

Chapter 17

The Wittem Group's European Copyright Code

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17.1. INTRODUCTION

From 2002 to 2010, a group of European scholars united in the 'Wittem Group' collaborated on drafting model provisions of a *European Copyright Code*.¹ The members of the Wittem Group share a concern that the process of copyright law-making at the European level lacks transparency and that the voice of academia too often remains unheard. The Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Published in April 2010, the Code provides model provisions on the core elements of any copyright law: subject matter of copyright, authorship and ownership, moral rights, economic rights and limitations.

This chapter first describes the background, *raison d'être* and method of the Wittem Project (section 17.2), thereafter examines the main provisions of the ECC (section 17.3), and concludes with a general reflection on the prospects of unification of European Copyright Law (section 17.4).

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1. Wittem Group, *European Copyright Code* (2010) <www.copyrightcode.eu>.

17.2. THE WITTEM PROJECT

The ECC is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the EU concerned with the future development of European copyright law. The project has its roots in an academic networking project ‘*Sophistication v. Transparency*’ that was sponsored by the Dutch government-funded *ITeR* (Information Technology and Law) programme and jointly run by three Dutch universities: Radboud University of Nijmegen (Professor Antoon Quaadvlieg), University of Amsterdam (Professor P. Bernt Hugenholtz) and Leiden University (Professor Dirk Visser).

The original aim of the *ITeR* project was to enhance transparency and consistency in the law of intellectual property in Europe. In a similar vein, the aim of the Wittem Project was to promote transparency and consistency in European copyright law. During a 2003 project team meeting at Chateau Wittem near Maastricht, it was decided to concentrate the project’s efforts on formulating basic principles of European copyright law in the form of a Code. To this end, the project leaders invited leading copyright scholars from across Europe to participate in this ambitious venture. Note that this was always an entirely academic project; ‘stakeholders’ were excluded from the Group and from its meetings.

The Code was eventually created by a Drafting Committee composed of seven members: Professor Lionel Bently (CIPIL, Cambridge University), Professor Thomas Dreier (Karlsruhe Institute of Technology), Professor Reto Hilty (Max Planck Institute for Intellectual Property Law), Professor P. Bernt Hugenholtz (IViR, University of Amsterdam), Professor Antoon Quaadvlieg (Radboud University of Nijmegen), Professor Alain Strowel (Facultés universitaires Saint-Louis, Brussels and University of Liège) and Professor Dirk Visser (Leiden University). In addition, an Advisory Board was formed that would serve as a discussion platform for the Drafting Committee.² It is important to note that the Wittem Group (both the Drafting Committee and the Advisory Board) included scholars from both the continental-European author’s right tradition and the British copyright tradition.

2. The Advisory Board was composed of Prof. Robert Clark (University College Dublin), Prof. Frank Gotzen (University of Leuven), Prof. Ejan Mackaay (University of Montreal), Prof. Marco Ricolfi (University of Turin), Prof. Jon Bing (University of Oslo), Prof. Elzbieta Truple (Jagiellonian University, Krakow), and Prof. Michel Vivant (formerly University of Montpellier, currently Sciences Po, Paris). Sophie van Loon and Liza Gerritsen (Radboud University of Nijmegen) acted as secretary of the Wittem Group.

The Wittem Group's European Copyright Code

Each chapter of the Code was originally drafted by one or two members of the Drafting Committee acting as rapporteurs.³ Draft chapters accompanied by short explanatory reports⁴ were discussed in plenary sessions with the members of the Advisory Board and other academic experts that were invited to these sessions on ad hoc basis. The proceedings of the plenary sessions were fed into the second versions of each chapter, and thereafter redacted and integrated into a final consolidated version by the Drafting Committee.

Although the Wittem Code is sometimes taken for an all-inclusive model law on European copyright, it was never the aim of the Wittem Group to draft a comprehensive code.⁵ The Group's single aim – ambitious nonetheless – was to sketch the contours of a possible future European copyright law by codifying its main provisions in the form of a model law. Although conceived as a model of a future European copyright law, the Code may also serve as a source of inspiration for legislatures operating at the national level.

