer of ownership of an original or of reproduced copies shall not include transfer of moral rights, unless otherwise agreed.

Any person who has acquired the plates or other devices for reproduction from the owner of the right of reproduction in an artistic work shall be deemed to have acquired the right of reproduction, unless otherwise agreed.

The last item has been repealed. (21.2.2001-4630/ 36-f)

VII. Right of Rescission

Art. 58. If the person to whom an economic right has been transferred or a license has been granted does not properly exercise such right within the agreed period or, where no period has been agreed, within a reasonable time, and if the author's interests have been prejudiced by the delay, the author may rescind the contract.

In order to rescind the contract, the author must have a notice issued by a notary public, requiring the other party to exercise the right transferred by the contract and allowing him a given period to fulfill his obligation. The allowance of such a period shall not be necessary if exercise of the right has become impossible for the other party or if the other party has refused to exercise the right or if delay would jeopardize the author's interests.

The notice issued by the notary public shall give effect to the rescission of the contract if the stipulated period expires without producing the required result or if it is not necessary to give such a period.

Rescission of the contract shall become incontestable four weeks after the notice issued by the notary public.

If no blame may be attached to the transferee for failure to use the economic rights or if greater fault may be imputed to the author, the transferee may claim reasonable compensation in those cases where equity entitles him to do so.

The right to rescind may not be renounced beforehand and any restriction prohibiting the exercise of such right for a period exceeding two years shall be null and void.

VIII. Reversion of the Right to the Author

Art. 59. If the author or his heirs have transferred an economic right for a specific purpose or for a definite period of time, the right shall revert to the author when the purpose has been attained or the period has expired. This provision shall not apply in the event of death or bankruptcy of a transferee who is not permitted under the contract to make a further transfer unless the nature of the work requires that the right be personally exercised by him.

Licenses granted for a specific purpose or a specific period of time shall terminate in the cases set out in the first paragraph.

B. Renunciation

Art. 60. The author or his heirs may renounce the economic rights afforded them by law by means of an official deed published in the Official Gazette, provided there is no prejudice to previous contractual obligations.

As of its date of publication, renunciation shall have the same legal effects as expiry of the term of protection.

C. Execution and Security

I. When Not Permitted

Art. 61. Without prejudice to the provisions of Articles 24 and 30 of the Law on Execution and Bankruptcy, the following shall not be the object of execution, lien, pledge, seizure or retention:

1. drafts or originals of a work not yet made public that are in the possession of the author or of one of his heirs;
2. economic rights in works referred to in item 1, except cinematographic works;
3. money due to the author, other than money resulting from transactions concerning his economic rights.

II. When Permitted

Art. 62. The following may be the object of execution, lien, pledge, seizure or retention, subject to the provisions set out thereunder:

1. drafts or originals of works that have been made public;
2. reproduced copies of a published work;
3. economic rights in a work that has been made public, provided that the author's moral rights worthy of protection are not prejudiced;
4. money due to the author as a result of transactions concerning his economic rights.

Liens and pledges shall be valid only if stipulated in writing, Their object must be specified in the document.

Plates and other means of reproduction may be temporarily taken from their holders to the extent necessary for the purposes of execution upon the economic rights referred to in item 3 of the first paragraph.

Original artistic works, except for works of architecture, and manuscripts of musical, scientific and literary works belonging to the author or to his heirs may be temporarily taken from their possessors to the extent necessary for the purposes of execution upon the economic rights referred to in item 3 of the first paragraph.

D. Inheritance

I. General

Art. 63. The economic rights afforded by this Law may be transmitted by way of succession. Economic rights may be the object of a will or other testamentary provision.

II. Death of One of the Joint Authors of a Work

Art. 64. If one of the joint authors of a work dies before the work is completed or has been made public, his share shall be divided among the other joint authors, who shall be required to pay suitable remuneration to the heirs of the deceased joint author.

Should they fail to agree as to the amount of such a remuneration, it shall be determined by the court.

If one of the joint authors of a work dies after the work has been made public, the other joint authors shall be free to decide whether or not they continue the association with the heirs of the deceased joint author.

