

# SCIENTIFIC AND CRITICAL EDITIONS OF PUBLIC DOMAIN WORKS: AN EXAMPLE OF EUROPEAN COPYRIGHT LAW (DIS)HARMONIZATION\*

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## ABSTRACT

Despite the lack of unanimity among European nations on how to treat so-called scientific and critical editions, most of these nations agree on the major proposition that this kind of work should attract some kind of protection under neighbouring rights doctrines in their copyright codes. Canada has no such provisions. This article explores the neighbouring rights protection in some European nations and shows that Canadian publishers of such editions should be aware of the diverse range of protection that they are given in Europe and the potential liability of Canadian publishers.

## RÉSUMÉ

En dépit de l'absence d'unanimité au sein des nations européennes quant à la façon de traiter les soi-disant « éditions scientifiques et critiques », la majorité de ces nations s'entendent sur la proposition principale voulant que ce type de travail mérite de faire l'objet d'une certaine forme de protection en vertu des doctrines des droits voisins contenues dans leurs codes sur le droit d'auteur. Le Canada ne possède pas de telles dispositions. Cet article explore la protection qu'accordent les droits voisins de certaines nations européennes et démontre que les éditeurs canadiens de ce type de publication devraient connaître les différents types de protection dont ils bénéficient en Europe ainsi que des obligations potentielles que les éditeurs doivent remplir.

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\* Initial submission to the Editor, June 30, 2011.

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### 1.0 INTRODUCTION: PRIMARY SOURCES IN E.U. COPYRIGHT LAW

Copyright laws<sup>1</sup> do not make the distinction between primary and secondary materials in studies of the humanities. Modern legislation is claimed to be general, abstract, and technology neutral, thereby leaving the judiciary with the task of applying the law to the particular circumstances. Primary and secondary sources are concepts developed within fields such as historiography, philosophy, and philology. Primary sources are generally defined as the material sources closest to the idea, period, or information under examination (for example, the original writings of Gunter Grass). Secondary sources are the material sources that cite, develop, or build on a primary source. For this article, the difference is immaterial; the primary and secondary sources can be combined and studied as one category. From a legal standpoint, both primary and secondary sources, which typically include manuscripts, texts, books, diaries, notes, melodies, or lyrics, are subject to copyright protection.

Copyright law is generally concerned with offering protection to works of authorship—that is, where there is an original expression of an idea. The usual standard to qualify for copyright protection—original works of authorship—is modest. To obtain protection, it usually suffices that the work (1) originates from the author—that is, it has not been copied from elsewhere, and (2) surpasses a minimum level of intellectual effort. Levels of originality vary from jurisdiction to jurisdiction; however, we can identify two main legal traditions where the concept of originality enjoys some homogeneity. Usually, the category of common law systems<sup>2</sup> is one in which levels of originality are most easily met—that is, where it is sufficient to show skill,

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<sup>1</sup> We use the term “copyright” to define both common law and civil law copyright systems. In the latter, the English “author’s right” is sometime used to recall the difference between common law copyright and the French based *droit d’auteur*. Here we use “copyright” as a legal system concept that is non-partisan. Unless otherwise noted, translations into English are by Thomas Margoni.

<sup>2</sup> Common law systems are those based on English law. This category includes the United Kingdom and many commonwealth countries, or those formerly under English dominion, such as Canada, the United States, South Africa, Australia, New Zealand, and India.

judgment, and labour.<sup>3</sup> This is in contrast to civil law systems,<sup>4</sup> where the concept of creativity is present to varying extents. In civil law systems, the national Copyright Acts usually employ words such as “creation,” “create,” and “intellectual product.”<sup>5</sup> However, it would be a mistake to believe that in these countries the level of intellectual effort needs to be connected with ingenuity or outstanding artistic ability. On the contrary, among these nations such an intellectual requirement is usually easily achievable, although higher than merely skill, judgment, and labour. The legal tradition of continental European countries links “creation” to the romantic idea of the lonely genius who creates something new and never seen before. The idea of “author” in such traditions is a transcendental concept.

