

I. INTRODUCTION

As long as I remember researching and practicing copyright law, Frank Gotzen was always there, accompanying my first hesitant steps into this area of law, supporting the comparative law approach I had chosen for my Ph. D. on the convergences and divergences between the *droit d'auteur* and the copyright traditions, always curious to discover new insights and viewpoints, always very open to new ideas, while eager to maintain sound copyright principles at the same time. Frank's tone and style, his unique sense of humour sometimes hid behind an austere appearance, have always helped him to convincingly convey his views. For one and a half year, we both participated, as experts, to the Belgian Parliamentary work on the complete overhaul of the 1886 Copyright Act by the still in force 1994 Copyright and Neighbouring Rights Act. During that period, I learned to appreciate not only the scientific qualities of Frank, but also his ability to advocate a balanced view of copyright law. Through Frank Gotzen's suggestions, the original draft law of SenatorALLEMAND, modelled on French copyright law, integrated some facets of German law, and became a fine piece of true European copyright law in the Continental sense, i. e. with the right safeguards for the creators. Frank himself is a true European: his impressive command of German, French and English, on top of his mother tongue, allows him to comfortably navigate through diverse currents of legal thoughts. Not a surprise that the European harmonisation of intellectual property law has always been at the centre of Frank Gotzen's attention. My contribution in the honour of Professor Frank Gotzen is focused on the Europeanization of copyright law.

The Europeanization of copyright law follows various paths. Secondary EU copyright law, embedded in the seven Directives devoted to copyright issues, has indeed contributed to the approximation of national copyright laws¹. But the Europeanization of copyright has recently taken another route: since the *Infopaq I* decision² of the Court of Justice of the EU ("CJEU"), the judges (and advocate generals) of Luxembourg regularly deliver decisions (and opinions) which rule on major copyright issues, such as the notions of work and originality, the scope

¹ See the contributions of Prof. A. Lucas and Prof. F. Brison in the present volume.

² CJEU, 16 July 2009, C-5/08 (*Infopaq International v. Danske Dagblades Forening (DDF)*).

of the rights and the limits of exceptions. Those decisions (and opinions) also indicate the direction that copyright should take in the future – if the EU again legislates in the field of copyright. To describe the far-reaching impact of the CJEU case law, some scholars have coined the terms “harmonisation by stealth”³ or “filling the gaps”⁴. It is clear that a court-made harmonisation of European copyright is under way. Whether the gaps will be filled remains to be seen. The CJEU probably will offer a sufficiently coherent interpretation of the substantive conditions of protection, of the rights belonging to copyright and of the copyright exceptions. The Court might also inject the dose of flexibility needed for a balanced system of copyright. This *oeuvre* from the Court of Justice should not be underestimated, even if it is not yet the *chef d’oeuvre* that some might have dreamed of back in the 1980s, before the whole harmonisation process started.

Some gaps not addressed by the EU legislature will remain, however. The main gap in the architecture of European copyright is linked to the territoriality principle. In the absence of a pan-European title, copyright is still national, which means that copyright can only be enforced at national level, that the contractual exercise of copyright hardly extends beyond borders, that the clearing of the rights is a cumbersome process. This fragmentation in practice creates numerous problems which reduce the value of copyright and, *in fine*, the return that creators can expect to earn. In a comprehensive study on the achievements and progress towards a true single market, Mr. Monti – working at that time as an academic – recommended that the establishment an EU-wide copyright be considered for the following reasons:

“The European markets for online digital content are still underdeveloped as the complexity and lack of transparency of the copyright regime creates an unfavourable business environment. It is urgent to simplify copyright clearance and management by facilitating pan-European content licensing, by developing EU-wide copyright rules, including a framework for digital rights management. ... Additional measures should also be examined to take into account the specificities of all the different forms of online content, such as further harmonisation of copyright, creation of an EU copyright title, considering that cross-border online transactions take place at the location of supply and extended collective licensing”⁵

³ See the contribution of Prof. L. Bently at the “InfoSoc Directive @ 10 Conference” held on Jan. 13, 2012 at the European Parliament, Brussels.

⁴ Contribution of Prof. J. Griffith at the May 19-20, 2011 Annual Conference on European Copyright Law organised by the Academy of European Law (ERA). Fr. Gotzen chaired a session of this conference.

⁵ M. MONTI, *A new strategy for the single market at the service of Europe's Economy and Society*. Report to the President of the European Commission José Manuel Barroso, May 9, 2010, p. 44-45 (available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf).

As we shall see, the Commission, since the Monti Report, has further mentioned the possibility to embrace a form of pan-European copyright⁶.

But, in the first part of this contribution, I will focus on the condition for copyright protection⁷ to show that a judge-made law of copyright is in the making. Even more importantly, we will see in a second part that the CJEU emphasizes the need to apply a balancing test to several copyright issues, bringing forward the requirement to take into account several fundamental rights and principles. In sum, the CJEU plants the overreaching proportionality principle in the middle of copyright. This, in turn, has implications on the way Belgian and other national copyright laws must be interpreted.

After this short tour of some European developments, I will discuss two issues which still appear as big holes in the existing framework for copyright in Europe: the absence of a Regulation on copyright and the lack of copyright contract rules at EU level.

Regarding copyright contracts, the influence of Frank Gotzen in shaping the rules that were adopted by the Belgian legislator in 1994 has been decisive; Frank Gotzen would probably agree that the main rules for copyright contracts should be adopted at EU level, but this is a touchy issue, as it exacerbates the antagonisms between creators and publishers. This issue is not on the Commission's agenda. This is an area on which the European legislature should focus, once the problems linked to the territoriality of copyright in Europe are adequately addressed.

II. THE CJEU CONTRIBUTION TO THE EUROPEANIZATION OF COPYRIGHT'S BUILDING BLOCKS: THE ORIGINALITY CRITERION FROM *INFOPAQ* TO *PAINER* AND *FOOTBALL DATACO*

As a first remark, the importance of the growing CJEU case law partly results from the sheer number of cases that have been decided since the leading *Infopaq* decision of July 2009 and that are now still pending before the CJEU. It is worth to enumerate those cases:

⁶ See Commission's Communication, *A Single Market for Intellectual Property Rights*, COM(287) final of 24.5.2011.

