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TOWARDS A EUROPEAN COPYRIGHT LAW: FOUR ISSUES TO CONSIDER

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I. INTRODUCTION

The Europeanisation of copyright law follows various paths. Secondary EU copyright law, embedded in the ten¹ Directives devoted to copyright issues, has indeed contributed to the approximation of national copyright laws. But the Europeanisation of copyright has recently taken another route: since the seminal *Infopaq I*² decision of the Court of Justice of the EU (CJEU) or the

1 On top of the seven Directives adopted during the decade 1991–2001, two more recent Directives respectively deal with the duration of related rights (Dir. 2011/77/EU) and some aspects of orphan works (Dir. 2012/28/EU), while the Directive on collective management and multi-territorial licensing of rights in musical works for online uses has been adopted by the European Parliament and the Council on February 4, 2014.

2 C-5/08 *Infopaq International A/S v Danske Dagblades Forening*.

Court)³, the Court (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 of the rights and the limits of exceptions. Those decisions (and opinions) not only make the law, they also indicate the direction that copyright reform should take in the future – if the EU continues to legislate in the field of copyright.

21.02 To describe the far-reaching impact of the CJEU case law, some scholars have coined the terms 'harmonisation by stealth'⁴ or 'filling the gaps'.⁵ It is clear that a court-made harmonisation of European copyright is under way. The CJEU is likely to offer a sufficiently coherent interpretation regarding the substantive conditions of protection, the scope of the rights belonging to copyright and the copyright exceptions. These constitute some of the main building blocks of copyright. The Court might also inject the dose of flexibility needed for a balanced system of copyright that keeps up with the digital developments. This *oeuvre* from the Court should not be underestimated, even if it is not yet the *chef d'oeuvre* of harmonisation that some might have dreamed of back in the 1980s, before the legislative process started at European level.

21.03 Despite the harmonising impact of the CJEU case law, some gaps will remain, however. This chapter identifies and reviews four issues which still hamper the Europeanisation of copyright law and might require some fix at EU level. Regulating those issues does not necessarily require the adoption of 'black letter laws' (such as EU Directives or Regulations). The Europeanisation of copyright law, i.e. the move 'towards a European copyright code', might rely on soft law, such as recommendations,⁶ interpretative rules, codification of good practices in copyright licensing and enforcement, rules of conduct, etc. Rather than discussing the best-suited tools to solve the remaining problems, we will describe more into detail the four issues that require some action if the Europeanisation of copyright is to be achieved.

³ See S. Voudsen 'Infopaq and the Europeanisation of Copyright Law', (2010) *WIPOJ*, 1 (2), 197210. As rightly stressed by E. Rosati ('Originality in a work, or a work of originality: The effects of the Infopaq decision', (2011–12) *EIPR*, 748), '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'. The importance of those changes were later emphasised in the *Painer* and *Football Dataco* decisions of the CJEU (C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH* and C-604/10 *Football Dataco Ltd v Yahoo! UK Ltd*).

⁴ See the contribution of Prof. L. Bently at the 'InfoSoc Directive @ 10 Conference' held on January 13, 2012 at the European Parliament, Brussels.

⁵ 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).

⁶ On the model of the 18 May 2005 Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC).

The first issue is territoriality. The main gap in the architecture of European copyright is linked to the territoriality principle. As seen below, territoriality of copyright potentially covers many different issues: the territorial scope of the right itself, the territorial relevance of measures to enforce copyright (such as injunctions), the national scope of the licenses which grant the right to use the works, etc. Some territorial limitations linked to copyright should be reduced or even abolished; others might be justified by Europe's cultural diversity or linguistic specificities, and could thus remain. But more needs to be done to distinguish the territorial limitations which are linked to the legal framework from those which might result from national specificities. The first ones should be removed, the second ones could stay. **21.04**

The creation of an optional unitary copyright title is a second issue that needs to be considered when adopting a forward-looking perspective on copyright in Europe. Of course, a unitary copyright title would help to overcome some territoriality issues. It would also go much further in the Europeanisation of copyright. The creation of such multinational title is thus a valuable option to keep in mind when reflecting about the future of copyright law in Europe. To adopt such a common title in the form of a EU copyright regulation is probably not politically feasible, at least in the mid-term. That said, it makes sense for an academic to advocate such a solution despite its utopian dimension. **21.05**

A third problem results from the absence of harmonised copyright contract rules. While freedom to contract applies everywhere in Europe, some Continental countries have largely restricted the freedom of the parties to shape the copyright contracts, in particular in relation to the scope of the assignments and to the remuneration of the authors. Although some issues of contracts were discussed within the 'Licences for Europe'⁷ initiative, it is clear that the Commission has not yet put the issue of copyright contracts on its agenda. Very probably the issue will not be addressed in the years to come. Nevertheless, more should be done in this area.⁸ **21.06**

A fourth problem results from both the rigidity, on one hand, and, paradoxically, the openness, on the other hand, of the existing system for copyright exceptions as embedded in Article 5 of the 2001/29 Copyright Directive. As emphasised by the CJEU in several decisions, including **21.07**

⁷ See <http://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site> (this initiative is defined as a 'structured stakeholder dialogue').

⁸ At least, some online licensing issues, such as portability, seem pressing for certain stakeholders. A good occasion to do more in the broader field of copyright contracts?