The difference between the two systems truly exists on a theoretical level rather than on a substantial one. In civil law traditions, the greater emphasis on creativity reflects the strong link between the author and his or her work, mirroring the philosophical views of the time when the modern continental copyright law theory developed.<sup>6</sup> To simplify, imagine a scale where the lowest level of originality is at the bottom—that is, where no creativity is required—and the highest level of originality

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<sup>3</sup> This is the standard under Canadian law, where the Supreme Court of Canada stated that to qualify for copyright protection, the level is higher than that of the English sweat of the brow, but does not have to reach that of its southern neighbour; see *CCH v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339, 2004 SCC 13, 236 D.L.R. (4th) 395, 30 C.P.R. (4th) 1, 247 F.T.R. 318 [*CCH*]. In other common law countries the standard varies. In the United States, a spark of creativity is required after the Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340 (1991) [*Feist*].

<sup>4</sup> Civil law systems are those based on continental European law, which traditionally originated from the *Corpus Juris Civilis of Justinian*, and have evolved with the history of Europe from approximately 530 C.E. until today.

<sup>5</sup> Art. L111-1 of the French Code of Intellectual Property (Code de la propriété intellectuelle) states: “L’auteur d’une oeuvre de l’esprit jouit sur cette oeuvre, du seul fait de sa création, d’un droit de propriété incorporelle exclusif et opposable à tous. Ce droit comporte des attributs d’ordre intellectuel et moral ainsi que des attributs d’ordre patrimonial”; [translation] *The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right that shall be enforceable against all persons. This right shall include attributes of an intellectual and moral nature as well as those of an economic nature*; art. 2, s. 2 of the German Copyright Act (*Urheberrechtsgesetz vom 9, September 1965* (BGBl. I S. 1273) states: “[translation] Personal intellectual creations alone shall constitute works within the meaning of this Law”; art. 10 of the Spanish *Intellectual Property Act* (*Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia*) states: “[translation] Every original literary, artistic, or scientific creation, expressed by any means or medium, are object of intellectual property”; art. 1, Italian *Copyright Act* (*Legge 22 aprile 1941 n. 633 Protezione del diritto d’autore e di altri diritti connessi al suo esercizio*) reads: “[translation] According with this Act, works of authorship of a creative nature, that belong to literature, music, arts, architecture, theatre, and cinematography, regardless of the medium or form of expression”; art. 1, Portuguese *Author’s Right Code* (*Código do Direito de Autor e Direitos Conexos*) states: “[translation] ‘Works’ means any intellectual creation in the literary, scientific or artistic domain, expressed by any means.”

<sup>6</sup> See M. Perry & T. Margoni, “From Sound Tracks to Google Maps: Who Owns Computer-Generated Works?” (2010) 26:6 *The Computer L. & Sec. R.* 621.

is at the top, where creativity is a requirement. In the common law tradition, the United Kingdom criterion rests at the lowest level of our imaginary scale and that of the United States, after *Feist*,<sup>7</sup> is toward the top. Civil law legislation, at least traditional European law, tends to appear at the mid to high level, but with variation from jurisdiction to jurisdiction. Other common law systems that remain closer to the English approach (New Zealand, South Africa, and to a lesser extent Australia and Canada) are at the lower levels.<sup>8</sup>

Despite the theoretical differences between the common law and civil law traditions, both primary and secondary sources attract copyright protection in both legal systems. The typical works that philosophy or historiography identify as primary or secondary sources are usually masterpieces of human knowledge, where no doubt exists about their qualifications for copyright protection, regardless of the originality requirement of the relevant jurisdiction. Although the term “critical and scientific editions” is usually understood to mean works that contain scholastic analysis of prior works, the term has a more technical meaning of works that are outside copyright protection and have been edited to render a meaning truer to the original intent of the author.

## **2.0 THE LEGAL FRAMEWORK: ORIGINAL WORKS, DERIVATIVE WORKS, AND THE PUBLIC DOMAIN**

Copyright potentially offers protection to texts, poems, treatises, and manuscripts and to their critical and scientific editions, falling into categories of original works, derivative works, and works in the public domain. Primary and secondary sources are, except for extreme cases, works of authorship. However, many of them have fallen into the public domain, which in Europe and the United States means 70 years after the death of the author for most works, and in Canada 50 years. Thus most works produced in the 19th century are likely in the public domain. However, the fact that a work is in the public domain does not mean that the specific version, edition, or translation of interest is in the public domain. The version might be a translation or another creative modification that qualifies for autonomous copyright protection as a derivative work. Below we explore and discuss the legal framework of original works of authorship, derivative works, and those works that have become a part of the public domain.

