

Harmonizing European Copyright Law

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Harmonizing European Copyright Law

The Challenges of Better Lawmaking

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Chapter 9

The Last Frontier: Territoriality

Having critically examined, in the previous chapters, the results of the process of harmonization of copyright and related rights in the European Union (EU), it is now time to look ahead. What will the future bring for European copyright? As we concluded in Chapter 8, harmonization has been a very mixed blessing at best. Although the laws of the Member States have been unified in specific areas, major fields have been left untouched or only ‘quasi-harmonized’, while the quality of the Union’s legislative product is suspect and the administrative costs of the harmonization process enormous. Arguably, the law of copyright and related rights in the Member States of the EU would benefit from a renewed dedication on the part of the EU to the principles of subsidiarity and proportionality.

However, even perfect harmonization could not have solved, and cannot solve, the problem of territoriality. Regardless of how wide or narrow the net of harmonization would be cast over the laws of the Member States, and how rigorous the European legislature would comply with its self-imposed principles of ‘better lawmaking’, this could never remove the ultimate barrier to market integration: the territorial nature of nationally defined copyright and related rights.

Territoriality is the Achilles’ heel of the *acquis*. As we saw in Chapter 1, the primary objective of harmonization is removing barriers to the free flow of information goods and services. Although the seven harmonization directives have indeed smoothed out some of the disparities among the laws of the Member States, the ground rule that the geographic scope of the economic rights granted under the laws of the Member States coincides with their national borders has remained intact. As a consequence, even today content providers aiming their services (e.g., an online music store) at consumers across the EU are compelled to clear rights covering some twenty-seven Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as

the United States. As the European Commission (EC) notes in its Communication on Creative Content Online:

as a result of copyright territoriality, a content service provider has to obtain the right to make content available in each Member State. The costs incurred, may be detrimental to the exploitation of a vast majority of European cultural works outside their national markets.⁹⁴⁰

Moreover, the rule of territoriality combined with the traditional deference by EC law to systems of national property seems to have been an important driver of the upward trend in copyright protection that has, almost inevitably, accompanied the harmonization process. It is high time, then, to conquer this last frontier.

Whereas the ECJ and the EU legislature have tackled the problem of territoriality for the distribution of physical goods by establishing a rule of Community exhaustion for goods incorporating rights of intellectual property, EU policies in respect to Internet-based services have left the territorial nature of rights of communication to the public intact. Even the Commission's Online Music Recommendation, which purports to promote a pan-European market for online music delivery services, does not question the territorial nature of copyright and related rights as such.

Nevertheless, in the long run the EU must confront the problem of territoriality in a more fundamental way. In this final chapter we will first examine how the European institutions have grappled with the problem of territorially defined intellectual property rights in the single market. Strategies have so far included the introduction of the exhaustion doctrine, the use of competition law, and a largely failed experiment to overcome territoriality by way of introducing a home country control rule for satellite broadcasting. We will conclude by tentatively exploring a far more ambitious strategy: the unification of the law of copyright and related rights through the introduction of a Community title, a truly European copyright.

9.1. EC LAW'S STRUGGLES WITH TERRITORIALITY

The process of harmonization of copyright and related rights that has occurred over the last twenty-odd years has been largely blind to the structural impediment that territoriality presents to the free movement of copyright-protected goods and particularly services. Basing its harmonization agenda primarily on disparities between national laws, the EU legislature has been aiming, as it would seem, at the wrong target. Disparities between national laws by themselves hardly amount to impediments of the free movement of goods or services, given that the copyrights and related rights that underlie these disparities are drawn along national borders. Indeed, for as long as the territorial nature of copyright and related rights is

940. Communication on Creative Content Online, 5.

left intact, harmonization by itself can achieve relatively little.⁹⁴¹ By approximating the laws of the Member States, harmonization can perhaps make these laws more consistent and transparent to (foreign) providers of cross-border goods or services, and thereby – by enhancing legal certainty – promote the internal market indirectly, but removing disparities does not do away with the territorial effect that constitutes a much more serious obstacle to the establishment of a single market.

Even if perfect harmonization were achieved, the exclusivity that a copyright or related right confers on its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. This has always been a core principle of copyright and related rights that has been enshrined in the Berne Convention and other treaties.⁹⁴² Given the obligation under the European Economic Agreement for Member States to adhere to the Berne Convention, the territoriality principle might even be described as ‘quasi-acquis’.⁹⁴³ In its *Lagardère* ruling⁹⁴⁴ the ECJ has recently confirmed the territorial nature of copyright and related rights.

The primacy of territoriality is also visible in Article 8 of the Rome II Regulation on the law applicable to torts. The Regulation provides that infringements of intellectual property rights are governed by the law of the place for which protection is claimed (*lex protectionis*). In regard to making works available over the Internet, which transcends borders almost by definition, this rule seems to imply that the legality of such acts has to be judged under as many laws as there are countries where the communication can be received.⁹⁴⁵

In sum, harmonization of substantive law does not solve the problems caused by territoriality. Instead, harmonization is more likely to preserve existing barriers to free trade and even raise new ones. As we have noted in Chapter 8, harmonization in practice invariably leads to an extension of existing rights or the introduction of new rights that previously were not known in the legal system of all Member States. Such ‘upward’ harmonization is almost inevitable given the political and legal problems that a scaling back of intellectual property rights would cause individual Member States.

To be sure, the territorial nature of copyright and related rights is not merely to be seen as an impediment to the internal market, but may have certain advantages as well, particularly in fields in which the Member States have remained largely

941. See ‘The Need for a European Trade Mark System. Competence of the European Community to Create One’, Commission Working Paper, III/D/1294/79-EN (Brussels, October 1979), 4 <http://aei.pitt.edu/5618/01/002702_1.pdf>.

