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Is Harmonization a Good Thing? The Case of the Copyright *Acquis*

† *Bernt Hugenholtz*

A. Introduction	57
B. The Harmonization of Copyright and Related Rights in the EU	58
(1) The decade of directives (1991–2001)	58
(2) The consolidation decade (2001–2009)	61
(3) The age of judicial activism (2009–...)	62
C. The Pros and Cons of Harmonization	64
D. Territoriality in European Copyright	68
(1) Community exhaustion	68
(2) The satellite broadcasting solution	69
(3) EU competition law	70
E. The Way Forward: Towards Unification of EU Copyright Law	71

A. Introduction

From the early 1990s onwards the European Union (formerly the European Community) has carried out an ambitious agenda of copyright harmonization, which has so far resulted in eight directives on copyright and related rights. This chapter assesses the results of copyright harmonization in the EU. It commences with a description of the harmonization process that has led to the current *acquis communautaire*, which has occurred in three distinct phases (see section B). Section C discusses the costs and benefits of copyright harmonization in the EU. Section D focuses on the Achilles heel of the *acquis*: the territorial nature of copyright,

† This article is partly based on studies that the Institute for Information Law (IViR) carried out for the European Commission; see M van Eechoud et al. *Harmonising European Copyright Law. The Challenges of Better Lawmaking* (Alphen aan den Rijn: Kluwer Law International, 2009).

which harmonization has left largely intact. Finally, section E looks at the prospect of unitary copyright protection in the EU.

B. The Harmonization of Copyright and Related Rights in the EU

Harmonization of copyright law in the EU has occurred in three phases: an initial, highly productive decade of harmonization by directive (1991–2001); a second, less productive decade of consolidation and ‘soft law’ (2001–2009); and a third period of activist judicial interpretation by the Court of Justice of the EU that began approximately in 2009.

(1) The decade of directives (1991–2001)

Of the eight directives in the field of copyright and related rights that are currently in place in the EU, seven were adopted between 1991 and 2001.¹ The first, on computer programs, was adopted as early as 1991, while the seventh, dealing with artists’ resale rights respectively, dates from 2001. Harmonization by directive has occurred in two stages, marking different approaches and ambitions of the European legislature.² The ‘first generation’ directives have their roots in the ‘Green Paper on Copyright and the Challenge of Technology’, published by the Commission in 1988.³ In the Green Paper the Commission identified six areas where ‘immediate action’ by the EC legislature was supposedly required: (1) piracy (enforcement), (2) audiovisual home copying, (3) distribution right, exhaustion, and rental right, (4) computer programs, (5) databases, and (6) multilateral and bilateral external relations. In the follow-up to the Green Paper, published by the Commission in 1990,⁴ several additional areas of possible Community action were identified, including the duration of legal protection, moral rights, reprography and artists’ resale rights, and a separate chapter was devoted to broadcasting-related problems.

¹ See Computer Programs Directive 1991; Rental and Lending Rights Directive 1992; Term Directive 1993; Satellite and Cable Directive 1993; Database Directive 1996; Information Society Directive 2001; Resale Right Directive 2001; Orphan Works Directive 2012. At the time of finalizing this chapter one proposal was pending: Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final (‘Collective Management Directive Proposal’).

² See J Reinbothe, ‘A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union’ (unpublished paper delivered at the Fordham IP Conference on 4 April 2002) <http://europa.eu.int/comm/internal_market/copyright/documents/2002-fordhamspeech-reinbothe_en.htm>.

³ ‘Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action’, COM(88) 172 final (7 June 1988).

⁴ Working Programme of the Commission in the field of Copyright and Neighbouring Rights, ‘Follow-up to the Green Paper’, COM(90) 584 final (17 January 1991).

Not coincidentally, many of the issues identified by the European Commission as requiring harmonization concerned new information technologies—areas where no or few disparities (as yet) existed between the laws of the Member States. Most likely, the European Commission saw these largely uncharted terrains as ‘easy’ targets for early harmonization, since no deep-rooted national copyright doctrines or established case law would pose obstacles to approximation.

Much of the Commission’s work programme as announced in the Green Paper and its ‘Follow-up’ eventually materialized in the course of the 1990s. In 1991 the Computer Programs Directive, the first directive in the field of copyright, was adopted. In response to the spectacular growth of the software sector, due in particular to the then emerging personal computer market, the Directive created a harmonized framework for the protection of computer programs as ‘literary works’, including economic rights and limitations, of which the controversial ‘decompilation’ (reverse engineering) exception was the subject of intense lobbying and political debate.

This was followed in the course of 1992 by the Rental and Lending Rights Directive, which harmonized—and for several Member States introduced—rights of commercial rental and lending. More importantly, the Directive also established a horizontal harmonized framework for the protection by neighbouring (‘related’) rights of performers, phonogram producers, broadcasting organizations, and film producers—at levels well exceeding the minimum norms of the Rome Convention.