### **2.1 Original Works of Authorship**

Many attempts have been made to harmonize copyright law internationally, and although much of the basic criteria are similar, some of the more subjective issues are not—for example, the level of originality required. The two most important

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<sup>7</sup> See *Feist*, *supra* note 3.

<sup>8</sup> See Perry & Margoni, *supra* note 6.

international treaties in copyright law—the Berne Convention<sup>9</sup> and the WIPO Copyright Treaty (WCT)<sup>10</sup>—do not address the evaluation of the level of originality a work of authorship requires in order to qualify for copyright protection. These treaties do not even state directly that a work has to be original; rather, they provide only that a work must be “not copied.” The Berne Convention offers us a non-exhaustive list of protected works, stating that “the expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, ... such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature,” and continuing with other examples in the field of music, cinematography, drawings, geography, and architecture.<sup>11</sup> It is common sense that in order to write a book or paint a portrait a minimum of intellectual effort, originality, or creativity is required. However, neither the Berne Convention nor the WCT address this issue. The same situation is observable in the E.U. copyright regime where the concept of “works of authorship” lacks specific definition.

Some interesting phrasing arises where the international instruments mentioned here deal with specific types of work, specifically where the epithet “intellectual creation” is used. Such expression appears in art. 2(5) of the Berne Convention when dealing with the specific category of “collections of literary or artistic works such as encyclopaedias and anthologies.” Similar wording with regard to the same category is used by the WCT at art. 5: “Compilations of data or other material ... which by reason of the selection or arrangement of their contents constitute *intellectual creations*, are protected as such” [emphasis added]. The term “intellectual creation” is also present in E.U. legislation, particularly art. 1(3) of the Computer Programs Directive,<sup>12</sup> art. 6, Term Directive for photographic works,<sup>13</sup> and in art. 3(1) of the Database Directive.<sup>14</sup> The impression is that because the nature of international agreements is more often rooted in diplomacy than in legislative

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<sup>9</sup> *Berne Convention for the Protection of Literary and Artistic Works*, September 9, 1886 (revised July 24, 1971 and amended 1979) [Berne Convention]. This is “wrapped” into the Agreement on Trade Related Aspects of Intellectual Property (TRIPS).

<sup>10</sup> World Intellectual Property Organization Copyright Treaty, adopted in Geneva on December 20, 1996 [WCT].

<sup>11</sup> See Berne Convention, art. 2, “Protected Works.”

<sup>12</sup> Council Directive 91/250/EEC (14 May 1991) on the legal protection of computer programs, replaced by Directive 2009/24/EC of the European Parliament and of the Council (23 April 2009) on the legal protection of computer programs (codified version) [Computer Programs Directive].

<sup>13</sup> Council Directive 93/98/EEC (29 October 1993), harmonizing the term of protection of copyright and certain related rights, replaced by Directive 2006/116/EC of the European Parliament and of the Council (12 December 2006) on the term of protection of copyright and certain related rights (codified version) [Term Directive].

<sup>14</sup> Directive 96/9/EC of the European Parliament and of the Council (11 March 1996) on the legal protection of databases [Database Directive]. See also T. Dreier, “Berne Convention for the Protection of Literary and Artistic Works” in Dreier & Hugenoltz, *Concise European Copyright Law* (Amsterdam, 2006).

enforcement, issues concerning the level of originality or creativity is ignored, leaving potential conflicts to be resolved and evaluated by national courts. Given the high level of heterogeneity between national copyright legislation on this point, the compromising nature that all international agreements have to account for may be seen as a good justification for this approach. On the basis of the principle *id quod plerumque accidit*,<sup>15</sup> each book, poem, or musical composition requires a minimum level of originality and creativity. A different conclusion is achieved when dealing with some types of product that are only considered works under certain conditions. This is the case of a collection of works or of facts where protection is offered if, and only if, by reason of the selection or arrangement of their contents, they constitute “intellectual creations.” It is easy to imagine a collection of facts or other materials so trivial as not to represent actual intellectual creations and thus not deserving of any copyright protection.

