

The Court of Justice Copyright Case Law: Quo Vadis?

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Almost a quarter of a century after the adoption of the first EU directive in the field of copyright¹, the case law of the Court of Justice of the European Union (“the CJEU” or “the Court”) on copyright is now pervasive; there is no aspect of copyright it has not ruled on.² The Court has intervened more recently because of three factors: more *acquis* (directives), more references and lacunae in the *acquis* which give the Court an interpretation space.³ Since its landmark judgment in *Infopaq* in 2009⁴, the Court has often filled gaps in the *acquis communautaire* where the silence of the texts could have meant that the competence still belonged to Member States. It has thus changed United Kingdom (“UK”) copyright law, sometimes rather deeply and often unexpectedly. This, among other things, has prompted much criticism against the Court’s case law especially on this side of the Channel. Less work has yet been done to try and predict the Court’s case law future direction. The flurry of CJEU copyright decisions now allows such analysis.

This short piece by no means performs such full-blown analysis. It more modestly shows that the Court’s case law has changed not only UK copyright law but also the copyright laws of many Member States, crafting a truly *communautaire* copyright rather than by definition or default taking a civil law approach. The article then analyses the literature’s criticisms of the Court’s copyright case law. This analysis shows that not all criticisms are justified and that while it is hard to predict the Court’s future case law, it is no more difficult than with any supreme court case law and some trends have started to emerge. Further analysis of the Court’s copyright case law, but also more generally of its intellectual property case law, to

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¹ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L111 of 5.5.2009, codifying Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L 122/42, hereinafter ‘software directive’.

² By aspect, we mean the general aspects namely subject-matter, protection requirements, duration, rights, exceptions and remedies, not every provision of the *acquis*, and obviously only those aspects which have been harmonised (so this excludes for instance moral rights). In the past, the Court ruled on copyright only marginally as there was not yet any secondary law. Therefore, the case law was mainly dealing with freedom of movement goods (exhaustion) and competition issues. For a concise exposition of this case law, see E. Derclaye, “The European Union and Copyright” in P. Geller & L. Bently (eds), *International Copyright Law and Practice*, Lexis Nexis (Matthew Bender), updated every year, last update 2013.

³ V.-L. Benabou, « Retour sur dix ans de jurisprudence de la Cour de Justice de l’Union Européenne en matière de propriété littéraire et artistique : les méthodes » [2012] 43 *Propriétés Intellectuelles*, p. 140, at 141.

⁴ Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] E.C.R. I-6569 (further referred to as *Infopaq*).

carry on deciphering these trends is useful. In addition and more urgently, the task is on the Court to use its interpretation methods more consistently.

Impact of the Court of Justice's case law on Member States' copyright laws

One of the Member States where the impact of the Court's case law is the deepest is the UK. The Court's first 'substantial' copyright decision, *Infopaq*, had already impacted UK copyright law well beyond what a first reading of the judgment could have made believe. This case dealt with news articles, small parts of which were reproduced and sent to subscribers by the media monitoring agency Infopaq. The question was whether there was a reproduction under article 2 of the Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society.⁵ In determining this, the Court decided to interpret the term 'work' and held that the originality requirement was the author's own intellectual creation for literary works and arguably for all works. The CJEU also interpreted the exception for temporary reproduction (art. 5(1) of the infosoc directive).⁶ Not only did the ruling change the traditional originality requirement of "sufficient skill, judgement or labour" and the infringement test of "substantial part" but also associated concepts and rules such as the *de minimis* rule for literary works.⁷

The subsequent CJEU case law has also impacted UK law, more or less clearly and more or less deeply. In *BSA*⁸ (a case dealing with communication to the public of a graphical user interface) and *FAPL* (the famous case in which a pub owner got sued for using (cheaper) Greek satellite decoding cards in order to show English Premier League football matches in her Portsmouth pub)⁹, the Court seems to have abolished the categories by arguably subsuming the concepts of work and originality into one.¹⁰ In *BSA*, the Court of Justice also

⁵ [2001] OJ L167 (herein after referred to as 'infosoc directive'). Article 2 reads: "Reproduction right Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite."

⁶ Article 5(1) reads: "1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2."

⁷ For a comment of *Infopaq*, see E. Derclaye, "Wonderful or worrisome? The impact of the ECJ ruling in *Infopaq* on UK copyright law" [2010] EIPR 247. For a detailed analysis of the impact of the CJEU case law on the concepts of work originality and infringement, see E. Derclaye, "Assessing the impact and reception of the Court of Justice of the European Union case law on UK copyright law: What does the future hold?" [2014] RIDA April issue, p. 3.

⁸ Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECR I-13971 (further referred to as *BSA*).

⁹ Joined Cases C-403/08 and C-429/08, *Football Association Premier League v. QC Leisure and Karen Murphy v Media Protection Services* [2012] F.S.R. 1 (further referred to as *FAPL*).