942. Green Paper on Television without Frontiers, 301.

943. J. Gaster, ‘Das urheberrechtliche Territorialitätsprinzip aus Sicht des Europäischen Gemeinschaftsrechts’, *ZUM* 1 (2006): 8–14, at 9, [Gaster, 2006].

944. *Lagardère*, para. 46: ‘At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonization regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.’

945. See literature mentioned in Ch. 1, n. 26.

autonomous, such as culture and education. In the first place, preserving autonomy in the area of copyright law makes it far easier to tailor the rules of copyright to local conditions. This is particularly relevant for limitations and exceptions. Although, as we saw in Chapter 3, many limitations and exceptions deserve universal application across the EU, there will always remain a need for state-specific rules where local conditions deviate the most, such as in the fields of culture and education. Clearly, tailoring copyright rules precisely to the specific needs of national states is easiest if territoriality is left intact.

In the second place, marketing cultural goods in foreign countries will sometimes necessitate territorial licensing, for instance, when the good needs to be customized to cater for local audiences. This may be the case, for example, for the publication of foreign books or the cinema release and broadcasting of foreign films. More importantly, most collective rights management societies currently derive their existence from rights granted or entrusted to them on a national, territorial basis. Proceeds from the collective exploitation of these rights flow not only to entitled right holders, whereby local authors are sometimes favoured over foreign right holders, but are also channelled to a variety of cultural and social funds, mostly to the benefit of local authors and performers and local cultural development. By protecting and promoting local authors and performers, collecting societies thus play an important role in fostering ‘cultural diversity’ in the EU. Removing the territorial aspect of performance and communication rights would not only affect these cultural subsidies, but also undermine the societies’ very existence, except for a handful of societies that are large enough to compete at the European level. Indeed, under the influence of the EC’s Online Music Recommendation a ‘struggle for survival’ among collecting societies is already visible.

In the third place, and somewhat related, the territorial nature of copyright and related rights facilitates price discrimination, which may promote economic efficiency. Territoriality makes it easier for right holders to define, and split up, markets along national borders and set different prices and conditions for identical products or services in different Member States. However, notwithstanding the efficiency gained by such price discrimination, it goes without saying that such uses of intellectual property are fundamentally at odds with the goal of achieving an internal market. As the ECJ has repeatedly held, it is not within the ‘specific subject matter’ of rights of intellectual property to artificially partition markets.⁹⁴⁶

Yet another caveat is in order here. Although the transborder transmission of copyright-protected content may affect rights in multiple Member States, in practice these rights are often held in one hand. Absent transfers or licenses, authors will usually own the rights in their works in all territories of the EU. The problems of territoriality become acute only in cases in which rights in a single work are distributed over a variety of right holders in different Member States. This will typically be the result of rights transfers to publishers, producers,

946. See e.g., *Deutsche Grammophon* (distribution right of phonogram producers in Germany held to be exhausted in respect of records put on the market in France with the right holder’s permission).

distributors, collecting societies, or other intermediaries with territorially limited mandates. Distributed rights may sometimes also result from disparities in national laws on authorship, ownership, or copyright contract law. Arguably, promoting rules that favour an allocation of rights to the original creators, either at the national level or by way of harmonization, might resolve some of the rights clearance problems associated with territoriality.⁹⁴⁷

In the following paragraphs we will describe how the European institutions – Court of Justice, Commission, and Legislature – have in the past struggled with the concept of territoriality in the law of copyright and related rights. We will first look at the rule of Community exhaustion, a doctrine developed by the Court and later codified in legislation. We will then turn to the Satellite and Cable Directive, a brave and forward-looking, but largely failed attempt at ‘de-territorializing’ the right of communication by satellite. Finally, we will mention European competition law, yet another field of law in which the battle between territorial rights of intellectual rights and EC law has been fought, without producing a clear winner. As we will conclude, despite several promising attempts, a fundamental solution to the problem of territoriality remains to be achieved.

9.1.1. EXHAUSTION

Finding a balance between national laws of intellectual property and the four economic freedoms recognized under the EC Treaty has been one of the main preoccupations of the Court of Justice during the years preceding harmonization.⁹⁴⁸ Because of the rule of national treatment found inter alia in Article 5(2) BC, copyright owners of works protected under the laws of the Member States enjoy a bundle of twenty-seven parallel (sets of) exclusive rights, the existence and scope of which are determined by the laws of the Member States. As a consequence, rights in multiple Member States will be concurrently affected by the cross-border trade in content-related goods and services. Whereas for the intra-Community distribution of goods the resulting impediment to the internal market has been mitigated by the rule of intra-Community exhaustion of rights, which was first developed by the ECJ⁹⁴⁹ and later codified inter alia in Article 4(2) of the Information Society Directive, the provision of content-related services remains vulnerable to the concurrent exercise of rights of public performance, broadcasting, cable transmission, or making available online in all the Member States where the services are offered to the public. For example, in its *Coditel I* (or *Le Boucher*)

947. But see Guibault & Hugenholtz (2002) (arguing that harmonization of copyright contract law is premature).

948. In its elaborate case law on the conflict between rights of intellectual property and the free movement of goods and services, the ECJ has often hinted at the need to approximate the laws of the Member States. Several harmonization directives thus have their roots in ECJ decisions, see e.g., *EMI-Electrola GmbH*.

949. See cases mentioned in Ch. 1, n. 12.

decision, the Court of Justice refused to recognize a rule of Community exhaustion of the right of broadcasting in respect of acts of secondary cable transmission. The Court opined:

15 Whilst article 59 of the Treaty prohibits restrictions upon freedom to provide services, it does not thereby encompass limits upon the exercise of certain economic activities which have their origin in the application of national legislation for the protection of intellectual property, save where such application constitutes a means of arbitrary discrimination or a disguised restriction on trade between Member States. Such would be the case if that application enabled parties to an assignment of copyright to create artificial barriers to trade between Member States.

