An EU Copyright Code: what and how, if ever?

Extract

2011 marks the 20th anniversary of the adoption of the first Directive in the field of copyright. However, while trademark, designs and plant variety rights are all almost fully both harmonised and unified, copyright is still not. Yet, the next decade may see a wind of change. In 2009, the Commission issued a paper in which it seriously considers a Regulation as a possible way forward in the field of copyright. The Treaty on the Functioning of the European Union now includes an article giving specific competence for unification in the field of intellectual property and in 2010, the Wittem project for a European copyright code, an academic proposal, was published. In the light of these developments, this article envisages whether unification and codification are indeed the way forward. It first examines the form any future EU legislative initiative in the field of copyright should take and then, its content.

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Introduction

This year marks the 20th anniversary of the adoption of the first Directive in the field of copyright.[1] However, while trademark, designs and plant variety rights are all almost fully both harmonised and unified[2], copyright is still not.[3] Yet, the next decade may see a wind of change. In October 2009, the Commission[4] issued a paper in which it seriously considers a Regulation as a possible way forward in the field of copyright.[5] The new Treaty on the Functioning of the European Union (TFEU)[6] now includes an article giving specific competence for unification in the field of intellectual property (art. 118) and in April 2010, the Wittem project for a European

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[1] Directive 91/250 on the legal protection of computer programs [1991] O.J. L122/42 as codified in Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.

[2] For instance, national procedures and a few substantive points such as the exclusion of must-match features in design law, have not been harmonised.

[3] Patent law is the other obvious non-harmonised and non-unified area.

[4] Put in place after the elections of June 2009.

[5] Commission Paper "Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG InfSo and DG Markt" of 22 October 2009, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf

[6] Entered into force on 1 December 2009.

copyright code, an academic proposal, was published.[7] In the light of these developments, it is time to take stock and envisage whether unification and codification are indeed the way forward. We first examine the form any future EU legislative initiative in the field of copyright should take and then, its content.

The form

There are four options: unifying (through a Regulation), further harmonising (through Directives), guiding (through Recommendations) or do nothing. We envisage them in turn.

A Unitary Copyright System

The Commission Paper "Creative Content in a European Digital Single Market: Challenges for the Future - A Reflection Document of DG INFSO and DG MARKT" has, in its discussion of "Possible EU Actions for a Single Market for Creative Content Online" floated in Section 5.2 the prospect of a unitary copyright system for Europe[8]:

> In order to create a more coherent licensing framework at European level, some stakeholders are suggesting a more profound **harmonisation of copyright laws.** A "**European Copyright Law"** (established, e.g., by means of an EU regulation[9]) is often mooted as establishing a truly unified legal framework that would lead to direct benefits for the coherence of online licensing. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance legal security and transparency, for right owners and users alike, and greatly reduce transaction and licensing costs. Unification of EU copyright by regulation could also restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation directives mandate basic economic rights, but merely *permit* certain exceptions and limitations. A regulation could provide that rights and exceptions are

[7] See The Wittem Project - European Copyright Code (April 2010), available on http://www.copyrightcode.eu, discussed in Eleonora Rosati, "The Wittem Group and the European Copyright Code" [2010] JIPLP 862-868 and in great detail by Jane Ginsburg, "European Copyright Code –Back to First Principles (with some additional detail)", Auteurs & Media, forthcoming 2011, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1747148. See also to a partial extent, A. Sterling, "The Future of Copyright: Approaches for The New Era", An address to the British Literary and Artistic Copyright Association, London, 12 March 2009, available at http://www.blaca.org/meeting2009.htm

[8] A further straw in the wind came from the new European Commissioner for the Internal Market, Michel Barnier, who in January 2010 stated that he is "in favour of an exhaustive and consistent framework for copyright law which will enable us to meet new challenges such as digitisation." - see written answers to the European Parliament, 8 January 2010 (IMCO/15/2009). Recently, the Commission has restated that it will examine the feasibility of having an "optional "unitary" copyright" (whatever that may mean). See Brussels, 24.5.2011, COM(2011) 287 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Intellectual Property Rights, Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, p. 11, available at http://ec.europa.eu/internal_market/copyright/docs/ipr_strategy/COM_2011_287_en.pdf However, this is all the document says so we will need to wait to see what emerges from the Commission's assessment of such feasibility.

[9] [FN 49 in Original] The legal basis could be the new Article 118(1) of the Treaty on the Functioning of the European Union, as introduced by the Lisbon Reform Treaty (…).

> afforded the same degree of harmonisation. By creating a single European copyright title, European Copyright Law would create a tool for streamlining rights management across the Single Market, doing away with the necessity of administering a "bundle" of 27 national copyrights. Such a title, especially if construed as taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules; a softer approach would be to make such a Community copyright title an option for rightholders which would not replace, but exist in parallel to national copyright titles. Naturally, the existence of such a title would raise important issues for the organisation of rights management. A recent report analysed the impact that the introduction of a Community title for copyright would have on current rights management practices[10]. Further reflection on the future of European rights management would therefore have to precede the introduction of a Community copyright title.