With its academic background and its goal to establish unified European legal standards, the Wittem Project is somewhat comparable to the Lando Group (the Commission on European Contract Law),⁶ but quite different in its methodology and end-product. While the Lando Commission concentrated on the formation of common legal principles (of contract law), the Wittem Group produced fairly detailed substantive provisions. The Wittem Code is, however, not devoid of principles. According to the preamble that precedes the Code, the Wittem Group believes as follows:

- that copyright law in the EU should reflect the core principles and values of European law, including freedom of expression and information as well as freedom of competition; [...]
- that copyright protection in the European Union finds its justification and its limits in the need to protect the moral and economic interests of creators, while serving the public interest by promoting the production and dissemination of works in the field of literature, art and science by granting to creators limited exclusive rights for limited times in their works;

3. The rapporteurs for each chapter were: Prof. Quaedvlieg (Ch. 1: Works), Prof. Hugenholtz (Ch. 2: Authorship and ownership), Prof. Strowel (Ch. 3: Moral rights), Prof. Visser (Ch. 4: Economic rights) and Prof. Dreier and Prof. Hilty (Ch. 5: Limitations).

4. Drafts, accompanying documents and minutes are on file with the Members of the Wittem Drafting Committee.

5. This seems to have been overlooked by Prof. Jane Ginsburg in her highly detailed criticism of the Code; J. Ginsburg, 'European Copyright Code – Back to First Principles (with Some Additional Detail)', 58 *Journal of the Copyright Society of the USA* No. 3 (2011); (2011) *Auteurs & Media*.

6. Ole Lando & Hugh Beale (eds.), 'Principles of European Contract Law, Parts I and II', prepared by the Commission on European Contract Law (2000).

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- that copyright legislation should achieve an optimal balance between protecting the interests of authors and right holders in their works and securing the freedom to access, build upon and use these works;
- that rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility;[...]

From this preamble, it can be inferred that the Wittem Group espouses a combined natural rights and utilitarian rationale for copyright. This is in line with the Group's intent to produce a European Code that embraces both the (civil-law-based) author's right and (common-law-based) copyright traditions that underlie the law of copyright in the Member States of the EU. Indeed, the provisions of the Code reflect legal concepts found in laws on both sides of the Channel.

The Code is not a utopian 'dream copyright law', nor is it a recodification of EU copyright law *tabula rasa*. Since European copyright law must operate within the confines of the international commitments of the EU and its Member States, the Code takes account of the substantive norms of the main international treaties, such as the Berne Convention and the TRIPs Agreement. Also, the members of the Group have found it hard to ignore the EU *acquis communautaire* in the form of seven Directives that the European legislature has produced in this field since 1991. However, the Code does on occasion deviate from the *acquis* and therefore cannot be considered a mere restatement or consolidation of the norms of the directives.

17.3. THE ECC IN SOME DETAIL

While drafted in the form of a legislative instrument and thereby exceeding the level of detail normally associated with common principles of law, the Wittem Code is not comprehensive. It concentrates on the core elements of any law on copyright: 'works' (Chapter 1), authorship and ownership (Chapter 2), moral rights (Chapter 3), economic rights (Chapter 4) and limitations (Chapter 5). The Code does not, for instance, provide rules on public lending right and *droit de suite*, nor does it deal with the legal protection of technical measures. The Code also lacks rules on copyright liability and enforcement, and does not touch upon the neighbouring (related) rights of performing artists, phonogram producers, broadcasters and database producers. As a result the Code is very concise, comprising a mere 28 articles. In addition, the Code comes with an Introduction and a preamble, and 58 clarifying footnotes. Unlike EU legislative materials, however, the Code lacks an explanatory memorandum. In line with the Wittem Group's 'rules first' approach, the provisions of the Code are mostly meant to speak for themselves.

This section will highlight and illuminate the most noteworthy provisions of each chapter of the Code.

17.3.1. WORKS

Article 1.1(1) defines the subject matter protected by the Code – ‘works’ – as ‘any expression within the field of literature, art or science insofar as it constitutes its author’s own intellectual creation’. This definition combines several well-known elements. The term ‘the author’s own intellectual creation’ is evidently derived from the *acquis*, being the harmonized protection standard for computer programs, databases and photographs respectively.⁷ Anticipating the *BSA* decision of the ECJ, the Code has made this into a general originality standard that applies to all categories of works.⁸ Nevertheless, like the Berne Convention and the *acquis*, the Wittem Code refrains from expressly requiring originality – a quality implicit in the words ‘the author’s own intellectual creation’.