16 The effect of this is that, whilst copyright entails the right to demand fees for any showing or performance, the rules of the treaty cannot in principle constitute an obstacle to the geographical limits which the parties to a contract of assignment have agreed upon in order to protect the author and his assigns in this regard. The mere fact that those geographical limits may coincide with national frontiers does not point to a different solution in a situation where television is organized in the member states largely on the basis of legal broadcasting monopolies, which indicates that a limitation other than the geographical field of application of an assignment is often impracticable.

17 The exclusive assignee of the performing right in a film for the whole of a member state may therefore rely upon his right against cable television diffusion companies which have transmitted that film on their diffusion network having received it from a television broadcasting station established in another member state, without thereby infringing community law.

In other words, the exercise in a Member State by a film producer of the right of cable retransmission was not exhausted by the authorized primary broadcast in another Member State. The right holder in the neighbouring Member State could therefore legitimately oppose the unauthorized retransmission of the film over cable networks without unduly restricting trade between Member States.

Note, however, that in arriving at this conclusion the Court expressly considered that the partitioning of markets along national borderlines was legitimate in this specific case because television broadcasting in the Member States was (then) traditionally organized on the basis of national monopolies.⁹⁵⁰ To infer from the *Coditel I* decision a general rule of non-exhaustion of communication rights would therefore be unwarranted.

Nevertheless, the EU legislature has eventually codified such a general rule in Article 3(3) of the Information Society Directive. Consequently, content-related services that are offered across the EU require licenses from all right holders covering all the territories concerned. If a service is offered to all consumers residing in the Union, as will be the case for many services offered over the

950. *Coditel I*, para. 15 et seq. Clearly, no such justification can be found for a territorial division of 'online' rights.

Internet, rights for all Member States will have to be cleared. This will be particularly problematic if the rights concerned are in different hands, as will often be the case, for instance, for rights in musical works that are exercised by national collecting societies or for rights in cinematographic works owned by locally operating distributors.

9.1.2. HOME COUNTRY RULE

For providers of content-related services across the EU the persistent fragmentation of rights along the national borders of Member States obviously presents a competitive disadvantage, particularly when compared to the United States, where copyright is regulated at the federal level and the constitutional rule of pre-emption⁹⁵¹ does not allow copyrights or 'equivalent' rights to exist at the level of the individual states.⁹⁵² Maintaining the territorial nature of copyright and related right in the EU thus implies high transaction costs for right holders and users alike.⁹⁵³

The harmonization of copyright and related rights in the EU has done relatively little to alleviate this problem.⁹⁵⁴ Apart from the codification of the rule of Community exhaustion, which permits the further circulation of copyrighted goods within the Community on their introduction on the market in the EU with the local right holder's consent, the only structural legislative solution can be found in the Satellite and Cable Directive of 1993. According to Article 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, that is, where the *injection* ('start of the uninterrupted chain') of the programme-carrying signal can be localized. Thus, the Directive has departed from the so-called 'Bogsch theory', which held that a satellite broadcast requires licenses from all right holders in the countries of reception (i.e., within the footprint of the satellite). Since the Directive was transposed, only a license in the home country of the satellite broadcast is needed. Thus, at least in theory, a pan-European audiovisual space for satellite broadcasting is created, and market fragmentation along national borders is prevented, by avoiding the concurrent application of multiple national laws to a single act of satellite broadcasting.⁹⁵⁵

951. Section 301 of the US Copyright Act (17 U.S.C. § 301).

952. One would find it hard to imagine that for a service that is offered over the Internet in the United States, the relevant rights in some fifty states would have to be cleared. Note that the formation of federal states has in the past led to a transfer of legislative competence for intellectual property from the local to the state level (e.g., in the United States, Belgium, Germany, Switzerland).

953. K. Peifer, 'Das Territorialitätsprinzip im Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen', *ZUM* 1 (2006): 4, [Peifer, 2006].

954. See Communication on the Management of Copyright and Related Rights in the Internal Market, 7 et seq.

955. Satellite and Cable Directive, recital 14.

But the ideal of a pan-European television market has not materialized. As the European Commission readily admits in its review of the Directive,⁹⁵⁶ the market fragmentation that existed prior to the Directive's adoption has continued until this day, mainly through a combination of encryption technology and territorial licensing. Note that the Directive does not actually prohibit territorial licensing. Right holders and broadcasters have therefore remained free to persist in these age-old practices, and will undoubtedly continue to do so as long as broadcasting markets remain largely local and a pan-European audiovisual space a distant utopia.⁹⁵⁷ In retrospect, it must be concluded that the Directive's home country rule was not much more than an innovative solution in search of a problem.

Since the days of the Satellite and Cable Directive, the territoriality debate in copyright has shifted from broadcasting to online content services. Paradoxically, in these emerging markets where the problem of territoriality has now become acute, no similar legislative solution has been achieved or is even being contemplated. Unlike satellite broadcasters, providers offering transborder services online across the EU will have to clear rights from all right holders concerned for all countries of reception.

Providers of services comprising musical works may find some comfort in the Online Music Recommendation that was issued by the European Commission in 2005. This non-binding instrument seeks to facilitate the granting of Community-wide licenses for online use of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and entrust them to a single collective rights manager operating at Community level. The Recommendation, however, does not address the more fundamental problem of territorially divided rights. Moreover, its scope is limited to musical works, phonograms, and performances – subject matter that is traditionally licensed through collecting societies. The Recommendation does not concern existing contractual arrangements between, for instance, film producers and distributors or broadcasters, or writers and publishers.