The definition and quantification of originality is an issue that remains in the domain of national law. It is prone to harmonization through globalization and court decisions rather than by international legislative reform, and the situation varies significantly from country to country. In the United Kingdom, the required level of originality is so low that everything that is not copied and whose production involved some effort is likely to be protected. Conversely, French law requires a work to hold the “imprint” of the personality of its author; German law requires creations to be individual and personal; and Italian law explicitly requires creativity.<sup>16</sup>

So far, we have observed that levels of originality required to protect a work of authorship are generally low. Therefore, a product such as a manuscript, book, musical composition, or a poem are almost undisputedly protected by copyright law. However, such potential might remain purely theoretical, because, given the temporal variable that usually affects the types of works we are investigating, copyright protection might have expired.

## 2.2 The Public Domain

The public domain is the legal space wherein human knowledge resides free from any proprietary tethers.<sup>17</sup> Within this sphere we find both knowledge and information that do not qualify for copyright protection (for example, not original, not expressed, and not fixed where required), and that which could potentially qualify for protection but (1) is not protected because of a specific, usually statutory, exemption; or (2) is not protected any longer because the term of copyright protection has expired. With respect to the latter category of works—that is, those that entered the public domain as a result of the passage of time—a work is said to fall into the public domain after the passage of a certain number of years. Currently, in all Berne Convention countries, such protection lasts a minimum of 50 years after the auth-

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<sup>15</sup> That which generally happens or, loosely, probable outcome.

<sup>16</sup> See *supra* note 5.

<sup>17</sup> Although, under some jurisdictions, moral rights are permanent and never expire.

or's death. In the United States and in the European Union, the term has been extended to 70 years after the author's death.<sup>18</sup>

It is usually left to countries participating in the Berne Convention, the WIPO agreements, or the European Union to establish which categories of works fall outside copyright protection. For example, in many civil law countries, Copyright Acts exempt Acts of Parliament or official texts of public administrations from protection. This is usually connected to public interest: in order to favour awareness and broad circulation of the laws governing a given society, no limitation and no prior authorization is required so that the maximum diffusion is achieved. This is also a typical concern of traditionally written and highly bureaucratic legal systems. In fact, the practice of common law countries is to reserve Acts to Crown Copyright, a practice that survives not only in England but also in Canada, New Zealand, South Africa, and Australia, though with huge variations between each country.<sup>19</sup> The main goal is to guarantee that acts and court decisions of the authoritative version circulate and that there are no modifications (of an Act) upon which citizens could unwittingly rely. The United States does not follow the common law rule in this case for historical reasons. Official texts of government and the courts are in the public domain (at least those emanating from the federal government). Other statutory exemptions with roots in international copyright sources often include "news of the day or miscellaneous facts having the character of mere items of press information" that are "not covered" by the Berne Convention. Although participating countries may protect such items, there is no such requirement nor any obligation of reciprocity.<sup>20</sup> Besides these two exemptions based on specific types of work (legislative texts and news), there are no other identifiable categories of work not protected by the Berne Convention or subsequent international agreements. A work of authorship that meets the statutory requirements for protection (apart from the identified exemptions) is generally protected for the life of its author plus a minimum of 50 years.

However, the public domain also includes activities, not only works. This means that there are cases where a (still) protected work can be used in absence of prior authorization on the basis of specific exceptions or limitations to copyright or fair use/dealing provisions. For example, art. 2bis of the Berne Convention provides for

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<sup>18</sup> In Europe, the Term Directive extended the term of protection an additional 20 years. In the United States, the same goal has been achieved by the Sonny Bono Copyright Term Extension Act of 1998, Pub. Law 105-298, in 7 U.S.C. §§108, 203(a)(2). The reported is the general rule. Copyright Acts also deal with specific type of works (for example, cinematographic works, joint works, and other subject matters) whose terms of protection may differ significantly.

<sup>19</sup> See M. Perry, "Acts of Parliament: Privatisation, Promulgation and Crown Copyright—Is There a Need for a Royal Royalty?" (1998) N.Z.L. Rev. 493 and "Judges' Reasons for Judgement: To Whom Do They Belong?" (1997) 18 N.Z.U.L. Rev. 257.