The term ‘literary, artistic or scientific expressions’, while clearly inspired by Article 2(1) of the Berne Convention, is more akin to the notion of ‘works of literature, science and art’ found in the Dutch Copyright Act of 1912. According to footnote 4 the term ‘circumscribes the domain of copyright, and serves as ‘Oberbegriff’ – i.e., as outer delineation of the domain of copyright. Article 1.1(2) provides examples of productions within the field of literature, art or science: written or spoken words; musical compositions; plays and choreographies; paintings, graphics, photographs and sculptures; films; industrial and architectural designs; computer programs; collections, compilations and databases. As these examples illustrate, whereas the focus of the Code is on protecting artistic works, the Code also embraces functional and informational subject matter, such as computer programs and databases – in line with the TRIPs Agreement and the WCT.⁹ Nevertheless, there is meaning in the Code’s express mention of an ‘Oberbegriff’. According to Article 1.1(3), facts, discoveries, news and data; ideas and theories; procedures, methods of operation and mathematical concepts ‘are not, in themselves, to be regarded as expressions within the field of literature, art or science within the meaning of this article’. By the same token, purely technical productions would squarely fall outside the ‘field of literature, art or science’.

Nevertheless, the Code’s broad conception of ‘works’ allows for a wide variety of intellectual productions to benefit from copyright protection, even (as is evident from footnote 7) factual and functional works. Here, according

7. Article 1(3) Computer Programs Directive; Art. 3(1) Database Directive; Art. 6 Term Directive.

8. CJEU *BSA v. Ministerstvo kultury*, 22 Dec. 2010, Case C-393/09; see also CJEU *Infopaq International A/S v. Danske Dagblades Forening*, 16 July 2009, Case C-5/08.

9. Article 10(1) and (2) TRIPs Agreement; Art. 4 and Art. 5 WCT.

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to the drafters, ‘the focus will be more on a certain level of skill (judgment) and labour, whereas for productions in the artistic field the focus will be more on personal expression.’ As is apparent, the Code does not rule out works based (largely) on expended skill and labour. In this respect, the Wittem Code appears to be less rigorous than the originality standard recently established by the ECJ. In *Football Dataco Ltd a.o. v. Yahoo! UK Ltd a.o.* the Court held that the ‘author’s own intellectual creation’ standard rules out copyright protection merely based on expended skill and labour.¹⁰

It is important to note that Article 1.2 of the Code also expressly excludes certain subject matter that might qualify as works within the field of literature, art or science, but which for various reasons do not merit copyright protection. Besides the official texts that national copyright laws commonly exclude, the Code also rules out copyright protection for ‘[o]fficial documents published by the public authorities’. While permitted by Article 2.4 of the Berne Convention, this outright exclusion of government works goes further than average rules on government’s works in the Members States of the EU.¹¹

17.3.2. AUTHORSHIP AND OWNERSHIP

Chapter 2 of the Code deals with authorship and ownership. The question of authorship is often confounded with the issue of initial ownership. Conceptually, however, these issues must be distinguished. Although authorship usually implies initial ownership, the determination of the author of a work has even more immediate consequences for the allocation of moral rights.

Like other parts of the Code, the focus of this chapter is on core legal issues. It does not deal, for example, with collaborative or joint authorship nor does it comprise a rule of evidence of authorship.¹² Although the Code does deal with assignment and certain limits thereto, it steers clear from matters of copyright contract law proper, including film contracts, since such issues are (too) closely related to matters of general contract law.

In contrast to its other chapters, the Code’s provisions in this chapter could hardly be based on established international or European standards. Rules on authorship and ownership remain largely unharmonized at the international and European levels. This is not surprising in light of the divergent approaches towards authorship and ownership found in *droit*

10. CJEU *Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others*, Mar. 1, 2012, Case C-604/10.

11. Copyright rules on government works have not been harmonized in the EU. Rules range from offering near-complete copyright protection (e.g. Crown Copyright in the UK), to more relaxed standards (e.g. Germany). Under s. 105 of the US Copyright Act copyright is not available for works created by the federal US government.

12. See Art. 5 EU Enforcement Directive.

d'auteur and common law traditions, respectively. The drafters have therefore looked for and found inspiration in solutions developed in national law.