9.1.3. COMPETITION LAW

Even less structural, but sometimes effective nonetheless, are the remedies found in EC competition law (Articles 81 and 82 EC Treaty) against the exercise of

956. Report from the European Commission on the application of Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM (2002) 430 final (Brussels, 26 Jul. 2002) [Report on the Satellite and Cable Directive].

957. P.B. Hugenholtz, 'Copyright without Frontiers: Is There a Future for the Satellite and Cable Directive?', in *Die Zukunft Der Fernsehrichtlinie/the Future of the 'Television without Frontiers' Directive*, Proceedings of the conference organized by the Institute of European Media Law (EMR) in cooperation with the European Academy of Law Trier (ERA), Schriftenreihe des Instituts für Europäisches Medienrecht (EMR), Band 29 (Baden-Baden: Nomos Verlag, 2005), 65–73, [Hugenholtz, 2005].

intellectual property rights along national borders that might result in the unjustified partitioning of the internal market. The European Courts and the EC have produced a host of precedents on this issue, applying both Articles 81 (anti-trust) and 82 (abuse of a dominant position). With regard to the former article, the Court has held in *Coditel II* that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market.⁹⁵⁸ In *Tiercé Ladbroke* the Court of First Instance (CFI) ruled that an agreement by which two or more undertakings commit themselves to refusing to third parties a license to exploit televised pictures and sound commentaries of horse races within one Member State:

may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.⁹⁵⁹

The string of decisions issued by the EC in its role of competition watchdog, in which it underlined that certain exclusive, territorially defined licenses in the audiovisual sector can violate Article 81 EC Treaty, also deserve mention in this context. Such agreements will be generally exempted only where appropriate access rights are afforded to third parties.⁹⁶⁰

The *GVL* case illustrates how Article 82 of the EC Treaty may also restrict the territorial exercise of copyright. According to the ECJ:

a refusal by a collecting society having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of Article [82] of the Treaty.⁹⁶¹

958. *Coditel II*, para. 17 et seq.

959. *Tiercé Ladbroke SA v. Commission*, CFI 12 Jun. 1997, Case T-504/93, *ECR* [1997] II-923, para. 157 et seq. [*Tiercé Ladbroke*].

960. Commission Decision 89/467/EEC of 12 Jul. 1989 (*UIP*), *OJ* 1989 L 226/25; Commission Decision 89/536/EEC of 15 Sep. 1989 (*Film purchases by German television stations*), *OJ* 1989 L 284/36; Commission Decision 91/130/EEC of 19 Feb. 1991 (*Screensport/Members of the EBU*), *OJ* 1991 L 63/32; Commission Decision 93/403/EEC of 11 Jun. 1993 (*EBU/Eurovision System*), *OJ* 1993 L 179/23; Commission Decision 2003/778/EC of 23 Jul. 2003 (*UEFA Champions League*), *OJ* 2003 L 291/25. In the field of technology transfer the EC has provided for normative guidance by issuing so-called 'block exemptions', which prohibit in technology licenses between competitors (*inter alia*) the exclusive territorial allocation of markets, subject to certain well-defined exceptions. See Commission Regulation (EC) No. 772/2004 on the application of Art. 81(3) of the Treaty to categories of technology transfer agreements of 27 Apr. 2004, *OJ* 2004 L 123/11 [Technology transfer agreements Regulation].

961. *GVL*, para. 56.

Issues of territorial exclusivity are also at the heart of several more recent competition cases concerning licensing practices of collecting societies.⁹⁶²

9.2. TOWARDS A COMMUNITY COPYRIGHT?

In sum, it appears that territoriality, as an essential characteristic of copyright and related rights, is both a natural basis for the partitioning of the internal market into national markets – a practice ‘repugnant to the essential purpose of the treaty, which is to unite national markets into a single market’, according to the ECJ in *Deutsche Grammophon v. Metro* – and a hindrance for EC law to have its full effect. As a consequence, as long as national copyrights and related rights persist, no complete internal market will be attained, not even if total harmonization of national laws is achieved.

If the EU is serious about creating an internal market for copyright-related goods *and* services, it must inevitably confront the problem of territoriality in a more fundamental way. A truly structural solution to this problem, which would immediately remove the current disparity in treatment of goods and services in the realm of copyright, would be the introduction of a Community copyright title, inspired by the Community rights that already exist *inter alia* in the realm of trademark law and design protection.⁹⁶³ Long considered taboo in copyright circles, the idea of a Community copyright is gradually receiving the attention it deserves, both in political circles⁹⁶⁴ and in scholarly debate.⁹⁶⁵

The potential advantages of a Community copyright are undeniable. A Community Copyright Regulation (or ‘European Copyright Law’) would immediately establish a truly unified legal framework. A Community copyright title would have instant Community-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. A Community copyright would enhance

962. Commission Decision 2003/300/EC of 8 Oct. 2002 relating to a proceeding under Art. 81 of the EC Treaty and Art. 53 of the EEA Agreement (Case COMP/C2/38.014) [*IFPI Simulcasting Decision*]; Commission Decision C (2008) 3435 final of 16 Jul. 2008 relating to a proceeding under Art. 81 EC and Art. 53 of the EEA Agreement (Case COMP/C2/38.698), *OJ* 2008 C 323/07 [*CISAC Decision*].

963. Regulation on the Community Trade Mark, Regulation on Community Plant Variety Rights, Community Designs Regulation.

964. According to EC Commissioner V. Reding, ‘we have to start calling into question the territoriality of copyright protection in Europe’, speech given at IDATE conference (Montpellier, 21 Nov. 2005).

