[DE] New copyright law raises questions concerning EC Directive on rental rights

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The Federal Constitutional Court is at present considering a constitutional complaint submitted on 27 December 1995 by a video rental operator. This concerns the third Act amending the Copyright Act (see : IRIS 1995-8: 1), which came into force on 1 July 1995, and is intended to implement the EC Directive of 19 November 1992 on rental and lending rights and certain rights related to copyright in the field of intellectual property.

CD rental firms, the Government, the Federal Court and the Federal German Industrial Association, complain that the EC Directive fails in its purpose, which is to give authors a claim on proceeds from the commercial renting of their works on CD.

The background to the new law is a discrepancy between the interests of authors and manufacturers. Distribution of their work is what interests authors, since their income depends on the number of people who pay to hear it. Manufacturers, on the other hand, are primarily interested in sales, and concentrate on boosting them, since this is where their profits lie.

So far, there has been nothing in copyright law to help them do this, but the amended Copyright Act now gives them an independent right, alongside authors, to prohibit the commercial renting of CDs. The old principle was that the author's rental rights lapsed (were exhausted) once he had released his work for rental. Now rights-holders may also forbid rental at a later stage. The new principle is that of non-exhaustibility, which is itself alien to the Copyright Act. The Directive provides a legal basis for transfer of the author's rental rights to the manufacturer, thereby strengthening the latter's legal position so much at the former's expense that - its critics argue - it fails in its purpose.

In his constitutional appeal, the applicant maintains that his freedom to practise his profession (Article 12, Paragraph 1, sentence 1 of the Basic Law (the German Constitution)) has been impaired, since manufacturers now have power to authorise or prohibit rental, and so determine that profession's survival. The real issue here is not protecting authors against renters; on the contrary, authors will in future need extra protection against manufacturers.

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Critics also point out that the new law can be used to manipulate the market and so eliminate middlemen, with harmful effects for the renting public, the rental trade and competition in general. The Federal Cartel Office has already been called in, since there is a danger that the rental market may become an oligopoly. They also complain that there has been interference with the formally established and actually exercised (Article 14, Para. 1, sentence 1 of the Basic Law) CD rental trade, and that the principle of equal treatment (Article 3, Para. 1, of the Basic Law) is violated by the distinction which the Directive makes between different kinds of protected work, e.g. CD rental firms are affected, but public libraries are not.

They demand that the solution already embodied in Section 27 of the Copyright Act be recognised as the one which best serves the interests involved. This gives the author a fair share of the proceeds from commercial renting of copies of his work, which can be effectively enforced through performing rights societies.

Finally, they argue that this provision already satisfies the requirements of the EC Directive. The new law is neither necessary nor proportional as a means of enforcing authors' rights.

The CD rental operators have no objection to fair remuneration of authors under Section 27 of the Copyright Act as it now stands.

The Federal Constitutional Court is expected to give a decision by the end of the year.

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