<sup>20</sup> Meaning that a country can offer protection to its nationals but is not obliged by the "national treatment" obligation of the Berne Convention. However, as Dreier, *supra* note 14 at 14 observes, within the European Union there is an obligation of non-discriminatory treatment that applies in such a case (art. 12 EC Treaty).

“[p]ossible limitation of protection of certain works,” identifying as a matter for legislation in the countries of the Union to exclude, wholly or in part, from protection such works as political speeches and speeches delivered in the course of legal proceedings, lectures, addresses, and other works of the same nature delivered in public. For E.U. countries, the InfoSoc Directive<sup>21</sup> provides a list of exceptions and limitations, identifying those activities that do not require any previous authorization, thereby pursuing its effort to harmonize European copyright law. Nonetheless, as clearly noted by Hugenholtz,<sup>22</sup> the directive completely misses the point of harmonization and, on the contrary, favours a further atomization of national copyright laws by identifying only one mandatory exception and adding an exhaustive, though not mandatory, list of 20 situations in which countries can decide whether and how to implement such exceptions.

Where a work or a specific activity on that work belongs to the public domain, no authorization or permission is needed. However, in order to avoid possible mistakes, because of badly drafted legislation in the case of exceptions and limitations and because of the erosion of the public domain, a great deal of attention must be paid when relying on public domain status.

### 2.3 Derivative Works

In light of the above, one might believe that it is possible to proceed with any kind of use of a work of authorship whose author died either 50 or 70 years ago, within the limit of moral rights where they are recognized and in force. However, this is not entirely the case. In such a situation, it is an error to think that the version, edition, or translation in our hands corresponds to the original work. This might be correct, but is not always the case. Where a work has been translated into another language or otherwise modified, a poem has been adapted into a dramatic work, an old song has been remixed with some modern bases or lyrics, and in other similar transformations, *derivative works* likely exist, which enjoy their own scope of protection.

Derivative works are those that are based on an earlier work, but whose modifications are substantial enough to create a new work. The “amount” of modification necessary to qualify for protection as an autonomous derivative work varies from country to country and is usually connected with levels of originality or creativity. What is important follows:

1. A derivative work is a “new” work, based on a previous one, but independently protected from it and its term of protection (50 or 70 years after the death of the author) will begin to elapse from the year in which the “derivative author” dies;

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<sup>21</sup> Directive 2001/29/EC of the European Parliament and of the Council (22 May 2001) on the harmonization of certain aspects of copyright and related rights in the information society [InfoSoc Directive].

<sup>22</sup> B. Hugenholtz, “Why the Copyright Directive Is Unimportant, and Possibly Invalid” [2000] Eur. I.P. Rev. 11 at 501-2.

2. The creation of derivative works is a right that copyright law usually reserves to the author of the original work of authorship, so the only person allowed to create or authorize the creation of a derivative work is the rights holder.

In the case of primary or secondary sources, the specific version, edition, or translation must be examined. While it is indisputable that Nietzsche's works are in the public domain, a given translation or re-elaboration might still be protected because the translator or re-elaborator, although not Nietzsche, might have created the work just a few years ago. A derivative work is a new work, a kind of creative re-elaboration, where the reasons for a new, autonomous protection resides in the originality or creativity that the "derivator" puts into the activity. However, the "derivator" must have been authorized by the original author, the original work must already be in the public domain, or the modification does not require authorization for other legal reasons (such as the presence of specific exceptions or limitations to copyright).

If the re-elaboration is not at all original or creative, but has only such minor differences as the order of the chapters or the way in which a specific handwritten word has been interpreted,<sup>23</sup> it gives rise to different treatment. There are instances where such modifications are the product of research and study by scholars whose goal is to discover the original wording, order, or shape. They may achieve this by selecting and comparing the different versions stratified during decades, and sometime centuries, eliminating mistakes and distortions and clarifying obscure passages. They can accommodate the most recent studies, techniques, and technologies. In other words, if the ultimate goal is to produce or rediscover something that *must* be very similar to the original version, it is not possible to add original comments and evaluations. When corrections are applied to the flawed version, although a new corrected version has been created, it is by no means a new work.<sup>24</sup>