If they decide to continue the association, the surviving joint authors may request the heirs to appoint a representative to exercise their rights in respect of the association.

Where it is decided not to continue the association, the provisions of the first paragraph shall apply.

III. More Than One Heir

Art. 65. Where the estate of a deceased author contains economic rights afforded by this Law and if an executor has been appointed in accordance with Article 581 of the Civil Code, the executor must obtain the consent of the heirs for any transaction connected with such rights.

PART FIVE

CIVIL AND CRIMINAL ACTIONS

A. Civil Actions

I. Actions for Infringement

(1) General

Art. 66. Any person whose moral or economic rights have been infringed may take legal action against the infringer.

If the infringement has been committed by the manager or employees of a company in the execution of their duties, legal action may be taken against the owner of such company.

It is not necessary that the infringer or the persons referred to in the second paragraph be at fault.

The court shall order such measures as the circumstances require for the discontinuation of the infringement, taking into consideration the moral rights and economic rights of the author, the extent of the infringement, the existence and degree of fault, and the probable prejudice suffered by the defendant if an injunction is issued.

The author shall also be entitled to bring an action in the district in which he resides for an injunction.

(Addition: 7.6.1995-4110/ 19) The author shall also take legal action for an infringement and for an injunction in the district in which he resides.

(2) Infringement of Moral Rights

Art. 67. Where a work that has not yet been made public is communicated to the public without the consent of the author or against his wishes, action for infringement may only be taken if communication has been made to the public by publication of the reproduced copies. This provision shall also apply if the author's name is placed on the work against his wishes.

If the author's name has not been placed on the work or has been given erroneously or in such a way as to cause confusion, and if the court recognizes his authorship in accordance with Article 15 and orders the discontinuance of the infringement, the infringer shall be required to place the author's name on the original work and on reproduced copies already distributed. The author may also require that the decision of the court be published in not more than three newspapers at the expense of the infringer.

The provisions of the second paragraph shall apply in the cases referred to in Articles 32, 33, 34, 35, 36, 39 and 40 if the source has not been stated or has been wrongly or inadequately stated.

If the work has been improperly changed, the author may require:

1. that reproduction, publication, performance and broadcasting of the modified work be prohibited and that the reproduced copies already distributed be corrected by the infringer or restored to their original form. If the changes are made in connection with publication in a newspaper or magazine or by broadcasting, the author may require that the newspapers, magazines or broadcasting organizations which have used the work to correct the modifications.

The expenses for such corrections shall be borne by the infringers;

2. (Amendment: 7.6.1995- 4110/ 20) in the case of artistic works, that an announcement be made to the effect that the change in the original work was not made by him, or that his name be removed or changed on the original. If it is possible to restore the work to its original form and if elimination of the changes does not seriously prejudice the interests of the owner or of the public, the author may restore the work to its original form.

(3) Infringement of Economic Rights

Art. 68- (Amendment: 21.2.2001-4630/25) If a work has been translated without the author's consent, has been published outside the scope of the contract or in excess of the number stipulated in the contract, or has been adapted in some other way or broadcast by radio or television or performed, the author may require the payment of compensation of up to three times the damages incurred, based on the current value. The setting of this amount is based on the opinions of the related professional associations before all else.

If use is made of a work by unauthorized reproduction and the reproduced copies have not been put into commercial circulation, the author may require destruction of the reproduced copies and of devices such as films, plates and the like, that permit reproduction, or may require the reproduced copies and the devices such as films, plates and the like, that permit reproduction, to be handed to him in return for suitable remuneration not exceeding their cost price, or may require payment of three times the amount he would have demanded if a contract had been concluded. These claims shall not remove the legal liability of the person undertaking the unauthorized production.

If copies of a work reproduced without the consent of the author have been put up for sale or if the nature of the sale constitutes an infringement, the author shall have a choice of the alternatives referred to in the second paragraph with respect to copies in the possession of the infringer.

Any person demanding compensation may claim all the rights and prerogatives he would have enjoyed had he concluded a contract.

II. Action for Injunction

Art. 69. Where his moral or economic rights are in danger of infringement, the author may take legal action to prevent such infringement. The same provision shall apply where there is a likelihood that an infringement will be continued or repeated.