In saying that such a proposal has been "often mooted", the Commission may have been rather over-stating matters, as it is hard to find much in the literature by way of discussion of a unitary copyright system, whether by way of specific proposals as to what such a system would look like, or, and perhaps more important and certainly more difficult, a road map as to how we might get to there from where we are now.[11]

It should be emphasised that what the "Creative Content" paper suggests is a unitary copyright system having effect throughout the EU, and not just greater harmonisation of national copyright systems by yet further harmonisation beyond the existing *acquis* as established by the several Directives that already serve to harmonise in the EU many aspects of the law of copyright and related rights. It is implicit however in such a proposal for a unitary right that it would have to go hand in hand with a much greater degree of harmonisation, of copyright law in the EU than exists at present, if not total harmonisation.

Let us first explore what such process would entail, especially as the "Creative Content" paper is opaque as to the relationship of the new unitary copyright system that it floats with the existing national ones. Does it replace them, as this author, and as those commentators who have addressed the issue, suggest would be necessary[12], or does it, as is suggested by the comments in the "Creative Content" paper as to

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[10] [FN 50 in Original] The Recasting of Copyright & Related Rights for the Knowledge Economy, 2006: "Surely, for collecting societies, the prospect of introducing a Community copyright and abolishing 'national' rights is unattractive, to say the least. Territorial rights are the bread and butter of most existing collecting societies"; available at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf.

[11] Two notable exceptions are Reto Hilty, "Copyright in the Internal Market" [2004] IIC760 and Bernt Hugenholtz, who has written on the topic, primarily in the context of territoriality, in Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, report to the EU Commission, DG Internal Market, IViR 2006, available at http://www.ivir.nl/publications/other/IViR_Recast_Final_Report_2006.pdf; Hugenholtz, "The Last Frontier: Territoriality", in Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault and Natali Helberger, *Harmonizing European Copyright Law - The Challenges of Better Lawmaking*, Kluwer Law International, 2009 and Hugenholtz, "Copyright without Frontiers: the Problem of Territoriality in European Copyright Law" in Estelle Derclaye (ed.), *Research Handbook on the Future of EU Copyright,* Edward Elgar, 2009. See also the papers referenced in footnote 765 of "The Last Frontier: Territoriality", including Joachim Bornkamm, "Time for a European Copyright Code?", 2000, available at http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf.

[12] Lionel Bently, "The Future of Copyright Law", Meeting of the AIPPI UK, London, report by J. Watts, 7 April 2010; Hilty, above footnote 11, p. 769 (national rights and a Regulation cannot coexist as this would create "barely solvable problems").

"[s]uch a title, especially if construed as taking precedence over national titles" and "a softer approach would be to make such a Community copyright title an option for rightholders which would not replace, but exist in parallel to national copyright titles"? And whether it is envisaged that national copyright systems are replaced by the new regime, or continue to exist in some limited way alongside it, what will happen to national copyrights that are already in existence when the new regime comes into force and which have the potential to continue in existence for another 100 years or so?

At a superficial level, it is easy to suggest that there is no fundamental problem with establishing a unitary system of copyright for the EU because we already have several intellectual property rights of a unitary nature in the EU[13] and the passage of the Lisbon Treaty has provided, in Article 118 TFEU, a new legal basis for establishing these.[14] However, just because there is now a more solid legal basis for such systems than that which existed before and assuming that establishing a unitary system of copyright is considered to be desirable,[15] establishing copyright as a unitary EU right presents certain unique problems. These are problems that have not been faced in establishing other unitary intellectual property regimes in Europe.

Firstly, all of these other unitary regimes, with the exception of the very short in duration (3 years) unregistered design right, establish registered intellectual property rights, so the rights in issue do not, unlike copyright, come automatically into existence, but need to be applied for. Secondly, these other unitary regimes all exist in parallel with, and not in replacement for, existing national regimes, which have to large extent (with the exception of the plant variety rights and unregistered design right) also been harmonised with the corresponding unitary rights.[16] This allows users of these systems a choice of the right that they apply for, and allows them, albeit at a cost which limits the extent to which they avail themselves of the possibility, to seek

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[13] See the Community Plant Variety Regulation, establishing a Community Plant Variety Right, the Community Trade Mark Regulation, establishing a Community Trade Mark, and the Community Design Regulation, establishing both Registered and Unregistered Community Designs. Each is enforced under a modified Brussels I Regulation jurisdictional regime enabling relief throughout the EU to be secured in a single proceeding when the defendant is sued under the right in question in its member state of residence or domicile, and allowing (except in the case of the Community Plant Variety Right) the court so seized of the matter to adjudicate also on the validity of such right.