*Infopaq*⁹ and *Painer*,¹⁰ those exceptions must be narrowly interpreted. This master rule for interpreting copyright exceptions does not leave much leeway for extending the exceptions and for updating them with a view to the digital uses. At the same time, Article 5(2) and (3) contains a list of 20 optional exceptions that the Member States might implement in their copyright legislation. Those provisions, by offering a 'shopping-list' from which Member States can 'pick and mix' limitations, are a noteworthy example of a law that 'leave(s)' national legislatures so much leeway that their actual harmonising effect must seriously be called into doubt'.¹¹

- 21.08 The issue of levies is directly related to the scope and nature of the private copying (and reprography) exceptions (Art. 5(2)(b) and (a)). The important *Padawan* decision and the more recent decisions of the CJEU on copyright levies in *VG Wort* and *Amazon*¹² show that we, in Continental Europe, are experimenting the 'levitation' of copyright (to use the term first coined by B. Hugenholtz to refer to the apparently unstoppable extension of levies). It is far from clear that replacing the exclusivity of copyright by a simple right to remuneration is beneficial to all operators in the chain of creation and distribution. Nevertheless, a well-designed and well-managed copyright levy system might ensure personal creators are adequately paid for their time and effort in conceiving and designing original works. As levies are still regulated at national level, the 'levitation' of copyright is likely to result in further discrepancies between EU Member States. The Europeanisation of copyright is thus hampered by the central role played by national rules in designing the conditions, scope, level (percentage), exceptions, etc, of those levies.

⁹ C-5/08 *Infopaq International A/S v Danske Dagblades Forening*. *Infopaq* stated in relation to the exception for temporary copies of Art. 5(1):

For the interpretation of each of those conditions in turn, it should be borne in mind that, according to settled case-law, the provisions of a directive which derogate from a general principle established by that directive must be interpreted strictly (Case C-476/01 *Kapper* [2004] ECR I-5205, paragraph 72, and Case C-36/05 *Commission v Spain* [2006] ECR I-10313, para. 31). (para. 57).

Thus, each condition of an exception incorporated in Art. 5 must be restrictively interpreted.

¹⁰ C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH*.

¹¹ B. Hugenholtz, 'Copyright harmonisation in the digital age: Looking ahead,' in M.-Chr. Janssens and G. Van Overwalle (eds.), *Harmonisation of European IP Law, Contributions in honour of Frank Gotzen*, Bruylant-Larcier, 2012, 61.

¹² C-467/08 *Padawan*; C-457/11 to C-460/11 *VG Wort* C-521/11 *Amazon*.

II. THE TERRITORIALITY ISSUES: WHAT CAN BE DONE? WHAT ARE THE PROBLEMS?

In the absence of a pan-European title (see below under Part III), copyright is still national. The territorial limitation of copyright is somewhat hidden because of the simultaneous birth of copyright, on the date of the original creation, in all the 28 Member States (and beyond in the Berne Union). 21.09

This simultaneous coming to life of national copyrights sometimes hides the fact that copyright enforcement can only happen at national level, before a national judge. In principle, the enforcement measures, for instance the injunctions, cannot take effect beyond the borders of each of the 28 national territories. On the contrary, the 207/2009 Community Trademark Regulation (CTMR) and the 6/2002 Community Design Regulation (CDR) provide for a national court with international jurisdiction (the so-called Community Trademark and Design Courts) and for the possibility to get injunctions in the whole EU territory if the competence of the Community Trademark or Design Court relies on the domicile rule (see respectively Arts 97 and 98 of the CTMR and Arts 82 and 83 of the CDR). The territorial limitation for copyright injunctions and other enforcement measures is unsatisfactory at a time the works freely circulate on the global networks. 21.10

Territoriality also means that the contractual exercise of copyright hardly extends beyond borders and 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 remuneration that creators can earn. 21.11

In a comprehensive study on the achievements and progress towards a true single market, Mr Mario Monti – working at that time as an academic – recommended that some measures to overcome territoriality and facilitate the licensing of the right be considered: 21.12

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 on-line 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.¹³

- 21.13** Since those measures were proposed in 2010, little harmonisation has been achieved; at least, no rule has been adopted to determine where cross-border online transactions involving copyright take place (no 'country of origin' rule was seriously discussed). Moreover, extended collective licensing, widely known in the Nordic countries, was dismissed as a politically feasible solution for the whole Union. Needless to say, the creation of a EU copyright title – another measure mentioned by Mr Monti – remains as remote as it was in 2010. (In 2011, the Commission has nevertheless mentioned the possibility of embracing a form of pan-European copyright.¹⁴)
- 21.14** Some progress has however been achieved with regard to the facilitation of multi-territorial and multi-repertoire licensing by collecting societies of the rights of authors in musical works for online uses. The Directive on collective management and multi-territorial licensing of rights in musical works for online uses¹⁵ which contains provisions facilitating the reciprocal representation of collective societies and ensuring the access to multi-territorial licensing for online rights in musical works was adopted by the European Parliament and the Council on February 4, 2014.
- 21.15** Territoriality of copyright is not only an issue for discussion at political level, it is a matter of concern for the CJEU. Territoriality is rightly questioned by the CJEU on the basis of the rules on freedom of goods or service and even on the basis of the free competition provisions. At the same time, the Court does not fully dismiss any territorial limitation of copyright. The decision in *Premier League*¹⁶ only ruled that license terms intended to enforce absolute territorial restrictions contravene EU law. Therefore, some (non-absolute) territorial limitations in the licensing of copyright arguably remain valid.
- 21.16** It is worth reviewing the facts and the ruling in *Premier League*, a leading case decided by the Grand Chamber of the CJEU. The Football Association Premier League (FAPL) organises the filming of Premier League football matches and licenses the rights to broadcast them on a territorial basis.

¹³ 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, 44–5 (available at: http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf).

¹⁴ See Commission's Communication, A Single Market for Intellectual Property Rights, COM(287) final.

¹⁵ COM(2012) 372 final.

¹⁶ 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).