¹⁰ See *BSA*, paras 45-46; *FAPL*, 96-98. Derclaye 2014, above n 7 and citations therein (arguing however that it is not what the Court intended. If asked the question, the Court would certainly refer to article 2(1) of the convention and require that there is first a work before checking if the work is original).

adopted the merger doctrine.¹¹ The High Court had rejected this doctrine in a 1994 computer programme case.¹² On this point, the case is now overruled. In *Luksan*¹³, a dispute between the director of a documentary film and its producer, the CJEU held that in light of all the relevant copyright directives, economic rights to exploit an audiovisual work vest originally and directly in the authors of the work and, thus, in the principal director. National laws which grant these rights exclusively to the producer and thus deny them to the principal director, are contrary to EU law. Member States may nevertheless provide for presumptions of transfer of such rights in favour of the producer so long as any such presumptions are rebuttable. Nonetheless, unwaivable rights to remuneration vest by law originally and directly in the author or co-authors of any audiovisual work. The *Luksan* ruling could very well imply that the UK rules on ownership of crown copyright, registered designs, or even rules limiting moral rights of employees, are illegitimate.¹⁴ It is also not impossible that the CJEU's interpretation of the reproduction right in *Infopaq* and later in *SAS* absorbs the concept of adaptation, although it is not harmonised explicitly in any of the directives.¹⁵

The CJEU case law also impacts exceptions. In *Infopaq*¹⁶, *FAPL*¹⁷ and *Painer* (a case dealing with a portrait photograph of a missing girl reproduced in newspapers)¹⁸, the Court held that they must be interpreted strictly.¹⁹ Nevertheless, the Court added that exceptions must also be interpreted according to their purpose and the exceptions' effectiveness must be safeguarded.²⁰ How does that impact the UK case law on exceptions? Does it mean that the UK courts' liberal interpretation²¹ is over?²² For instance, *Forensic Telecommunications Services v The Chief Constable of West Yorkshire Police* dealt with a number of tables the claimant argued the copyright or alternatively the database *sui generis* right of which were infringed.²³ The defendant argued they were using the tables for the purposes of research.

¹¹ Para 48. E. Derclaye, "L'arrêt *Softwarová*: une révolution en droit d'auteur ou une « erreur de jugement »? [2011] 43 *Revue du Droit des Technologies de l'Information* 57, at p. 60; T. Synodinou, "The Foundations of the Concept of Work in European Copyright Law" in T. Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives*, Kluwer, 2012, p. 101.

¹² *Ibcos Computers v. Barclays Mercantile Highland Finance* [1994] FSR 275.

¹³ Case C-277/10, *Martin Luksan v Petrus van der Let* [2012] nyr.

¹⁴ L. Bently, "Harmonization by Stealth: Copyright and the ECJ", Presentation at 20th Annual Intellectual Property Law & Policy Conference, Fordham University School of Law, April 2012, available at http://fordhamipconference.com/wp-content/uploads/2010/08/Bently_Harmonization.pdf. In the same vein, see J. Griffiths, "The Role of the Court of Justice in the Development of European Union Copyright Law", in I. Stamatoudi & P. Torremans, *EU Copyright Law, A Commentary*, Elgar, 2014, no. 20.28.

¹⁵ Case C-406/10, *SAS Institute v World Programming* [2012] nyr, paras 63-70 (further referred to as *SAS*). In this case, SAS Institute was suing World Programming for infringement of copyright in various parts of its computer program and manuals describing how the program worked. A. Ohly, "Economic Rights" in Estelle Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Elgar, 2009, p. 212, at 218; L. Bently, "The return of industrial copyright?" [2012] EIPR 654, at 668; Griffiths, above n 14, no 20.16, citing *SAS*.

¹⁶ Paras 56 and 57.

¹⁷ Para 162.

¹⁸ Case C-145/10, *Eva-Maria Painer v. Standard Verlags GmbH* [2011] E.C.D.R. 297, para 133 (further referred to as *Painer*).

¹⁹ This was controversial as the Court could have said instead that the principle is free competition, intellectual property rights including copyright are the exception and thus limitations and exceptions to copyright are a return to the principle and must be interpreted broadly. See Derclaye, above n 7, p. 250-251.

²⁰ *FAPL*, para 163; *Painer*, para 133.

²¹ See for instance the broad interpretation of the terms 'criticism', see *Pro Sieben Media AG v Carlton UK TV* [1999] FSR 610, at 620; *Fraser-Woodward Ltd v BBC* [2005] EWHC 472, 'current' in *Hyde Park Residence v Yelland* [2000] 3 WLR 215, and 'event' in *Pro Sieben*, *ibid*, at 625.

²² J. Griffiths, "Infopaq, BSA and the 'Europeanisation' of United Kingdom Copyright Law" [2011] *Media & Arts Law Review*, expressed this view but probably writing before the CJEU handed down *FAPL* and *Painer*.

²³ [2011] EWHC 2892.

Arnold J referred both to *Infopaq*'s and *FAPL*'s tests and interpreted the meaning of research in the exception of fair dealing for research purposes as encompassing only 'scientific research' and not just 'research' (the latter being the wording of section 29 CDPA) as article 5(3)(a) of the infosoc directive only applies to the former not the latter.²⁴ But it is far from clear that the *Forensic Telecommunications* decision means that UK courts may not interpret concepts liberally as they used to. It will depend if the current liberal interpretation respects the CJEU's triple test for exceptions (narrow, purposive and effective) and the three step test (art. 5(5) infosoc directive).