In 1993 two more directives were adopted. Departing from the prevailing approach of approximation of national laws, the Satellite and Cable Directive, more ambitiously, sought to achieve an internal market for trans-frontier satellite services by applying a country-of-origin rule to acts of satellite broadcasting. The Directive was a direct response to the deployment of new technologies of transmission of broadcast programs, by satellite and cable, which greatly facilitated the broadcasting of television programs across national borders. Indeed, the Directive envisioned the establishment of an internal market for broadcasting services. The Directive also introduced a scheme of mandatory collective rights management with regard to acts of cable retransmission. The unique characteristics of the Directive can be traced to its different origins—not in the Green Paper of 1988, but in an earlier ‘Green Paper on Television without Frontiers’ of 1984, which dealt primarily with broadcasting regulation and eventually resulted in the Television without Frontiers Directive of 1989.⁵

The year 1993 also saw the adoption of the Term Directive that harmonised the term of protection of copyright at the relatively high level of 70 years *post mortem auctoris*, and set the duration of neighbouring rights at 50 years.

Three years later, in 1996, the Database Directive was adopted. The Directive created a two-tier protection regime for electronic and non-electronic databases.

⁵ See ‘Television Without Frontiers: Green Paper on the Establishment of the Common Market, Especially by Satellite and Cable’, COM(84) 300 final (14 June 1984); Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in member states concerning the pursuit of television broadcasting activities, OJ L298/23 (17 October 1989).

Member States were obliged to protect databases by copyright as intellectual creations, and provide for a *sui generis* right (also known as ‘database right’) to protect the contents of a database in which the producer has substantially invested.

A directive on home copying of sound and audiovisual recordings, as prioritized in the ‘Follow-up to the Green Paper’, was never proposed. Private copying was eventually harmonized, to a limited degree, by the Information Society Directive, but the thorny issue of levies, which was mentioned in the Green Paper of 1988, has remained on the Commission’s agenda until this day.⁶

Of the other issues mentioned but not prioritized in the ‘Follow-up to the Green Paper’, two have eventually resulted in directives. In 2001, after barely surviving its perilous journey between the Commission, the European Parliament, and the Council, the Resale Right Directive was finally adopted. The Commission’s original work program was completed by the adoption in 2004 of the Enforcement Directive, which provided for harmonized remedies against piracy and other acts of infringement, in response to the need first identified in the 1988 Green Paper.

Mid-way through the 1990s, however, the Commission’s harmonization agenda had already become even more ambitious. The emergence of the internet, which promised seamless trans-border services involving a broad spectrum of subject-matter protected by copyright and related rights, brought a new urgency to the harmonization process that had considerably slowed down after its productive start in the beginning of the decade. Early in 1994 work commenced on a new round of harmonization of copyright law. This eventually led to the publication of yet another Green Paper in 1995, the ‘Green Paper on Copyright and Related Rights in the Information Society’.⁷ Simultaneously, ongoing discussions at WIPO on a possible Protocol to the Berne Convention accelerated and eventually led to the conclusion of the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) in 1996. Both Treaties were signed by the Commission on behalf of the EU, thereby taking on a commitment to implement the new international norms in a harmonized fashion.

Surprisingly, the scope of the Information Society Directive, which was first proposed in 1997 and finally adopted in 2001, turned out to be considerably broader than the ‘digital agenda’ that it was supposed to deal with. While the Directive harmonizes the basic economic rights (rights of reproduction, communication to the public, and distribution) in a broad and ‘internet-proof’ manner and introduced special protection for digital rights management systems, by far the largest part of the Directive deals with ‘exceptions and limitations’—a subject that was never on the agenda of any Green Paper. After this extremely productive initial decade of harmonization by directive, no new directives in the field of copyright were passed for many years. For reasons known only to the Commission, three directives—the Rental and Lending Rights Directive, the Term Directive, and the Computer

⁶ On 2 April 2012 a special European ‘mediator’ was appointed by the Commission to explore ways of bringing the perennial issue of copyright levies forward at the European level; see <http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm>.

⁷ ‘Green Paper on Copyright and Related Rights in the Information Society’, COM(95) 382 final (19 July 1995).

Programs Directive—were renumbered (with very minor updates) in the course of 2006–2009.⁸ In 2011 the Term Directive underwent a more far-reaching amendment by way of the Term Extension Directive, which instructs the Member States to extend the terms of protection for phonogram producers and performing artists in respect of musical sound recordings from 50 to 70 years. The amending Directive has attracted universal criticism from copyright scholars in Europe,⁹ and was eventually passed with the smallest of margins in the European Council.