By distinguishing between rules on authorship and rules on ownership the Code departs from the monistic approach that is followed in some Member States, such as Germany, Austria and Slovenia. In the monistic system, moral rights and economic (patrimonial) rights are intertwined. The latter remain with the author as much as the former, and therefore cannot be assigned. In the dualistic system that is dominant in the EU and elsewhere in the world, moral rights and economic rights exist independently. Whereas moral rights cannot be transferred, economic rights may usually be assigned, either in whole or in part.

Articles 2.1., 2.2 and 2.3 of the Code are uncontroversial. Article 2.1 of the Code designates as author of a work 'the natural person or group of natural persons who created it'.¹³ Article 2.2 attributes the moral rights treated in Chapter 3 to the author, and makes these unassignable. Article 2.3 codifies the 'creator doctrine'¹⁴ (*Schöpferprinzip*) by attributing initial ownership of the economic rights treated in Chapter 4 to the author, and makes these assignable, licensable and inheritable. According to Article 2.3(3) any assignment must be made in writing; this is in line with rules existing in many Member States. Note that this does not concern licenses, which therefore may be orally or tacitly granted.

Article 2.4 limits the scope of an assignment or exclusive license, in order to protect authors against overbroad transfers.¹⁵ It does so by giving a primary rule and a subsidiary (default) rule. The primary rule requires specification in the granting contract of the core features of such a contract: remuneration, geographical scope, modes of exploitation and duration of the grant. Failure to comply with this rule of specificity will not, however, nullify the grant, but will bring the default rule into operation. Under the default rule, any grant of copyright is to be interpreted in accordance with the grant's underlying purpose. Article 2.4 is essentially a composite of a French-style rule of specification¹⁶ that promotes legal certainty while protecting authors against overbroad transfers, and a German/Dutch purpose-of-grant rule,¹⁷ which similarly favours authors but allows taking into account the parties' intentions insofar as these are not clearly reflected in the instrument of assignment. The rule of specification requires parties to an assignment to precisely describe the intended uses that are envisaged by the assignment, and corresponding remuneration(s). 'All rights grants' or 'buy-outs' drafted

13. The provision is inspired by a Art. 7 of the German Copyright Act that reads as follows: 'The person who creates the work shall be deemed the author.'

14. See J. Seignette, *Challenges to the Creator Doctrine* (Kluwer Law and Taxation Publishers, 1994).

15. Note that Art. 2.4 sets limits to transfers executed by the author of a work. A transfer by a successor-in-title to the author may therefore be done without restriction.

16. See Art. L 131-3 CPI (France).

17. See Art. 31(5) of the German Copyright Act; Art. 2(2) of the Dutch Copyright Act.

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in general terms do not comply with this requirement and will therefore be interpreted following the purpose-of-grant rule.

Articles 2.5 and 2.6 provide special ownership rules for works created under employment and on commission. In many countries, ownership of the economic rights, either by way of a presumption of transfer or by directly attributing initial ownership, is granted to the employer instead of the employee-creator, following the principle that the fruits of labour performed pursuant to a contract of employment belong to the employer. Under these circumstances, the author receives compensation for his or her intellectual creation not in the form of an exclusive economic right in the work but by way of a salary or other agreed remuneration. This departure from the creator doctrine clearly collides with the principle of authors' rights that underlies the laws of the European continent. Continental legislators are therefore reluctant to directly allocate initial ownership to the employer.¹⁸ Rules vesting copyright ownership directly in employers are more straightforward in common law jurisdictions¹⁹ and in the Netherlands.²⁰

At the EU level, harmonized rules on ownership exist only in respect of computer programs.²¹ According to Article 2.3 of the Computer Programs Directive, the employer is considered the first owner of all economic rights on a work created by an employee in the execution of his or her duties or following the instructions given by the employer, unless otherwise provided by contract.

Article 2.5 of the Code finds middle ground by providing that '[u]nless otherwise agreed, the economic rights in a work created by the author in the execution of his duties or following instructions given by his employer are deemed to be assigned to the employer.' In practice, the scope of the assignment will therefore largely depend on the contract of employment between the author and the employer or on collective labour agreements.