⁷ The conditions of protection were mainly defined in the *Infopaq* (C-5/08) and *Painer* (C-145/10) cases decided by the CJEU in respectively July 2009 and December 2011.

- C-403-429/08 Premier League
- C-168/09 Flos
- C-387/09 EGEDA
- C-393/09 BeSoft
- C-431/09 Airfield
- C-462/09 De Thuiskopie
- C-70/10 Scarlet
- C-135/10 Consorzio Fonografici
- C-145/10 Painer
- C-162/10 Phono Performance
- C-198/10 Cassina
- C-228/10 UEFA v. Euroview
- C-271/10 VEWA
- C-277/10 Luksan
- C-283/10 Circus Globus
- C-302/10 Infopaq II
- C-360/10 Netlog
- C-406/10 SAS Institute
- C-461/10 Bonnier Audio AB
- C-604/10 Football Dataco I
- C-05/11 Titus Alexander Donner
- C-103/11 Systran
- C-128/11 UsedSoft
- C-173/11 Football Dataco II
- C-457-460/11 VG Wort
- C-521/11 Amazon

And others are coming...

For the present contribution, it is not in our intention to offer a review on all the copyright issues raised by those cases. Instead, we will focus on the Europeanization of the originality criterion.

The *Infopaq I* decision⁸ of the CJEU is clearly a turning point in the court-made Europeanization of copyright law.

Infopaq operates a media monitoring business which involves the scanning of newspaper articles and the email transmission of summaries

⁸ CJEU, 16 July 2009, C-5/08 (*Infopaq International v. DDF*).

and short extracts to customers. DDF, a professional association of Danish daily newspaper publishers, sued Infopaq for copyright infringement. The Danish court referred several questions on the scope of the reproduction right (Art. 2(a) of the Directive 2001/29), but the CJEU decided *en passant* to define the condition for newspaper articles to be protected by copyright. To generalize the existing definition of originality contained in some EU Directives, the CJEU relied on the Berne Convention and on the notions of “work” and “intellectual creation”. The CJEU first considers that the exclusive reproduction right of Article 2(a) applies to a ‘work’ (§33); then, the Court refers to the Berne Convention, in particular Article 2(5) and (8), from which it derives that “the protection of certain subject-matters as artistic or literary works presupposes that they are *intellectual creations*” (§34); the Court notes that, similarly, the Directives 91/250 (Art. 1(3)), 96/9 (Art. 3(1)) and 2006/116 (Art. 6) provide that “works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense they are their author’s own *intellectual creation*” (§35); after noting that the horizontal Directive 2001/29 “is based on the same principle”, the Court concludes that copyright within “the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense of that it is its author’s own *intellectual creation*” (§37). Then the CJEU addresses the issue whether parts of works can be protected: “Regarding the elements of such works covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation [...] given the requirement of a broad interpretation of the scope of the protection conferred by Article 2 of Directive 2001/29, the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the *intellectual creation* of the author of that article” (§45-47).

The more recent *Infopaq II* order⁹ just confirms that “an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract,

⁹ CJEU, 17 Jan. 2012, C-302/10 (Order) (*Infopaq International v. DDF*).

is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29 if [...] the elements thus reproduced are the expression of the intellectual creation of their author" (§22).

Infopaq has already influenced several important court decisions at national level, in particular in cases involving the reuse of press articles, such as *Copiepresse v. Google*¹⁰ in Belgium and *Meltwater*¹¹ in the UK. In *Copiepresse*, the Brussels Court of appeal had to consider whether the reproduction of the titles and of the first three lines of the articles posted on the websites of the Belgian newspapers was infringing copyright. The Court stated that "as regards the sections of a work, it should be borne in mind that there is nothing in Directive 2001/29 or in any other relevant directive to indicate that these sections should be treated differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work and they contain elements which are the expression of the intellectual creation of the author of the work [the decision then refers to *Infopaq*"]". In *Meltwater*, a case involving the reuse of newspaper headlines, the UK Court of appeal confirmed the decision of the High Court that headlines can be protected under the standard defined by *Infopaq*: "headlines are capable of being literary works, whether independently or as part of the articles to which they relate. Some of the headlines [...] with which I have been provided are certainly independent literary works within the *Infopaq* test" (see §17 and 20 of the Court of Appeal decision). The description by the High Court of the process leading to the composition and selection of the headlines is interesting: "The headlines are often striking and substantial, both in terms of content and in terms of length. They are not usually written by the journalists who write the underlying articles but by editorial staff whose specific functions include the composition of headlines. The ability to compose a headline is a valuable and discrete skill and courses exist to teach it. Headlines require skill in order to fulfil the objective of capturing the reader's attention and inducing them to read the article. Thus a headline frequently has some emotional or sentimental 'hook', it may contain a pun, it may summarise the content of the article to which it relates." More surprisingly, the Court of

Appeal (§20) considers that the *Infopaq* test is in line with the UK precedents on the long-standing test for copyright protection¹².

In *Painer*¹³, the CJEU further applied the *Infopaq* standard to the protection of photographs (see §87). The case involves the reproduction by several newspapers of the portrait photographs of a child and of a photo-fit version made later after the child had been abducted. The decision goes further than *Infopaq* in that it describes into details when a work is protected as the author's own intellectual creation: "an intellectual creation is an author's own if it reflects the author's personality. That is the case if the author was able to express his creative abilities in the production of the work by making free and creative choices [...]. As regards a portrait photograph, the photographer can make free and creative choices in several ways and at various points in its production. In the preparation phase, the photographer can choose the background, the subject's pose and the lighting. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software" (§88-91). Moreover, the Court clearly rejects the view that the extent of copyright protection should depend on "the possible differences in the degree of creative freedom in the production of various categories of works" (§97).