The above highlights just a few areas; a thorough analysis of all the CJEU decisions post-*Infopaq* to determine their implications for UK copyright law is warranted.

Commentators in the UK have sometimes tended to think that the CJEU used the civil law continental notions of authors' rights laws to interpret the provisions of directives.²⁵ This may lead to believe that the case law has no impact in those countries. However, a quick look at some of the literature reviewing the impact of the CJEU case law in some of these Member States shows that the CJEU decisions also impact civil law countries and sometimes in rather drastic ways too. The following are just a few examples.

In countries where the level of originality for works of applied art is higher than for other works, the application of the author's own intellectual creation to works of applied art is problematic because of the *Flos* ruling.²⁶ *Flos*'s paragraph 34 implies that unregistered designs (i.e. works of applied art which are not also registered as designs) are now subject to the same originality requirement like all other copyright works i.e. the author's own intellectual creation. But the decision also means that Member States keep their national originality requirements for those designs which are registered, as article 17 of the design directive leaves this to Member States, as confirmed by the Court. In the UK, the requirement for works of artistic craftsmanship (the category in which falls the vast majority of works of applied art) is higher than the author's own intellectual creation, namely the work must be artistic, which has been interpreted by UK courts as some level of artistic merit. The result of *Flos* is that works of artistic craftsmanship which are registered must meet a higher threshold of originality than those which remain unregistered. A similar problem exists in Germany²⁷, Austria²⁸ and Sweden²⁹. In addition, like in the UK³⁰, Swedish courts take into account the

²⁴ Paras 108-109. Article 5(3) of the directive reads "Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved".

²⁵ E.g. E. Rosati, *Originality in EU Copyright, Full Harmonization through Case Law*, Elgar, 2013, p. 156.

²⁶ Case C-168/09, *Flos SpA v Semeraro Casa e Famiglia SpA* [2011] E.C.D.R. 8.

²⁷ A. Lucas, H.-J. Lucas & A. Lucas-Schloetter, *Traité de la propriété littéraire et artistique*, 4th edn, Litec, 2012, para. 141 (further referred to as Lucas 2012a). In Germany, *Infopaq* has rekindled the debate as to whether originality still includes a modicum of creativity (*Gestaltungshöhe*); A. Lucas, 'La longue route vers l'harmonisation du droit d'auteur. Analyse critique', in M.-C. Janssens & G. Van Overwalle (eds), *Harmonisation of European Intellectual Property Law: From European rules to Belgian law and practice, Contributions in Honour of Frank Gotzen*, Bruylant/Larcier, 2012, p. 19 (further referred to as Lucas 2012b), citing Loewenheim, in Schricker and Loewenheim, *Urheberrecht Kommentar*, Beck 4th edn, 2010, §2, nos. 23-41. M. van Echoud, 'Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgments on Copyright Work' (2012) 3 JIPITEC 1, p. 69 and references therein.

²⁸ Van Echoud, above n 27, p. 69 and references therein.

²⁹ H. Bengtsson, "EU harmonisation of the copyright originality criterion", Delphi, 2012, available at <http://www.worldservicesgroup.com/publications.asp?action=article&artid=4597>

purpose of works of applied art.³¹ Thus, at least for works of applied art protectable by copyright but not registered as designs, the criterion of originality is lower than it used to be in those countries and it is open to question whether checking the purpose of a work of applied art is contrary to *Flos*.

Even in France where most areas are left unchanged by the CJEU case law³², some of the CJEU decisions have had a big impact. For instance, in *Painer*, the Court held that it is irrelevant if the citation is made within a work or another object unprotected by copyright.³³ Indeed, neither article 5(3)(d) nor 5(3)(e) of the infosoc directive requires a ‘citing work’.³⁴ The directive and its interpretation in *Painer* thus abolish the French rule that there must be a citing work.³⁵ *Painer* has also ousted the modulation that French courts made of the scope of protection in function of the level of originality of the work.³⁶ The same goes for Sweden where the courts also modulated originality in this way.³⁷

In conclusion, the CJEU case law is affecting both civil law and common law systems and often developing a truly ‘*communautaire* copyright’, in other words, new notions based neither on civil nor on common law concepts.

The literature’s criticisms

The literature’s criticisms in most part relate to the interpretation methods that the CJEU uses. In the relatively short time span since its *Infopaq* decision, the Court has used at least 10 interpretation methods to decide the copyright cases referred to it. It seems that the most popular method is the reference to the ‘autonomous and uniform notion of EU law’.³⁸ According to this principle, an EU meaning must be given to a term if the relevant legislation

³⁰ See *Lucasfilm v Ainsworth* [2008] EWHC 1878 (Ch), *aff’d by* [2009] EWCA Civ 1328 and [2011] UKSC 39 (the issue was whether the helmet and armour of the stormtroopers in Star Wars films were protected by copyright as sculptures or works of artistic craftsmanship).

³¹ Bengtsson, above n 29 and references cited therein.