The copyright acts of most Member States are largely silent on the issue of ownership of works created on commission. Even in the common law countries of the EU, a concept similar to the 'work for hire' rule of the US does not exist in respect of commissioned works. The European *acquis* is similarly reticent on the issue. Whereas the original proposal of the Computer Programs Directive attributed the economic rights in respect of

18. In France, for instance, the principle that employee-authors are the first owners of copyright is expressly enshrined in Art. L 111-1 CPI. Nonetheless, the Cour de Cassation has read into the employment contract an implicit transfer in favour of the employer of the rights in the works that the employee creates in the course of his or her employment, to the extent necessary to conduct the employer's business.

19. See e.g. Art. 11(2) CDPA (UK); and Art. 23 (1)(a) Copyright and Related Rights Act 2000 (Ireland).

20. Article 7 Dutch Copyright Act.

21. A rule similar to Art. 2(3) of the Computer Programs Directive was proposed in the first draft of the Database Directive, but was withdrawn from its final version.

computer programs to both employers and commissioners, the final version merely provides for special rules for programs made under employment.

In several Member States, courts have accepted the argument that the commissioner should be able to use a commissioned work within the limits of the object and purpose of the contract of commission. Article 2.6 codifies this doctrine: 'Unless otherwise agreed, the use of a work by the commissioner of that work is authorized to the extent necessary to achieve the purposes for which the commission was evidently made.' As is clear, such purposes must have been known or obvious to the author, for example, from the terms of the contract.

17.3.3. MORAL RIGHTS

Chapter 3 deals with moral rights. As with matters of authorship and ownership, the Wittem Group did not have much *acquis* in this field to build on. In line with average levels of moral rights protection across Europe, the Code provides for rights of divulgation (first publication), attribution (paternity) and integrity. None of these are controversial; the right of integrity mentioned in Article 3.4(1) is literally reproduced from Article 6*bis*(1) of the Berne Convention.

It is interesting to note that the Code does not provide for uniform terms of moral rights protection. Footnote 22 reads as follows:

[i]t was generally felt by the members of the group that not all moral rights merit the same term of protection, and that the right of divulgation might expire following the death of the author, whereas other moral rights could remain protected for a certain period post mortem.

In such cases, the moral rights are to be exercised by the author's legal successor(s).²² Moreover, Article 3.6(2) limits the scope of the rights of attribution and integrity that do survive the author. Such rights 'shall only be exercised in a manner that takes into account the interests in protecting the person of the deceased author, as well as the legitimate interests of third parties'.

An especially noteworthy feature of the Code's chapter on moral rights is its elegantly phrased, concise provision on consent in Article 3.5: 'The author can consent not to exercise his moral rights. Such consent must be limited in scope, unequivocal and informed.' According to the accompanying footnotes, consent must be 'certain', but does not require a written instrument.²³ Consent must relate to a particular use of a work; general waivers are not possible.²⁴ Consent is only informed where full information is disclosed

22. Articles 3.3(2) and 3.4(2).

23. Footnote 28.

24. Footnote 30.

to the author as to the way in which the work will be used.²⁵ The requirement of informed consent is particularly relevant in the context of standard-form contracts.

Another remarkable provision is Article 3.6(1) that limits the exercise of moral rights in cases where the interests of third parties would be disproportionately harmed. While abuse of a right is always unlawful as a matter of course, specific mention of this principle was found necessary because the moral rights set out in the Code are not offset by specific limitations and exceptions, as are the economic rights.²⁶ Article 5.6 (in the chapter on Limitations) further regulates the interface between limitations to the economic rights and moral rights.

17.3.4. ECONOMIC RIGHTS

Chapter 4 enumerates and defines the rightholder's economic rights. In line with international and European standards, these are the rights of reproduction, distribution, rental, communication to the public and adaptation of the work (Article 4.1). Subsequent provisions define each of these rights, largely in line with the *acquis* of the Rental Right Directive and Information Society Directive.²⁷

It is interesting that the Code's definition of the reproduction right in Article 4.2 incorporates the Information Society Directive's mandatory exception on transient copying (Article 5(1)). As is evident, the Wittem Group opines that temporary copies without independent economic significance are to be carved out from the reproduction right as a matter of principle,²⁸ and not subjected to an ad hoc exception. This is in line with the normative approach of the reproduction right that has long been advocated by European copyright scholars.²⁹

Article 4.5(2) adds to the *acquis* by defining the 'public' element of the communication right. A communication of a work is public 'if it is intended for a plurality of persons, unless such persons are connected by personal relationship'.

