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Proposed EEC Directive on legal protection of semiconductor products

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At the very end of 1985, the Commission of the European Communities submitted to the Council of Ministers a proposal for a directive on the legal protection of original topographies of semiconductor products. Since this is a legal development of potentially major importance to companies which produce, market or use semiconductor-based products in the EEC, a brief outline of the proposed directive, its content, objectives and current status is provided below.

(i) Purpose of the proposed directive

In most EEC Member States, there is presently no adequate legal protection for new integrated circuits and similar semiconductor products.

The proposed directive is intended to establish adequate and co-ordinated legal protection for such products throughout the European Community.

The proposed directive has the important ancillary purpose of assisting EEC nationals and residents in obtaining transitional protection in the United States under the Semiconductor Chip Protection Act of 1984. Such protection for foreigners is premised upon satisfying US authorities that the foreign applicant's home country is endeavouring to adopt appropriate legislation insuring protection of semiconductor chips. The proposed directive, together with a declaration by the EEC Council¹ of its intent to examine the proposals with a view to its rapid adoption, has allowed EEC semiconductor producers to benefit from transitional protection in the United States until at least 12 September 1986.² For the US authorities to renew such transitional protection after September 1986, they should be satisfied that good faith efforts and progress in respect of providing for protection of the topographies of semiconductor products in the European Community are being made.

(ii) Content of the proposed directive

The proposed directive defines what should be protected, namely, the 'topography' of a 'semiconductor or product' by specifying its characteristics.

Pursuant to the proposed directive, protection may be afforded either through national copyright laws or via specific statutory provisions enacted for this purpose or a combination of both. Such protection should follow the principles contained in the proposed directive which are outlined below.

Protection shall be granted only to products which are original, that is resulting from their creator's own intellectual effort. The Member States are authorized to make protection subject to registration with a public authority. They may require protected semiconductor products to be marked with the following sign: T

The protected person shall be a national or resident of

a Member State who is either the creator of the topography or, in the context of registered forms of protection, the person registering the topography. Pursuant to the proposed directive, protection of foreign, e.g. US, producers of semiconductor products will be granted by a separate decision of the EEC Council.

Protection grants in any Member State shall be recognised in all Member States on the basis of the national treatment principle. It should be afforded for at least ten years from the time the topography is first commercially exploited or, if appropriate, from the date of registration whichever is the later. The protection shall in principle not last for more than 15 years.

The exclusive rights attached to the protection should include the rights to authorize the reproduction of the topographies (in whole or in part) and the marketing (sale, rental, leasing, etc.) of the topographies or of semiconductor products manufactured by using the topographies. Accordingly, any of these acts would constitute an infringement if it is not authorized by the protected person.

Reverse engineering shall not be considered as an infringement. With regard to the commercial exploitation of reverse engineering, the proposed directive provides that once substantial similarity between two topographies is shown, someone relying on a reverse engineering defence in relation to a product that he has marketed will have the burden of establishing that his topography is indeed an original creation realized on the basis of reverse engineering.

Pursuant to the proposed directive, Member States would be required to bring their national laws into compliance with the directive's provisions no later than 1 October 1987.

(iii) Present status of the proposed directive

The draft directive was submitted by the Commission to the Council of Ministers in December 1985. It is presently under discussion by the 'Intellectual Property Group' of the Council. As noted above, in its resolution of

19 June 1985, the Council has previously undertaken to deliberate on adoption of the directive as soon as possible, following submission of a draft text by the Commission. Pursuant to EC officials, the proposal should be adopted before the fall.

Notes

1. Com (85) 775 Final of 23 December 1985 (not yet published in the Official Journal).
2. Resolution of the Council of Ministers of 19 June 1985.
3. Cf. Semiconductor Chip Protection Act, section 914, and order dated 12 September 1985 of the US Commissioner of Patents and Trademarks; the UK had previously been granted transitional protection for its producers on the basis of existing copyright law until 8 November 1987.