³² It was already a principle of French law that titles and short works were protectable. See Lucas 2012a, above n 23, para 67. The concept of partial reproduction was already based on whether the part is original. *Ibid*, para 318. France applies the principle of strict interpretation of exceptions. *Ibid*, para 346. The CJEU case law on notion of originality will affect French law only weakly. *Ibid*, para 127.

³³ Para 136.

³⁴ Paras (d) and (e) read as follows “(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author’s name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose; (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings”.

³⁵ V.-L. Benabou, above n 3, p. 148.

³⁶ See paras 97-98. V.-L. Benabou, « L’originalité, Un Janus juridique, Regards sur la naissance d’une notion autonome de droit de l’Union », in *Mélanges en l’honneur d’André Lucas*, Éditions du Jurisclasseur Lexis Nexis, forthcoming 2014, citing C. Cass. Com. 19 janvier 2010, n° 08-15216 : « qu’en opérant une distinction (...) entre des éléments représentant une « totale originalité » et des éléments présumés moins originaux, cependant que le degré d’originalité est totalement indifférent en matière de droit d’auteur, la cour d’appel s’est déterminée par une motivation inopérante et a privé sa décision de toute base légale au regard des articles L. 112-1 et L. 112-2 du Code de la propriété intellectuelle ».

³⁷ Bengtsson, above n 29, and references cited therein.

³⁸ Lucas 2012b, above n 27, p. 25; Van Eechoud, above n 27, p. 72; S. Carre, « Le rôle de la Cour de Justice dans la construction du droit d’auteur de l’Union », in C. Geiger (ed.), *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe*, Lexis Nexis/Université de Strasbourg/CEIPI, 2013, p. 1, at 58.

is silent on it i.e. it does not refer to the Member States' laws.³⁹ The Court has used this method to extend its competence not only in the areas of subject-matter, originality and reproduction but also authorship and ownership, communication to the public, equitable compensation (for private copying) and equitable remuneration (for rental and lending).⁴⁰

The use of this method has led commentators to say that the Court's ruling in *Infopaq* (and by analogy the subsequent decisions referring to it) deciding that all works must display their author's own intellectual creation is *ultra vires*. Indeed, the infosoc directive does not define the term 'work' and does not refer to national laws. However, the preparatory materials to the directive are clear in this respect: the originality requirement is harmonised only for photographs, computer programs and databases.⁴¹ If the court had used the historical method, it would have found the competence in relation to the term work belonged to the Member States. On the other hand, the infosoc directive refers in no less than five recitals (recitals 2, 4, 9, 10 and 11) to creativity. And the Court uses almost all of them to support its finding that all works must be original in the sense of displaying their author's own intellectual creation (*Infopaq*, para 36).⁴² This wording was also apparent in recitals 11 and 12 of the term

³⁹ See e.g. Cases C-245/00, *Stichting ter Exploitatie van Naburige Rechten (SENA) v Nederlandse Omroep Stichting (NOS)* [2003] E.C.R. I-1251, para 23 (further referred to as *SENA*); C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v. Rafael Hoteles SA* [2006] E.C.R. I-11519, para 31 (further referred to as *SGAE*); *Infopaq*, para 27; C-271/10, *Vereniging van Educatieve en Wetenschappelijke Auteurs (VEWA) v Belgium* [2011] E.C.D.R. 446, para 25. Benabou, above n 3, p. 148-149, noting that this is not something special to copyright, it is a principle the Court uses generally in other areas too – see cases C-327/82, *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, para 11; C-287/98, *Luxembourg v Linster* [2000] ECR I-6917, para 43 and C-357/98, *The Queen v Yiadom* [2000] ECR I-09265, para 26.

⁴⁰ Lucas 2012b, above n 27, p. 25; Benabou, above n 3, p. 149 although she does not mention the concepts of reproduction and equitable remuneration.

⁴¹ European Commission, Green Paper on Copyright and Related Rights in the Information Society, COM (95) 382 final, Brussels, 19.07.1995, p. 27. Even if it postdates the three relevant directives, the Commission restated this fact again in 2004. If not the Member States, at least the Commission did not think that the criterion of originality was harmonised beyond photographs, computer programs and databases. See Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, Brussels 19.07.2004, SEC(2004) 995, available at http://ec.europa.eu/internal_market/copyright/docs/review/sec-2004-995_en.pdf at 3.1, p. 14.

⁴² “35. Similarly, under Articles 1(3) of Directive 91/250, 3(1) of Directive 96/9 and 6 of Directive 2006/116, works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation.

36. In establishing a harmonised legal framework for copyright, Directive 2001/29 is based on the same principle, *as evidenced by recitals 4, 9 to 11 and 20 in the preamble thereto.*” (emphasis added)

The relevant recitals of the infosoc directive read as follows:

(2) The European Council, meeting at Corfu on 24 and 25 June 1994, stressed the need to create a general and flexible legal framework at Community level in order to foster the development of the information society in Europe. This requires, inter alia, the existence of an internal market for new products and services. Important Community legislation to ensure such a regulatory framework is already in place or its adoption is well under way. Copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their *creative content*.