(2) The consolidation decade (2001–2009)

In the years following 2001 the pace of copyright harmonization slowed down considerably. Except for the Enforcement Directive, which was adopted in 2004 and which deals with the enforcement of rights of intellectual property in general, no new directives in the field of copyright were adopted. The reasons for this decline in legislative activity vary. An important factor was the rapid growth of EU membership, which made law-making at the EU level increasingly complex and difficult. In addition, since the new EU Member States came from less-developed parts of Europe, these states were less inclined to support an agenda of ever-increasing rights. A gradual loss of faith in the quality of the EU legislative product, and in the Union generally, may also have played a role.

All this explains a gradual policy shift of the European Commission, which has the sole competence to initiate harmonization directives, towards ‘softer’ legislative instruments such as the Online Music Recommendation, which was issued by the Commission in 2005.¹⁰ This non-binding Recommendation sought to facilitate the grant of Union-wide licences for online uses of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and grant them to a single collective rights manager operating at EU level.

While short on ‘hard’ law, the 2001–2009 period did generate a flurry of European Commission policy papers, the most intriguing of which is the Commission’s 2005 evaluation of the Database Directive.¹¹ In marked contrast to the ‘thumbs-up’ reports the Commission usually produces in praise of its progeny of directives,¹² this evaluation report is a scathing review of a directive once heralded by the Commission as a model for the world. According to the Commission, ‘[f]rom the outset, there have been problems associated with the “sui generis”

⁸ See n 1.

⁹ See, eg N Helberger et al., ‘Never Forever: Why extending the term of protection for sound recordings is a bad idea’ [2008] *EIPR* 174.

¹⁰ Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services.

¹¹ DG Internal Market and Services Working Paper: ‘First evaluation of Directive 96/9/EC on the legal protection of databases’ (12 December 2005) 1–28 <http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf>.

¹² See, eg ‘Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the implementation and effects of Directive 91/250/EEC on the legal protection of computer programs’, COM(2000) 199 final (10 April 2000).

right: the scope of the right is unclear; granting protection to “non-original” databases is perceived as locking up information, especially data and information that are in the public domain; and its failure to produce any measurable impact on European database production’.¹³ The Commission therefore proposes various policy options, including repealing the entire Directive.¹⁴

Other noteworthy documents from this period are the 2008 Green Paper and 2009 Communication on ‘Copyright in the Knowledge Economy’,¹⁵ which introduce various future dossiers, such as the issues of orphan works and user-generated content. The former has eventually led to the Orphan Works Directive, which was adopted in October 2012.

The new decade indeed seems to promise more productive years for the European law-maker. The year 2011 produced two Green Papers that set out the harmonization agenda of the EU for the near future.¹⁶ High on the list is harmonization of the rules of governance of collective rights management organisations—a dossier that has been on the Commission’s desk since at least 2004, when it published an ambitious Communication expressing an urgent need for community action in this complex field. The Commission’s long-awaited proposal for a directive on collective rights management was finally published in July 2012.¹⁷ The proposal pursues two objectives: (1) to promote greater transparency and improve governance of collecting societies through strengthened reporting obligations and right holders’ control over their activities; and (2) to encourage and facilitate multi-territorial and multi-repertoire licensing of authors’ rights in musical works for online uses in the EU, by way of a ‘passport system’ that favours collective rights management organizations that are logistically capable of offering such licences under competitive conditions.

(3) **The age of judicial activism (2009–...)**

Despite the Commission’s renewed ambitions, the centre of copyright harmonization in the EU has in recent years shifted from the law-maker to the judiciary: the Court of Justice of the European Union. Starting with the landmark *Infopaq* case of 2009, the Court has pursued an activist agenda of ‘harmonization by interpretation’—or by ‘stealth’, as some commentators would have it.¹⁸ In

¹³ DG Internal Market and Services Working Paper (n 11) 23.

¹⁴ DG Internal Market and Services Working Paper (n 11) 25.

¹⁵ Green Paper, ‘Copyright in the Knowledge Economy’, COM(2008) 466 final (16 July 2008); Communication from the Commission, ‘Copyright in the Knowledge Economy’, COM(2009) 532 final (19 October 2009).

¹⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, ‘A single market for intellectual property rights boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe’, COM(2011) 287 final (24 May 2011); ‘Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market’, COM(2011) 427 final (13 July 2011).

¹⁷ Collective Management Directive Proposal (n 1).