In *Football Dataco*¹⁴, the CJEU quite clearly exclude the reference to the standard UK "skill and labour" test to define the condition for protecting databases: "the fact that the setting up of the database required, irrespective of the creation of the data which it contains, significant labour and skill of its author [...] cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data" (§42). However, it remains to be seen whether this express rejection of "skill and labour" to designate the test for copyright protection will substantially modify the approach of the UK judges. Arguably, the "intellectual creation" test of *Infopaq* is not more selective than the traditional "skill" test applied by the UK courts, and I would thus tend to partly agree with the view of the UK Court of Appeal that *Infopaq* is not remote from the test applied in the UK, at least with regard to press materials. For instance, the description (quoted above) of the process

¹⁰ Brussels Court of appeal, 5 May 2011 (*Copiepresse v. Google*) available in English on the *Copiepresse* website at http://www.copiepresse.be/index.php?pageNum_rq_news=1&totalRows_rq_news=19.

¹¹ *Meltwater Holding BV v. Newspaper Licensing Agency Ltd*, [2011] EWCA Civ. 890 and [2010] EWHC 3099 (Ch). See also the interim decision of the Copyright Tribunal CT 114/09 of 14 Febr. 2012 concerning the determination of the licensing fee.

¹² *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601 approved by the House of Lords in *Ladbroke (Football) Ltd v. William Hill (Football) Ltd* [1964] 1 WLR 273.

¹³ CJEU, 1 Dec. 2011, C-145/10 (*Eva-Maria Painer v. Standard VerlagsGmbH*).

¹⁴ CJEU, 1 March 2012, C-604/10 (*Football Dataco Ltd v. Yahoo! UK Ltd*).

leading to the composition and selection of press headlines arguably could have been made by a Continental judge. To be officially aligned on the CJEU approach, it would suffice to replace the reference to a "skill" (the term appears several times in the extract quoted) by "intellectual creation" or "originality"!

In *Premier League*¹⁵, a case which focuses on the issue of territorial limitations to copyright licensing – see below –, the CJEU ruled that, although the football matches themselves cannot be protected by copyright, some elements of the broadcast (graphics, music, etc.) were copyrighted. Surprisingly, the decision does not deal with the possibility to protect the footage of sport events. The CJEU seems to have completely missed this point. In the Continental countries which, on top of copyright, have a neighboring right for the producers of fixations of films and for the broadcasters, a protection by a related right arguably could apply to the footage itself. With regard to the protected elements of the broadcasts (logos, music, video sequences, graphics...), the CJEU considers that their televising in a pub to customers constitutes a communication of the works to the public¹⁶.

To conclude on the role of the CJEU in defining the criterion of protection, I tend to agree with E. Rosati's view that "probably, neither policy papers nor legislative instruments have ever been capable of providing changes as abrupt and radical as the ones brought about by the CJEU in the *Infopaq* decision"¹⁷ and later confirmed in several cases, including *Painer* and *Football Dataco*.

III. THE CJEU CONTRIBUTION TO THE LEGAL REASONING ON COPYRIGHT ISSUES: THE PROPORTIONALITY PRINCIPLE AND THE NEED TO BALANCE COPYRIGHT AND OTHER FUNDAMENTAL RIGHTS

Two recent CJEU decisions on the role of Internet Service Providers (ISPs) show that the Court in Luxembourg is keen to apply a method that balances copyright with other fundamental rights. I see the growing

¹⁵ CJEU, 4 Oct. 2011, C-403/08 and C-429/08 (*FA Premier League v QC Leisure* and Case C-429/08, *Karen Murphy v Media Protection Services Ltd*).

¹⁶ Because the *Premier League* controlled the right to communicate its works to the public, the pubs required *Premier League*'s authorization to screen the works; but, as we shall see below, the pubs could lawfully acquire decoder cards already put elsewhere on the EU market with the consent of *Premier League*.

¹⁷ E. ROSATI, "Originality in a Work, or a Work of Originality: The Effects of the *Infopaq* Decision", *EIPR*, 2011/12, p. 748.

role of the proportionality principle in the copyright case law as a very positive development.

In *Scarlet*¹⁸, the CJEU gave some guidance as to the power of national courts to award injunctive relief to prevent internet piracy. Specifically, the CJEU held that while national courts can enjoin ISPs to restrict access to a particular website engaged in or facilitating copyright infringement, courts cannot order ISPs to filter or monitor *all* of their customers' traffic in order to prevent copyright infringement via peer-to-peer (P2P) transfers on their network.

In 2004, SABAM (the largest Belgian collective rights management society) established that users of Belgian ISP Scarlet's services were downloading and exchanging works in SABAM's catalogue via P2P protocols, without authorisation and without paying royalties. SABAM sued Scarlet and sought two remedies: a declaration that Scarlet's subscribers were infringing its members' copyrights; and an order requiring Scarlet to end the infringements by blocking all P2P traffic that could contain a media file (i.e., a musical/audio-visual work). The Brussels Court of First Instance granted both remedies, although the order was only issued in 2007 following an expert feasibility report.

Scarlet appealed to the Brussels Court of Appeal on the basis that the order could not be effectively implemented and, more fundamentally, that it would require Scarlet in practice to monitor all traffic on its network and thus violate (i) Article 15 of the E-Commerce Directive (Directive 2000/31/EC), which provides that ISPs have no duty to monitor activities on their networks, and (ii) EU data protection laws. As these questions impacted EU legislation, the Brussels Court of Appeal referred the matter to the CJEU.