Traditionally, there has been limited demand for EU and international rights, and so in practice FAPL has granted national licenses that provide licensees with 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 (UK Copyright, Designs and Patent Act 1988, s 298). 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 (Arts 34 and 56 of the Treaty on the Functioning of the EU). While the CJEU recognised that national laws restricting free movement could be justified in certain situations – including where necessary to safeguard intellectual property (IP) rights – it concluded that the protection of IP rights was not justified in this instance as there was no copyright in the underlying football match. Even if protection by an IP right (on the footage) did exist, it would not justify rules prohibiting the supply or possession of decoders. As the court explained, national laws restricting free movement must not go beyond what is 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 maximise the right holder's remuneration rather than to ensure an appropriate remuneration.

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.

21.20 Restricting the distribution of content across Europe on a territorial basis has 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. However, it is not yet clear when a contractual restriction or obligation can constitute an absolute territorial exclusivity (ATE). More work is required to identify standard clauses in copyright licences that create such ATEs. Arguably, clauses which block or limit cross-border access to online services, in the sense that an end user must reside in a specific Member State in order to have access to online services in that Member State, create such ATE. Similarly, territoriality related issues might exist when the access to online services is not portable, in the sense that an end user that has access to a service related to copyright in the Member State in which he usually resides (or is connected to in another way, e.g. via his IP address or his credit card) cannot maintain that access when he leaves that Member State for a limited period of time (e.g. because of a business trip or a vacation). The lack of portability might result from contractual provisions, but also from technical and infrastructure constraints.

21.21 The question remains whether primary EU law (rules on freedom of goods and services and on free competition) would suffice to avoid unjustified territorial limitations or whether secondary EU law would be needed (for example in the form of a regulation providing black and grey lists of contractual clauses which are unlawful or presumed to be unlawful unless proven otherwise). The issue also involves whether an *ex post* approach (i.e. regulation by competition and freedom of goods and services rules) or an *ex ante* approach is better suited to deal with the identified problems. One of the main advantages of an *ex ante* approach is to provide more legal certainty about what can be included in the copyright licenses. As freedom to contract should remain the principle, those restrictions provided by secondary law should in any case remain limited. The use for regulating online copyright licences of an instrument similar to the 772/2004 Technology Transfer Block Exemption Regulation (TTBER) in the field of technology transfer agreements is worth being further examined.

III. THE ARGUMENT FOR A EU-WIDE COPYRIGHT TITLE AND A REGULATION

In the absence of a copyright Regulation, there are no directly applicable copyright rules in the EU. The obligation for the provisions of the 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 level, also means that the time between the first draft Directive by the European Commission and the last implementation by a Member State can take ten years or more; and discrepancies between the various implementations usually remain. Although its adoption is likely to take several years, the advent of a European Copyright Code in the form of a EU Regulation is advisable – whether this Regulation should offer a new pan-European title for copyright is another, more complex issue which I will only briefly discuss. **21.22**

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: **21.23**

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.¹⁷

The Commission also recognised that a new legal instrument could do more than just facilitating pan-European licensing: **21.24**

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.¹⁸

Indeed, such a codification could rely on the existing *acquis* (the Directives in the field of copyright), but as well on the growing case law of the CJEU in **21.25**

¹⁷ See COM(287) final, 9–10.

¹⁸ Ibid, 11.

interpreting the *acquis*. Codifying 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.

- 21.26** 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 considering (see also Part IV below). The adoption of a Regulation would offer the possibility of confirming this flexibility and clarifying 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).
- 21.27** If we manage to have a Regulation which would (i) make the existing rules, and their application by national courts, more accessible (today, the rules are embedded in 28 national copyright laws and further elaborated in the case law developed in each country), (ii) codify the growing case law of the CJEU (for instance on the condition of protection and the scope of the rights), and (iii) confirm the flexibilities needed in the application of the exceptions, this would already constitute a serious improvement, and a real achievement at EU level.
- 21.28** 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'.
- 21.29** If the adoption of such a unitary title is considered, it should remain optional. National copyrights should remain available. The co-existence and right articulation between the EU title to be created and the existing national titles is an issue for which several options should be considered, and for which solutions probably can be devised. At least with regard to the judicial enforcement, it seems easy to distinguish cases involving the EU title (which would permit 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. This court could be a new international court as for patents in Europe (Agreement on the Unified Patent Court signed on February 19 2013) or an existing national court with an international jurisdiction, 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 of articulating in a proper way the existing national copyrights and a future EU-wide title 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) which supplements the national (registered or unregistered) design rights, and this precedent could serve as a model for a future copyright Regulation.

IV. THE NEED FOR EU RULES ON COPYRIGHT CONTRACTS

Regulating copyright contracts might help to address the issue of territoriality **21.30** (already presented above in Part II). For instance, this would be the case if contractual provisions providing for absolute territorial exclusivity were expressly prohibited by an EU law instrument. The adoption of copyright contract rules might achieve other objectives. It would allow a better protection and a more adequate remuneration for creators.

The harmonisation of copyright contract rules could probably be best addressed **21.31** through an EU Copyright Regulation (see above in Part II). As the adoption of an EU regulation is not on the agenda, some other initiative to approximate copyright contract rules in Europe might be justified.

Such initiative should not focus solely on online licensing, contrary to the **21.32** 'Licences for Europe' dialogue launched by the European Commission in December 2012.¹⁹ 'Licences for Europe' includes 'a structured stakeholder dialogue tasked with delivering rapid progress in bringing content online through practical, industry-led solutions, without prejudging the possible need

¹⁹ See the Commission's Communication on content in the Digital Single Market COM(2012) 789 final, available at http://ec.europa.eu/internal_market/copyright/docs/copyright-info/121218_communication-online-content_en.pdf.

for public policy action'.²⁰ This initiative is only geared to addressing online licensing issues. It is even not clear whether 'Licences for Europe' is at all focused on addressing contractual issues in Europe – some of the working groups under this initiative deal with user-generated content and data mining for instance.