### 3.0 SCIENTIFIC AND CRITICAL EDITIONS: THE TERM DIRECTIVE

The protection of scientific and critical editions is not present in the Berne Convention, TRIPS, or any WIPO Treaty. It was also unknown to E.U. legislation until 1993 when the Term Directive,<sup>25</sup> harmonizing the term of protection of copyright and certain related rights, was enacted. The Term Directive brought the E.U. copyright term from 50 to 70 years following death, and created some specific terms in special cases—for example, joint, anonymous, pseudonymous, collective, and cinematographic works). However, surprisingly, the Term Directive also opened the

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<sup>23</sup> See e.g. P. D'Iorio, "The Digital Critical Edition of the Works and Letters of Nietzsche" in (2010) 40 *The Journal of Nietzsche Studies* 164.

<sup>24</sup> This applies to the original work as modified. The "critical apparatus"—i.e. the account of how and why the researcher came up with such a new version—is usually presented in the footnotes or end-notes and represents a different work, which will be protected if the copyright requirements are met.

<sup>25</sup> *Supra* note 13.

door for a new form of copyright-like (neighbouring or related rights) protection granted to non-creative but original activities, called “critical and scientific editions.” Article 5 of the Term Directive reads:

Member States may protect critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published.

It is strange that a European directive, which has as its principal objective the harmonization of European (copyright) law, uses a legislative technique that clearly has the consequence of creating disharmonization and legal uncertainty, ultimately, jeopardizing European copyright and the internal market.<sup>26</sup> Article 5 states that member states are entitled to grant such protection to non-creative works and that this protection can last a maximum of 30 years (after all, it is a Term Directive). The European legislator takes great care not to provide any further guidance toward the content or shape of such a right.<sup>27</sup> There is no other article or reference in the whole directive, save for a second mention in recital 19, that can help national legislators find some guidance as to what and how such rights should be enacted.<sup>28</sup>

The protection granted to scientific and critical editions has its roots in a similar provision present in the German *Copyright Act*.<sup>29</sup> The aim of this Act is to protect new critical editions of authors whose works have already fallen into the public domain, but where there is still a necessity for philological studies and publications. Germany is a particularly rich source of such authors. It is not the intent of this article to deny any utility to such protection, even though the value of simply giving intellectual property protection to any item of intellectual output is often overstated. What we are criticizing here is *not* the Term Directive per se, but the individual jurisdictional techniques used to achieve such a goal. It is glaringly evident that the techniques are flawed and do not achieve their stated goal of harmonization. The part of the Term Directive analyzed here should be deemed invalid or repealed as a result of its implementation. Such a position is supported by the extreme disharmonization observable at the national level.

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<sup>26</sup> See Hugenholtz, *supra* note 22, and L. Guibault, “Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright Under Directive 2001/29/EC” (2010) 1:55 JIPITEC at para. 1.

<sup>27</sup> Perhaps, regaining awareness of the fact that this directive is the wrong place to introduce a new form of protection, definitions were avoided.

<sup>28</sup> Recital 19 reads: “Whereas the Member States should remain free to maintain or introduce other rights related to copyright in particular in relation to the protection of critical and scientific publications; whereas, in order to ensure transparency at Community level, it is however necessary for Member States which introduce new related rights to notify the Commission.”

<sup>29</sup> See Dreier, *supra* note 14.

### 3.1 National Implementation: Neighbouring and/or Related Rights

Several observable examples of the reported disharmonization exist at the national level. Only a few member states have implemented specific protection, and in doing so have followed the “transposition-by-translation” technique of implementing European directives. The main flaw in this situation is that there is no legal definition of a critical or scientific edition. There is no guidance at a national or European regulatory level regarding how to interpret the concept.<sup>30</sup>

What can be logically inferred is that philological studies of public domain works result in something that cannot be considered creative or original in itself. Otherwise such studies should qualify for autonomous copyright protection.<sup>31</sup> In this regard, the specific competencies of philologists, philosophers, and the other scholars committed to such studies are fundamental in order to understand what should qualify for an autonomous work, independently copyrightable, and what is simply a scholarly re-edition of public domain knowledge. The latter is most common where authors’ works of the past centuries are studied and repropounded in slightly different shapes, or where there is some correction connected to the interpretation of a segment or the translation of a word. The protection offered by article 5 of the Term Directive should apply in these situations for jurisdictions that recognize critical and scientific editions. Jurisdictions not recognizing such form of protection find themselves in the “standard” situation. Either the work (the re-edition of the public domain work) is an original work or a creative modification, in which case it deserves autonomous copyright protection, or it is not, in which case it deserves no protection.