The right of adaptation – as yet unharmonized – is broadly defined in Article 4.6 as 'the right to adapt, translate, arrange or otherwise alter the work.'

25. Footnote 32.

26. Footnote 36.

27. Article 291(a) of the Rental Right Directive defines the exclusive right of rental; Articles 2, 3 and 4 of the Information Society Directive deal with the rights of reproduction, communication to the public and distribution respectively.

28. Article 13a of the Dutch Copyright Act similarly carves out temporary copies from the reproduction right.

29. See e.g. P. B. Hugenholtz, 'Adapting copyright to the information superhighway', in P.B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment* (The Hague, Kluwer Law International, 1996), 81-102.

Like the preceding chapter on moral rights, this chapter reveals a concern among the members of the Wittem Group that current copyright terms of protection in the EU (normally, life plus 70 years) are excessive. The Group could not, however, agree on what would be the appropriate term.³⁰

17.3.5. LIMITATIONS

Chapter 5 on 'Limitations'³¹ to the economic rights is easily the largest of the five parts that make up the Code. It is also the most ambitious and likely to attract more criticism than other chapters. While most of the limitations enumerated in Articles 5.1 through 5.3 are in line with the *acquis* of the Information Society Directive (Article 5.2-5.4), what makes this chapter stand out are its conceptual structure and its normative flexibility. Chapter 5 enumerates limitations to copyright under four distinct 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; and (4) uses for the purpose of enhancing competition. Enumerated limitations are defined either as outright exemptions (i.e., free uses), such as the right of quotation of Article 5.2(1)(d), or as remunerated exceptions, such as private copying (Article 5.3(2)(a)). According to Article 5.7(1) remuneration 'shall be fair and adequate'; Article 5.7(2) mandates collective management of certain remuneration rights.

This categorization illustrates that copyright limitations serve a variety of purposes, and allows courts to interpret each limitation in the light of its stated goal.³² Additionally, the categories have a normative effect, since Article 5.5 extends the scope of the itemized limitations by permitting other uses that are 'comparable to' the uses mentioned in Articles 5.1 through 5.4, subject to the operation of the three-step test.³³ This half-open structure of copyright limitations is perhaps the most innovative aspect of the entire Wittem Code. It combines the advantage of legal security and predictability associated with the 'closed list' approach of limitations and exceptions under

30. Footnote 40.

31. Note that the Code avoids the term 'exceptions', presumably because the Wittem Group does not perceive limitations to copyright as exceptional, but as essential features of a system of balanced copyright.

32. See for comparable efforts at categorization of limitations: P. B. Hugenholtz, 'Fierce Creatures. Copyright Exemptions: Towards Extinction?', IFLA/IMPRIMATUR Conference, *Rights, Limitations and Exceptions: Striking a Proper Balance* (Amsterdam, 30-31 Oct. 1997), available at <<http://www.ivir.nl/publications/hugenholtz/PBH-FierceCreatures.doc>>; P. Samuelson, 'Unbundling Fair Uses', 77 *Fordham L. Rev.* 2537 (2008-2009). See also P. B. Hugenholtz & R. L. Okediji, 'Conceiving an International Instrument on Limitations and Exceptions to Copyright', Study supported by OSI (2008), <http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf>.

33. See footnote 48.

the author's right tradition with the flexibility and adaptability to technological change of the American *fair use* doctrine.³⁴ Adding to this flexibility is the way the limitations are shaped; exempted uses are not defined with direct reference to economic rights (e.g., right of reproduction or right of communication to the public), but actually refer to *uses*. As a consequence, a limitation may on occasion exempt acts that affect multiple economic rights concurrently.

Article 5.1 excuses various 'uses with minimal economic significance', such as making back-up copies and incidental uses. While these uses are in line with the *acquis*, what is novel here is the recognition of a general *de minimis* rule, which by operation of Article 5.5 might extend to other similarly insignificant uses.