¹⁸ See, eg L Bently, ‘Harmonisation by stealth’ (unpublished paper presented at the Fordham IP Conference on 8 April 2012) <<http://fordhamipconference.com/wp-content/uploads/2010/08/>

Infopaq—a case involving the unauthorized reproduction of 11-word fragments of newspaper articles by a news alert service—the Court matter-of-factly held that ‘copyright within the meaning of Article 2(a) of [the Information Society Directive] is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation’.¹⁹ From this the Court derived a harmonized copyright infringement standard:

In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of [the Information Society Directive], if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.²⁰

While the Court’s holding is roughly in line with the author’s right conception of works of authorship that underlies the law of copyright in continental-European Member States, it came as a surprise since no general harmonized standards for works of authorship or copyright infringement formally exist. The directives have only harmonized three distinct categories of works—computer programs,²¹ databases,²² and photographs²³—along the common standard of ‘the author’s own intellectual creation’, whereas the directives are completely silent on the standard(s) for assessing copyright infringement. The Court has nevertheless confirmed and expanded its *Infopaq* holding in *BSA* and various later cases, consistently repeating that copyright law in the EU protects ‘the author’s own intellectual creation’.²⁴

Not surprisingly, the *Infopaq* and *BSA* decisions have attracted criticism, mostly from commentators in the United Kingdom. For example, according to Griffiths the decisions are ‘a striking example of judicial activism in the interests of harmonisation’.²⁵ Undeterred by this criticism, the Court has continued to express similar judicial activism in other largely uncharted areas, such as the notion of ‘public’ (communication). According to the Court, communication to the public occurs both in a hotel that merely provides CDs and CD players to its guests²⁶ and in a public house where customers may view broadcast sports programs on television screens,²⁷ but not, however, in a dentist’s waiting room.²⁸

Bently_Harmonization.pdf>. See also G Schulze, ‘Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs? Anmerkung zu EuGH Infopaq/DDF’ [2009] *GRUR* 1019.

¹⁹ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569, para 37.

²⁰ *Infopaq* (n 19), para 48. ²¹ Computer Programs Directive, Art 1(3).

²² Database Directive, Art 3(1). ²³ Term Directive, Art 6.

²⁴ Case C-393/09 *BSA v Ministerstvo kultury* [2010] ECR I-13971 (graphical user interface of a computer program, while failing to qualify as a ‘computer program’, deemed protected by copyright if it is its author’s own intellectual creation). See also Joined Cases C-403/08 and 429/08 *Football Association Premier League v QC Leisure and Karen Murphy v Media Protection Services Ltd* [2012] 1 CMLR 29 (football matches not considered works of authorship).

²⁵ J Griffiths, ‘*Infopaq*, *BSA* and the “Europeanisation” of United Kingdom Copyright Law’ [2011] *Media & Arts Law Review* 1.

²⁶ Case C-162/10 *Phonographic Performance (Ireland) Limited v Ireland* [2012] 2 CMLR 29.

²⁷ *EA Premier League* (n 24).

²⁸ Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* [2012] ECDR 16.

In another important decision the Court ventured into the law of film production contracts, another area not formally harmonized. In *Luksan* the Court held that the economic rights to exploit a cinematographic work vest by operation of law, directly and originally, in the principal director of the film. Consequently, national (Austrian) law that allocated these rights to the film producer was deemed incompatible with EU law.²⁹

As a result of these and similar decisions, important areas of copyright that had been largely left untouched by harmonization directives have been de facto harmonized by the Court. One can only wonder what topics, if any, will remain for the EU legislature to tackle within the years to come.

The Court's judicial activism reminds us of the important role it played in the years leading up to harmonization. In a series of landmark decisions the Court measured the exercise of intellectual property rights against the basic freedoms of the internal market—in particular, the free circulation of goods and services.³⁰ Where the exercise by right holders was found to be outside the 'specific subject matter' of intellectual property, for example to impede parallel imports of copyrighted goods between Member States, the Court found conflict with these freedoms. In retrospect these early decisions of the Court provided an important impetus for the European Commission's harmonization initiative.³¹

C. The Pros and Cons of Harmonization

How, then, should the European harmonization experience be assessed after 20 years? At first impression, two decades of harmonization of copyright and related rights have been remarkably productive. Despite initial scepticism about the EU's legislative competence in the realm of copyright among Member States, stakeholders, and scholars, the EU legislature has carried out an ambitious and broad ranging agenda of harmonization that has touched upon many of the most important issues in the field of copyright and related rights. From the early directives dealing primarily with specific subject-matter or rights, to the later broad Information Society Directive, the harmonization process has produced a sizeable body of European law on the subject-matter, scope, limitations, term, and enforcement of copyright and related rights.

Although many inconsistencies remain, the harmonization machinery has undeniably produced a certain *acquis communautaire*. While far from complete it has normative effect not only in the Member States that are obliged to transpose the

²⁹ Case C-277/10 *Luksan v Petrus van der Let* [2013] ECDR 5.