The provisions of the second, third and fourth paragraphs of Article 66 shall also apply in such case.

III. Action for Damages

Art. 70- (Amendment: 7.6.1995-4110/ 22) Any person whose moral rights are infringed may sue to take moral indemnity in response to the infringement he/she had been exposed to.

The court may order that punitive damages be awarded instead of or in addition to ordinary damages.

If the infringer is at fault, the person whose economic rights have been infringed may claim damages under the provisions governing unlawful acts.

In the cases mentioned in the first and second paragraphs, any person whose rights are infringed may also claim, in addition to damages, that the profits made be surrendered to him. In such case, any sum claimed in accordance with Article 68 shall be deducted from the above amounts.

B. Criminal Actions

(1) Infringement of Moral Rights

Art. 71- (Amendment: 1.11.1983- 2939/11)

In violation of the provisions of law, any person who willfully

1. communicates to the public or publishes, without the written consent of the author or his successor in title, a work whether or not it has already been made public;

2. places a title on a work or on the reproduced copies of the work without the written consent of the author or his successor in title;

3. alleges that the work of others are his own or that his own works are those of others or who acts contrary to the second paragraph of Article 15;

4. fails to cite the source in the case provided in Articles 32, 33, 34, 35, 36, 37, 39 and 40, or cites the source in a false, incomplete or misleading way,

5. (Addition: 21.2.2001- 4630/ 26) Makes changes on a work without the written consent of the author.

(Addition: 21.2.2001- 4630/ 26) Shall be liable to imprisonment of between 4 years and 6 years and a fine of between 50 billion and 150 billion Turkish Liras.

(2) Infringement of Economic Rights

Art. 72. (Amendment: 1.11.1983- 2936/ 12) Any person who, in violation of this Law, willfully and without the written consent of the right holder:

1. adapts a work in any manner;
 2. reproduces a work in any manner;
 3. sells, offers for sale or commercially distributes copies reproduced by him of a work or of its adaptation;
 4. (Amendment: 21.2.2001- 4630/ 27) Performs or exhibits a work in public, organizes this exhibition or disseminates or mediates the broadcasting by all kinds of signs, sounds and visual transmission.
 5. (Amendment: 21.2.2001- 4630/ 27) Hires out or lends a work.
 6. (Amendment: 21.2.2001- 4630/ 27) Legally or illegally imports the reproduced copies and uses them for commercial purposes.
- (Amendment: 21.2.2001- 4630/ 27) Shall be liable to imprisonment of between 4 years and 6 years and a fine of between 50 billion and 150 billion Turkish Liras.

(3) Other Offenses

Art. 73.(Amendment: 1.11.1983-2936/ 13) Any person who willfully:

1. places on sale or uses for profit for the purposes of public performance, broadcasting or in any other manner, copies of a work which he knows or should know to have been reproduced in violation of the provisions of this Law;
 2. sells or uses for profit for the purposes of public performance, broadcasting or otherwise copies of a work which he knows or should know to have been placed on sale in violation of the provisions of this Law;
 3. transfers, donates, pledges or otherwise disposes of an economic right or a license which he knows or should know does not exist or cannot be the subject of such transaction;
 4. (Has been repealed: 21.2.2001-4630/ 36-g)
 5. (Addition: 7.6.1995- 4110/ 25) stores for commercial purposes, copies of a work which he knows or should know to have been reproduced in violation of the provisions of this Law;
 6. (Addition: 7.6.1995- 4110/ 25) stores or distributes for commercial purposes, any technical device serving the circumvention or unauthorized removal of a technical device applied solely for the protection of a computer program,
- (Amendment: 21.2.2001- 4630/ 28) Shall be liable to imprisonment of between 2 and 4 years and a fine of between 10 billion and 50 billion Turkish Liras.

II. Offenders

Art. 74. If the offenses set out in Articles 71, 72 and 73 have been committed by the managers or employees of a company, the proprietor, director or any person, whatever his appellation, who in effect directs that company shall be liable to punishment in the same manner as the persons who have actually committed the offense if he has not prevented the offense. If the offense has been committed on the orders of the proprietor, director or other person who directs a company, such person shall be liable to punishment as the offender and the managers and employees as accomplices.