[14] Bornkamm and Hugenholtz (see footnote 11 above) both discuss the degree to which, before the TFEU came into effect, the legal basis for the other unitary intellectual property rights could also have been applied to establish a unitary copyright, and both envisaged difficulties in seeking to apply such legal basis to establish a EU copyright, especially were it to supplant national rights. One problem which Hugenholtz (in van Eechoud et al., above footnote 11, pp 319-321) eschews is that created by article 295 TEC (now art. 345 TFEU) which provides that "[t]he Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." Indeed, the case law and preparatory materials imply that the article is not an obstacle to the adoption of European intellectual property rights. Thus, an EU copyright title could replace national copyright laws. If the EU is competent, as now article 118 FEU specifically says, to introduce uniform intellectual property rights and both national and an EU copyright would not be able to co-exist, the natural conclusion is that the EU title could replace the national laws.

[15] This is not self-evidently the case, as shall be seen below.

[16] This has led to the absurdity that there are four, cumulative, regimes available to protect designs in an EU Member State such as the UK, and in others copyright and unfair competition law may also be available to protect designs. It can perhaps be expected in the longer term that the uptake of such national rights where registered will fall, and that in some cases the scope to secure such national rights will be withdrawn, but this has not as yet happened anywhere.

to register both types of right. Whether in fact such a potential multiplicity of cumulative rights, and the legislative thicket that underpins it, is in fact desirable from the point of view of EU society at large is not an issue that has, so far, apparently troubled the EU legislature. However, the cost to the potential rights holder, with registered intellectual property rights, of availing itself of the possibilities for multiple rights that this situation offers does at least provide some measure of practical control over the extent to which any particular right exists in parallel.

In contrast, and despite what the Commission says in its "Creative Content" paper about parallel systems, it is hard to envisage how a unitary EU copyright could subsist in parallel with national copyrights, with the two rights coming into effect simultaneously and in parallel every time a new work is created and then enduring for life plus 70 years.[17] Although the Berne Convention does not seem to envisage it for copyright, such a situation does currently exist under the Paris Convention for the EU and its Member States in relation to designs and trade marks, so it seems unlikely that Berne precludes it. However, if two types of copyright were to co-exist in the EU in parallel then, unless the establishment of a unitary right were to be accompanied by the corresponding degree of harmonisation of national rights, many of the aims behind introducing a unitary right would be wholly frustrated. Moreover, harmonisation of national rights would do nothing to address the Commission's main aim in proposing a unitary right, namely to overcome the inherent territoriality of national rights. So it would seem most likely that, and in contrast to the existing unitary intellectual property regimes, a unitary EU copyright regime would have to be introduced as a replacement for, rather than an addition to, national copyrights in EU member states.

But replacing an existing intellectual property regime is not easy, especially where the intellectual property right involved is one that is as long–lived as copyright. As Hugenholtz has observed, the "introduction of [an EU] copyright would of course pose challenges in terms of enacting adequate transitional law."[18] Even if national copyright systems are to be wholly supplanted by the new unitary EU copyright regime for new works, such national regimes will, on the face of matters, have to remain in existence for already subsisting national copyrights in old works, and in most cases for more than hundred years afterwards. Thus Hugenholtz' observation is something of an understatement, especially when one considers that EU intellectual property harmonisation in the past has in general avoided the need for transitional measures by increasing protection[19] or adding new protection. Certainly such measures have been careful to preserve existing rights, even where the underlying basis of protection has been restricted in scope for the future.[20]

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[17] The existence of a unitary EU unregistered design rights regime in parallel to unregistered design rights protection regimes at a national level (either by unfair competition law, copyright, or by specific regimes such as that in the UK) presents considerably fewer difficulties, because design rights are hardly harmonised at all at an international level, and the right is of very short duration. Even so, the complex and confusing pattern of overlapping design protection in the EU can hardly be characterised as ideal.

[18] Footnote 773 in Hugenholtz, "The Last Frontier: Territoriality" (see footnote 11 above).

[19] As with Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights [2006] OJ L 372/12.

[20] See for example Article 14(2) of the Database Directive. That is not however to suggest that legislation that restricted existing rights would necessarily be inconsistent with article 1 of the First Protocol to the ECHR or article 17 of the Charter of Fundamental Human Rights of the EU in view of

Even were the new unitary right to replace national rights going forward any approach which did not however radically cut back on the scope to which already existing national rights could be asserted inconsistently with the new unitary right would undermine the Commission's main aim behind introducing a new unitary copyright – addressing the issue of territoriality. Moreover, any approach that was limited to copyright and did not also address the territorial nature of related rights would also fail in such aim.

Despite the problems highlighted above, there are a great number of advantages in unifying copyright rather than harmonising it further or simply guiding its course.[21] Of course, as highlighted above, it assumes that the Regulation would replace national rights and adopt appropriate transitional measures. In addition, it should also deal with the issue of applicable law in so far as it does not establish its own such law.[22] First of all, evidently, the idea of adopting a Regulation is not to have a copyright code for the sake of a code, otherwise it is simply an academic exercise. Therefore, it may well have to remain at first incomplete while simultaneously striving to be as comprehensive as possible. A Regulation will at the same time reduce a great many types of costs as well as legal uncertainty and as the Commission paper mentions it, increase transparency.[23] First, transaction and licensing costs for copyright holders and copyright users will dramatically decrease as copyright law will be the same in all 27 Member States.[24] In this respect, a Regulation will also annihilate the current application of the strictest national copyright law to contracts involving cross-border licensing.[25] The costs (mainly but not only parliamentary time and resources) for Member States to implement Directives will disappear along with the costs incurred by the Commission to sue Member States not complying with the Directives. Lobbying efforts will no longer need to be duplicated. Transparency will be greater as all Member States will have only one copyright text providing exactly the same law in the same words rather than 27 ones.