965. Schack (2000), 800; J. Bornkamm, ‘Time for a European Copyright Code’, conference speech at Management and Legitimate Use of Intellectual Property Conference of 10 Jul. 2000, 20, available online at <www.europa.eu.int/comm/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf>, [Bornkamm, 2000]; Hilty (2004), 760; see also various contributions in *ZUM* 1 (2006). In 2002–2003 a group of European copyright scholars formed the ‘Wittem Group’, which regularly convenes with the aim of drafting a ‘European Copyright Code’.

legal security and transparency, for right owners and users alike and greatly reduce transaction costs.⁹⁶⁶ Unification by regulation could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely *permits* limitations. A regulation might give rights and limitations equal status and could restore the necessary ‘delicate balance’, provided it were the product of a transparent legislative process wherein all interests concerned are fairly represented.

In the remainder of this chapter the advantages and drawbacks, as well as the very rough contours of a *European Copyright Code* will be described. But before turning to the normative challenges of a truly unified European copyright law, we will first revisit the issue of competence.⁹⁶⁷ Assuming that a Community copyright would indeed be beneficial to the creative economy of the EU, would the European Legislature have the power to enact it?

9.2.1. COMPETENCE ISSUES

As was noted in Chapter 1,⁹⁶⁸ the EC Treaty does not presently provide for a specific legal basis for the establishment of Community intellectual property rights. Legislative measures that provide for such rights, such as the Community Trademark and Design and Plant Variety Regulations, are based solely on the residual legislative competence derived from Article 308 EC Treaty. In its WTO’s Opinion 1/94, the ECJ considered that the EC ‘may use Article [308] as the basis for creating new rights superimposed on national rights, as it did in Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark . . .’.⁹⁶⁹

The Court’s characterization of Community intellectual property titles as rights that are ‘superimposed on national rights’, begs the question of whether a Community title that effectively replaces national rights would also be possible. Merely superimposing a Community copyright on a structure of territorially defined national copyrights and related rights would of course severely reduce the benefits of a Community title. Whereas Community trademark and design rights can to a certain extent coexist with national titles, because the granting of such rights requires an affirmative act of deposit and subsequent registration, a similar coexistence would be hard to imagine for the domain of copyright. In regard to trademarks and designs, companies are offered a choice between relative cheap protection in distinct national markets or more expensive, but extensive, Community-wide coverage. Owners of Community titles will have little or no

966. Peifer (2006), 3–4.

967. See discussion in Ch. 1.

968. Section 1.2.2.

969. WTO Opinion 1/94, para. 59. See also Case C-350/92, ECR [1995] I-1985 (*Spain v. Council; Supplementary Protection Certificate*), para. 23; ECJ 9 Oct. 2001, Case C-377/98, ECR [2001] I-7079 (*Netherlands v. Parliament and Council; Biotechnology Directive*), para. 24.

incentive to register the same trademarks or designs at the national level.⁹⁷⁰ Copyrights and related rights, by contrast, are granted *ex lege*. Absent pre-emption, each creation of a work would automatically trigger the vesting of a national right and a Community right in the same subject matter. If national rights would continue to survive side by side with Community rights, the existing obstacles to the free flow of goods and services would therefore remain.⁹⁷¹ Effectively, providers of copyright-related services would be even worse off, because the introduction of a Community copyright would create yet another layer of rights to be cleared.

In sum, a Community Copyright would make sense only if it replaces national copyrights. In legal literature a number of potential competence issues can be discerned, which we will examine in the remainder of this subsection. They concern the status of copyright and related rights as part of the fundamental right to respect for property rights, the proper legal basis for a Community title (Article 308 TEC) and the relation between EC law and national property systems (Article 295 TEC).

As to the first issue, both the ECJ and the European Court of Human Rights have held that intellectual property falls within the scope of the fundamental right to property.⁹⁷² The right to property is laid down in Article 1 of the First Protocol to the 1952 European Convention on Human Rights and also features in the Charter on Fundamental Rights in the European Union. Article 17(2) of the Charter explicitly refers to intellectual property as part of the fundamental right to property. The 2000 Charter will acquire legally binding status once the Lisbon Reform Treaty enters into force (Article 6 TEU new). The Court has consistently held that the right to property as recognized by Community law is not an absolute right and must be viewed in relation to its social function.

Would the introduction of a Community copyright be at odds with fundamental rights in intellectual property? This is not likely because right holders would benefit from EU-wide exclusive rights that are equivalent to the bundle of territorially limited national copyrights they now enjoy.⁹⁷³

970. This development is already visible in trademark law. For instance, the French *Institut National de la Propriété Industrielle* reports in its annual reports of 2003 through 2005 that the number of foreign applications for French trademarks has dropped significantly since the introduction of the Community trademark; similar developments are reported in the Benelux Trademark Bureau annual reports and those of the Deutsches Patent-und Markenamt. For economic actors whose activity is purely local (no internal market dimension) national titles obviously will continue to serve their purpose.

971. Compare Peifer (2006), who assumes that a European copyright title could exist next to national rights and will gradually make national rights obsolete.

972. *Laserdisken II*, para. 65, again in ECJ 29 Jan. 2008, Case C-275/06, *ECR* [2008] I-271, (*Promusicae*); ECHR 11 Jan. 2007, Application no. 73049/01 (*Anheuser-Busch Inc. v. Portugal*), paras 62–72: adding that the protection of Art. 1 applies only to a person's existing possessions and not to future intellectual property rights.

973. The introduction of a Community copyright would of course pose challenges in terms of enacting adequate transitional law.