The CJEU ruled that although rightsholders may apply for an injunction against intermediaries, such as ISPs, whose services are used by third parties to infringe copyrights and other rights (under the Infosoc and Enforcement Directives, 2001/29/EC and 2004/48/EC), those injunctions must respect Article 15 of the E-Commerce Directive. In reaching its conclusion, the CJEU considered the extent of the order, which would have required Scarlet, on an on-going basis, to (1) identify all P2P traffic on its network; (2) identify all files transferred over P2P that could be copyrighted music or other media files; (3) determine which files were being transferred unlawfully; and (4) block the unlawful con-

¹⁸ CJEU, 1 Nov. 2011, C-70/10 (*Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*). The presentation of this decision largely relies on the Covington & Burling's review of *Significant Developments in U.S. and European Copyright Law 2011* (available on www.cov.com). Thanks to Mark Young who was the main author of this presentation.

tent. The CJEU said that these obligations, taken together, would amount to a general monitoring obligation exactly of the kind that Article 15 prohibits.

In reaching its conclusion, the CJEU acknowledged rightsholders' property rights under the Charter of Fundamental Rights of the EU (the Charter). But the Court emphasised that these rights must be balanced against the rights of the ISP and its customers under the Charter, and observed that "*there is. .. nothing whatsoever in the wording of [the Charter] or in the Court's case-law to suggest that that right [to protection of intellectual property] is inviolable and must for that reason be absolutely protected*". The CJEU held that the order on Scarlet to install a complicated, costly, permanent computer system at its own expense would result in "a serious infringement" of the right of the ISP to conduct its business, as well as the rights of the ISP's customers to protection of their personal data and freedom to receive and impart information. The court held that customers' rights were especially at risk, as the filtering system would analyse and identify content on the basis of customers' IP addresses (which the court qualified as "personal data"), and because the system might fail to adequately distinguish differences between lawful and unlawful content and therefore might block the transfer of lawful communications.

In *Netlog*¹⁹, another Belgian case which largely mirrors the Scarlet case, the CJEU again applies a balancing test to rule whether an injunction can be obtained against the company hosting an online social networking platform (Netlog). The Netlog platform is used, among others, to share and communicate works belonging to the SABAM repertoire. An injunction against Netlog would require to implement a filtering system allowing the hosting provider to identify "within all the files stored on its servers by all its service users, the files which are likely to contain [protected] works" and to determine which of those files are unlawfully made available to the public. Relying on Scarlet, the CJEU considers that such a preventive monitoring system is prohibited by Article 15(1) of the E-Commerce Directive. Furthermore, the CJEU expressly considers that "to assess whether that injunction is consistent with EU law, account must also be taken of the requirements that stem from the protection of the applicable fundamental rights" (§39). If copyright is protected as a fundamental right under Article 17(2) of the Charter of Fundamental Rights, this right is not "absolutely protected" and it must be

"balanced against the protection of other fundamental rights" (§41-42). In particular, account must be taken of the freedom to conduct a business enjoyed by operators such as hosting service providers (Art. 16 of the Charter) and of the fundamental rights of the service provider's users, namely their right to protection of their personal data and their freedom to receive or impart information (Art. 8 and 11 of the Charter). Applying the balancing method, the CJEU then decides that the contested injunction would not respect the fair balance to be struck between those various fundamental rights.

IV. THE MULTIPLIER EFFECT: THE GROWING USE OF COMPARATIVE LAW AND THE RELIANCE ON THE CJEU CASE LAW BY NATIONAL JUDGES

Another driving force in the approximation of copyright laws results from the growing tendency of national judges to use the tools of comparative law, especially where there is a common EU denominator. Even in the larger countries, such as the UK, where the local precedents tend to offer enough support for construing new cases, judges, more often than in the past, expressly refer to foreign decisions as a source of legal authority. This is probably mostly visible in patent law, where the patents litigated at national level derive often from the same European patent, but a similar trend exists in copyright law even if national traditions still play a prominent role in shaping copyright and the legal reasoning of the judges.

Let us take one example in the copyright field. The way Mr Justice Arnold ruled in the *Newzbin2*²⁰ case involving the possibility to grant a injunction against an access provider (BT) shows how the CJEU case law and the comparative law method have made their way in the reasoning of UK judges, something that would have been difficult to anticipate a decade ago. For instance, the July 2011 decision in *Newsbin2* contains an interesting analysis which systematically distinguishes the *Newsbin2* case from the *Scarlet* case (see above), and paves the way for limited injunctions against access providers which, in particular circumstances, are well aware that their "services are used by a third party to infringe copyright" (Art. 8(3) of the Directive 2001/29).

¹⁹CJEU, 16 Febr. 2012, C-360/10 (*Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) v. Netlog NV*).

²⁰Two decisions were issued in this case: *Twentieth Century Fox Film Corp. v. British Telecommunications PLC*, EWHC 1981 (Ch.) of July 28, 2011 et EWHC 2714 (Ch.) of October 26, 2011.

V. TWO MISSING PIECES IN THE EUROPEAN CONSTRUCTION OF COPYRIGHT LAW: NO REGULATION, NO CONTRACTUAL RULES

In my mind, despite the Europeanization by the courts (the CJEU and the national judges), two important building blocks are still missing in the EU copyright landscape: there is no Regulation on copyright and there are no copyright contract rules.

A. The need for a EU copyright Regulation to overcome the territoriality of copyright

In the absence of a copyright Regulation, there are no directly applicable rules in the EU. The obligation for the provisions of the (seven) copyright Directives to be transposed in order to be effective, reduces the level of harmonisation, at least the visibility of the applicable rules. The need to adopt a law at two levels, first at EU level, then at national, also means that the time between the issue of the first draft Directive by the European Commission and the last implementation by a Member State can take 10 years or more; and discrepancies between the various implementations usually remain. I thus plead for the advent of a European Copyright Code in the form of a EU Regulation – whether this Regulation should offer a new pan-European title for copyright is another, more complex issue which I will only briefly discuss. (However, I will not conclude on this issue: the difficulties in coordinating the national copyrights with a possible EU copyright are real and should be further studied.)

The debate on whether a new instrument is needed to complete the Europeanization of copyright has come to the fore. True, a form of harmonisation is under way through the case law of the CJEU (see above). But a more substantive CJEU case law will not remedy the two main issues of copyright in Europe: that we lack the choice to licence copyright on a pan-European scale and that there is no real possibility to enforce copyright beyond the limited borders of each country where a copyright infringement has been recognized. Those are the limits inherent to the principle of territoriality on which copyright is based throughout the world.