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the well established principle in relation to the former that national authorities have a wide margin of appreciation in implementing social and economic policies, and their judgment as to what is in the public or general interest will be respected unless that judgment is manifestly without reasonable foundation - see *James v United Kingdom* (1986) 8 EHRR 123, ECtHR, at para 46; *The Former King Of Greece v Greece* (2001) 33 EHRR 21, at para 87; *Malama v Greece*, Judgment of 1 March 2001, ECtHR, at paras 45–46; and *Denimark Ltd v United Kingdom* (2000) 30 EHRR CD 144, ECtHR. There is a precedent for some national measures which have had a greater effect on existing rights than Article 14(2) of the Database Directive in the UK Copyright Designs and Patents Act 1988, which as from 1999 restricted the scope to assert already existing copyright in two dimensional artistic works against three dimensional designs that copied such works, before which it had, as from 1989, considerably limited the damages recoverable for such copying and which before such date had been calculated on a "conversion" basis as the full value of the infringing articles.

[21] Hilty, above footnote 11, p. 769, was already of this opinion.

[22] Ibid., p. 774. Article 8(2) of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II"), provides that for infringement of a unitary EU intellectual property right, the law applicable, to the degree it is not covered by the relevant EU instrument, is that of the country in which the act of infringement is committed.

[23] Van Eechoud et al., above footnote 11, p. 317.

[24] Of course, it all depends, as we mentioned just above, how comprehensive the Regulation is. To be most effective, it would have to deal not only with copyright *sensu stricto* (i.e. author's rights) but also neighbouring rights.

[25] Simply think of a book which quotes short extracts of works and is meant to be sold all over the Union. Because the law on exceptions is still greatly unharmonised, the strictest law will, in effect, by default govern the publishing contract.

Legally speaking, a copyright Regulation is now a realistic prospect thanks to article 118 TFEU.[26] Article 118(1) provides:

> "In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements."[27]

Before the Treaty's amendment, it was necessary to reach unanimity to adopt a Regulation. With the new article 118, this is a thing of the past as qualified majority is now the rule (the ordinary legislative procedure requires only qualified majority). A Regulation is therefore a much easier and thus much more possible option in the field of copyright law than ever before. In fact, it is permitted to think that the Union is even obliged to adopt such a Regulation, at least if adopting such copyright Regulation is necessary for the functioning of the internal market, as the article uses the term "shall". And there is already is strong evidence that it is the case because the Directives were taken on that basis and there remains issues, both harmonised and unharmonised[28], which affect the smooth functioning of the internal market. There is another strong reason for adopting a Regulation in the field of copyright. Because of its fragmented copyright law, the EU is weak at the international negotiating table.[29] Obviously, the most difficult hurdle in adopting a Regulation, let alone a complete codification, will be political.[30]

Further Copyright Harmonisation

If a Regulation is not enacted, the next best alternative is to carry on adopting Directives. As we have mentioned above, doing so has the disadvantages of costly and slow implementation, with the added problems of poor transparency and legal certainty.[31] Furthermore, contrary to a Regulation, Directives will not solve the territoriality issue.[32] The Directives would also need to have as few options as possible for Member States so as not to hamper the harmonisation goal.[33]

Further harmonisation can also happen without legislative input. Such indirect harmonisation can be achieved by the EU courts and also by national courts following

[26] In the field of intellectual property law, article 118 replaces article 352 TFEU (ex Article 308 TEC), which was the basis for adopting Regulations.

[27] The second paragraph deals with language arrangements for European intellectual property rights, In practice, this paragraph only relates to patent rights.

[28] Indeed, some Member States' implementation of Directives has not lead to a harmonised state of play, either because the Directives themselves gave options to the national legislatures (one only needs to think of article 5 of the Infosoc Directive) or because Member States have badly transposed the Directives and the Commission has not sued them.

[29] Hilty, p. 775.

[30] See also Bently, above footnote 12.

[31] Ibid.

[32] Hugenholtz, "Copyright without Frontiers: The Problem of Territoriality in European Copyright Law", p. 18, footnote 11 ("for as long as the territorial nature of copyright and related rights is left intact, harmonisation can achieve relatively little").