- 21.33** The content of the 'Licences for Europe' initiative shows that the political agenda for copyright reform is largely determined by sector-specific concerns which do not have much to do with a true review of copyright licensing rules. This is unsatisfactory. More should be done in the light of the existing divergences between copyright contract rules throughout the EU.

1. Overview of the rules on copyright contracts in the EU

- 21.34** The European situation concerning copyright licensing can be summarised 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 (protective) rules than in the common law countries.²¹
- *Objectives of copyright licensing rules.* Where copyright licensing rules exist, their aim is to protect the presumed weak parties i.e. 'authors and

²⁰ See the consultation launched by the UK Intellectual Property Office, Copyright in Europe. Call for views, 15 July 2013, 3 (available at <http://www.ipo.gov.uk/pro-policy/consult/consult-live/consult-2013-copyright-europe.htm>).

²¹ Nevertheless, there are substantive differences. 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, 2 of the Summary).

performing artists²² in their contractual relations with exploiters'.²³ 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 'digital libraries'). This is for instance reflected by the rules on extended collective licensing known in the Scandinavian countries.

- *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

Unlike economic rights, moral rights are often qualified as 'non-transferable' **21.35** (unalienable) by law, as they are in the French and Belgian Copyright Acts, as distinct from how moral rights are viewed in the UK.²⁴ 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 void,²⁵ 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 authorises 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.

²² We focus here 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 Arts 34 and 35 of the Belgian Copyright Act (hereafter: BCA)).

²³ 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, 34.

²⁴ Art. L. 121-1 French Intellectual Property Code (hereafter: IPC); Art. 1(2)(1) BCA.

²⁵ Art. 1(2)(2) BCA.

- 21.36 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, the transfer is immediate and takes place when the consents have been exchanged.²⁶ 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.
- 21.37 This is also prompted by the rules imposed for *proving* licensing agreements: some formalism is sometimes imposed by law. For instance, under Belgian copyright law,²⁷ 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.
- 21.38 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 licensed.²⁸ 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 the chain of contracts, for instance between a licensee and sub-licensees, a producer and its distributors, etc. The requirement that the amount of remuneration be indicated in the written document does not bar free licences, insofar as the contract makes clear the remuneration in exchange for the right is zero.
- 21.39 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

²⁶ For the sale of tangible goods (transfer of material property), this rule is enshrined in Arts 1583 and 1138 of the French and Belgian Civil Code.

²⁷ Art. 3(1)(2) BCA.

²⁸ Art. L. 131-3 (2) IPC; Art. 3(1)(4) BCA.

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 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 of concluding collective agreements between the producers and some organisations representing the authors is more likely to improve the economic position of creators. An adequate EU regulation of copyright licensing would probably facilitate collective bargaining; this would not only benefit the authors, but the users as well.

3. Extended collective licensing in the Scandinavian countries

With the development of large-scale digitisation projects (the so-called 'digital libraries' for books or audio-visual archives), the authorisations to reproduce and to communicate to the public the digitised works must be obtained from numerous right holders. Obtaining the authorisation 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 freely negotiated between a collective management organisation and a user; then, it is extended by law to the works of outsiders.²⁹ 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 realised by virtue of the law. 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.

ECLs started in the 1960s in the Nordic countries and were designed for broadcasters. Today, different users are covered in the Nordic countries by

²⁹ 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.

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.

- 21.43** 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, which contains a presumption that 'where a right holder 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'.³⁰ This provision on mandatory collective management preserves competition because the right owner retains the opportunity to choose among collecting societies. Recital 18 of the 2001/29 Copyright 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.

- 21.44** The ECL model has already been used in Norway for a national digital library called Bokhylla.³¹ 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 long as we do not have a truly EU copyright, but only 28 different national copyright regimes. This again shows that territoriality of copyright is a major impediment to a more harmonised regime across European borders.

³⁰ In its *Uradelex v RTD and Brutele* judgment of June, 1 2006 (C-169/05), the CJEU 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.

³¹ See BOKHYLLA, <http://www.nb.no/bokhylla>.

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 reach their audience directly 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 with, and aware of, the financial constraints and returns associated with older business models. In the new economy made possible by the internet and 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 to facilitate open licences? 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 access to a particular work to a prior payment. When users are paying for services offering the access to whole repertoires, e.g. music streaming services, rather than for enjoying some identifiable works, when the system of distribution thus shifts from an ownership to an access based model, it might become more complicated for authors to be paid, while, at the same time, the remuneration obtained through levies might be reduced as the overall amount of copying by end users decreases.³² Therefore, the need to elaborate contractual rules, including transparency requirements, aiming to ensure an adequate remuneration becomes even more important.

³² The January 31, 2013 *Recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies* (see http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf) stresses the evolving business models:

many stakeholders expect a shift from ownership based to access based models. The latter, combined with widespread and ubiquitous Internet access, have the potential of significantly decreasing the overall amount of copying undertaken by end users and, as a consequence, also the amount of levies required to compensate for acts of private copying.

5. The facilitation of pan-European licensing in certain sectors

21.46 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. 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 concluded. Those individual contracts are subject to several mandatory rules (see *supra*) in each country of the EU. 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.

21.47 However, let us focus 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 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 (Arts 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 law making 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, and not for books and other published contents). The Commission's Recommendation on collective cross-border management of copyright and related rights for legitimate online music services³³ has not led to a sensible improvement in the music licensing practices throughout Europe. More should be done to foster cross-border licenses where there is a common market on the demand side (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.

³³ Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services, OJ L 276, 21.10.2005, 54.