### 3.2 National Implementation: Some Examples

Germany, Italy, Poland, Spain, Portugal, and the United Kingdom already had, or have subsequently implemented, legislation that offers either protection for critical and scientific editions, or, in the case of the United Kingdom and Spain, slight variations of such type of protection (for typographical arrangements and similar works).

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<sup>30</sup> Some reference can be found in the guidelines of administrative bodies such as the Italian Collecting Society (SIAE), online: SIAE <[http://www.siae.it/Faq\\_siae.asp?link\\_page=lirica\\_faq.htm](http://www.siae.it/Faq_siae.asp?link_page=lirica_faq.htm)>. However, the relevance in court of such type of documentation is doubtful:

[translation] [Critical and Scientific Editions] are the output of the research, study, and comparison work that the critic researcher, on the basis of the available sources, conducts on a given work in order to bring it back to its original connotation, choosing the possible alternatives, eliminating the wrong interpretations stratified over time, correcting the mistakes, interpreting the unclear passages, and rebuilding the missing or incomplete parts.

<sup>31</sup> See the Italian case of the “*Italiana in Algeri*,” *Corte d’appello civile*, sez. II, Torino, sentenza 25/09/2008, in *Giurisprudenza italiana*, 2009, note 7, UTET at 1712.

Article 70 of the German *Copyright Act* states:

1. [translation] Editions which consist of non-copyrighted works or texts shall enjoy, *mutatis mutandis*, the protection afforded by the provisions of Part I if they represent the result of scientific analysis and differ in a significant manner from previously known editions of the works or texts. ...

(3) The right shall expire 25 years after publication of the edition; however, it shall expire 25 years after its production if the edition is not published within that time limit.<sup>32</sup>

Article 85quater of the Italian *Copyright Act* states:

[translation] With no prejudice of authors' moral rights, the person who publishes in any way or by any means, critical or scientific editions of public domain works, enjoys the exclusive rights of economic exploitation of the work, such as result from the activity of critical and scientific revision ...

2. The exclusive rights identified at the previous paragraph last twenty years from the day of the first licit publication.<sup>33</sup>

Article 99(2) of the Polish *Copyright Act* states:

[translation] The person who after expiry of the term of protection of the copyright to the work prepares a critical or scientific publication thereof, which is not a work, shall have the exclusive right to dispose of and use such publication within the scope specified in Article 50, subparagraphs 1 and 2, for 30 years after the date of publication.<sup>34</sup>

Article 39(2) of the Portuguese *Code of Copyright Law* states:

[translation] Critical and scientific editions of works in the Public Domain, enjoys protections during 25 years, since the first licit publication.<sup>35</sup>

Article 129 of the Spanish *Intellectual Property Act* states:

[translation] Editors of works [not-protected by the first book of the present Act] enjoy the exclusive right to authorize the reproduction, distribution and public communication of such editions, when such editions are capable to be identified by their typographic composition, presentation, and similar editorial characteristics.<sup>36</sup>

<sup>32</sup> German *Copyright Act: Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz—UrhG)* (9 September 1965).

<sup>33</sup> Italian *Copyright Act: Legge 22 aprile 1941 n. 633 sulla Protezione del diritto d'autore e di altri diritti connessi al suo esercizio*.

<sup>34</sup> Polish *Copyright Act* (4 February 1994) on Copyright and Neighbouring Rights (Dz.U. 1994 No. 24, item 83 and No. 43, item 170; Dz.U. 1997 No. 43, item 272 and No. 88, item 554) as amended (9 June 2000) on *Amendment to the Act on Copyright and Neighbouring Rights*.

<sup>35</sup> Portuguese *Code of Copyright Law: Decreto-Lei nº 63/85, de 14 de Março, Código do Direito de Autor e dos Direitos Conexos*.

<sup>36</sup> Spanish *Intellectual Property Act: Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual*.

