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Amory, Bernard

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EUROPE

Proposal for an EEC Directive on Legal Protection of Semiconductor Products

BY BERNARD E. AMORY

At the very end of 1985, the Commission of European Communities (EEC) submitted to the Council of Ministers a proposal for a Directive on the legal protection of original topographies of semiconductor products.¹

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 will be given in this article.

Purposes 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 an adequate and coordinated system of legal protection for such products throughout the European Community.

The proposed Directive has an important ancillary purpose, which is to assist 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 U.S. authorities that the foreign applicant's home country is endeavoring to adopt appropriate legislation insuring protection of semiconductor chips.

The proposed Directive, together with a declaration by the EEC Council² of its intent to examine the proposal with a view to its rapid adoption, will allow EEC semiconductor producers to benefit from transitional protection in the United States until at least November 8, 1987.

Content of the Proposed Directive

The proposed Directive defines what should be protected, namely, the "topography" of a "semiconductor 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 discussed below.

Protection shall be granted only to products which are *original*, i.e., 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 for foreign (e.g., United States), producers of semiconductor products shall be granted by a separate decision of the EEC Council.

Protection granted in any Member State shall be

recognized 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 later. The protection shall in principle not last for more than fifteen 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, lease, 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 defense 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 October 1, 1987.

Present Status of the Proposed Directive

The draft Directive was submitted by the Commission to the Council of Ministers in December 1985. It was discussed by the Council of Ministers of Industry in early June 1986. However, it has not yet been adopted. Pursuant to EEC officials, the proposal should be adopted shortly.

Mr. Amory is with the law firm of Dechert, Price & Rhoads, Brussels, Belgium. © 1986 Bernard E. Amory.