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 does not, therefore, contradict the need to keep territorial licenses in other areas. As emphasised 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.³⁴

V. THE FLEXIBILITY NEEDED FOR COPYRIGHT EXCEPTIONS AND THE NEED FOR HARMONISING PRIVATE COPYING LEVIES

In the field of exceptions: (1) a legislative initiative needs to be undertaken so as to somewhat align the law with the advance of technology; (2) exceptions should also take into account the new education requirements (and the public interest goals such as transparency of public documents; and (3) in general, the way the exceptions are designed should ensure copyright rules do not contradict the private behaviour most people consider to be reasonable.

1. The need to take technology-enabled uses into account

The advance of technology, in particular in relation to internet search technology and new consumer empowering technologies, requires more flexibility in the exceptions.

Let's just take the example of image-based search technology and compare the US with the EU approach. In the US, the fair use exception of Article 107 of the Copyright Act³⁵ allows for more flexibility. In particular, several courts have

³⁴ 'Digital opportunity. A review of intellectual property and growth', An independent report by Professor Ian Hargreaves, May 2011, 36 (available at <http://www.ipo.gov.uk/ipreview-finalreport.pdf>).

³⁵ The Copyright Act instructs courts determining whether a particular use of a copyrighted work falls within the fair use exception to consider four factors:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and

addressed fair use with respect to image-based search engines and have concluded that their reproduction and display of thumbnail images drawn from the websites of copyright holders constituted fair use.³⁶ In *Kelly v Arriba Soft Corp.*,³⁷ the plaintiff, a photographer, alleged that a search engine's use of thumbnail images violated his display, reproduction, and distribution rights. After applying the fair use factors to 'the reproduction of Kelly's images to create the thumbnails and [to] the use of those thumbnails in Arriba's search engine', the court found that the fair use doctrine would protect Arriba from liability.³⁸ In considering the first factor, the purpose and character of the use, the court noted that the search engine used copyrighted images for a commercial purpose. However, the court concluded that this was outweighed by the fact that the nature of the use was highly transformative – the images were 'much smaller, lower-resolution images' than the originals. Moreover, rather than serving an aesthetic purpose, as the original images were intended to do, 'Arriba's search engine functions as a tool to help index and improve access to images on the internet'. In considering the fourth fair use factor, potential harm to the market for the copyrighted work, the court first noted that, '[a] transformative work is less likely to have an adverse impact on the market of the original than a work that merely supersedes the copyrighted work'.³⁹

- 21.52 In *Perfect 10, Inc. v Amazon.com, Inc.*,⁴⁰ the Ninth Circuit revisited the same issue in the context of Google's display of thumbnail images in its image search offering. The court's fair use analysis applied only to the infringement of Perfect 10's display rights, which the court explained would be infringed absent a finding of fair use, because 'Google's computers store thumbnail versions of Perfect 10's copyrighted images and communicate copies of those thumbnails to Google's users'.⁴¹ The court largely followed the analysis in *Kelly*. As to the first factor, it held that 'Google's use of thumbnails is highly transformative' because 'a search engine transforms the image into a pointer directing a user to a source of information'.⁴² The court went on to explain that, 'a search engine provides social benefit by incorporating an original work into a new work, namely, an electronic reference tool'. With respect to the fourth factor, Perfect

substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 USC § 107.

36 See on this A. Strowel and V. Hanley, 'Secondary liability for copyright infringement with regard to hyperlink', in A. Strowel (ed.), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law*, Edward Elgar, Cheltenham UK and Northampton, MA, USA, 2009, 71–109.

37 336 F.3d 811 (9th Cir. 2003).

38 Ibid, 817, 815.

39 Ibid, a821.

40 487 F.3d 701 (9th Cir. 2007).

41 Ibid, 716.

42 Ibid, 721.

10 had asserted that Google's search results might harm the market for reduced-sized images, for instance, for use on mobile phones. While the court considered this possibility, it accorded it limited weight because the district court had not made any factual findings regarding such harm.⁴³ In addition, as it had in *Kelly*, the Ninth Circuit noted that Google's transformative use of the images in question meant that harm to the market could not simply be presumed based on the commercial nature of Google's search engine.

In the EU, the reproduction and communication to the public of the thumbnail images extracted from websites by search technology (such as Google Images) hardly qualify as falling under one of the 21 exceptions listed in Article 5 of the 2001/29 Copyright Directive. To exonerate those technical uses from copyright liability, it is thus necessary to rely on other theories or principles. For instance, according to the *de minimis* principle, no infringement takes place when only a small portion of the protected work is copied. However, this principle in the infringement analysis that possibly could apply to image-based search technology is neither widely shared by the courts throughout the EU, nor expressly recognised under most national copyright regimes. To allow new uses resulting from technology, other courts might rely on the existence of an implied consent. In a decision of 29 April 2010 (*Thumbnail I*), the German Federal Court of Justice admitted that neither the quotation exception, nor the exception for private copying, nor the transitory reproduction exception (Art. 5(1) Copyright Directive) could apply to a case involving the reproduction and making available, through Google Images, of photographs as thumbnails.⁴⁴ By rejecting the exception of Article 5(1), the German Court of Justice expressly recognises that showing some works as thumbnails has an economic significance.