[33] A recent example are the vast options left in article 6(4) of the Infosoc Directive which lead to great disharmony and corresponding discrimination between users in different Member States.

each other's decisions if they are willing and able to do so.[34] In fact, we should soon have massive harmonisation thanks to a high number of references lodged in 2009 and 2010, many on vital copyright law points. Whilst this is welcome, this "do nothing" approach is the most minimalist and probably the least satisfactory in terms of cost and legal certainty. Indeed, one needs to wait for litigation to occur and for the willingness of national courts to refer questions. Until then, the law is unclear and it is costly for those litigating. It is also in some way discriminatory because private parties bear the cost which should be borne by all. In addition, this indirect or a posteriori harmonisation will happen in any case. EU courts will still play a role in the further harmonisation or unification through the interpretation of existing Directives, and of any potential Regulation, not only to clarify concepts but also to correct the imbalances.[35]

Finally, further harmonisation can also be achieved via Recommendations. Recommendations may be better than the "do nothing" approach but they remain soft law and are good only as a first step, as they are non binding. Their harmonisation is therefore all but random. This is not to say that the Commission should not carry on issuing recommendations. They serve a useful purpose in the meantime until a Regulation is adopted.

The content

The issue of content necessitates asking two questions. What *do* and what *may* we include in the code? The latter question refers to the limited competence of the EU. Because the EU's competence in the field of intellectual property law is not exclusive, the principles of proportionality and of subsidiarity apply.[36] According to the subsidiarity principle, "the Union should not intrude on national, regional and local political and cultural identities".[37] In addition, the question is also one of "comparative efficiency, namely could the measure be more effectively resolved by central rather than local legislation."[38] One single measure may well enable economies of scale and minimise disruptions caused by different laws.[39] Even if the

[34] They may be willing but might not be able owing to the language barriers.

[35] See for instance the 2004 database cases, namely *The British Horseracing Board Ltd v William Hill Organisation Ltd* Case C-203/02 [2004] ECR I-10425; *Fixtures Marketing Ltd v Organismos Prognostikon Agonon Podosfairou (OPAP)* case C-444/02 [2004] ECR I-10549; *Fixtures Marketing Ltd v Oy Veikkaus AB* case C-46/02 [2004] ECR I-10365; *Fixtures Marketing Ltd v Svenska Spel AB* case C-338/02 [2004] ECR I- 10497.

[36] Art. 5(3) and (4) TEU: "3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.
4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality."

[37] D. Chalmers, G. Davies and G. Monti, *European Union Law*, Cambridge University Press, 2nd ed., 2010, p. 363.

[38] Chalmers, et al, above footnote 40, p. 364.

[39] Ibid.

subsidiarity principle has been frequently invoked before the EU courts, the latter have not yet annulled a measure based on a breach of it.[40] In the field of intellectual property, one will recall famously, the failed attempt by the Netherlands to annul the Biotech Directive[41] for non-respect of the principle. The decision's paragraph 32 may be crucial in so far as it may well apply by analogy with a future copyright Regulation:

"The objective pursued by the Directive, to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone. As the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community. "

Proportionality implies that the means employed are appropriate and necessary to the end sought. In other words, it asks what the best type of regulatory instrument to realise a task is; EU or national?[42] As with the subsidiarity principle, it is rare for the ECJ to annul a measure for breach of the proportionality principle.[43] In fact, the ECJ is not inclined to struck down measures for breach of one or the two principles also because they are mainly of a political nature.[44]

In view especially of the subsidiarity principle, it may already appear to the connoisseur that copyright law includes a few aspects which can well be thought to be preserving or embodying national or cultural identity, because the common law and civil law systems differ quite a bit in the area of copyright and related rights. One can readily think of the following as the last bastions of sovereignty which many countries would not want to see touched: authorship and ownership, moral rights, dealings, exceptions, accessorial and secondary liability, and fixation.[45] Some commentators have therefore suggested that on grounds or proportionality and subsidiarity, total harmonisation may be inappropriate.[46] It should also be noted that the Commission's proposal in its "Creative Content" paper is in response to one particular issue that troubles it – namely rights management practices such as those for on-line licensing. The Commission does not however seem to consider itself to be without remedies in such matters having already chosen to use EU competition law to challenge certain

[40] *The Netherlands v Council and European Parliament* Case C-377/98 [2001] ECR I-7079. The case law also suggests that it is enough that the instrument (Directive, Regulation) includes a reference to the principle, or that there is no reference but on the face of it, the instrument seems to comply. See Chalmers et al., above footnote 40, p. 364-365.

[41] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions [1998] OJ L 213/13.

[42] On proportionality, see e.g. Chalmers et al, above footnote 40, p. 367 ff. On the two principles, see also van Eechoud, et al, above footnote 11, pp 19-22.

[43] Van Eechoud et al., above footnote 11, p. 22 and cases cited.

[44] Ibid., p. 20 and 22 and cases cited.

[45] Collecting societies can also be seen as preserving and promoting cultural diversity. See Hugenholtz, "Copyright without Frontiers: the Problem of Territoriality in European Copyright Law", p. 19, footnote 11, above ("By protecting and promoting local authors and performers, collecting societies play an important role in fostering 'cultural diversity' in the European Union").