(4) A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in *creativity* and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation.

(9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to *intellectual creation*. Their protection helps to ensure the maintenance and development of *creativity* in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.

directive⁴³, although not in the software and database directive. This is not surprising as these latter two types of works are generally highly functional and thus generally less creative. It is therefore not entirely unexpected that the Court in its tradition of textual and contextual interpretation decided the way it did in *Infopaq*.

The other, long-standing, contenders in the Court's interpretation methods are indeed the textual, contextual and teleological interpretation methods.⁴⁴ Apart from these four interpretations methods, the Court has used the following six other methods: historical interpretation⁴⁵, referring to international law⁴⁶, useful effect⁴⁷, coherent reading to ensure unity and coherence of EU law⁴⁸, strict interpretation of exceptions combined with the requirement of legal certainty for authors and right holders, the proportionality principle⁴⁹, teleological interpretation and respecting the exceptions' effectiveness⁵⁰, and human rights.⁵¹

However, the Court has not used all these methods consistently. On the contrary, it has used them sometimes in a contradictory fashion⁵² and sometimes haphazardly to the point that one wonders if there are just a means to an end (harmonisation). This confusing use of methods

(10) If authors or performers are to continue their *creative and artistic work*, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

(11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European *cultural creativity* and production receive the necessary resources and of safeguarding the independence and dignity of *artistic creators* and performers. (emphases added).

⁴³ Articles 6 of 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 (codified version), Official Journal L 372/12 (hereinafter term directive). The recitals read as follows: (11) The level of protection of copyright and related rights should be high, since those rights are fundamental to *intellectual creation*. Their protection ensures the maintenance and development of *creativity* in the interest of authors, cultural industries, consumers and society as a whole.

(12) In order to establish a high level of protection which at the same time meets the requirements of the internal market and the need to establish a legal environment conducive to the harmonious development of *literary and artistic creation* in the Community, the term of protection for copyright should be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public, and for related rights at 50 years after the event which sets the term running. (emphases added)

⁴⁴ *SGAE*, para 34 where the Court itself says this method is 'settled case-law'. The Court uses this technique again in *Infopaq*, para 32 and *BSA*, para 29.

⁴⁵ *FAPL*, paras 163, 192, 201-202; Case C-283/10, *Circul Globus București v. Uniunea Compozitorilor și Muzicologilor din România--Asociația pentru Drepturi de Autor (UCMR--ADA)* [2011] ECR I-12031, para 34 ff (further referred to as *Circul Globus*); Case C-135/10, *Società Consortile Fonografici (SCF) v. Marco del Corso* [2012] Bus L.R. 1870, para 59 (further referred to as *SCF*).

⁴⁶ See *SGAE*, para 35 referring to previous case law; *Infopaq*, para 32; *BSA*, para 30; *FAPL*, paras 189, 191, 201.

⁴⁷ *Luksan*, para 67.

⁴⁸ *Infopaq*, para 36; Joined Cases C-431/09 and 432/09, *Airfield & Ors v. SABAM & Ors* [2012] E.C.D.R. 39, para 44.

⁴⁹ *Painer*, para 105.

⁵⁰ *FAPL*, para 162; *Painer* para 108. Another intriguing fact is that in the discussion of article 5(3) of the software directive (exception for testing and observing the computer program) in *SAS*, the Court does not cite any previous judgement on exceptions or in fact any judgement at all.

⁵¹ See e.g. Cases C-275/06, *Promusicae v. Telefónica* [2008] E.C.R. I-271, paras 63-68; *Bonnier Audio v. Perfect Communication Sweden* [2012] 2 C.M.L.R. 42, paras. 58-60; C-70/10, *Scarlet Extended v. SABAM* [2012] E.C.D.R. 54; C-360/10, *SABAM v. Netlog* [2012] nyr; *Luksan*, paras 68, 71.

⁵² On the 'telescoping' of the interpretation methods, see Benabou, above n 3, p. 150ff.

leaves the case law unclear.⁵³ The literature has identified no less than six inconsistency problems.

First, the CJEU has used the *travaux préparatoires* in some cases (*FAPL* and *Circul Globus*)⁵⁴ but not in others (*Infopaq*). Using the historical method in *Infopaq* would have made an enormous difference in relation to the concept of originality as the preparatory materials made clear that the Member States' intention was that the notion of originality was not harmonised for all works.

