EUROPEAN WRITERS' CONGRESS
THE FEDERATION OF EUROPEAN WRITERS' ASSOCIATIONS

CONGRES DES ECRIVAINS EUROPEENS
LA FEDERATION DES ASSOCIATIONS
EUROPEENNES D'ECRIVAINS

JOCHEN KELTER - PRESIDENT
c/o SWISS WRITERS' UNION OLTEN GROUP
INDUSTRIESTR. 23
CH 8500 FRAUENFELD
TEL.: *41-52-728 8933
FAX: *41-52-728 8932
Mél: ch-autoren.go @bluewin.ch
TEL. PARIS *33-1-4783 6575

LORE SCHULTZ-WILD
GENERAL SECRETARY
KONRADSTR. 16
D 80801 MÜNCHEN
TEL: *49-89-345 581
FAX: *49-89-392 094
e-mail: EWC.lsw@t-online.de

QUESTIONNAIRE REGARDING POSSIBLE IMPACT OF NEW TECHNOLOGIES ON PROTECTION OF MORAL PREROGATIVES OF AUTHORS AND PERFORMERS IN VIEW OF EVENTUAL HARMONIZATION OF MORAL RIGHTS PROTECTION WITHIN THE EUROPEAN COMMUNITY

Directorate General *Internal Market* has assigned us to conduct a study on the eventual need of harmonization of moral rights legislation within the European Community. The Commission has asked specifically to analyze whether the new technologies have had any impact on the realization of protection of moral prerogatives of authors and performers of protected works. In order to be able to judge the current situation we would need to know how different interested parties see the impact of new technologies on the protection of moral rights of authors and performers. Because of the borderless nature of the digital exploitation environment, we have decided to do this by asking the interest organizations relevant for this question to submit their views on the subject. We would be grateful if you could provide us with answers to the following questions.

THESE ANSWERS ARE SUBMITTED BY THE EUROPEAN WRITERS' CONGRESS, THE FEDERATION OF EUROPEAN WRITERS' ASSOCIATIONS, ON BEHALF OF 49 MEMBER ORGANISATIONS IN 26 COUNTRIES OF EUROPE, REPRESENTING SOME 50.000 INDIVIDUAL PROFESSIONAL WRITERS AND LITERARY TRANSLATORS.

- **1. Are there any specific problems in your sector with respect to moral rights protection? If so, are these problems caused by new technologies or do they arise because of other circumstances, e.g. employmentship?**

Writers/authors have to deal with two specific problems of immediate and current interest (plus a third problem of fundamental relevance to be dealt with at the end of this questionnaire):

a)
As far as the legal and contractual implementation of moral rights (droit moral resp. Urheberpersönlichkeitsrecht) is concerned, there are differences at the heart of the question (right of paternity, authenticity etc.) to the detriment of authors in the UK and Ireland as compared to the situation in the continental and Nordic member states of the EU. These differences originate in the different approaches of the Anglo-American copyright system vs. continental-European authors' right: The former aims at the work as a form of property whose exploitation will enable the creator to continue (creating???); the latter, traditionally European since the age of Enlightenment, aims at protecting intellectual property and the author.

The EWC has therefore, for years, demanded the harmonisation of authors' rights within the European Union because the existing national regulations violate the general

principle of the equality of all citizens while at the same time distorting the conditions of fair competition in the exploitation of copyright/authors' rights.

b)
The second problem arises with the incalculable and unforeseeable extension of the technological possibilities of the exploitation of copyright protected works. Although it is to be hoped that the imminent EU Directive on "Harmonisation of certain aspects of copyright and related rights in the information society" will safeguard the principles of moral rights during the process of electronic/digital dissemination of protected works, it is still unclear whether they really will be respected and guaranteed – just as the questions of control and remuneration for these forms of exploitation remain to be solved.

The fact that this Directive has been blocked for over two years by commercial parties and public institutions alike, who refuse to take the consequence of their intermediary role and pay adequate remuneration or compensation for the exploitation of protected works, does not inspire confidence in the legal awareness of the need for protection of intellectual property, and it opens access to the abuse of moral rights for information at will.

(Forms of reproduction like print-on-demand (pod) show that there are a number of special gaps: from the relatively simple question whether a work that is available in this form only is "out of print" and thus the rights revert to the author, up to the unclarified complex of legal definitions as to whether such a work is to be considered *disseminated, published, appeared, released* or whatsoever – with all the *legal consequences* …!)

- **2. Do you think that authors and performers should be subject to similar moral rights protection or do you see any differences in ways to protect their moral prerogatives?**

According to the approach of EU Directives on Copyright so far, authors' moral rights should also be valid for performing artists in a modified form.

- **3. Do you think that moral rights protection should be regulated differently during the production period of the work, on the one hand, and after the completion of the work, on the other hand? If so, how do you propose to determine what is the final version of the work?**

The protection of moral rights has to apply to all forms of the work of an author or artist, whether authorized or still unpublished as part of an estate.

- **4. How do standard industry contracts or practices deal with moral rights protection in your sector? Could you provide us with copies of such contracts or sections of the contracts dealing specifically with questions having relevance to moral rights protection, e.g., right of attribution, right of integrity, right of modification or adaptation, right to decide over the final version of the work etc.**

In the field of book publishing with traditionally rather clear standards concerning moral rights protection in publishing contracts there is now a risk that publishers want to make themselves "partners" in the sense that the writer's right should contractually be shared with the publisher. Principally it is unacceptable that the most personal part of the writer's rights should be shared with someone who is not a creator.