[46] Hugenholtz, above footnote 11; W. Kingston, "Intellectual Property in the Lisbon Treaty" [2008] EIPR 439, at 443 is against a Regulation dealing with all aspects of copyright and related rights, because it will reduce diversity.

territorially limited licensing practices.[47]. There may be other reasons why many of these would be best regulated at national level, namely because many of these concepts are not purely or even not at all copyright concepts but pertain to property, tort and contract laws, which are not (yet) within EU competence.[48] Nevertheless, as we shall see below when examining the Wittem Code, on some points, e.g. moral rights, cultural diversity can be preserved in a common text, bridging the gap between the two traditions. The two principles should not therefore be seen as an insurmountable obstacle to the adoption of a Regulation. In fact, a Regulation may now even be the only possible instrument. This is because article 6 of the revised Protocol on Subsidiarity and Proportionality requires that the Union's legislature chooses the instrument which minimizes the financial and administrative burden both of the Union and of the national and local authorities.[49]

The second question is: what do we include in the Regulation? The copyright harmonisation that has taken place so far, despite being effected through several Directives, has only been of the "low hanging fruit" of copyright harmonisation. This may well be reflected in the relatively few references that there have been, until only recently, to the ECJ under these various Directives. It is certainly the case that these Directives have left untouched, either at all or in large part, some fundamental and difficult issues where there are clear differences between Member States. Not surprisingly, these include many of the same aspects which may well be, according to the principles of subsidiarity and proportionality, best regulated by the Member States:

- what can constitute a copyright work?[50]
- what copyright protection is available for works of applied art and industrial designs and models?[51]

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[47] See Commission Decision C (2008) 3435 final of 6 July 2008, against which an appeal is pending in *CISAC* Case T-442/08.

[48] See however the project instigated by the Commission itself, via two recommendations and an action plan, to provide a Common Frame of Reference for European contract law, which is well summarised by Andrew Vogeler at http://jurist.org/dateline/2010/07/germany-european-contract-law-harmonization.php and is now entrusted to the Joint Network on European Private Law http://www.copecl.org/. See also the project of the European Group on Tort Law (http://www.egtl.org/), whose ultimate aim is to codify European tort law and that of the Study Group on a European Civil Code who has a similar aim in the broader field of civil law, http://www.sgecc.net/pages/en/introduction/index.introduction.htm. All these groups are mainly composed of academics.

[49] Van Eechoud et al,, above footnote 11, p. 21.

[50] For example, can a perfume be a copyright work, as the Dutch Supreme Court found in *Kecofa BV v Lancome Parfums* [2006] ECDR 26, in contrast to the French Cour de Cassation, which found it could not in *Bsiri-Barbir v. Haarmann & Reimer* [2006] ECDR 28. Note that it has been suggested that the effect of the decision of the ECJ in *Infopaq* Case C-5/08 is that it is within the competence of the ECJ to interpret what constitutes a copyright work, despite there having been no ostensible attempt to harmonise its meaning in the Copyright in the Information Society Directive – see Christian Handig, "Is the Term "Work" of the CDPA 1988 in line with the European Directives?" [2010] EIPR 53-56.

[51] Article 2(7) of Berne permits considerable latitude in this respect, and such latitude is expressly preserved by Article 17 of the Designs Directive. As a result, the degree of copyright protection available for designs is highly variable throughout the EU - see Estelle Derclaye, "Are Fashion Designers Better Protected in Continental Europe than in the United Kingdom? A Comparative Analysis of the Recent Case Law in France, Italy and the United Kingdom" [2010] Journal of World Intellectual Property 315–365.

– what level of originality must apply for copyright to subsist in a work?[52]
– who is the author and who is the first owner of copyright in a work, in particular as between an employee and his employer?[53]
– are there special laws that apply to copyright contracts, for example as to the degree to which authors may renegotiate such contracts or the degree to which authors can waive moral rights in such contracts?[54]
– what exceptions should apply, recognising that, except for copyright in computer programs, virtually none of the exceptions as currently provided for in the EU *acquis* are mandatory?
– what approach should be taken to the variety of legal theories in the EU which address accessorial liability – i.e. what, under English law, would be characterised as "joint tortfeasance"?[55]
– what types of copyright infringement attract criminal penalties, and what penalties should be levied for such acts?[56]

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[52] The Computer Program and Database Directives address this issue for computer programs and databases respectively, and the Term Directive does so for photographs (albeit allowing Member States also to protect photographs which do not meet such criteria, by what in effect are related rights) but apart from these, there has been no explicit further harmonisation of the concept. Despite this, the ECJ assumed in *Infopaq* Case C-5/08 that the "author's own intellectual creation" test applied also to copyright works other than computer programs and databases.

[53] So far, after more than 20 years of legislative activity, this issue has only been harmonised in the EU for copyright in computer programs. An attempt to do so in respect of copyright in databases was abandoned, and for copyright in films, the "harmonisation" allows Member States considerable latitude in the types of person who can be designated as an author – see the Commission's *Report on the question of authorship of cinematographic or audiovisual works in the Community* – COM (2002) 691 Final – 6 December 2002.