Article 5.2 exempts and unites various common limitations, such as those for the purposes of news reporting, quotation, parody and scientific research, under the heading 'uses for the purpose of freedom of expression and information'. While the enumerated limitations are again fully in line with the *acquis*, their classification as serving a fundamental freedom protected, *inter alia*, by Article 11 of the EU Charter, gives special weight to these exemptions.

Article 5.3 organizes an assortment of socially desirable limitations under the banner of 'uses permitted to promote social, political and cultural objectives'. These include free uses, such as uses for the benefit of disabled persons and for the purpose of non-commercial archiving by libraries and museums, as well as remunerated uses, such as private copying and uses for educational purposes.

Article 5.4 permits uses 'for the purpose of enhancing competition'. To this end the first paragraph exempts (*inter alia*) 'reverse engineering'—presumably of computer programs. Note that Article 5.4(1)(b) of the Code does not require that reverse engineering (i.e., decompilation) be done with the aim of creating an interoperable program. It is therefore considerably less restrictive than its counterpart in the *acquis*, Article 6 of the Computer Programs Directive.

The second paragraph constitutes another innovation, by subjecting five categories of informational and functional works (news articles, scientific works, industrial designs, computer programs and databases) to a regime of compulsory licensing if three criteria are met: (i) the use is indispensable to compete on a derivative market; (ii) the copyright holder has refused to license the use under reasonable terms, leading to the elimination of competition in the relevant market; and (iii) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright in the work. While these prerequisites are reminiscent of the *Magill doctrine* developed

34. See P. B. Hugenholtz & M. R.F. Senftleben, 'Fair use in Europe. In search of flexibilities', Amsterdam, Nov. 2011, <<http://www.ivir.nl/publications/hughenholtz/Fair%20Use%20Report%20PUB.pdf>>.

by the CJEU in *Magill* and other cases concerning abuse of IPRs with the aim of controlling downstream markets,³⁵ this provision goes further by setting a standard that applies *ex ante* to a variety of (informational and functional) works.

Article 5.5 of the Code is likely to attract even more attention from legal commentators.³⁶ As said, its aim is to inject some flexibility into the traditional European system of 'closed' limitations and exceptions, which the drafters evidently found to be overly rigorous. As the preamble remarks, 'rapid technological development makes future modes of exploitation and use of copyright works unpredictable and therefore requires a system of rights and limitations with some flexibility'. Article 5.5 thus permits the following:

[a]ny other use that is comparable to the uses enumerated in art. 5.1 to 5.4(1) [...] provided that the corresponding requirements of the relevant limitation are met and the use does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author or rightholder, taking account of the legitimate interests of third parties.

Note that Article 5.5 is not a blank cheque permitting all sorts of unspecified 'fair uses'. It goes considerably less far than section 107 of the US Copyright Act, by (1) requiring that uses are 'comparable' to those enumerated; (2) applying the requirements (e.g., obligation to pay remuneration) of the corresponding requirements; and (3) subjecting the exempted uses to the *three step-test* enshrined, *inter alia*, in Article 13 of the TRIPs Agreement and Article 5.5 of the Information Society Directive. Moreover, as the drafters are keen to note in footnote 55, Article 5.5 does not allow the introduction of new limitations 'by blending the criteria of Articles 5.1 to 5.3'.

Although the Code does not deal with legal protection of technical protection measures (subject matter evidently considered by the Wittem Group as beyond the domain of copyright), the Code does provide, in its final provision, a rule aimed at giving practical effect to copyright limitations 'in cases where the use of copyright-protected works is controlled by technical measures'. In such cases, 'the rightholder shall have an obligation to make available means of benefiting from the [exempted] uses'. Like the corresponding provision in Article 6(4) of the Information Society Directive, the Code does not elaborate on the ways and means of achieving this.

35. *RTE v. Commission of the European Communities* (Magill), 6 Apr. 1995, Joined Cases C-241/91 P and C-242/91 P; *IMS Health v. NDC Health*, 29 Apr. 2004, Case C-418/01.

36. J. Ginsburg, 'European Copyright Code – Back to First Principles (with Some Additional Detail)', 58 *Journal of the Copyright Society of the USA* No. 3 (2011); (2011) *Auteurs & Media*.