In the field of the media it is hardly possible to talk about "*standard* industry contracts". They exist in some Nordic countries and in the UK, above all in relation to public service broadcasting corporations. In a few other countries there are so-called model or minimum terms contracts, recommended by the organisations of authors.

They are open to a wide range of individual applications: As a rule, each enterprise (publishing house, broadcasting house, producer) offers a particular, specific version of the contract which is signed by the author because of his weaker position and generally less extensive legal knowledge. Only from the small print and from legal formulations in detail can it be inferred to what extent moral rights are being violated – in particular concerning the integrity of the work, modifications and adaptations on the occasion of granting and using secondary rights – and the consequences are unpredictable for legal amateurs. Control, even if agreed by contract, all too often cannot take place, due to the lack of or belated information.

Therefore the EWC and national writers' associations urgently request an EU investigation, and a future EU DIRECTIVE ON CONTRACT LAW IN THE FIELD OF CREATIVE ARTISTS, as in many countries the relevant minimum terms remain far below the legal "general terms of trade"! (See extra copy of "Authors' Rights", p. 27-32)

- **5. How has the question of protecting the integrity of the work with respect to digitization and further use of back-stock material owned by companies or stored in archives been solved in your sector? On more general level, does the storage and use of works in digital databases create any particular problems with respect to protecting the moral prerogatives of rights holders of the material included in the database?**

As long as the latest WIPO treaties (WCT & WPPT) - via adequate regulations in the forthcoming EU DIRECTIVE ON HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY - have not been adopted and implemented internationally there is hardly any way of bringing an action for violation of the writer's moral rights.

However, even if, after the introduction of efficient technical devices of control (which are still in the phase of development) it is possible to impose sanctions which will be respected by honorable companies/enterprises intending to digitally use copyright protected material – even then it will hardly be possible to guarantee comprehensive protection on the Internet against private misuse and commercial embezzlement. Thus a worldwide playground for distortion, fraud and deception opens up where identified authorship as well as the authenticity of texts and other intellectual property will fall prey to falsification for purposes of all kinds. At that stage this will no longer be a problem for authors only, but a reliability test for society at large.

- **6. In case specific problems with respect to moral rights protection of authors and performers may be identified in your sector, do these problems have any impact on the free movement of goods and services within the internal market? In other words, does the fact that moral rights protection in a given Member State differs from the moral rights protection conferred under the laws of some other Member States, have adverse effect on the free movement of goods and services within the European Union? Please consider this also from the point of view of whether divergences in regulating the restrictions to moral rights protection have impact on the Common Market.**

The moral rights protection of authors in the UK and Ireland gives cause for grave concern, and it is to be expected that that for performers will follow the same model. The right of paternity under UK law does not reside automatically in either the author or the work but must be asserted. The first case has recently been brought by an author attempting to claim moral rights which had not been asserted originally. The author lost.

In the case of the right of integrity the author can be forced to waive this under contract. Broadcasters, magazine and some book publishers insist on a waiver of this right as a condition of publication or production. This enables the broadcaster, producer or publisher to sell on the work to a third party, without consulting the author, and in any modified or manipulated form. Such an ability gives UK entrepreneurs an unfair advantage over their continental colleagues who are forced to respect and consult the author‘s wishes. Such an advantage patently distorts the market.
Similarly the ability to remove the author’s name from a work if the right of paternity has not been asserted, enables the entrepreneur to pass the work off as a company product. This is not only extremely damaging to the reputation and career of the author but, in the digital environment where rights management information is attached to the work, all revenues will necessarily flow to the producer. This too must constitute an unfair advantage to the producer under UK and similar laws, while causing serious economic damage to the author.

Please, feel free to raise any other problems or considerations related to moral rights protection of authors and performers.

Another problem is hardly being tackled by this inquiry, although it should be in the background of general awareness:
Mandated by its member organisations in 26 countries of Europe with a total of some 50.000 individual writers and literary translators the EWC maintains that authors’ moral rights be not only *inviolable* and *inalienable* – but also that, equivalent to material property, their intellectual property right be *everlasting*.
This claim is nothing but logical, it is democratic and has been well-founded ever since the age of Enlightenment by people like Beaumarchais or Kant. And this claim fits well into this age, 200 years later, as a social contribution and for good reasons:

- After the end of the individual term of protection, works of intellectual property no longer revert to the public domain free of charge, from where every user and exploiter may help himself for his own profit, but their use remains subject to remuneration as in the concept of *domaine public payant*, *DPP*.
  However, DPP is not an adequate denomination and we would rather call it *authors’ communal right, ACR*: The proceeds should not be distributed individually (to heirs) or to the State as some kind of a “tax on culture”, but the monies should be given, after collection via the existing, author governed collecting societies, to cultural funds in the respective fields of art, which will spend these proceeds, via self-administering bodies, for the support of contemporary cultural creation (see brochure DOMAINE PUBLIC PAYANT – KÜNSTLERGEMEINSCHAFTSRECHT, sent by separate mail).

We would appreciate if you could kindly provide us with the answers by 3rd of December 1999.
Please, send or, preferably, e-mail, your answers to the following address:
Marjut Salokannel
LL.D.
Department of Private Law
P.O. Box 4, 00014 University of Helsinki, Finland
tel 358 - 9 - 19 12 33 82
fax 358 - 9 - 19 12 31 08
e-mail Marjut.Salokannel@helsinki.fi

Submitted on behalf of the European Writers’ Congress / EWC
by members of the Board
Hans Peter Bleuel, Maureen Duffy, John Erik Forslund
and Lore Schultz-Wild, General Secretary