A second example of inconsistency is that the Court has become far more audacious than in the past when using the autonomous notion interpretation method⁵⁵ to the point that it could be said that it contradicts much of its previous case law. Indeed, in the pre-*Infopaq* era, it left a bigger room for manoeuvre to Member States as it interpreted the silence of the directives on certain terms to mean that the competence belonged to the Member States.⁵⁶ For instance, it is clear that the Court has changed its mind in respect of the concept of equitable remuneration. In *SENA*⁵⁷, the Court held that the criteria to determine an equitable remuneration were left to Member States and then in *Lagardère*⁵⁸ and *SGAE*, the Court gave details on which criteria should be used.⁵⁹

A third consistency problem is that even if the Court refers to its the textual, contextual and teleological interpretation 'mantra', in fact, it "seems to focus primarily on recitals to construct objectives and underlying principles, so it still engages in a textual interpretation more than anything else."⁶⁰ Fourth, as far as the coherent reading interpretation goes, it is fine when the Court makes links between directives when that makes sense but not when it does not.⁶¹ In addition, the coherent reading principle does not sit well with the special status the Court sometimes gives to the infocus directive compared to other directives, sometimes not.⁶² A fifth contentious issue is the Court's rewording of the questions without apparent reason, thereby drawing in matters on which the national court had sought no clarification.⁶³

Finally, the way the Court uses international conventions to achieve some of the results it arrives at in its judgments has attracted criticism as well. There is a fundamental problem

⁵³ For instance, Lucas 2012b, above p. 27 thinks that Case C-467/08, *Padawan v. Sociedad de Autores y Editores de España (SGAE)* [2011] E.C.D.R. 1 is not clear.

⁵⁴ The Court has used the historical method over the years, even if less frequently than other methods. See C. Gielen, "European Trade Mark Legislation: the Statements" [1996] EIPR 83, at 85-86 (noting already in 1996 a number of CJEU decisions which cited the *travaux préparatoires*, showing that the CJEU uses them to interpret secondary law). *Contra*: Benabou, above n 3, 147; Van Eechoud, above n 27, p. 73 citing C. Handig "The copyright term "work" - European harmonisation at an unknown level" [2009] IIC 665, at 671; C. Handig "The "sweat of the brow" is not enough! - more than a blueprint of the European copyright term "work"" [2013] EIPR 334, at 334-335 (further thinks that the historical method should not be used if the Member States' intentions in the preparatory materials were not incorporated in the directive's text).

⁵⁵ Carre, above n 38, p. 19; Benabou, above n 3; Lucas 2012b, above n 27.

⁵⁶ Lucas 2012b, above n 27, p. 25, quoting Case C-60/98, *Butterfly v. CEMED and FIMI* [2000] E.C.R. I-3939 and Case C-293/98, *Entidad de Gestión de Derechos de los Productores Audiovisuales (Egeda) v. Hosteleria Asturiana SA (Hoasa)* [2000] E.C.R. I-0629. See in the same vein, Griffiths, above n 14, no. 20.30.

⁵⁷ *SENA*, para 34.

⁵⁸ Case C-192/04, *Lagardère Active Broadcast v SPRE and GVL*, [2005] E.C.R. I-7199.

⁵⁹ Carre, above n 38, p. 22.

⁶⁰ Van Eechoud, above n 27, p. 73.

⁶¹ *Ibid.*

⁶² Compare *FAPL*, paras 187-188 with *SCF*, para 102 on the notion of communication to the public. See also Benabou, above n 3, p. 152.

⁶³ Van Eechoud, above n 27, p. 71, citing *Painer* and *BSA*; Benabou, above n 3, 146-147 citing *BSA* and *Luksan*; Bently, above n 14, citing *BSA*, para 43.

with this as most international instruments (e.g. the Berne Convention) are only concerned with the protection of foreign authors and works on the basis of national treatment.⁶⁴ The international instruments' minimum standards do not apply in internal situations. In other words, the EU is in no way bound to apply say the criterion of originality set by the Berne Convention in situations involving only EU citizens.

Commentators have also criticised the Court for relying on the Berne convention because it is controversial that the convention actually sets out that the criterion of originality is creativity.⁶⁵ However, Sam Ricketson has demonstrated in a very detailed and convincing analysis of the several versions of the Berne convention and of its *travaux préparatoires* that the convention indeed requires works to be original in the sense of 'intellectual creations'.⁶⁶ Even if the convention does not define this term, it sets both lower and upper limits. Thus, it is clear that sweat of the brow in the sense of pure labour, time or investment is excluded and so is artistic merit.⁶⁷ Therefore, the CJEU was not wrong to exclude pure labour on that basis, that is if the Berne convention is seen as an aspirational instrument, as it is clear that Members can grant more protection as the Berne convention itself allows.⁶⁸ But the CJEU did not only do so on the basis of the convention but on the basis of the infosoc directive which harmonises the requirement at that level anyway (as per the autonomous notion of EU law and textual interpretation methods explained above). So even if countries are perfectly free to grant more protection - and thus the UK and Ireland were free to keep their sweat of the brow criterion until the infosoc directive's adoption except for photographs, computer program and databases -, the latter directive has now gotten rid of it. The reasoning of the Court is entirely logical. It is clear from the *acquis* that Member States can still protect subcreative photographs but the term directive does not say it has to be done via copyright law. What the directive clearly says though is that the Berne convention's acceptance of originality is 'intellectual creation'.⁶⁹ Granted, the CJEU added to the convention by stating that personality is the criterion to determine if there is intellectual creation, something that the convention does not say. Nevertheless, the CJEU could say that the infosoc directive has harmonised the requirement of originality for all works⁷⁰ and the Court's reasoning on the Berne convention's aspirational value is not flawed nor do its rulings conflict with the principle of the respect of acquired rights⁷¹ and legitimate expectations or unjustly appropriate right holders.⁷²

⁶⁴ Van Eechoud, above n 27, p. 74 and references therein.