³⁰ Case 78/70 *Deutsche Grammophon v Metro SB* [1971] ECR 487; Case 62/79 *Coditel v Ciné Vog Films* [1980] ECR 881; Case 262/81 *Coditel v Ciné Vog Films (Coditel II)* [1982] ECR 3381; Case 58/80 *Dansk Supermarked v Imerco* [1981] ECR 181; Case 158/86 *Warner Brothers* [1988] ECR 2605; Case 341/87 *EMI-Electrola v Patricia* [1989] ECR 79; Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521; Case C-61/97 *Laserdisken I* [1998] ECR I-5171; Case 55/80 *Musik-Vertrieb Membran* [1981] ECR 147.

³¹ See J-F Verstrynge, 'Copyright in the European Economic Community' (1993) 4 *Fordham Intellectual Property, Media and Entertainment Law Journal* 6.

directives, but also at the international level. Where the directives have provided precise instructions, leaving the Member States little discretion for deviation, such as in the case of the Computer Programs Directive, the harmonization process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency, and predictability of norms in these distinct sectors. This approximating effect has been enhanced in recent years by activist case law of the European Court of Justice that has resulted in de facto harmonization of areas not formally harmonized.

Harmonization of copyright has also empowered the European Community, which later became the EU, to negotiate agreements in the field of copyright and neighbouring rights with Europe's trading partners, and thereby provided opportunities to 'export' European copyright standards. The European Commission has, over time, negotiated a host of international, bilateral, and regional trade arrangements on behalf of the EU and its Member States. For example, the EEA Agreement³² concluded between the European Community, its Member States, and Iceland, Liechtenstein, and Norway, contains an obligation to implement the entire *acquis* in the field of copyright and neighbouring rights.³³ The more recent EU-Korea Free Trade Agreement 2009 contains various 'European' standards, including an obligation for the contracting parties to protect authors' rights for a term no less than the life of the author and 70 years after the author's death.³⁴

But these positive results have come at considerable expense, in terms of time, public finance, and other social costs, to the organs of the EU and its Member States. Due to the complexity of the European law-making procedure, even a relatively non-controversial directive takes several years to complete, from its first proposal to its final adoption, including translation into the many official languages of the Union. Upon adoption of a directive, another round of law-making will commence at the level of the Member States. Twenty-seven governments will consult local stakeholders, draft implementation bills, and discuss these with 27 parliaments often ignorant of the fact that the directives leave limited discretion to national legislatures. The step-by-step approach towards harmonization that the European legislature has followed has placed an enormous burden on the legislative apparatus of the Member States. For national legislatures, the harmonization agenda of the EU has resulted in an almost non-stop process of amending the national laws on copyright and related rights. In all, the time span between the first proposal of a directive and its final implementation can easily exceed 10 years.

Clearly, the instrument of a harmonization directive is ill suited to respond quickly to the challenges of a constantly evolving, dynamic information market. But even a relatively unambitious consolidation exercise, such as a 'recasting' of

³² Agreement on the European Economic Area, OJ L1/3 (3 January 1994).

³³ EEA Agreement, Annex 17 No 9(e). See, generally, S von Lewinski, 'Copyright Within the External Relations of the European Union and the EFTA Countries' [1994] *EIPR* 429.

³⁴ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L127/6 (14 May 2011), Art 10(6).

the *acquis*,³⁵ would take several years to complete and then transpose, assuming that Member States and stakeholders could exercise enough self-restraint to refrain from adding new policy options to the agenda.

Another structural deficiency of the harmonization process is the asymmetric normative effect of harmonization by directive. The harmonized norms of copyright and related rights in the seven directives in many cases exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered. More often than not the norms also surpass average levels of protection that existed in the Member States prior to implementation, as exemplified by the Term Directive, which has harmonized the duration of copyright at a level well above the normal European term of 50 years *post mortem auctoris*. Surely, this trend of ‘upwards’ harmonization is driven, at least in part, by the desire of the European legislature to seek ‘a high level of protection of intellectual property’, which would lead to ‘growth and competitiveness of European industry’³⁶—a proposition that has yet to be proven.³⁷ But some up-scaling of protection is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

A related problem is the ‘ratcheting-up’ effect that a harmonization directive inevitably has on national levels of protection, even in the rare case that a directive is later repealed. Repealing a directive does not automatically lead to the undoing of implementation legislation at the national level, unless a national legislature has provided for a sunset clause. This makes harmonization by directive essentially a one-way street, from which there is no turning back. For example, despite the European Commission’s scathing assessment of the Database Directive³⁸ in 2005, no initiative to repeal the Directive or its controversial *sui generis* database right has yet been taken or is expected soon.