Any person who, knowing the unlawful nature of a performance, provides premises for such performance either on lease or gratuitously, or accepts a role or a part in the performance, shall be liable to punishment as an accomplice.

If any of the offenses laid down in Articles 71, 72 and 73 are committed in connection with the business activities of a legal person, such legal person shall be jointly and severally liable with the other offenders for the expenses and the fines.

The provisions of Articles 64, 65, 66 and 67 of the Criminal Code shall remain unaffected.

III. Prosecution

Art. 75- (Amendment: 21.2.2001- 4630/ 29) The offenses set out in Articles 71, 72 and 73 shall be prosecuted on complaint.

In addition to the persons suffering injury, the following shall also be authorized to file complaints:

1. the Ministry of Education and the Ministry of Culture or the professional association to which the infringer or the plaintiff belongs in the cases set out in item 4 of Article 71 and in respect of the citing of the source as required by Article 35;
2. the Ministry of Culture and the General Directorate of Press and Advertising and the institution representing the Turkish press in the cases set out in item 4 of Article 71 with respect to the citing of the source as required by Article 36.
3. The ministry of Culture in cases set out in the item 14 and 15 in the framework of the last paragraph of the Article 19.
4. Professional Associations in the fields that they operate.

In case of infringement of the rights of authors, right holders of neighboring rights or other right holders, the public prosecutors office of where the infringement or its consequences occurred may

demand abolishment of the place where the improper reproduction is being realized, the confiscation of the copies or publications found there and the padlock of technical tools used to that end, from the competent tribunal after the application of people who have authorization of complaint.

Where the circumstances demand rapid action, the public prosecutor may, at his own initiative, issue an order for confiscation and padlock that shall be submitted for approval to the competent tribunal within three days.

If the offense remains in the prescription term of action, right holders may have recourse to public prosecutors office with the documents that prove their rights, in 6 months beginning from the day that they learn the infringement and the perpetrator. The adjudication procedure of the Law on Procedure in Flagrant Offenses no. 3005 related to this offense shall be applied to such offenses, regardless of the district mentioned in the item A of the first Article and the time enrollment written in the Article 4 of the same law.

If one, who has already been sentenced because of the offenses included in this Law, recommits the same crime within 2 years, the sentence shall be increased one level.³⁰⁰

C. Miscellaneous Provisions

I. Jurisdiction

Art. 76- (Amendment: 21.2.2001- 4630/ 30) In cases concerning the legal relations governed by this law, the specialized tribunals that are to be established by the Ministry of Justice shall be competent regardless of the amount involved or the degree of penalty foreseen by the law. Until the establishment of specialized tribunals and until they start their judging activities, The supreme Committee of Judges and Prosecutors determine which Criminal and Law Courts of first instance are to be charged and their frameworks of judgment as specialized tribunals upon the proposal of Ministry of Law.

If a personal complaint is brought, Article 358 of the Code of Criminal Procedure shall apply. If the criminal case is disposed of by acquittal and a claim for damages is also involved, the file shall be automatically referred to the Civil Court for a decision on the claim.

(Addition: 21.2.2001- 4630/ 30) In the proceedings extended by this law, if the plaintiff presents right amount of evidence that ensures powerful belief about the truth of the claim, the tribunal may demand the presentation of documents of permissions and authorizations and/ or the list of every work, phonogram, performance, movie and broadcasts under protection. If the issued documents and/or lists are not being presented, it refers to the unjust usage of all works, phonograms, performances, movies and broadcasts.

II. Interlocutory Injunctions

Art.77- (Amendment: 21.2.2001- 4630/ 31) Upon the request of the person whose rights have been infringed or endangered or the person who has authority to claim, the tribunal may order the other party, before or during the proceedings, to perform certain acts or to abstain from performing them as well as it can order closing the district that the act is being done or opening that place, if such an order is deemed necessary for the prevention of serious injuries or sudden dangers or accomplished facts. The order shall state that, in the case of non-compliance, the penalties specified in Article 343 of the Law on Execution and Bankruptcy shall be applied.