The principle of territoriality is questioned by the CJEU, but not completely rejected. Before embarking on a brief advocacy in favour of a EU copyright Regulation, let's summarize the impact of the recent *Premier League* decision on the principle of territoriality.

1. The prohibition of absolute territorial fragmentation by licensing: *Premier League*

In *Premier League*²¹, the CJEU ruled that license terms intended to enforce territorial exclusivity contravene EU law.

The Football Association Premier League (FAPL) organizes the filming of Premier League matches and licenses the rights to broadcast them on a territorial basis. Traditionally, there has been limited demand for EU and international rights, and so in practice FAPL has granted national licenses that provide licensees the exclusive right to broadcast in a given EU Member State. To enforce this exclusivity, FAPL's licenses have required broadcasters to encrypt their broadcasts, and prohibited them from supplying decryption devices (decoders) for use outside the licensed territory.

Defendants in this case – operators of UK pubs – acquired legitimate, lower-priced decoders intended for the Greek market, and used them in the UK to access and screen transmissions of live Premier League matches. FAPL sued both the pub operators and the suppliers of the decoders in the UK courts, alleging, among other claims, that their activity violated UK prohibitions on trading in or possessing for commercial purposes foreign decoding devices (Section 298 of the UK Copyright, Designs and Patent Act 1988). FAPL also claimed that the pubs infringed its copyright by making copies of FAPL's copyrighted works in the satellite decoders and displaying those works on screen to the public. The UK court concluded that the case raised novel issues of EU law, and referred a series of questions to the CJEU – along with questions from two related cases – for guidance.

In its October 4, 2011 judgment, the CJEU held that national laws (such as the UK's) that prohibit the supply and possession of foreign decoder devices contravene EU rules on free movement of goods or services (Art. 34 and 56 of the Treaty on the Functioning of the EU). While the CJEU recognized that national laws restricting free movement could be justified in certain situations – including where necessary to safeguard intellectual property rights – it concluded that the protection of intellectual property rights was not justified in this instance as there was no copyright in the underlying football match. Even if a protection by an intellectual property right (on the footage) would exist, it would

²¹ CJEU, 4 Oct. 2011, C-403/08 and C-429/08, *FA Premier League v QC Leisure* and Case C-429/08, *Karen Murphy v Media Protection Services Ltd*. The summary of this decision comes from the Covington & Burling's review of *Significant Developments in U.S. and European Copyright Law 2011* (available on www.cov.com). Thanks to M. Young in particular.

not necessarily justify rules prohibiting the supply or possession of decoders. As the court explained, national laws restricting free movement must not go beyond that necessary to protect the owner's rights – e.g., the right to exploit the work commercially; in the CJEU's view, a prohibition on foreign decoders exceeded what was necessary, because it was designed to maximize the right holder's remuneration rather than to ensure an appropriate remuneration. (This argument of the Premier League ruling again shows how the proportionality principle pervades the approach of copyright issues by the CJEU.)

Regarding FAPL's license agreements, the CJEU concluded that, in principle, granting a sole licensee the exclusive right to broadcast a match via satellite from a single Member State was not in and of itself anti-competitive. However, the CJEU also held that additional license terms that imposed absolute bars on the cross-border provision of goods and services – such as prohibitions on the supply of decoders for use outside the licensed territory – were anti-competitive and violated Article 101 of the Treaty on the Functioning of the EU. In other words, territorial restrictions in licenses are permissible under EU law – but further provisions seeking to enforce those prohibitions absolutely are invalid.

It thus appears that restricting the distribution of content across Europe on a territorial basis will become more difficult as a result of the CJEU ruling, as certain restrictions and obligations in license agreements intended to ensure absolute territorial exclusivity are now likely to be unenforceable. The Commission is currently reviewing the EU's rules on pan-European copyright licensing and on the collective management of copyright. The *Premier League* decision will probably have some effect on the content of the forthcoming draft Directive.

2. The need for a new instrument: a copyright Regulation

In its May 2011 Communication, the Commission stressed the discrepancy between the borderless Internet and the borders within the EU, and pointed to the licensing issues resulting from this situation: *"The internet is borderless but online markets in the EU are still fragmented by multiple barriers. Europe remains a patchwork of national online markets and there are cases when Europeans are unable to buy copyright protected works or services electronically across a digital single market... The creation of a European framework for online copyright licensing would greatly stimulate the legal offer of protected cultural goods and services across the EU. Modern licensing technology could*

*help make a wider range of online services available cross border or even create services that are available all over Europe."*²²

The Commission also recognizes that a new legal instrument could do more than just facilitating pan-European licensing: *"Another approach for a more far-reaching overhaul of copyright at European level could be the creation of a European Copyright Code. This 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."*²³

Indeed, such a codification could rely on the existing *acquis* (the seven Directives in the field of copyright), but as well on the growing case law of the CJEU in interpreting the *acquis*. Merging the existing Directives and the rulings of the CJEU in one instrument would clearly be useful (this instrument could for instance incorporate the *Infopaq* test for the protection of all works). This would help to make the EU copyright rules more transparent.

As recognised by the Commission in its May 2011 Communication, this *"would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the 2001/29/EC Directive need to be updated or harmonised at EU level"*. I personally do not believe that we should embark on a complete overhaul of those exceptions, and even less start to consider their replacement by a fair use-type of provision – it would take too much time and trouble. But a clarification of the flexibilities offered by those existing exceptions is worth to be considered. The adoption of a Regulation would offer the possibility to confirm this flexibility and to clarify the scope of the exception (on this, the EU legislator could even go beyond the rather prudent approach of the CJEU which systematically insists on the restrictive interpretation of the exceptions contained in the 2001/29 Directive).