This phenomenon of ‘upwards’ approximation is inherent to the process of harmonization by directive, and a reason for serious concern. The effectiveness, in economic and social terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary ‘delicate balance’ between the interests of right holders in maximizing protection, and the public at large, in having access to products of creativity and knowledge. Moreover, a constant expansion of rights of intellectual

³⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘Updating and simplifying the Community acquis’, COM(2003) 71 final (11 February 2003); see also Commission Communication, ‘A single market’ (n 16) (proposing a ‘European Copyright Code’ that would consolidate the existing directives).

³⁶ Information Society Directive, recital 4.

³⁷ See DG Internal Market and Services Working Paper (n 11), arguing that positive effect of the introduction of the *sui generis* right on the EU information economy cannot be proven.

³⁸ See DG Internal Market and Services Working Paper (n 11).

property due to 'upwards' harmonization is likely to create new obstacles to the establishment of an internal market, rather than remove them, as long as exclusive rights remain largely territorial and can be exercised along national borders.

Another weakness of the harmonization process lies in its short-term negative effect on legal certainty in the Member States, especially where a directive introduces new rights or novel terminology. Harmonization by directive creates additional layers of legal rules that require interpretation first at the national level of the local courts, and eventually by the Court of Justice of the EU. This extra legislative layer is the cause of legal uncertainty, as long as the Court has not pronounced its final 'verdict' on the most contentious issues.

Another structural drawback of the instrument of harmonization is its limited potential to provide for true unification of law. Harmonization directives usually leave a broad measure of discretion to the Member States, and are often vague as a result of political compromise. It is common for directives to provide minimum standards of protection, or optional provisions. In some cases, the norms in a directive leave national legislatures so much leeway that their actual harmonizing effect must seriously be called into doubt. A noteworthy example is Article 5(2) and (3) of the Information Society Directive, which allow Member States to 'pick and mix' limitations from a 'shopping list' of some 21 broadly worded categories of exemptions.

Yet another criticism concerns the lack of transparency of the legislative process. Law-making by directive involves a highly complex interplay between all three legislative powers of the Community. Almost inevitably this complexity reduces the transparency of the legislative process, and invites lobbying and rent-seeking. More often than not, harmonization initiatives are driven by hidden political agendas. Indeed, the stated aim of a directive ('removing national disparities') rarely tells the full story, and in some cases appears to be far-fetched.

Another critique concerns the quality of the final legislative product. The complex legislative procedure leading to a harmonization directive, involving input from three EU institutions and some 27 Member States, simply cannot produce norms of the quality that the EU—the largest market in the world—requires. To make matters worse, pressure from powerful lobby groups and from the EU's main trading partners does not allow enough time for the reflection needed to produce good-quality regulation. At the national level, to avoid the risk of rushing into immature or unnecessary legislative initiatives, legislatures often seek advice from (committees of) academic advisors. Similarly, academic experts could play an important role as 'quality controllers' at the European level.

On balance, the process of harmonization in the field of copyright and related rights has produced mixed results at great expense, and its beneficial effects on the internal market are limited at best, and remain largely unproven. This sobering conclusion calls for caution and restraint when considering future initiatives of harmonization by directive.

D. Territoriality in European Copyright

However, the real Achilles heel of harmonization is territoriality. Despite 20 years of harmonization, copyright law remains essentially national law, with each of the EU's Member States having its own national law on copyright and neighbouring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted. In its *Lagardère* ruling³⁹ the Court of Justice confirmed the territorial nature of copyright and related rights.

An important consequence of territoriality is that according to the rule of private international law, the law of the country where protection is sought (the so-called *Schutzland*) governs instances of copyright infringement.⁴⁰ This implies that making a work available online (ie over the internet) affects as many copyright laws as there are countries where the posted work can be accessed. In other words, copyright licences for such acts need to be cleared in all countries of reception—normally, all 27 Member States of the EU.

Due to the rule of national treatment found, *inter alia*, in Article 5(2) of the Berne Convention, works or other subject-matter protected by the laws of the Member States are protected by a 'bundle' of 27 parallel (sets of) exclusive rights. A related consequence of territoriality is, therefore, that copyright in a single work of authorship can be split into multiple territorially defined national rights, which may be owned or exercised for each national territory by a different entity. This is the case, for instance, with copyrights in musical works. In practice, composers, song writers, and music publishers grant their copyrights to collective rights management organizations that operate on the basis of strictly nationally defined legal mandates.

Over time, the Court of Justice of the European Union (CJEU) and the EU legislature have responded to the problems of territoriality, by mitigating its consequences in various ways. These responses, however, have been uneven and remain incomplete, particularly with regard to making works available online.

(1) Community exhaustion

The CJEU recognized early on that the territorial exercise of rights of intellectual property negatively affects the free circulation of goods, which is a core characteristic of the internal market. In a series of decisions preceding the harmonization of copyright and related rights, the Court held that the right to control

³⁹ Case C-192/04 *Lagardère Active Broadcast* [2005] ECR I-7199, 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 harmonisation 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.'