[54] This is not an issue in the regimes for existing unitary EU intellectual property rights, where there is more scope for effective freedom of contract as between commercial entities than there is in contracts as between authors and publishers in copyright, but as to which different Member States provide different types of protection for authors. Reflecting the absence of harmonisation of contract law in the EU, the Community Designs Regulation for example provides, at Article 27(1) that "… a Community design as an object of property shall be dealt with in its entirety, and for the whole area of the Community, as a national design right of the Member State in which: (a) the holder has his seat or his domicile on the relevant date; or (b) where point (a) does not apply, the holder has an establishment on the relevant date." Hugenholtz, who has also studied such contracts, (see Lucie Guibault et al., *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, IViR 2002, available at http://www.ivir.nl/publications/other/contracts.html) has however suggested, in "The Last Frontier: Territoriality" (see footnote 11 above) that copyright contract law, along with moral rights and the governance of collective rights management societies, need not, on grounds or proportionality and subsidiarity, be harmonised.

[55] This is not just a question of what sort of acts constitute what English law characterises as "joint tortfeasance," and which is a general legal concept under English law, not limited to copyright or even intellectual property rights. These days its highest profile is in the issue of ISP liability, and the relationship between ISPs and their customers, as to which the ECJ held in *Promusicae v. Telefónica* Case C-275/06 [2008] ECDR 135 that the specific balance to be struck between the protection of intellectual property and the protection of privacy was a matter for national law. The nature of such balance, as demonstrated by the controversy over Amendment 138 to the "Telecoms package" in 2009, which became Article 1(3a) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), as amended by Directive 2009/140/EC, remains highly controversial.

[56] Under the TFEU, there is a sounder basis than previously to legislate as to criminal penalties for intellectual property infringement, and drafts of Directives aimed at harmonising the use of criminal penalties for intellectual property infringement have been in existence for some time. The expected further initiatives at an EU level as to this promise however to be controversial.

These are only a few examples of important areas of copyright law where there is as yet no harmonisation in the EU, or where the partial degree of the harmonisation that has been achieved to date evidences the depth of the problems that face any attempt to harmonise further. Such differences in "black letter" law are however only the "tip of the iceberg". They mask fundamental differences in approach as between different national copyright systems in the EU, differences that are all too apparent to anyone who analyses how the same, apparently harmonised, issue is in practice addressed in these different national systems. It is time to now look at the Wittem Code, proposed by copyright academics from both civil and common law traditions. What does the code include? The first clear observation is that it is by far incomplete. It includes a preamble, and regulates the following areas: subject-matter of protection, the idea/expression dichotomy and originality, authorship and ownership, moral rights, economic rights and limitations. Therefore, it does not include the public lending right, legal protection of technological protection measures (TPMs), secondary liability, related rights including the database sui generis right nor the relationship between on the one hand copyright and on the other hand, competition, unfair competition or contract laws. In the preamble, the authors set out the principles that govern the code. In short, a code is needed for a functioning internal market. The code bridges the gap between authors' right and copyright systems and also combines the justifications for copyright from both civil and common laws (personality rights and incentive theories). In addition, the preamble emphasises that copyright must reflect freedom of expression and of competition and takes note of the international and EU *acquis*. It is not the place or aim to offer here a comprehensive critique of the code.[57] We will just flag a few of the good and less good aspects of it.

On the plus side, it cannot be denied that overall, the code is well thought-through, clearly written and precise. It has footnotes under the articles rather than recitals, which increases clarity. As to content, the provisions on authorship and ownership are more advanced than under current harmonisation and there are comprehensive moral rights provisions. In addition, both of these types of provisions along with those on exceptions neatly bridge the gap between copyright and authors' rights systems.[58] The exceptions are classed in five categories: (1) uses with minimal economic significance, (2) uses for the purpose of freedom of expression and information, (3) uses permitted to promote social, political and cultural objectives, (4) uses for the purpose of enhancing competition and (5) the three step test but only in the sense that it allows new similar exceptions. This classification increases clarity and allows differential treatment between exceptions e.g. whether a remuneration is due or not. The Wittem code, also shows that the double risk which a complete or near complete unification of copyright entail, namely that of downward harmonisation (e.g. moral rights) and that of upward harmonisation (e.g. term), can be reduced considerably.

On the minus side, the non-exhaustive list of works can obviously cause problem.[59] Nothing is provided for borderline creations which some Member States' courts

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[57] For this, we refer to Rosati, above footnote 7.

[58] Ibid., p. 866-867 also thinks that there is a 'sensible balance between a US style open-ended system of limitations and a civil law style exhaustive enumeration' and that the exceptions are worthy of praise.

[59] See above footnote 53 re perfumes. A recent ruling of the CJEU in fact has perhaps harmonised the law in favour of an open system and done away with the categories still existing in UK and Irish copyright law. See *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo*

would recognise as works while some others would not. What should Member States do in case such issue is raised in litigation? Arguably, it is impossible to have a complete list and the problem will always exist, in any country with an open clause. However, the code could include a provision along side this one stating that in case of doubt, there is an obligation for the first ever court to be seized of such new matter, even if a first instance one, to refer to the CJEU (or a potential future intellectual property court). Another point of contention is the absence of any provision on technological measures and anti-circumvention provisions except for one which regulates the relationship between them and exceptions (art. 5.8.).[60] But then why is that relationship addressed but not that between exceptions and contracts which is akin to it? There are, as mentioned above, a number of other gaps, but understandably they are due to the group's limited resources.[61] Indeed, the group was only composed of seven members, helped by another eight members of its advisory board.