As to the proper legal basis, the Lisbon reform will introduce a specific competence for Community intellectual property rights. Article 118 TFEU provides:

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

Article 118 TFEU will replace Article 308 TEC as the appropriate legal basis for European intellectual property titles. 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. By contrast, the granting of Community rights based on Article 308 TEC requires a unanimous vote, and does not entail co-decision powers for Parliament.⁹⁷⁴

At first blush Article 295 appears to be more problematic because it provides that EC law ‘shall in no way prejudice the rules in Member States governing the system of property ownership’. Whether this implies that national intellectual property titles may not be replaced by European titles is, however, not at all clear.⁹⁷⁵ The Court has never been called to answer this type of question,⁹⁷⁶ and on the basis of case law one could argue that Article 295 poses no problem.

It is commonly assumed in legal literature⁹⁷⁷ that intellectual property comes within the scope of Article 295 TEC. The ECJ has only implicitly recognized this, in the case of *Consten v. Grundig*, which was decided as early as 1966.⁹⁷⁸ Historically, Article 295 TEC purports to guarantee the freedom of Member States to opt

974. For registered intellectual property rights such as patents, Art. 118 TFEU requires that any Council decisions on language regimes (e.g., filing of applications, official languages) are taken by a unanimous vote.

975. On the significance of Art. 295 for intellectual property, see H. Schack, ‘Europäisches Urheberrecht im Werden’, *ZEuP* (2000): 799–819, [Schack, 2000a]; compared with Chr.E. Würfel, *Europarechtliche Möglichkeiten einer Gesamtharmonisierung des Urheberrechts* (Karlsruhe: Universitätsverlag Karlsruhe, 2005), 3–6, 28–29.

976. In the *Tobacco Advertising II* case the question was different: the referring court asked whether EC restrictions on tobacco advertising constituted an infringement of Art. 295 TEC, considering that the relevant Directive has an impact on (the use of) trademarks for tobacco products. The ECJ concluded it did not and reaffirmed that Art. 295 ‘merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights’ (para. 147).

977. A. Hatje, in A. von Bogandy, *Europäisches Verfassungsrecht, Theoretische und Dogmatische Grundzüge* (Heidelberg: Springer Verlag, 2003), 697, [Hatje, 2003]; D. I. Bainbridge, *Intellectual Property* (Glasgow: Bell & Bain Ltd, 2007), 16, 779, [Bainbridge, 2007]; Wyatt & Dashwood, *European Union Law* (London: Sweet & Maxwell, 2006), 637, [Wyatt & Dashwood, 2006]; M. Walter (2001), 53.

978. ECJ 13 Jul. 1966, Cases 56 and 58/64, *ECR* [1966] 429 (*Consten v. Grundig*). A more recent explicit reference is by the President of the CFI. In *IMS Health* he did offer the opinion that ‘the public interest in respect for property rights in general and for intellectual property rights in particular is expressly reflected in Art. 30 and 295 EC’ (Pres. CFI, Order of 26 Oct. 2001, Case T-184/01R, *ECR* [2001] II-3193, para. 143) (in the subsequent ruling on appeal of 11

for public or private ownership of the means of production, especially enterprises.⁹⁷⁹ Not surprisingly then, ECJ cases on Article 295 (formerly 222) tend to deal with the compatibility of national rules with EC law in areas such as ownership of real estate, public sector companies, or public sector-owned golden shares.⁹⁸⁰ There is much less case law on the opposite issue: the compatibility of secondary EC legislation with national systems of property. Article 295 is sometimes invoked – typically as a minor point – by litigants against Commission decisions in competition matters. In a few cases, Member States have relied on it to argue against EU competence, in disputes over the validity of harmonization or unification measures. Now and again national courts in their preliminary questions also inquire on the effect of Article 295 on intellectual property.

In the few intellectual property cases in which Article 295 was raised as an issue, the Court has so far focused on determining what the ‘no prejudice to national property systems’ clause does not do. Article 295 does not affect the EC’s basic jurisdiction to harmonize national copyright laws or introduce community titles. Neither Article 295, nor Article 30 TEC for that matter, reserves a power to regulate substantive intellectual property law to the national legislature to the exclusion of any Community action.⁹⁸¹ Nor does Article 295 give Member States the power to adopt measures that would adversely affect the principle of free movement of goods within the common market as provided for and regulated by the Treaty.⁹⁸²

Although this does tell us something about the limited role the ECJ accords to Article 295 TEC to keep national intellectual property systems from disrupting a functioning internal market, it still does not answer the question whether a Community copyright could actually replace national copyrights. We believe it could. A reading of Article 295, based on its history and place in the EC framework,

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- Apr. 2002, the President of the ECJ did not think it necessary to rule on the relevance of Art. 295 for interim measures imposed on intellectual property owners based on competition law).
979. P. Léger (ed.), *Commentaire article par article des traités UE et CE* (Brussels: Bruylant, 2000), [Léger, 2000]; J. Steiner, L. Woods & C. Twigg-Flesner, *EU Law* (Oxford: Oxford University Press, 2006), 665, [Steiner et al., 2006].
980. See e.g., ECJ 6 Nov. 1984, Case 182/83, *ECR* [1984] 3677 (*Robert Fearon & Company v. Irish Land Commission*); ECJ 1 Jun. 1999, Case C-302/97, *ECR* [1999] I-3099 (*Klaus Konle v. Republik Österreich*); ECJ 4 Jun. 2002, Case C-503/99, *ECR* [2002] I-4809 (*Commission v. Belgium*); ECJ 4 Jun. 2002, Case C-367/98, *ECR* [2002] I-04731 (*Commission v. Portugal*); ECJ 29 Mar. 2001, Case C-163/99, *ECR* [2001] I-2613 (*Portugal v. Commission*); ECJ 28 Sep. 2006, Cases C-282/04 and C-283/04, *ECR* [2006] I-09141 (*Commission v. the Netherlands*).
981. See for example ECJ 13 Jul. 1995, Case C-350/92, *ECR* [1995] I-1985 (*Spain v. Council; Supplementary Protection Certificate*), para. 22. In this case Spain brought an action for annulment of Council Regulation (EEC) N° 1768/92 of 18 Jun. 1992 concerning the creation of a supplementary protection certificate for medicinal products. The regulation in effect extended the life of patents in medicines.
982. For example, ECJ 15 May 2003, Case C-300/01, *ECR* [2003] I-04899 (*Salzmann*). Specifically for intellectual property: ECJ 18 Feb. 1992, Case C-30/90, *ECR* [1992] I-829 (*Commission v. UK; Compulsory license patents*), and ECJ 18 Feb. 1992, Case C-235/89, *ECR* [1992] I-777 (*Commission v. Italy*): national rules forcing local production by patent holders on penalty of compulsory license are in contravention of EC law.