Section 15 of the English *Copyright, Design, and Patents Act*, Duration of copyright in typographical arrangement of published editions, states:

Copyright in the typographical arrangement of a published edition expires at the end of the period of 25 years from the end of the calendar year in which the edition was first published.<sup>37</sup>

Thus, only a handful of member states decided to take advantage of this new possible protection. However, in doing so, not one has taken the initiative to clarify the definition of the protected subject matter. Some legislators preferred to focus on a slightly different form of protection, which is less connected to scientific and critical editions and more with editorial and typographical arrangements and new editions of old works. This is in line with the copyright features of those specific jurisdictions, such as England, which usually protect sweat of the brow.

Regarding the transnational enforceability of this type of protection, the situation is not quite as clear. Remaining within the borders of the European Union, note that no national treatment obligation is present because scientific and critical editions protection does not stem from the Berne Convention or WCT, nor from other international agreements such as TRIPs. The applicable law in jurisdictions where such protection is not present in the relevant legislation would give no remedy in cases of alleged violations of the neighbouring right protecting such editions, assuming the default rule of *lex loci*.<sup>38</sup> Once again, in countries where such protection is present (for example, Germany and Italy) the rules to be applied will likely be those of the jurisdiction where protection is sought.<sup>39</sup> Thus the same edition could enjoy slightly different types of protection in different jurisdictions, even where such protection is available. In particular, note that the rule set forth in Berne Convention article 7(8) will not find applicability in Canada, and even if the term of protection in the country of origin is shorter, the longer term of protection in the country where protection is sought shall be applied. For example, if a scientific edition first published in Italy is looking for protection in Germany, the German term of protection (25 years) and not that of Italy (20 years) is applicable. Such a situation could sound “normal” to a non-expert reader, but actually represents a significant deviation from the standard international rule as it was set forth in the Berne Convention.

The issue of course is that publishers of scientific or critical editions must be aware of the source of the works they are publishing. Even if there is no copyright protection as such, it should be of concern to a Canadian publisher of a German work that appears in the public domain that such publication may infringe the German neighbouring right. Adding a layer of complexity, such material might be

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<sup>37</sup> The English *Copyright, Designs and Patents Act 1988*.

<sup>38</sup> That is, the courts apply the legislation of the country where protection is sought, especially in absence of any Berne Convention obligation.

<sup>39</sup> See e.g. art. 99(5)(2) of the Polish *Copyright Act*.

mounted on Canadian websites readily accessible in European countries that have this neighbouring right in their legislation. Indeed, although it is a little-known problem, it is one in which a sophisticated approach to the issue has been taken by a public domain host in Canada.<sup>40</sup>

#### 4.0 CONCLUSIONS

It is unclear why the European legislator felt it necessary to insert in a European directive with an entirely different scope the possibility for member states to create this peculiar type of protection. It has yet to be proven that this provision has had any beneficial effects on the internal market or on European copyright law. However, it is clear that the legislative undertakings have been most undesirable in terms of (1) the technique of insertion of directive terms by simply translating the words without much consideration of the effects, and (2) the vast gap created in European copyright. Such legislation completely loses sight of harmonizing the legislation of member states and creates additional differences among jurisdictions; further, it seems to be a disharmonization of European copyright law. This results in negative consequences for the whole internal market, including socioeconomic needs and the consistency of the European legal environment. On the broader international level, this leads to less certainty to users of materials in the public domain. Although this issue has yet to directly involve the Canadian legal environment, Canadian users of materials protected in Europe should be aware of this potential European pothole.

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<sup>40</sup> The public domain source of music texts and urtexts, IMSLP, is hosted primarily in Canada, online: <<http://imslp.org/>>. Its website notes:

There are special provisions in several countries for a limited copyright for scholarly editions, which include critical, urtext or "scientific" editions (notably those of Bärenreiter and other German publishers). ... Although it is unlikely that this type of edition, apart from any editorial prefaces, annotations and commentary, contains sufficient original material to qualify for copyright status in Canada, IMSLP as a courtesy voluntarily prohibits the posting of critical or urtext editions published less than 25 years ago, with the exception of those issued by government agencies or government-owned corporations (such as those issued by the USSR state publishing concern before the late 1991 demise of the Soviet Union).