The provisions of Article 57 of the Customs Law shall be applied during the exportation and importation of the copies that may possibly violate the rights on the work.

The operations related with the confiscation of these copies by the Custom Administrations are put into force in accordance with the related provisions of the Customs Regulation.

III. Publication of the Decision

Art. 78. In addition to the cases referred to in the second paragraph of Article 67, the prevailing party may, if justified, require publication of the decision, in whole or in part, in a newspaper or similar medium at the expense of the other party. The form and contents of the text to be published shall be specified in the court order. The right to require such publication shall lapse three months after the date on which the decision becomes final.

IV. Seizure, Confiscation and Destruction

Art. 79. Article 36 of the Criminal Code and Articles 392, 393 and 394 of the Code of Criminal Procedure shall apply to the seizure, confiscation and destruction of copies, plates and similar devices for reproduction, the manufacture and reproduction of which are punishable under the provisions of this Law.

PART SIX

MISCELLANEOUS PROVISIONS

A. Neighboring Rights and Injunctions

I. Neighboring Rights

Art. 80- (Amendment: 7.6.1995- 4110/ 26) Artists who perform and interpret intellectual and artistic works in an original manner, producers of phonograms who make the first fixation of a performance or of sounds and radio- television organizations shall enjoy neighboring rights on condition that the economic and moral rights of the author are not prejudiced.

Performers shall have the exclusive right to make a fixation of their performances, to reproduce and to hire out the fixations thereof, to use their performances by broadcasting, by wire or over the air or by live performance and shall require their written consent. Performers may transfer these rights to the producer by contract and against equitable remuneration.

In the case of a performance by an orchestra, chorus or a theatrical company, the permission of the manager shall suffice. If an individual performer or a group has been engaged under contract for a recital, performance or presentation by an entertainment promoter, the permission of such promoter shall also be required.

The right of reproduction of a fixation, directly or indirectly, rental, broadcasting by wire or over the air, or exploitation of a fixation by presentation on public premises shall belong exclusively to the producer and his written consent shall be required. No person or organization may reproduce broadcasts, in whole or in part, or rebroadcast them by wire or over the air or show them on premises subject to an admission fee without the written consent of the radio and television organization.

The written consent of the holder of neighboring rights shall not be required in the following circumstances:

1. performance or communication to the public of intellectual and artistic works for purposes of public policy, education and instruction, scientific research or interviews, for non - profit-making purposes;
2. broadcasting of intellectual and artistic works in radio and television programs and their reproduction for personal use, for non-profit-making purposes;
3. ephemeral fixations made by broadcasting organizations using their own facilities and for use in their own broadcasts;
4. in the cases referred to in Articles 30, 32, 34, 35, 43, 46 and 47 of this Law.

However, such uses may in no way prejudice the legitimate interests of the right holder and may not conflict with normal exploitation of the work. Artists, chorus masters, orchestra conductors and soloists and leading actors in theatrical companies may require that their names be shown on devices permitting the transmission of signs, sounds and images.

The holders of neighboring rights, like authors, shall enjoy the right to bring legal proceedings for injunction and for damages.

Any person infringing neighboring rights without obtaining the written consent laid down in this Article shall be liable to imprisonment of between three months and one year and a fine of between 300 million liras and 600 million liras.

II. Injunctions With Respect to Intellectual Rights

Art. 81- (Amendment: 7.6.1995- 4110/ 27) In order to reproduce a work it shall be necessary to prove the capacity as author or right holder to the printing house, the production company or the recording facilities by means of a contract or powers drawn up in accordance with Article 52 and certified by a notary public. The persons who reproduce works shall be required to complete an order slip and a waybill certified by the Ministry of Finance and to present these together with the invoice.

It shall be compulsory to affix to non-serial publications a band to be obtained from the Ministry of Culture. The documents referred to in the first paragraph shall be submitted in order to obtain the band. On such submission, the band shall be issued within 15 days without further formality. The rules and principles for obtaining a certificate shall be set out in a regulation to be issued by the Ministry of Culture.