In the same way, the US court in *Perfect 10* recognised the commercial nature of Google Image; nevertheless, the fair use exception could apply absent any proof of harm for the copyright holder. In the EU, the copyright owner who claims one of its rights is infringed need not prove any harm; at the same time, the user of a work cannot escape copyright liability by establishing the absence of harm for the copyright owner. To require a proof of harm from the copyright owner is a too high threshold; in addition, it would go against the principle of copyright ownership. That said, the absence of proved harm should sometimes be taken into account in the analysis of the exceptions. It is worth considering a system where the possibility to apply some exceptions would turn on whether the new

43 Ibid, 722, 724–5.

44 BGH, I ZR 69/08 (29 April 2010) (*Thumbnails I*) which rejects the appeal against the second instance decision (OLG Jena, 27 April 2008 – 2 U 319/07, GRUR-RR 2008, 223; see also the first instance decision: LG Erfurt, 15 March 2007 – 3 O 1108/05).

use might substitute for the existing modes of exploitation, and thus create some harm for the copyright holder.

21.55 In *Thumbnail I*, after dismissing the application of the copyright exceptions, the German Court of Justice considered whether the artist who had first posted the images online had given an implied consent. The court rejected the implied consent theory for exonerating Google from liability. (By the same token, the court dismissed the argument made by Google that, by omitting to implement an exclusion tag for search engines, such as the html code 'robot.txt', the website operator has implicitly consented to the indexing of her site.) Ruling in favour of Google's image-based technology, the court considered that, by claiming her copyright was infringed, the artist had committed an abuse of right: her decision to put photographs of her works on her website indicated she intended to maximise the access to those pictures; to sue Google for indexing her images appeared contradictory and thus abusive. A court decision prohibiting image-based search technology (in the case the images are put online with the authorisation of the copyright owner) would have seriously limited the utility of the internet. (However, the intermediary should be liable if it knows that it stores, and/or if it facilitates the access to, illicit information.)

21.56 In a second decision *Thumbnail II*⁴⁵ involving search technology, the German Federal Court of Justice arguably went one step further. The court admitted that the consent to some internet reproductions (as thumbnails by an image-based search tool) might be implicitly granted if the copyright owner has first consented to the making available online of the photographs on certain websites, even if the thumbnails retrieved by the search engine refer to third-party websites which were not authorised by the copyright holder. The possibility of relying on a theory of implied consent thus substitutes for the absence of flexibility in the copyright exceptions. It would be preferable to have a more flexible scheme for copyright exceptions. One possibility would consist in adding a flexibility clause modelled on the requirements of the three-step-test (Art. 13 TRIPS and Art. 5(5) Copyright Directive).⁴⁶ Under that clause, courts could be free to assess the fairness of the technology-enabled use using the non-cumulative criteria listed in the clause in the same way the US courts implement the four fair use criteria. Particular weight should be given to the economic criterion of whether the new technology-enabled use risks to impact the 'normal exploitation', i.e. the market for the protected work and the benefits copyright holders actually derive from the work (or can reasonably expect from

⁴⁵ BGH, I ZR 140/10 (19 Oct. 2011) (*Thumbnails II*).

⁴⁶ See Copyright in the EU Digital Single Market, Report of the CEPS Digital Forum by Rapporteur G. Mazziotti, Brussels, June 2013, 16.

the new use). The prevalence of this criterion could be enshrined in the text of the flexibility clause.

Before considering such flexibility clause, it is advisable to conduct a thorough study of the outcome of the fair use cases in the US and compare these with the situation in Europe.⁴⁷ The Europeanisation of copyright cannot be achieved without consideration of the globalisation of copyright rules and practices, and the comparison and convergence with the US (and other countries) must be taken into account.

At the same time, it is necessary to avoid the situation that powerful operators and distributors of works systematically rely on the uncertainty of a flexibility clause to avoid asking for a prior authorisation before using the protected works. One should consider whether a simple procedure should not be designed in order to quickly resolve disputes about the flexibility clause. This procedure could require the commercial distributor to ask for a prior authorisation when the situation is not clearly exempted by the flexibility factors. If the copyright holder refuses to allow the technology enabled use, parties could follow a simplified mediation and arbitration procedure with the possibility to have a quick ruling by a specialised body, i.e. a sort of EU Copyright Tribunal. (The case law of this tribunal could help in defining the boundaries of copyright for those technology enabled uses.) Commercial operators which would not ask for a prior authorisation and would not follow the simplified procedure would be subject to aggravated sanctions (e.g. statutory damages) to be imposed by the normal courts.

2. The need to revisit the exceptions applicable in the field of non-commercial education

Under Article 5 of the Copyright Directive, the exceptions for the education sector are arguably too narrow and do not clearly allow the new modes of online education schemes. For the reproduction right, Article 5(2)(c) probably provides for a sufficient broad exception as 'educational establishments' are allowed to make copies in case the acts of copying are 'not for direct or indirect economic or commercial advantage'. Regarding the communication to the public and making available rights, more certainty in the scope of the exception of Article 5(3)(n) is to be recommended. This exception indeed allows the communication and making available 'for the purpose of research or private study to individual members of the public by dedicated terminals on the premises of [educational] establishments'. A narrow reading of this provision would prevent

⁴⁷ See the suggestion made in CEPS Report (Ibid, 16).

educational institutions offering open online courses or distance-learning programs that make use of protected materials.

A thorough review of the exceptions to the reproduction and communication to the public rights should be conducted in the light of the new realities and opportunities in the field of online education by non-profit organisations (including by some providers of Massive Open Online Courses commonly known as MOOCs). While the proposal regarding a flexibility clause for technology-enabled uses (see paras 21.50 to 21.58 above) probably requires amendment of Article 5 of the Copyright Directive – including its paragraph (5) –, introducing a clarification of the exceptions in order to allow new forms of online education does not necessarily mean that the 2001 Copyright Directive and its Article 5 should be revisited.

- 21.60 Other issues involving the public interest, e.g. the need for transparency and improved access to documents in particular in relation to administrative procedures, would need to be addressed too in a revision of the copyright exceptions scheme.