⁶⁵ I. Alexander, "The concept of reproduction and the 'temporary and transient' exception" [2009] 68(3) Cambridge Law Journal 520, at 522. The Court relied on it in *Infopaq* to arrive at the conclusion that all works must be intellectual creations of their author.

⁶⁶ S. Ricketson, "Threshold requirements for copyright protection under the international conventions" [2009] WIPO Journal, p. 51, at 54-58. See also A. Strowel, *Droit d'auteur et copyright*, Bruylant, 1993, p. 399 (adding that according to the WIPO guide to the Berne convention (Act of 1971), 1978, p. 18, statutes which subordinate protection of works to the criterion of originality in the sense that they must constitute 'creations' respect the spirit of the convention).

⁶⁷ Ricketson, above n 66, p. 59.

⁶⁸ *Ibid.*, p. 61. See also Alexander, above n 65, p. 522.

⁶⁹ Recital 16 of the term directive reads '(16) The protection of photographs in the Member States is the subject of varying regimes. A photographic work *within the meaning of the Berne Convention* is to be considered original if it is the author's own intellectual creation reflecting his personality, no other criteria such as merit or purpose being taken into account. *The protection of other photographs should be left to national law.*' (Emphases added).

⁷⁰ With the exception of works of applied art also registered as designs. On this, see the discussion of *Flos* above.

⁷¹ See e.g. recital 25 of the term directive.

⁷² *Contra*: Alexander, above n 65, p. 522.

Are the criticisms justified and can we predict the Court's future case law?

The above analysis reveals two things: the CJEU is interventionist⁷³, and more particularly integrationist⁷⁴, and its case law is also often inconsistent.⁷⁵ This inconsistency inevitably leads to unpredictability and legal uncertainty. In this respect, the criticisms are justified. But the CJEU's activism and inconsistency are in no way out of line and in that respect, the criticisms are unjustified.

As to inconsistency: at the end of the day, the Court probably simply tries to achieve a reasonable and just result in the concrete case and balance the economic interests of the parties.⁷⁶ In short, it is “just attempting to give the best answer” and to be a “good judge”.⁷⁷ This attempt to give a just result in each case means that some inconsistency here and there in its use of the interpretation methods may be inevitable. The reproach that the case law lacks direction or a clear aim⁷⁸ is not totally justified as by definition the Court is not the legislator and is limited to answering national courts questions on discrete aspects of copyright. This is by nature the problem with any judge-made law. So it is clear that the CJEU does not have a harmonisation ‘agenda’, but only a harmonisation bias, i.e. a tendency to expand its role and to deepen harmonisation.⁷⁹ Also, compared to the often centuries-long copyright legislation and case law in the Member States, EU copyright law is relatively under-developed and so is the Court's case law on these issues; therefore, hick-ups are to be expected. Furthermore, the Court's interpretation methods also do not differ that much from those of the supreme courts of advanced legal systems and are no less clear.⁸⁰ As to the harmonisation bias, mainly via the use of the autonomous notions of EU law, the literature's reproach is in major part unjustified. A lot of secondary legislation is conceptually vague because it embodies political compromises and thus legislation inevitably bears a lot of legal uncertainty.⁸¹ This means that

⁷³ Benabou, above n 3; van Eechoud, above n 27, p. 74 and 76.

⁷⁴ G. Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, 2012, p. 8.

⁷⁵ Benabou, above n 3, p. 151 (the decision in *Painer* could have been different if the Court had only used the principle of strict interpretation of exceptions that it used in *Infopaq*). Beck, above n 74, p. 7 also concludes from an analysis of all areas of CJEU case law that there are no rules governing the criteria the CJEU uses for interpreting the case law.

⁷⁶ T. Riis, “Ophavsrettens fleksibilitet” (“The flexibility of copyright”) [2013] Nordiskt Immateriellt Rättsskydd, p. 139, discussing some recent controversial judgments namely *SCF, FAPL, Usedsoft v Oracle International* [2012] nyr; case C-5/11, *Re: Donner* [2012] E.C.D.R. 349 and case C-162/10, *Phonographic Performance (Ireland) v Ireland* [2012] 2 C.M.L.R. 29.

⁷⁷ Bently, above n 14.

⁷⁸ Benabou, above n 3, p. 152.

⁷⁹ Bently, above n 14, citing K. Alter, “Who Are the Masters of the Treaty?” [1998] 52(1) International Organization, p. 121-147.

⁸⁰ Beck, above n 74, p. 7 (such courts also use the textual cum purposive cum contextual interpretation method and the rule of precedent). In fact, the integrationist tendency and the attention to political sensitivity of the CJEU means that the degree of certainty of the CJEU's case law may exceed the predictability of the case law of many national supreme courts. *Ibid.*, p. 442. Beck's analysis of the CJEU rulings in all areas of EU law shows that the Court uses the rule of precedent and the purposive interpretation more than other methods (except when the matter is politically sensitive where it uses the textual interpretation method rather than the purposive one). See p. 7, 8, 434-440. At p. 12, he adds a caveat that all his study does is give the Court's general interpretative tendency and he stresses the high level of discretion the Court has in how it applies which interpretation methods.