Where economic and neighboring rights in intellectual and artistic works are used without authorization by persons other than the lawful holders thereof, the public prosecutor of the district in which the infringement or the consequences thereof have occurred shall request the competent judge, at the request of the right holders or of the appropriate professional association, to order confiscation of the copies of the work that have been unlawfully produced or performed and to secure the technical devices used in the infringing act.

Where the circumstances demand rapid action, the public prosecutor may, at his own initiative, issue an order for confiscation and securing that shall be submitted for approval to the competent judge within three days.

The right holders may submit a petition, together with documents evidencing their rights, to the public prosecutor's office within six months of the date on which they were informed of the infringement and the identity of the infringer, insofar as the infringement took place within the period of protection. The Law on Procedure in Flagrant Offenses, No. 3005, shall apply to such offenses.

Any person who reproduces or distributes works by means of devices or processes which serve to transmit signs, images and sounds without having obtained the required written permission and the band referred to in this Article shall be liable to imprisonment of between three months and one year and a fine of between 300 million liras and 600 million liras.

III. Scope and Term of Neighboring Rights

Art. 82- (Amendment: 7.6.1995- 4110/ 28) The provisions of this Law on performers shall apply to:

1. performers who are nationals of the Turkish Republic;
2. performers who, not being nationals of the Turkish Republic, make their performances on the territory of the Turkish Republic, including recording on sound mediums to which the provisions of this Law apply and, even where not fixed on a sound medium, broadcast in radio or television programs to which the provisions of this Law apply.

The provisions of this Law on recording mediums shall apply to:

1. producers who are nationals of the Turkish Republic;
2. producers located on the territory of the Turkish Republic.

The provisions of this Law on broadcasts shall apply to radio and television organizations:

1. whose headquarters are located on the territory of the Turkish Republic;
2. who broadcast from a transmitter on the territory of the Turkish Republic.

The provisions of this Law on neighboring rights shall also apply to performers, producers of phonograms and broadcasting organizations under the provisions of the international treaties to which the Turkish Republic is party.

The rights of performers shall subsist for 70 years beginning with the date of first publication of the fixation of their performances. If their performances have not yet been published, the term shall begin with the date on which the performance is first made public.

The rights of phonogram producers shall subsist for 70 years beginning with the date on which the sound mediums were first broadcast.

The rights of broadcasting organizations shall subsist for 70 years beginning with the date on which the program was first broadcast.

B. Unfair Competition

I. Titles and Distinguishing Marks

Art. 83. The title, the distinguishing marks and the form of the reproduced copies of a work may not be used in connection with another work or with its reproduced copies in such way as to give rise to confusion.

The provision in the first paragraph shall not apply to titles, marks or forms that lack a distinguishing character and are commonplace.

This Article shall apply even in the absence of the conditions set out in Parts One, Two and Three of this Law.

The provisions of Article 14 of the Press Law concerning the titles of periodicals shall remain unaffected.

The provisions on unfair competition shall apply to persons who infringe the first paragraph of this Article even if they are not acting by way of business.

II. Signs, Sounds and Images

Art. 84. Any person who fixes signs, sounds or images on a device permitting the transmission of such elements or who lawfully reproduces or distributes the same for commercial purposes, may prohibit others from reproducing or distributing the same signs, sounds or images by use of the same means.

The provisions on unfair competition shall apply to persons who infringe the provisions of the first paragraph of this Article even if they are not acting by way of business.

The provisions of this Article shall also apply to those photographs that do not qualify as works, to images fixed by similar means and to cinematographic productions.

C. Letters

Art. 85. Even where they do not have the character of a literary work, letters, memoirs and similar writings may not be published without the consent of their writers or, if they are dead, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed since the death of the writer.

In addition to the conditions set out in the first paragraph, letters may not be published without the consent of the addressee or, if he is dead, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed since the death of the addressee.

The provisions of Article 49 of the Code of Obligations and Articles 197 and 199 of the Criminal Code shall apply to persons infringing the above provisions.

In those cases where distribution is permitted in accordance with the first and second paragraphs of this Article, the provisions of Article 24 of the Civil Code shall remain unaffected.