If we manage to have a Regulation which would make the existing rules more accessible (today, the rules are embedded in 27 copyright laws which implement 7 Directives), which would codify the growing case law of the CJEU (for instance on the condition of protection and the scope of the rights), and which would confirm the flexibilities needed in the application of the exceptions, this would already constitute a serious improvement, and a real achievement at EU level.

²² See Commission's Communication, *A Single Market for Intellectual Property Rights*, COM(287) final of 24.5.2011, p. 9-10.

²³ *Ibidem*.

But a Regulation could also serve a more ambitious project: the creation of a unitary copyright title. In its May 2011 Communication, the Commission announced it will “*examine the feasibility of creating an optional ‘unitary’ copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers*”. This title should remain optional. National copyrights should remain available. The right articulation between the EU title to be created and the existing national titles is still an issue for which solutions can be devised. At least with regards to the judicial enforcement, it seems easy to distinguish cases involving the EU title (which would permit to obtain the much needed pan-European measures, such as EU-wide injunctions) from cases involving national titles: a special court should be exclusively competent for the new unitary title (be it a new judiciary system as what is considered for patents in the future or a national court with an international competence such as the Community trademark and design courts). If parties sue before this special court, then the EU title would automatically apply. For the enforcement and interpretation of copyright contracts, the articulation between the EU and national titles might be more complex to organise. Additional rules would be needed to link contracts either to the EU title or to a national copyright regime. A clear delineation between the scope of application of the EU title and of the national titles would obviously require more thinking. But the task is not impossible. In any case, with the 6/2002 Design Regulation, we already have a Regulation which defines the regime applicable to an unregistered intellectual property right (the unregistered Community design right), and this precedent could serve as a model for a future copyright Regulation.

B. The need for rules on copyright contract and collective management at EU level

The difficulty of pan-European licensing and the harmonisation of copyright contract rules could probably be best addressed through an EU Copyright Regulation. But if such a Regulation is not on the agenda, some initiative to approximate copyright contract rules in Europe might be justified. Copyright licensing rules in Europe indeed vary widely: harmonisation in this area has not yet taken place, and the European Commission is not likely to propose something on (individual) licensing in the near future. Only the fragmentation of the internal market and the territorial issues relating to the way copyright is collec-

tively licensed, in particular for online uses, are on the agenda of the European Commission²⁴.

1. Overview of the rules applicable to copyright contracts in the EU

The European situation concerning copyright licensing can be summarized as follows:

- *No uniform contract law.* Some rules applicable to copyright licensing are defined in the general law on contracts which is codified in a civil code (in most Continental countries) or derived from common law (in the UK and other countries sharing the same legal tradition). There is no uniform contract law in Europe, although various initiatives to develop a common contract law are under way. Even for civil law countries, huge variations in contract law still exist, for instance between the Romanic tradition (France, Belgium, Italy, etc.) and the Germanic tradition (the civil code in Germany, called the *Bürgerliches Gesetzbuch*, or BGB, has peculiarities which do not exist elsewhere in Europe);
- *Divergence in copyright licensing rules.* Other rules concerning copyright contracts are included in the various national copyright acts. Legislators in the Continental European countries tend to introduce more rules than in the common law countries²⁵;
- *Objectives of copyright licensing rules.* Where copyright licensing rules exist, their aim is to protect the presumed weak parties i. e. “authors and performing artists”²⁶ in their contractual relations with exploiters.”²⁷ Sometimes the objective of the regulation is two-fold: beyond the objective of ensuring a fair remuneration and an adequate protection for the authors, it aims at facilitating the exploitation of the works, in particular in the cases of mass-digitisation projects (the “dig-

²⁴ See the 24 May 2011 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled “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). An initiative of the Commission’s Directorate General for the Internal Market in order to solve some pan-European licensing issues is expected for the end of 2012.

²⁵ Nevertheless, there are substantive differences even among Continental countries. For example, a study conducted by B. Hugenholtz and L. Guibault for the Dutch Ministry of Justice concludes that the Netherlands has not yet adopted a “very extensive statutory regulation of authors’ contracts”, compared to that in Germany, France and Belgium (*Copyright Contract Law: Towards a Statutory Regulation?*, Study conducted on commission for the Department of Scientific Research and Documentation Centre [WODC] of the Ministry of Justice, IVIR, Amsterdam, 2004, p. 2 of the Summary).

²⁶ We will here focus on the contractual rules applicable to authors, but similar rules are sometimes provided by the national copyright acts to protect the performing artists (see for ex. art. 34 and 35 of the Belgian Copyright Act (hereafter: BCA)).

²⁷ B. HUGENHOLTZ and L. GUIBAULT, *Study on the conditions applicable to contracts relating to intellectual property in the European Union*, Study contract No. ETD/2000 /B5-3001/E/69, 2002, p. 34.

ital libraries"). This is for instance reflected by the rules on extended collective licensing known in the Scandinavian countries. The new role of (collective) licensing rules in the digital context is an important issue that we will address at the end of this contribution;

- *Convergence in the licensing practices.* Despite those disparities in the legal framework, whether resulting from the general provisions on contract or the specific copyright rules, a common licensing practice has developed throughout Europe (and beyond), at least for the basic building blocks of a standard copyright licence. Thus, the practice of copyright licensing has *de facto* brought some cross-border harmonisation;
- *Sector specific variations in licensing practices.* However, the contractual practices differ greatly depending on the media sector. For instance, practices for literary, scientific and press publishing differ, and additional distinctions exist in the sectors of graphic design, music, television, film, software, multimedia and computer games, to name but a few.

2. Example of protective rules in Continental Europe and in Belgium

Unlike economic rights, moral rights are often qualified as "untransferable" (unalienable) by law, as they are in the French and Belgian Copyright Acts, as distinct from how moral rights are viewed in the UK²⁸. Notwithstanding the express or implicit recognition of their inalienability in Continental European countries, moral rights can usually be waived, but under strict conditions. For example, the Belgian Copyright Act considers that a global waiver of an author's moral rights should be null and void²⁹, but a partial waiver for a determined use, consented a posteriori or even a priori, could be valid. It is clear that the moral right of integrity is partly waived when the creator authorizes an adaptation of her work. Many other forms of exploitation of copyrighted works imply a limited renunciation of the right to oppose certain marginal changes to the work that conform to the common and fair practices. Similarly, the right of attribution (paternity) can be exercised negatively, when the author intends to remain anonymous or has been paid to ghost-write for example.