implies that it merely lays down the prerogative of a Member State to regulate the allocation of ownership (public, private, or combinations thereof). If that interpretation holds, Article 295 would not present a stumbling block for a Community title that replaces national rights.⁹⁸³

In *Spain v. Council*, on the supplementary protection certificate for medicinal products, the Court revisited its earlier judgment in *Commission v. U.K.*, stating that in that judgment (paragraph 19):

far from endorsing the argument that rules concerning the *very existence* [italics added] of industrial property rights fall within the sole jurisdiction of the national legislature, the Court was anticipating the *unification* [italics added] of patent provisions or harmonization of the relevant national legislation.

This could be read as an indication that Article 295 does not stand in the way of a Community copyright. If one accepts that the Community is in principle competent not only to harmonize national copyright law, but also to introduce a uniform European title, one would have to accept the pre-emptive operation of the latter. After all, (harmonized) national copyrights and a uniform Community copyright cannot meaningfully coexist.

A final objection that could be raised against a unified Community copyright is that copyright regulation does not merely concern economic policy, but also cultural policies, and the latter is an area in which the EC's competence is limited. We saw in Chapter 1 that this is true today and will remain so in the future if the Lisbon reform takes effect. But here too, the ECJ allows the European legislature a wide margin of appreciation. More often than not a directive or regulation will have a harmonization 'side effect' in an area in which the EC has no harmonization powers (as in health, or culture), and the ECJ tends to accept this. All that is required is that the measure has a proper legal basis (e.g., Article 95 TEC) and that Article 95 is not used to circumvent a prohibition to harmonize.⁹⁸⁴ Arguably, the principles of subsidiarity and proportionality do demand that a Community Copyright Regulation leaves Member States some leeway to organize the more culture-oriented aspects of copyright as they see fit. One could imagine in this context local provisions on the exercise of moral rights by the State as under French copyright law, or local rules concerning the reallocation of income streams of collective rights management organizations to cultural funds or even local limitations and exceptions.

9.2.2. NORMATIVE ISSUES

Assuming the legal obstacles raised in the previous section are not insurmountable to the establishment of a Community copyright, important normative issues

983. Possibly only for the way in which collective rights management is organized.

984. See *Tobacco I*, esp. para. 77.

remain. What kind of rules would a Community Copyright Regulation contain? What underlying goals and purposes would it espouse, and what would inform its normative content? How could the Community Copyright Regulation prevent these norms suffering from the same qualitative defects as the existing directives, as observed in Chapter 8? This final section will offer some tentative answers.

As Chapter 1 and the previous section have made painfully clear, EU primary law offers little guidance as to the normative content of secondary law in the field of copyright and related rights. Although the existing harmonization directives are largely based on the EC's mandate to establish a single market for goods and services, this mandate by itself gives no normative guidance and certainly does not prescribe the 'maximalist' conception of copyright law that is apparent from the preambles to various directives.⁹⁸⁵ Regrettably, Article 17 (2) of the Charter of Fundamental Rights of the European Union, while recognizing intellectual property as a fundamental right of the EU, offers no further normative guidance because it fails to offer any insight into the underlying rationales of a structure of intellectual property in the EU.⁹⁸⁶ In this respect, the Charter has, unfortunately, much less to offer than the US Constitution, which provides for a constitutional mandate in the field of copyright with the aim 'to promote the progress of science and useful arts'.⁹⁸⁷

What then should be the rationales of a future unified European copyright law? Certainly, it would be informed by the author's rights tradition rooted in notions of natural and social justice, which has dominated the law of copyright on the European continent for over a century. But European copyright law should reflect other, competing values and policies as well. If protecting the rights of authors is a fundamental right, preserving user freedoms and a robust public domain can be based on freedom of expression and information, as protected in Article 10 of the European Convention on Human Rights and Article 11 of the Charter. Moreover, fostering competition and protecting consumer interests have always been prime motivators of secondary EU law, while promoting culture, science, and education are becoming equally important drivers. All of this does not necessarily point to the 'high level of protection of intellectual property' that is envisaged in, for example, the Preamble of the Information Society Directive. Instead, future European copyright law ought to reflect a balancing of competing policies.

The constant expansion of the EU towards the East adds an additional reason for restraint. These countries generally have less mature market economies and may require a differently balanced intellectual property system. The integration of Eastern European societies into the Union could well in itself justify a more moderate, less protectionist approach than the past directives have espoused.

985. Preamble to the Information Society Directive, consideration 12, Preamble to the Rental Right Directive, consideration 5, Preamble to the Term Directive, consideration 10.

986. C. Geiger, 'Intellectual Property Shall Be Protected!?' Art. 17 (2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope', *EIPR* 31 (2009): 113–117, [Geiger, 2009].