D. Pictures and Portraits

I. General

Art. 86. Even where they do not have the character of a work, pictures and portraits may not be exhibited or presented to the public in any other way without the consent of the person portrayed or, if he is dead, without the consent of the persons referred to in the first paragraph of Article 19, unless 10 years have elapsed since the death of the person portrayed.

No consent shall be required for:

1. pictures of persons who have played a role in the political and social life of the country;
2. pictures of parades, official gatherings or public meetings at which the portrayed persons appeared;
3. pictures concerning events of the day in the press, television and film.

The provisions of Article 49 of the Code of Obligations and Articles 197 and 199 of the Criminal Code shall apply to persons who infringe the provisions of the first paragraph of this Article.

In those cases where distribution is permitted under the provisions of the first and second paragraphs of this Article, the provisions of Article 24 of the Civil Code shall remain unaffected.

II. Exceptions

Art. 87. Photographs, pictures and portraits, if made to order, may be reproduced by photography with the consent of the person who ordered them or with the consent of the person portrayed or with the consent of their heirs, unless otherwise agreed.

The foregoing provisions shall not apply to photographs, pictures and portraits published in the press. However, if the persons referred to in the first paragraph are unable to obtain such photographs, pictures or portraits or if they encounter serious difficulty in so doing, they may be reproduced by photography.

E. Applicable Law

Art. 88. The provisions of this Law shall apply:

1. irrespective of the nationality of the author, to all works communicated to the public for the first time in Turkey and to all works existing in Turkey but not as yet communicated to the public, as also to all letters and pictures existing in Turkey;
2. to all works of Turkish nationals which have not yet been communicated to the public or which have been communicated to the public for the first time outside Turkey;
3. to all works of foreigners which have not yet been communicated to the public or which have been communicated to the public outside Turkey, subject to the relevant provisions of the international conventions to which Turkey is party.

Where the State of which the author is a national affords adequate protection to the rights of Turkish authors or an international treaty allows for exceptions and limitations with respect to the conditions concerning foreign authors, the Council of Ministers may order certain exceptions to the provisions of items 1 and 3 of this Article.

Additional Art. 1- (Being the provision of the law; 1.11.1983- 2936, numbered for concatenation by transformation to additional article).The regulations and statutes to be issued pursuant to this Law shall be prepared within six months and published in the Official Gazette.

Additional Art. 2- (7.6.1995- 4110/ 29) The terms of protection under this Law for neighboring rights, cinematographic works, computer programs and databases shall apply only to works, adaptations and productions that are made public after the date on which this Law enters into force. The provisions of this Law with respect to ownership of cinematographic works shall apply to cinematographic works of which the production begins after this Law enters into force.

Additional Art. 3- (7.6.1995- 4110/ 30) The principles relating to practice with respect to neighboring rights shall be laid down by regulation to be issued within six months from the date on which this Law enters into force.

F. Temporary Provisions

I. Transitional Provisions

(1) General

Provisional Art. 1. Except as otherwise provided below, the provisions of this Law shall also apply to works communicated to the public for the first time on the territory of the Turkish Republic or entered in the register before this Law entered into force.

This provision shall apply even where the Copyright Law of May 8, 1326 (1910), did not apply to such works or products.

The term of protection for works which were made public before the entry into force of this Law shall be calculated in accordance with this Law. The terms "copyright," "intellectual rights," "literary property," "artistic property" and similar expressions used in other laws and treaties shall be given the meaning this Law requires according to the context in which they are used.

If all or part of the rights in a work or their exercise have been transferred to another person before this Law enters into force, the new and broader rights and prerogatives afforded by this Law to the author shall not be considered to have been transferred. The same provision shall also apply if the term of protection under this Law is longer than the term afforded by the former Law or if the former Law did not protect works and products protected by this Law.

(2) Protection of Acquired Rights

Provisional Art. 2. If the term of protection afforded by the former Law is longer, such term shall apply to works published before the entry into force of this Law.

If a lawful translation or adaptation of a work has been published before the entry into force of this Law, the rights and prerogatives acquired by the translator or adapter under the former Law shall not be prejudiced by this Law.