⁸¹ *Ibid.*, p. 6-7.

the Member States have by definition delegated a lot of power to the CJEU, leaving it both ‘forced and [...] free to develop its own judicial vision of European integration’.⁸²

The inconsistency of the Court’s case law makes it hard to speculate on its future direction. Nevertheless, if the Court keeps going the way it has, we can assume an increasing use of autonomous notions of EU law as the case law develops. While the meaning the Court will ascribe to these notions is less predictable, we can at least try to identify these possible notions in the copyright *acquis*. Many provisions of the copyright *acquis* are riddled with potential autonomous notions, not the least the *infosoc* directive. The question posed - Is the concept of ‘parody’ an independent concept in European Union law? - by the Belgian court in case C-201/13 proves it well.⁸³ Another example is the concept of ‘fair practice’ that article 5(3)(d) of the *infosoc* directive uses without referring to Member States laws. In addition, at least so far, the Court’s autonomous notions are not biased towards civil law notions but are, rather, *communautaire* notions.

It is also unlikely that the CJEU is setting a very high protection level of copyright. It is surely not the case with its setting of the originality threshold quite high at least for countries which, like the UK, had a low standard. Even if the Court is often quoting recital 9 of the *infosoc* directive to support a ‘high level of protection’⁸⁴, which leads it to construe rights broadly and exceptions narrowly, it does not follow necessarily that it will interpret the exceptions strictly in each case or for that matter interpret all provisions of the *acquis* to give the highest level of protection to right holders. On the contrary, the Court has clearly stated in *FAPL* that right holders can only aspire to an appropriate remuneration and not the highest possible one.⁸⁵ As the Court has already stated several times now, the strict interpretation must be complemented with the requirement of legal certainty for authors and right holders, the proportionality principle, teleological interpretation and the respect of the exceptions’ effectiveness and of human rights. However, in its most recent case, *ACI Adam B.V. et al v Stichting de ThuisKopie et al*, the Court has only referred to the strict interpretation of exceptions and not to its other interpretation methods relating to exceptions; this shows yet again the inconsistency of its rulings.⁸⁶ To the Court’s defence, its ruling in *ACI Adam* nonetheless shows a will to balance the interests of right holders and users.

Therefore, it would be good if the CJEU clarified how it plans to use its interpretation methods in future. For instance, it makes sense that the Court does not use the historical method when the preparatory materials are silent or unclear.⁸⁷ But it should say if it is not going to use the historical interpretation method at all, or if it will use it in all cases, including to construe notions which have been left without definitions and without reference to national laws but for which the preparatory materials are clear. It cannot be stressed enough that such clarification is especially important because it is the Court rather than the legislature nowadays which harmonises copyright law, in view of the already high and always increasing

⁸² Ibid, p. 7. However, this *communautaire* trend is “neither inflexible nor unlimited”. The Court can choose between more or less integrationist outcomes and its power is limited by the questions it receives. Its discretion increases with the vagueness of the term it interprets. Ibid, p. 8.

⁸³ *Deckmyn and Vrijheidsfonds*, pending.

⁸⁴ See n 42 above.

⁸⁵ *FAPL*, paras 108-116. See also Case C-128/11, *Usedsoft*, above n 76, nyr, para 68.

⁸⁶ Case C-435/12, [2014] nyr. In that case, the Dutch Supreme Court asked among others whether the application of the three-step test referred to in article 5(5) of the *infosoc* directive can form the basis for the expansion of the scope of the exception of article 5(2) or whether its application can only lead to the reduction of the scope of the limitation.

⁸⁷ Van Eechoud, above n 27, p. 74 citing Case 15-60, *Simon* [1961] ECR 225.

number of preliminary references in the field of copyright.⁸⁸ In view of the previous case law, our hope is a little bleak in this respect⁸⁹ but as the case law further matures, it may finally iron out the inconsistencies. In the meantime, analyzing the Court's intellectual property case law, also in conjunction to studies already made of the Court's case law in general⁹⁰, may help determine the direction of future decisions.⁹¹

⁸⁸ Van Eechoud, above n 27, p. 76.

⁸⁹ First, the Court seldom overrules itself and second, it is hard to see how the Court could announce once and for all how it will use its interpretation methods in a judgment, especially it is far less outspoken than common law courts for instance. If anything, the clarification of the use of the interpretation methods will probably be more a gradual implicit process. Its most recent case, *ACI Adam*, proves even more that the prospect of the Court clarifying its interpretation methods is bleak. Our modest hope is that the literature criticising the case law's inconsistencies may have an impact on the Court.

⁹⁰ E.g. Beck, above n 74.

⁹¹ Such work has already started. For instance, the project of P. Torremans, M. Kretschmer and M. Favale "Is there an EU copyright jurisprudence? An empirical analysis of the copyright case law", aims to predict the direction of the CJEU case law in the field of copyright. The authors are examining, among others, how the background of the advocates general and judges (mainly EU and international lawyers) influence the CJEU copyright case law.