987. U.S. CONST. Art. I, § 8, cl. 8.

In other words, it is high time for the EU to start developing a consistent and coherent vision of the law of copyright and related rights at the EU level. Such a vision is hard to interpolate from the seven directives of the *acquis*. The recent debate on the Term Extension Proposal is a shameful illustration of the normative vacancy of European legislation in the field of copyright and related rights. In the absence of guiding principles and policies, lawmaking in Brussels seems to be driven solely by the agendas of major stakeholders.

Because few normative principles can be inferred from the mere aim of establishing a single market, it would be a mistake to leave to the Directorate General in charge of the Internal Market the primary responsibility for developing the Commission's copyright policies. Although several other Directorate Generals seem to be better qualified to take on this role, it would be essential at any rate to better coordinate the norm-setting process in the field of copyright and related right within the Commission. This could be achieved, for example, by creating a Coordinating Committee charged with developing coherent and socially responsible EU copyright policies and coordinating policies between the Directorate General's.

All this is not to suggest that a future Community Copyright Regulation should completely replace the laws of copyright and related rights of the Member States. In the light of the principles of subsidiarity and proportionality, a Regulation should not deal with issues that have little or no impact on the internal market and are intrinsically linked to the cultural, educational, and social policies of the Member States. Such issues might, for instance, include moral rights, copyright contract law, and the governance of collective rights management societies. In this context, distinguishing genuine national cultural interests from considerations of national economic self-interest will of course pose a challenge.

What a Community Copyright Regulation should certainly deal with are the basic economic rights and limitations that shape the law of copyright and related intellectual property. Its catalogue of economic rights could be easily reproduced from the *acquis*, adding a right of adaptation and translation. In regard to its limitations, one might consider a two-tiered approach, which would take into account the need for regulatory flexibility, according to the principles of subsidiarity and proportionality. The first tier might comprise a list of basic limitations and exceptions. These provisions, no longer optional as under the Information Society Directive, should ideally reflect the fundamental rights and freedoms that are enshrined in the European Convention on Human Rights and the Charter and thus are already part of European law. Limitations of this kind would include at the very least rights of quotation and criticism, a right of news reporting, a right of parody, basic scientific and educational freedoms, some library and archive limitations, and privileges for the impaired. In addition, a Regulation might include limitations that directly concern the rights of European consumers, such as a right of private copying. The second tier could be an open-ended norm leaving Member States the freedom to provide for additional limitations, subject to the three-step test and on the condition that these freedoms not have a noticeable impact on the Internal Market.

As to the quality of the legislative product, perceived through the lens of ‘better regulation’, replacing the rules of seven directives and twenty-seven national laws on copyright and related rights by a single regulatory instrument comprising provisions that require no transposition and are directly binding upon the citizens of the EU, has obvious advantages in terms of enhanced transparency, consistency, and legal certainty. Although questions of interpretation will undoubtedly remain, they need not be channelled through the national courts to the ECJ, but could be answered directly by specialized Community Courts that have exclusive jurisdiction.⁹⁸⁸ In other words, replacing the seven directives by a single regulation would effectively amount to *deregulation*.

But several serious caveats are in order here. Many of the drawbacks of harmonization by directive mentioned in Chapter 8 may equally apply to unification by regulation. Although regulations do not require transposition by the Member States, the legislative process leading up to a regulation may still take a considerable length of time, particularly if it were based on Article 308, requiring a unanimous decision by the Council. Although technically less complicated than legislation by directive, the legislative process may still lack transparency and remain prone to rent-seeking. Like harmonization by directive, unification by regulation will favour standards of protection at the high end of the European average, especially if unanimity among Member States were required. Like directives, a regulation will be difficult to amend, and thus cannot provide rapid solutions to the most pressing problems of a dynamically evolving market. This would be an extra reason to build in a measure of flexibility, allowing the Member States to provide ad hoc regulatory first aid.

The quality of the legislative product also could be enhanced by engaging academic experts in its initial drafting. Although academics are traditionally involved in the legislative process in many of the Member States,⁹⁸⁹ such involvement is noticeably absent from the EU level. In addition, a Copyright Regulation should be subjected to a process of constant regulatory review that would allow for regular feedback from interested circles and possible adjustment of legal norms on an ongoing basis.

In view of all the political hurdles that undoubtedly would lie in the way of a future Copyright Regulation, this would surely become a project of the very long term, allowing sufficient reflection and continuous input from academic experts.⁹⁹⁰ In this respect, the slow but certain development of a body of European contract law in an institutionalized cooperation between the Commission and a

988. One might even consider attributing certain administrative or regulatory tasks (e.g., setting uniform levy rates) to existing Community bodies, such as the Office for the Harmonization of the Internal Market (OHIM).

989. For example, the Copyright Committee (Commissie Auteursrecht) that advises the Dutch Minister of Justice has a statutory basis; its members are appointed by the Minister. See Decree of 8 Jul. 2000, *Staatsblad* 309.

990. See for example, the ongoing efforts of the Wittem Group to draft a *European Copyright Code*, above n. 965.

group of qualified academic experts might serve as an example.⁹⁹¹ Ideally, such an ‘unhurried’ drafting process could produce the technologically neutral norms that make up a transparent, consistent, and stable legal framework for many years to come.

More importantly, before embarking on any such ambitious journey, we first need a clear perspective on the future of the EU. Obviously, the Union’s failure to agree on a Constitution that would, for the first time, create an express mandate for the EU to legislate in the field of intellectual property has not fostered a political climate that is favourable to such an undertaking. Surely, musing on a future Community Copyright in the current climate will remain ‘music of the future’ for some time to come.

991. 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).