⁴⁰ Rome II Regulation, Art 8.

the distribution of copyright protected goods is exhausted following the initial putting on the market of these goods inside the Community with the consent of the right holder(s).⁴¹ This so-called rule of 'Community exhaustion' was codified, much later, in Article 4(2) of the Information Society Directive. As a consequence, markets for copyright protected goods can no longer be partitioned according to national borders; parallel importing of goods that incorporate copyrighted works, such as books or CDs, that originate from other EU Member States, is legitimate. No exhaustion, however, occurs if these goods have their origin outside the EU, for example from the United States; in such cases, right holders in the EU may legitimately oppose parallel imports.

No similar rule of exhaustion, however, presently exists in respect of the provision of content-related services. These services therefore remain vulnerable to the concurrent exercise of rights of public performance, communication to the public, cable retransmission, or making available in all the Member States where the services are offered to the public. In its *Coditel I* decision, the European Court of Justice refused to recognize a rule of Community exhaustion in respect of acts of secondary cable transmission.⁴² The right holder in a neighbouring Member State (in this case Belgium) could therefore legitimately oppose the unauthorized retransmission of a film broadcast in another state (Germany) via cable networks, without unduly restricting trade between Member States. In 2001 the EU legislature codified the *Coditel I* rule in respect of the rights of communication and making available to the public in Article 3(3) of the Information Society Directive. The Directive, however, does not apply to subject-matter covered by previous directives, such as the Computer Programs Directive.⁴³ Interpreting that Directive in 2012, in yet another recent groundbreaking decision, the CJEU in *UsedSoft* has opened the door to exhaustion online by holding that:

the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.⁴⁴

(2) The satellite broadcasting solution

Apart from the rule of Community exhaustion that permits the further circulation of copyrighted goods within the EU upon their introduction on the market in the

⁴¹ See, eg Case 78/70 *Deutsche Grammophon v Metro SB* [1971] ECR 487.

⁴² Case 62/79 *Coditel v Ciné Vog Films* [1980] ECR 881.

⁴³ See Information Society Directive, Art 1(2): 'Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to: (a) the legal protection of computer programs; (b) rental right, lending right and certain rights related to copyright in the field of intellectual property; (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission; (d) the term of protection of copyright and certain related rights; (e) the legal protection of databases'.

⁴⁴ Case C-128/11 *UsedSoft GmbH v Oracle International Corp* [2012] 3 CMLR 44.

EU with the local right holder's consent, the only structural legislative solution to the problem of market fragmentation by territorial rights can be found in the Satellite and Cable Directive 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, ie where the 'injection' ('start of the uninterrupted chain') of the program-carrying signal can be localized. Thus, the Directive departed from the so-called 'Bogsch theory', which held that a satellite broadcast requires licences from all right holders in all countries of reception (ie within the footprint of the satellite). Since the transposition of the Directive, only a licence in the country of origin (home country) of the satellite broadcast is needed. As a result—at least in theory—a pan-European audiovisual space for satellite broadcasting has been created, and market fragmentation along national borders is avoided, by steering away from the cumulative application of several national laws to a single act of satellite broadcasting. Paradoxically, in the market for online content where the problem of territoriality has now become acute,⁴⁵ no similar legislative solution has been achieved. Unlike satellite broadcasters, content providers offering trans-border online services across the EU will have to clear the rights from all right holders concerned for all the Member States of reception.

(3) EU competition law

Even less structural, but sometimes effective nonetheless, are the remedies found in EU competition law, notably Articles 101 and 102 TFEU, formerly Articles 81 and 82 of the EC Treaty, against the exercise of intellectual property rights along national borders that result in the unjustified partitioning of the internal market. The Court of Justice has produced extensive case law on the issue, applying both former Articles 81 (anti-trust) and 82 (abuse of a dominant position). With regard to the former article, the Court 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.⁴⁶ In *Tiercé Ladbroke* the Court of First Instance ruled that an agreement by which two or more undertakings commit themselves to refusing third parties a licence 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'.⁴⁷ The *GVL* case demonstrates that Article 102 TFEU may also serve as a remedy against the territorial exercise

⁴⁵ See 'Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, on creative content online in the single market', COM(2007) 836 final (3 January 2008).

⁴⁶ Case 262/81 *Coditel v Ciné Vog Films (Coditel II)* [1982] ECR 3381, paras 17 et seq.