In France and Belgium, the transfer of property, including the assignment of copyright, is not subject to any formalities; only the consent of both parties is needed (transfer operating *solo consensu*). In principle,

²⁸ Art. L. 121-1 French Intellectual Property Code (hereafter: IPC); art. 1(2)(1) BCA.

²⁹ Art. 1(2)(2) BCA.

the transfer is immediate and takes place when the consents have been exchanged³⁰. The consent can be made in writing, orally or even tacitly. There is no requirement of a written instrument for the contract to be valid. Under German law, the right to use can also be granted explicitly or implicitly (e.g. for an author under an employment contract). However, in practice, most licenses will be in writing in order to secure the respective rights of the parties.

This is also prompted by the rules imposed for *proving* licensing agreements: some formalism is sometimes imposed by law. For instance, under Belgian copyright law³¹, the producer will have to use a written (and signed) instrument as proof against the author (i. e. the individual creator), while the author is free to use any element of proof, including clues or oral evidence. The *rationale* of this rule on evidence is of course to induce producers to submit written contracts, allowing the author to be better informed about the scope of the rights she grants. Written contracts also ensure that the parties enjoy a reflection time before concluding the agreement and that all relevant information is exchanged before signing the written document.

Other rules aim at ensuring that the author's consent be well-informed. Several countries (including Belgium and France) require that copyright contracts specify the breadth of the rights licensed³². A contract should thus expressly indicate the scope, purpose, duration, and geographical scope of the rights granted, as well as the amount of remuneration. The obligation of specification applies to the contract between the author and a producer, but it is no more applicable down in the chain of contracts, for instance between a licensee and sublicensees, a producer and its distributors, etc. The requirement that the amount of remuneration be indicated in the written document does not bar free licenses, insofar the contract makes clear the remuneration in exchange for the right is zero.

The question remains whether this formalism has helped the creators. Research revealed no study of the impact of those rules on the (economic) situation of authors. We believe those rules lead to copyright contracts being more often concluded in writing and becoming more standardised. Overall, this is probably beneficial to all parties (at least written instruments reduce the uncertainty, and help creators to better understand what they consent to), but does not directly result in a significant improvement of the financial situation of the authors (the

³⁰ For the sale of tangible goods (transfer of material property), this rule is enshrined in articles 1583 and 1138 of the French and Belgian Civil Code.

³¹ Art. 3(1)(2) BCA.

³² Art. L. 131-3 (2) IPC; art. 3(1)(4) BCA.

standard contracts, using common terms or *conditions générales*, tend to be prepared by the producers and publishers, rather than by the authors, and they most often include a long list of exploitation modes, for which the rights are licensed or assigned, covering almost all possible exploitation modes known when the contract is executed). The possibility to conclude collective agreements between the producers and some organisations representing the authors (see *infra*) is more likely to improve the economic position of creators. An adequate EU regulation of copyright licensing should probably facilitate collective bargaining; this will not only benefit the authors, but the users as well.

3. Extended collective licensing in the Scandinavian countries

With the development of large-scale digitization projects (the so-called "digital libraries" for books or audiovisual archives), the authorizations to reproduce and to communicate to the public the digitized works must be obtained from numerous right holders. Obtaining the authorization is complicated by the fact that old materials are involved, sometimes making it difficult to find the right owners. Works in this category have been dubbed "orphan works", when the "parents" of a work (the copyright holders) are unknown and cannot be identified without high transaction costs. To resolve this problem, new forms of copyright licensing have developed.

One interesting model is the "extended collective licenses" (or ECLs), originally developed in the Scandinavian countries. An ECL is a license agreement that is first freely negotiated between a collective management organization and a user; then, it is extended by law to the works of outsiders³³. An ECL is comprised of three elements: (1) an agreement based on a negotiation (this is the voluntary aspect of ECLs); (2) there is the extension effect which aims at integrating third parties within the scope of the agreement; and (3) this extension effect is realized by virtue of the law³⁴. It is important to stress that outsiders nevertheless retain their exclusive rights until the extension effect takes place. In certain ECLs, there is the possibility for outsiders to opt out.

³³ ECLs are a way to solve the problem of outsiders. There are different types of outsiders. First, there are the non-members of collecting societies, meaning the third parties having the same nationality as the collecting society. There are also the foreigners. Finally, there is the problem of unknown parents in the case of orphan works. To negotiate with non-members is easier than to approach foreigners, not to speak of unknown parents. ECLs propose a solution to solve this problem.

³⁴ This distinguishes the ECL from the Google Book Settlement, still under discussion, which allows to obtain the consent of third parties by virtue of a private contract combined with the effect of a class action.

ECLs started in the 1960s in the Nordic countries and were designed for broadcasters. Today, different users are covered in the Nordic countries by ECLs, including digital exploiters for uses related to archiving, educational institutions, libraries, museums and so on. ECLs are most often designed for specific uses and specific users. However, one provision in Danish law creates a general omnibus provision on ECLs³⁵ covering potentially different users.

EU law provides for a sort of ECL in the case of cable retransmissions of broadcasts. Article 9 of the 1993/83 Cable and Satellite Directive establishes an exclusive right for cable retransmission, but it is associated with a mandatory collective management system. This cable retransmission right, which is an exclusive right, can only be exercised through a collecting society. Outsiders are addressed in the second part of article 9, where there is a presumption that "*where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights.*"³⁶ This provision on mandatory collective management preserves competition because the right owner retains the opportunity to choose among collecting societies. Recital 18 of the 2001/21 Infosoc Directive says, "[t]his Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses." Thus, ECLs are presented as a management system. Except for cable retransmission, the EU framework does not provide for ECLs, but admits their existence under national laws.