If the publication of a translation permitted by the former Law but prohibited by this Law was started before this Law came into force, such publication may be completed within one year. This provision shall also apply to translated works to be performed by theatrical companies or other entertainment organizers.

Where reproduction was permitted under the former Law, but is now prohibited under this Law and the reproduction of a work had already started at the date of entry into force of this Law, reproduction may be completed and the reproduced copies may be distributed.

The distribution of copies existing at the date of entry into force of this Law and whose reproduction was permitted under the provisions of the former Law may be continued. The same shall apply to devices permitting the transmission of signs, images and sounds and to plates and similar means of reproducing artistic works.

Any person wishing to avail himself of the possibility afforded by the preceding paragraph shall be required to declare such copies and devices to the competent authority and have them sealed within six months of the entry into force of this Law.

Where necessary, details may be specified in a regulation.

Provisional Art. 3:

(Addition: 1.11.1983- 2936/ 17 md.) The president and members of the boards of the compulsory organs of the professional associations and the federation shall be determined by decree of the Council of Ministers, on a recommendation by the Ministry of Culture, until such time as the number of members required by the statutes for convening the first general meeting has been attained and an election can be held.

Provisional Art. 4:

(Addition: 1.11.1983- 2639/ 17md.)

Decree of the Council of Ministers No. 8/423 of March 15, 1980, issued under Article 43 of Law No. 5846 on Artistic and Intellectual Works, and the schedule of fees to be issued under that Decree, shall be applicable as from March 15, 1980, and up to December 31, 1985.

Payments made in accordance with the schedule of fees to be issued under the Decree of the Council of Ministers shall be made to the appropriate professional association for distribution to right holders in the case of works which have been transferred to the professional association under an authorization certificate and, in other cases, directly to the holders of the economic rights.

Such payment shall be finalized by the Turkish Radio and Television Organization on December 31, 1985, at the latest. After deduction of its own share from the payments made by the Turkish Radio and Television Organization, the professional association shall pay the remaining amounts to its member right holders within two years of the date on which payment has been made to it.

Royalties that have not been claimed by members within two years shall be deposited in accordance with Article 44 in a special account to be opened with a national bank in the name of the Ministry of Culture.

Provisional Art. 5:

(Addition: 6.7.1995- 4110/ 31 md.) Professional associations established prior to the entry into force of this Law shall be converted to new professional associations under the surveillance of the Ministry of Culture within one year from publication of the uniform statutes in accordance with this Law and with the principles of uniform statutes and shall set up their respective new organs in a general meeting to be held within that same period.

Professional associations that fail to comply with the provisions of the first paragraph shall be deemed to have been dissolved on expiry of the initial year.

II. Repealed Provisions

Art. 89. The Copyright Law of May 8, 1326 (1910), and any provisions of other laws in conflict with this Law are hereby repealed.

G. Final Provisions

I. Entry Into Force of This Law

Art. 90. Articles 42 and 43 of this Law shall enter into force on publication of this Law and the remaining Articles shall enter into force on January 1, 1952.

II. Authority Entrusted With the Implementation of this Law

Art. 91. This Law shall be implemented by the Council of Ministers.

ABBREVIATIONS

Berne Convention: Berne Convention for the Protection of Literary and Artistic Works

Copyright Directive: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

ECJ: European Court of Justice

ECR: European Court Report

EU: European Union

FSEK: Turkish Law on Intellectual and Artistic Works No. 5846

HMUK: Hukuk Usulü Mahkemeleri Kanunu (The Turkish Law on the Law of Procedure Courts)

Internet Treaties: WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty

IPR: Intellectual Property Rights

ISP: Internet Service Provider

MÖHUK: Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun (The Turkish The Law on International Private Law and Law of Procedure)

MP3: A computer file, with an online audio standard, a compressed audio file of CD quality, recorded from CD to a hard drive.

OJ: Official Journal of the European Union

P2P: Peer to peer

PC: Personal Computer

RG: T.C. Resmi Gazetesi (Official Journal of Turkey)

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights

UCC: Universal Copyright Convention

WCT: WIPO Copyright Treaty

WIPO: World Intellectual Property Organization

WPPT: WIPO Performances and Phonograms Treaty

WTO: World Trade Organization

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