3. Alignment of the private copying exception with the reasonable expectations of users and harmonisation of copyright levies

- 21.61 To have an adequate system of exceptions is also important 'to help build confidence in and respect for copyright'.⁴⁸ This is one additional reason for advocating a revision of the exceptions. Such revision should not prejudice the legitimate interests of the copyright owners and could help to have a legal system more in line with the practice of using and enjoying works in an information society.

A. Private copying exception

- 21.62 That the law be more aligned with the reasonable behaviour of the majority of users is indeed a requirement. This does not mean that the claims of consumers' advocates must be blindly followed. There is no right for users to access protected works: there is, however, a right to access the internet as an important way to communicate and share opinions.⁴⁹ It has long been emphasised that the

⁴⁸ This link between the private copying exception and respect for copyright was suggested in the 2013 UK proposal for introducing a private copying exception (see the commentary on the draft new Article 28B of the Copyright, Design and Patent Act, available on www.ipo.gov.uk).

⁴⁹ The access to the internet is protected under the provisions on freedom of expression such as Art. 10 European Convention on Human Rights or Art. 11 of the EU Charter of Fundamental Rights (or the equivalent provisions in national constitutions). As in other instances, this freedom can be curtailed if the restrictions: (i) are provided by the law; (ii) aim at fostering a legitimate goal; and (iii) are proportional. See on this, A. Strowel,

system of copyright exceptions is out of touch with reality. It is important to reconnect the law with the reasonable expectations of the end users when they acquire some recording media or equipment. In its July 2013 *Amazon* decision, the CJEU rightly stressed that the 'natural persons are rightly presumed to benefit fully from the making available of those [recording] media, that is to say that they are deemed to take full advantage of the functions associated with that equipment, including copying'.⁵⁰ As the end users can be expected to 'take full advantage of the functions' associated with the media or equipment they acquire, Member States are also allowed, under Article 5(2)(b), to establish 'a rebuttable presumption of private use'⁵¹ of the media and equipment marketed to natural persons.

The discrepancy between the copyright exceptions and the practice is nowhere as huge as in the UK and in other countries which do not have a true private copying exception (or which only recognize a time-shifting exception). The UK is now considering introducing a narrow private copying exception allowing individuals to copy content they own, and which they acquired lawfully, to another medium or device for their own personal use.⁵² Because the exception is narrowly designed, and for instance prohibits the transfer of privately made copies to other people, the UK Government considers that an 'appropriate compensation' is paid 'at the point of sale', and that no levies (see below) should be associated with the private copying exception.

B. Copyright levies

For more than a decade, industry and in particular the IT sector has been very critical of the copyright levy system in Europe. For instance, a 2012 study commissioned by the American Chamber of Commerce for the EU considers that 'the current system creates a number of internal market problems that creates barriers to trade within Europe and hinders and delays the pick-up of new technologies and thereby slows the adoption of new digital technologies in Europe'.⁵³ Some standard criticisms voiced by industry are not really substantiated, in particular the link between levies and a slower adoption of digital

'The "graduated response" in France: Is it the good reply to online copyright infringement?' in I. Stamatoudi (ed.), *Copyright Enforcement and the Internet*, Kluwer Law, 2010, 147–61 and A. Strowel, 'Les réponses au téléchargement illicite en France et au Royaume-Uni: proportionnées ou attentatoires aux libertés?' in C. Doutelepont, Fr. Dubuisson and A. Strowel (sous la dir.), *Le téléchargement d'œuvres sur Internet*, Larcier, 2012, 365–408.

⁵⁰ CJEU, 11 July 2013, C-521/11, § 41 (*Amazon*).

⁵¹ Ibid, § 45.

⁵² See the UK proposal on Private copying on the www.ipo.gov.uk website.

⁵³ Copenhagen Economics (M.H. Thelle, Chr. Jervelund, S. Naess-Schmidt, S.T. Jespersen and M.B. Hansen), *The EU Single Market – A work in progress*, AmCham EU, June 2012, p. 3.

technologies. This casts some doubts about the real impact of levies on the information society.

21.65 That said, it is equally clear that the discrepancies between the varying levy systems create some problems, which could require further harmonisation at EU level. For the CJEU, the notion of 'fair compensation' mentioned in Article 5(2)(a) and (b) of the Copyright Directive is an autonomous concept of copyright law, which must be interpreted uniformly in all Member States that have introduced a private copying exception.⁵⁴ In particular, fair compensation 'must be regarded as a recompense for the harm suffered by authors, resulting from such a copy not authorised by them'.⁵⁵ However, many aspects of copyright levies are not harmonised. In its July 2013 decision, the CJEU once more emphasised that the provisions of the Copyright Directive 'do not expressly address the issue of who is to pay that [fair] compensation'; therefore, 'the Member States enjoy broad discretion when determining who must discharge that obligation'.⁵⁶ The CJEU also recognised broad discretion at national level regarding 'the form, detailed arrangements and possible level of such compensation'.⁵⁷ This broad discretion is due to 'the absence of sufficiently precise Community criteria' in the Copyright Directive.⁵⁸ It is thus justified to advocate more precise criteria for levies in Europe. In particular, I agree with the proposition that 'a uniform concept of harm caused by unauthorised private copying to right holders should be adopted at EU level in order to enable an economics-based calculation of levies'.⁵⁹

21.67 Other issues have been clarified or will be solved by the CJEU case law. The EU mediator on copyright levies, Mr Vitorino, is thus right in noting that 'the best way forward is to build on this case law'.⁶⁰ For instance, the recent CJEU decision in the *VG Wort* joint cases⁶¹ clarifies the relationship between contractual authorisations, on one hand, and authorisation by the effect of exceptions, on the other hand. In *VG Wort*, the CJEU decided that 'an act by which a right holder may have authorised the reproduction of his protected work or other subject matter has no bearing on the fair compensation owed'.⁶² The question

⁵⁴ CJEU, 21 Oct. 2010, C-467/08, paras 33–37 (*Padawan*).