More disappointing is the fact that the Wittem group eschews taking a position on the desirability or otherwise of introducing a unified framework for copyright as this position may diminish the code's already only potential political impact.[62] In sum, the group's proposals address and adopt agreed and also remarkably elegant positions on many, but not all, of the difficult harmonisation issues listed above, but that is not to suggest that such proposals would prove to be politically viable; indeed even amongst themselves they have been unable to agree on the appropriate term of protection of economic rights and of some moral rights. Nevertheless, despite its incompleteness, the code is a good starting point for future EU legislation.

Conclusion: towards "EU Copyright 2.0"?

On any basis, very much more work on harmonisation will be needed, either as preparatory to, or as part of, any attempt to introduce a unitary EU copyright regime. Such work will make the hard work done to date on harmonisation of copyright since the first Commission Green Paper in this area in 1988 look extremely easy by comparison. That is not to say that work on such a "grand projet" should not be begun. But it should not start with the mindset of providing the "quick fix" for the issue of territoriality in the EU that the Commission seems to be looking for in its "Creative Content" paper. The need for transitional provisions as to already existing copyrights, and the status of related rights, make it likely that it would take several generations to address the issue of territoriality by such measures.

Moreover, the issue of territoriality is hardly likely to prove an aspirational motivation for such work in the eyes of the sort of experts who should be involved with formulating with a unitary EU copyright regime, if it is to be done properly. Indeed the Commission has already, for the short and medium term, chosen to fall back on its old standby, EU competition law, in seeking to deal with the issue of territoriality, having apparently abandoned "country of origin" and exhaustion type approaches as

kultury, Case C-393/09, nyr, 22 December 2010 available on http://curia.europa.eu/ and the discussion at http://ipkitten.blogspot.com/2011/01/lionel-bezpecnostni-softwarova-asociace.html

[60] Rosati, above footnote 7, p. 864.

[61] Correspondence with Lionel Bently, one of the members of the Wittem group, on file with the authors.

[62] Rosati, above footnote 7. p. 864.

apt to address this in the context of cross border transmissions such as on-line services.[63]

Nonetheless, we think that a Regulation replacing national laws is the best way forward both in terms of form and in terms of content. It may not, for the reasons given above, be possible to achieve a complete copyright unification but this should not prevent the adoption of a copyright Regulation governing all aspects which can be regulated while respecting the proportionality and subsidiarity principles. Whether we are close to the work being started is a political question and depends on the goodwill of the Union's institutions. But if there is something that can convince them is that we are ready to start the work. The Wittem code shows that agreement even on the thorny questions is possible and that the gap between the common and civil law traditions can be bridged elegantly and respectfully. The topics have matured over the years both through the Directives and the case law of the EU courts, and the Union's goals in the field of intellectual property as well. Indeed, in the genesis, the goals were ending market fragmentation and distortion of competition, improving the competitiveness of the European economy and protecting EU investment against outside free riders. These have remained but new ones have been added, notably increasing the efficiency and simplicity of intellectual property rights for all involved and reducing costs (e.g. patents). In turn, this will increase the attractiveness of the EU as an intellectual property legal system in which to operate and in turn the Union's competitiveness in accordance with one of its founding goals.

Therefore, the copyright 1.0 phase has come to an end. The first step (1991-2010) was an initial 'clearing up' or quick fix of important issues that needed to be done. We are now probably entering the next 'generation' of EU copyright, the second phase, that of unification. And beyond codifying existing law and bridging the gaps between authors' right and copyright systems, we might also need some changes such as the promised initiative on orphan works[64]. We could in this regard usefully look at proposals beyond our borders such as the Copyright Principles Project led by Pamela Samuelson to reform US copyright law.[65] But in the end, the crucial question will remain whether there is enough political will to conceive and then give birth to "EU Copyright 2.0".[66] Let us hope that in this respect, the EU will adopt its host country's national motto[67] rather than its current politics…

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[63] See Trevor Cook, "Exhaustion - A Casualty of the Borderless Digital Era" in Lionel Bentley, Uma Suthersanenan and Paul Torrermans – "Global Copyright – Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace" Edward Elgar 2010.

[64] A Directive proposal was announced for November 2010 but has at the time of writing not yet appeared on the Commission's web site.

[65] http://www.law.berkeley.edu/files/bclt_CPP.pdf

[66] It does not seem to be for the very near future as the Commission's "Creative Content" paper itself states that "[f]urther reflection on the future of European rights management would therefore have to precede the introduction of a Community copyright title."

[67] Belgian's motto is L'union fait la force or Eendracht maakt macht (unity makes strength).