The ECL model has already been used in Norway for a national digital library called Bokhylla³⁷. Could it be used more broadly at European level to obtain the multiple authorizations from non-members of collective societies and other outsiders, such as the unknown or not-so-easy to find parents? The main issue relates to the extension effect. As indicated above, ECLs require an extension by virtue of the law, but the extension effect by (copyright) law arguably cannot cross the borders as

³⁵ Article 50 of the Danish Copyright Act.

³⁶ In its *Uradelex v. RTD and Brutele* judgment of June, 1st, 2006 (C-169/05), the Court of Justice of the EU has confirmed that: "Article 9(2) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission is to be interpreted as meaning that, where a collecting society is deemed to be mandated to manage the rights of a copyright owner or holder of related rights who has not transferred the management of his rights to a collecting society, that society has the power to exercise that rightholder's right to grant or refuse authorisation to a cable operator for cable retransmission and, consequently, its mandate is not limited to management of the pecuniary aspects of those rights".

³⁷ See Bokhylla, <http://www.nb.no/bokhylla>.

long as we do not have a truly EU copyright, but only twenty-seven different national copyright regimes. This again shows that territoriality of copyright is a major impediment to a more harmonized regime across European borders.

4. *The need for new rules with regard to the new online business models*

The role of copyright contract might evolve now that new ways to disseminate works online are widely available. With the Internet, authors have the opportunity to directly reach their audience without incurring high costs; they do not need the producers and distributors of the material copies as in the past. This has prompted the creators themselves to develop new forms of open licenses which intend to redesign how works are to be received by the public. These new licensing models have been supported by the creators; publishers, on the contrary, are more concerned, and aware of, the financial constraints and return associated with older business models. In the new economy made possible to keep new technologies of dissemination, the first remuneration for the author is probably reputation and popularity. Therefore, some authors support a free online access to works. Beyond the symbolic economy of free distribution, commercial models of online distribution also develop, whether based on subscription or advertising revenues. As we are moving toward forms of distribution where a direct payment, and thus a remuneration for the author, is not linked to the access to a particular work, some copyright rules intended to protect the author (and her remuneration paid by the producer) seem outdated. The law on copyright contract has not yet taken those developments into account. But should the copyright licensing rules be amended? The existing framework based on freedom of contract is probably flexible enough to allow new commercial or not-for-profit forms of copyright licensing to flourish. Nevertheless, rules are still to be designed to ensure creators are adequately remunerated in relation to the new business models which are based on advertising revenues and do not subject the access to the works to a prior payment.

5. *The facilitation of pan-European licensing*

According to the European Commission, the creation of "a European framework for online copyright licensing" could help to make a wider range of online services available in more than one Member State or even create services that are available all over Europe; therefore, it was announced that "in 2011, the Commission will submit proposals to

create a legal framework for the multi-territorial collective management of copyrights"³⁸. This proposal was not yet released when the present contribution was achieved (April 2012). But the CJEU has already given some guidance in *Premier League*: as we saw (see above), license terms intended to enforce absolute territorial exclusivity contravene EU law.

In the field of copyright, the problems differ according to the type of exploitation involved. The reproduction right is usually managed on an individual basis; by contrast, the communication to the public right is normally managed by collective organisations. Regarding the modes of exploitation involving material copies, individual contracts are usually signed. Those individual contracts are subject to several mandatory rules (see *supra*) in each country of the EU. The above review of the key features of the European rules on copyright licensing is focused on standard individual contracts between an author and a producer. The main rules on contracts tend to correct the presumed weak bargaining position of the author. The legal framework for individual licensing could still be improved, especially where the national copyright acts do not contain detailed contractual rules.

However, let us focus here on the immaterial forms of exploitation that often require collective management. In the field of collective licensing, especially when applied to online licensing, other issues arise. In Europe, collective licensing is still based on national territories, which means that a distributor has to obtain the authorisations from each local collecting society; however, reciprocity agreements between collective societies often permit the extension of the territorial scope of the agreement concluded between a distributor and one collective society. With the online distribution of works, this territorial system seems partly outpaced; it also raises issues regarding the free movement of goods or the free provision of services guaranteed under the Treaty on the Functioning of the EU (Art. 34 and 56). For solving those territoriality issues, one could think that a robust instrument such as an EU Regulation (see above) would be needed. But soft lawmaking should not necessarily be disregarded to forge an improved, truly pan-European, copyright licensing regime, at least where collective management is the rule (this clearly applies to music, less for film, not for books and other published contents). The Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate

³⁸ See the 24 May 2011 Communication from the Commission, *A Single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, COM(2011) 287 final, p. 10.

online music services³⁹ has not led to a sensible improvement in the licensing practices throughout Europe. More should be done to foster cross-border licenses where there is a common market on the side of the users. For instance, the tastes of young consumers for music are probably sufficiently similar throughout the whole EU to justify that the various music repertoire represented by local collecting societies are offered on a pan-European basis. This would benefit some artists who could more easily enjoy some success outside their native market. Users would enjoy more diversified content.

Pan-European licenses might be less important and relevant for content other than music. Some genre of literature or some films based on local peculiarities only have a local appeal which means that national licensing or licensing throughout a common language area still make sense. The promotion of cross-border licenses is thus not contradictory with the need to keep territorial licenses in other areas. As emphasized in the May 2011 Hargreaves Report commissioned by the UK authorities, *"Legal changes are needed at EU level to establish cross border licensing ... The design of a new EU framework will need to take account of the needs of particular sectors, including territoriality of pricing. Licences with a national scope should remain available alongside cross border licenses."*⁴⁰

Influence of EU copyright harmonization directives on the building of post-socialist copyright law in Eastern Europe

Adolf Dietz

³⁹ Commission Recommendation N° 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, *O.J. L* 276 (21.10.2005), 54.

⁴⁰ *Digital Opportunity. A Review of Intellectual Property and Growth*, An Independent Report by Prof. Ian Hargreaves, May 2011, p. 36 (available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>).