⁵⁵ Ibid, paras 39–40 and C-457/11 to C-460/11, *VG Wort*, para. 31.

⁵⁶ CJEU, 11 July 2013, C-521/11, § 20 (*Amazon*).

⁵⁷ Ibid, at § 22 referring to recital 35 of the Copyright Directive.

⁵⁸ Ibid, at § 21.

⁵⁹ Copyright in the EU Digital Single Market, Report of the CEPS Digital Forum, 18.

⁶⁰ A. Vitorino, *Recommendations Resulting from the Mediation on Private Copying and Reprography Levies*, Brussels, 31 January 2013, 3.

⁶¹ C-457/11 to C-460/11, *VG Wort*, paras 30–40.

⁶² Ibid, para. 40. This part of the judgment seems to go in a different direction to the one advocated by Mr Vitorino. For Mr Vitorino:

whether private copies can be made from illicit sources should as well find a response in future decisions of the CJEU.⁶³

As other topics reviewed in this chapter, the issue of copyright levies is in the process of being clarified by the CJEU. At the same time, some levy issues require an initiative at EU level. This harmonisation initiative does not necessarily require the adoption of a Directive or a Regulation. As shown for other topics reviewed here, soft law could help too at this stage of copyright harmonisation in the EU. **21.68**

The path Towards a European Copyright Law will build both on the future initiative to be adopted by the EU Commission and on the CJEU case law (and its impact on national courts)⁶⁴. **21.69**

NOTES

1. Related instruments

Berne Convention for the Protection of Literary and Artistic Works last amended on 28 September 1979.

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, OJ L 248/5, 27.9.1993.

Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167/10, 22.6.2001.

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011, amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265/1, 11.10.2011.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27.10.2012.

a person paying for e.g. the download of a song expects that this payment does not only cover the first download of that song onto his or her personal computer but also the subsequent copying of that song to a certain number of his or her mobile services, as determined by the usage rules of the service provider

therefore, according to Mr Vitorino, no levies should be associated with those additional copies as the function of levies does not lie 'in guaranteeing a premium that rightholders could not achieve under market conditions' (A. Vitorino, 6).

⁶³ C-463/12 *Copydan Bandkopi v Nokia* and C-435/12 *ACI Adam v Stichting de Thuiskopie*. Unexpectedly, the Court considered in the *VG Wort* joint cases (para. 63) that the nature of the original from which the reproduction is effected clearly did not arise in those disputes.

⁶⁴ On this last issue, see A. Strowel and H.-E. Kim 'The balancing impact of general EU law on European intellectual property jurisprudence', in G. Dinwoodie and A. Ohly (eds), *The Europeanization of Intellectual Property Law*, Oxford, OUP, 2013, 121–42.

2. CJEU case law

- EA Premier League v QC Leisure* C-403/08 and C-429/08, and *Karen Murphy v Media Protection Services Ltd* (Case C-429/08) [2012] 1 CMLR 29.
- Infopaq International A/S v Danske Dagblades Forening* (C-5/08) [2009] ECDR 16.
- Eva-Maria Painer v Standard Verlags GmbH* (C-145/10) [2012] ECDR 6.
- Football Dataco v Yahoo! UK Ltd* (C-604/10) [2012] ECDR 10.
- Padawan SL v SGAE* (C-467/08) [2011] ECDR 1.
- VG Wort* (C-457/11–C-460/11) ECR I-0000.
- Amazon.com International Sales Inc. and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH* (C-521/11) ECR I-0000.
- Uradex SCRL v Union Professionnelle de la Radio et de la Télédiffusion (RTD) and Société Intercommunale pour la Diffusion de la Télévision (Brutele)* (C-169/05) [2006] ECR I-04973.

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CONCLUSION

The obvious starting point for a conclusion is that the EU has already dealt with copyright in an extensive way. Initially, these interventions dealt with new technological developments such as software and databases, where it was important to introduce new legislation in a harmonised, rather than a disharmonised way. What followed were interventions to iron out existing differences in national copyright rules that risked disturbing the operation of the single market. One thinks of the term of copyright and the approach to photographs. Another example is the artists' resale right that was extended to all EU Member States. A third group of interventions reflects what happened in the international arena. After the conclusion of the TRIPs Agreement there was a real need to equip right holders and judges with efficient and streamlined tools to enforce copyright. And the WCT and the WPPT needed to be transposed into EU and national law. As these waves of interventions came along, the approach changed from vertical interventions that dealt with a specific issue to more horizontal interventions that apply across the board. One thinks for example of the term of copyright for the first group and for the exceptions and limitations for the second group. In tandem with all these interventions the Court of Justice of the European Union (CJEU) developed an extensive case law that implemented the rules on free movement of goods and competition in copyright related cases. 22.01

It serves no purpose to go back to all these Directives and judgments at this stage. They have been analysed in depth in the various chapters and that analysis cannot usefully be repeated or summarised here. What is clear though is that despite the fact that more and more pieces of the jigsaw are falling into place and connecting with each other, the picture is far from complete. As the recent orphan works example shows, new issues emerge and need to be tackled and older difficult issues, such as collective management of copyright, again require attention against the background of a fast evolving copyright scene in the digital environment. There is also, despite the move towards a more horizontal approach, no complete horizontal coverage. In areas such as trademarks the EU has effectively put in place a complete 'new' trade mark regime, based on a complete harmonisation of virtually all aspects of trademark law. In the area of copyright the EU is still very far away from such a situation, even if the European Parliament encourages the EU to go down such a path. It is also highly questionable whether the trademark approach can be replicated in the 22.02