⁴⁷ Case T-504/03 *Tiercé Ladbroke SA v Commission* [1997] ECR II-923, paras 157 et seq.

of copyright. According to the European Court of Justice, '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'.⁴⁸

Issues of territorial exclusivity are also at the heart of several competition cases concerning licensing practices of collecting societies.⁴⁹ In the *Santiago Agreement* case, the European Commission prohibited a large number of European collecting societies, members of CISAC, from restricting competition as regards the conditions for the management and licensing of authors public performance rights for musical works. The collecting societies were found to have restricted the services they offer to authors and commercial users outside their domestic territory.⁵⁰

The groundbreaking *Premier League Decoder* cases that were decided by the Court in 2011 confirm that EU competition law militates against licensing contracts that confer absolute territorial exclusivity.⁵¹ These cases essentially turned on the trade in satellite decoder cards that provide access to encrypted foreign satellite transmissions of live Premier League football matches from Greece at lower prices than domestic pay TV services in the United Kingdom. According to the Court the exclusive licensing contracts the Premier League had entered into with the Greek satellite pay television vendor, which included an obligation not to sell decoder cards to consumers abroad, led to absolute territorial exclusivity, which the Court held not to be justified and therefore in conflict with both the freedom to provide services and competition law. Interestingly, the Court expressly rejected the argument of price discrimination—ie the possibility of differentiating consumer prices—as a valid justification for segmenting markets inside the EU.⁵²

E. The Way Forward: Towards Unification of EU Copyright Law

As this chapter has demonstrated, harmonization of copyright law in the EU has occurred in three different phases, with different means and with various levels of ambition and effectiveness: by way of harmonization directives, through soft law, and via the Court of Justice. Could there be a fourth phase on the horizon?

As the Institute for Information Law has suggested in a major study on the future of European copyright law carried out for the European Commission,⁵³ the

⁴⁸ Case C-7/82 *GVL v Commission* [1983] ECR 483, para 5.

⁴⁹ Commission Decision 2003/300/EC of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, COMP/C2/38.014 (IFPI Simulcasting).

⁵⁰ Commission Decision of 16 July 2008, COMP/38698.

⁵¹ Joined Cases C-403/08 and 429/08 *FA Premier League v QC Leisure and Karen Murphy v Media Protection Services* [2012] 1 CMLR 29.

⁵² *FA Premier League* (n 51), para 115.

⁵³ See PB Hugenholtz et al., 'The Recasting of Copyright & Related Rights for the Knowledge Economy', Report to the European Commission (DG Internal Market) (November 2006) 210. See also M van Eechoud et al., *Harmonising European Copyright Law. The Challenges of Better Lawmaking* (Alphen aan den Rijn: Kluwer Law International, 2009) 317 et seq.

logical next step in this process towards uniformity of copyright law in Europe would be the introduction of a truly unified European Copyright Law. Long considered taboo in copyright circles, the idea of copyright unification is gradually materializing, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner Vivian Redding endorsed the idea of a European Copyright Law:

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.⁵⁴

Significantly, the Lisbon Reform Treaty has introduced a specific competence for Union-wide 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 authorisation, coordination and supervision arrangements.⁵⁵

Arguably, 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 full effect and remove territorial restrictions.

The potential advantages of such a Union-wide copyright title are undeniable. A European Copyright Law would immediately establish a truly unified legal framework, replacing the multitude of national rules of the present. It would have instant Union-wide effect, thereby creating an unfragmented 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 transaction costs. Unification could also restore the asymmetry that is inherent in the current *acquis*, which *mandates* basic economic rights, but merely *permits* limitations.

Devising a European Copyright Law would be an ambitious undertaking—at best a project of the long term. With copyright law today in a state of constant crisis, due in particular 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

⁵⁴ V Reding, 'Bringing down walls and barriers in the digital world—priorities for the European Digital Agenda', unpublished paper delivered at Visby/Gotland on 9 November 2009 <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>>. Similar ideas were expressed in 'A Reflection Document of DG INFSO and DG MARKT, Creative Content in a European Digital Single Market: Challenges for the Future' (22 October 2009) <http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf>.

⁵⁵ The 'ordinary procedure' to which Art 118 refers 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.

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 in the EU. Indeed, such work could be less dependent on the mood of the day, and might allow for sufficient reflection, thereby enhancing the quality of the final legislative product.

The European Commission's 2011 IPR Strategy paper entertains the possibility of consolidating the entire body of harmonized copyright law into a single 'European Copyright Code'.⁵⁶ According to the Commission, '[t]his could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at 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 a 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 European Copyright Law that would effectively replace national copyright laws in the Member States.

In anticipation of a future EU initiative towards unification, a self-appointed group of European copyright scholars ('the Wittem Group') has drafted a model European Copyright Code, which was published in April 2010.⁵⁷ Interestingly, the Wittem Group comprised scholars from both the continental-European author's right tradition and the British copyright tradition, demonstrating that a European Copyright Law that assimilates both traditions can actually be realized.

⁵⁶ Commission Communication, 'A single market' (n 16) 11.

⁵⁷ The Wittem Group's European Copyright Code.