17.4. UNIFICATION OF EU COPYRIGHT LAW

While the Wittem Code is often interpreted as a rallying call for copyright unification in the EU, the Wittem Group has refrained from taking a position on this contentious issue. The Introduction to the Code rather subtly states the following:

[t]he Group believes that a European Copyright Code drafted by legal scholars might serve as a model or reference tool for future harmonization or unification of copyright at the European level. Nevertheless, the Group does not take a position on the desirability as such of introducing a unified European legal framework.

The author of this chapter is, however, on record as a proponent of unification.³⁷ A European Copyright Law could have many advantages; it immediately establishes a truly unified legal framework, replacing the multitude of sometimes conflicting national rules of the present. It would have Union-wide effect, thereby instantaneously creating a single market for copyrights and related rights, both online and offline. It would enhance legal security and transparency, for right owners and users alike and greatly reduce licensing and (other) transaction costs. Unification could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely permits limitations.

Long considered taboo in copyright circles, the idea of a unified copyright law is now gradually receiving the attention it deserves, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner Vivian Redding expressly endorsed the idea of a European Copyright Law, as follows:

Last, but not least, one could think of a more profound harmonisation of copyright laws in order to create a more coherent licensing framework at European level. A ‘European Copyright Law’ – established for instance by an EU regulation – has often been mooted as a way of establishing a truly unified legal framework that would deliver direct benefits. This would be an ambitious plan for the EU, but not an impossible one.³⁸

37. P. B. Hugenholtz et al., ‘The Recasting of Copyright & Related Rights for the Knowledge Economy’, Report to the European Commission, DG Internal Market, Nov. 2006, 210. See also M. van Eechoud, P. Bernt Hugenholtz a.o., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (Alphen aan den Rijn: Kluwer Law International, 2009), 317 ff.

38. V. Reding, Speech delivered at Visby/Gotland on 9 Nov. 2009, <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>>. Similar ideas are expressed in a ‘Reflection paper’ on ‘Creative Content in a European Digital Single Market: Challenges for the Future’, which was jointly issued by the DG’s Information

The Wittem Group's European Copyright Code

In a significant move, the Lisbon Reform Treaty has introduced a specific competence for EU-wide IPRs. Article 118 TFEU provides as follows:

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 authorization, coordination and supervision arrangements.³⁹

It can be argued that Article 118 TFEU would allow not only for the introduction of Union-wide copyright titles, but also for the simultaneous abolishment of national titles, which would be necessary for such an initiative to take its full effect and remove territorial restrictions.

The European Commission's IPR Strategy paper that was published in 2011 entertains the possibility of consolidating the entire body of harmonized copyright law into a single 'European Copyright Code'.⁴⁰ According to the Commission, '[t]his could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonize and consolidate the entitlements provided by copyright and related rights at the EU level.' The paper also states the Commission's intention to examine the feasibility of creating an optional 'unitary' copyright title based on Article 118 TFEU, which would exist in parallel to national copyrights. While these statements demonstrate that the prospect of unification of European copyright is no longer beyond the political horizon, the European Commission apparently is not yet ready to consider the creation of a truly unified law that would replace the national copyright laws of the Member States.

For sure, devising a European Copyright Law would be an ambitious undertaking – at best a project of the very long term. With copyright law today in a state of constant crisis, particularly due to the problems of mass infringement associated with the Internet, the question arises whether time would allow the EU legislature to embark on such an undertaking. The answer, in the opinion of this author, is yes. Work on a European Copyright Law could be undertaken in parallel with improvement, at the national level or in the form of further harmonization, of copyright law in the EU. Indeed, such work would be less dependent on the mood of the day and might allow for sufficient reflection, thereby enhancing the quality of the final legislative

Society and Markt, <http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf>.

39. The 'ordinary procedure' that Article 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote.

40. European Commission, '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', COM(2011)287 final, Brussels, 24 May 2011, 11.

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product. In this respect, the slow but certain development of a body of European contract law in an institutionalized cooperation between the Commission and a group of qualified academic experts could serve as an example.⁴¹

If the Wittem Project has demonstrated anything at all, it is that a unified European Copyright Law that assimilates the two great legal traditions of copyright – author’s rights and copyright proper – can actually be realized.

41. See Communication from the Commission to the European Parliament and the Council, *European Contract Law and the Revision of the Acquis: The Way Forward*, COM (2004) 651 final (Brussels, 11 Oct. 2004).