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Introduction & Contents

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Pluralism or Universalism in International Copyright Law

Edited by

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Chapter 2

The Creeping Unification of Copyright in Europe

P. Bernt Hugenholtz

On April 17, 2019, the European Union (EU) formally adopted the Directive on Copyright in the Digital Single Market (DSM Directive).[1] The Directive is the twelfth harmonization directive in the field of copyright and neighboring rights in Europe, since the adoption of the Computer Programs Directive in 1991.[2] Now that the approximation of copyright law in Europe is approaching completion, the idea of actual unification of copyright in the European Union (EU) is gaining ground. Note that harmonization and unification of law, although often confused,[3] are different things. While harmonization compels lawmakers in the Member States to align national law with the norms of a directive, unification creates norms that directly apply in the entire territory of the Union, making national law redundant. Complete unification of copyright would therefore not only lead to "perfect harmonization"—i.e., identical substantive rules across the Union—but would also remove the territorial reach of copyright protection that is

1. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Apr. 17, 2019) Official Journal L 130, 17/5/2019, pp. 92-125.
2. Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (May 14, 1991) Official Journal L 122/42, 17/5/1991, pp. 42-46.
3. *See,* for example, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a Modern, More European Framework for Copyright* (Dec. 9, 2015) COM(2015) 626 final.

inherent to the existing structure of national rights, and which continues to fragment the internal market until this day.

In its 2015 Communication on the modernization of the European copyright framework, the European Commission espoused its "long-term vision" of a unitary copyright "in the form of a single copyright code and a single copyright title," which should eventually replace the national copyright laws of the Member States.[4] According to the Commission:

> The EU should pursue this vision for the very same reason it has given itself common copyright legislation: to build the EU's single market, a thriving European economy and a space where the diverse cultural, intellectual and scientific production of Europe travel across the EU as freely as possible.[5]

Whereas in these Brexit-ridden times, formal unification in the form of an EU Copyright Regulation still seems to be a long way off, the EU legislator and the Court of Justice are gradually removing or reducing the territoriality of copyright in distinct fields, thereby bringing a unified European copyright law slowly but steadily closer. This chapter traces this process of creeping unification of copyright law in the EU. Section 2.1 below begins by summarizing the process of harmonization that has led to the current copyright *acquis* and highlights the current role of the Court of Justice as the main promotor of approximation. Section 2.2 below sets out various ways in which EU law has tackled territoriality in copyright law until today. Section 2.3 below describes the increasing role of the EU Charter as a unifying force. Section 2.4 below concludes by examining the prospect of formal unification by way of an EU Copyright Regulation.

2.1 HARMONIZATION OF COPYRIGHT

The harmonization of copyright in Europe has its roots in a legendary study conducted by Dr. Dietz in the 1970s for the European Commission.[6] The study, which was completed in 1976, clearly demonstrated that the substantive rules on copyright and related rights of the (then) nine Member States of the European Community differed considerably from one another, and potentially hindered the free movement of cultural goods across the Community. Harmonization of copyright was therefore necessary, Dietz concluded. To this end, Dr. Dietz advised the European Commission to

4. *Ibid.*
5. *Ibid.*
6. Adolf Dietz, *Das Urheberrecht in der Europäischen Gemeinschaft, Studie im Auftrag der Generaldirektion Forschung, Wissenschaft und Bildung der Komission der Europäische Gemeinschaften* (Baden Baden: Nomos, 1978).

initiate a program of step-by-step harmonization. According to the *Harmonisierungsfahrplan* proposed by Dietz, priority should be given to the most urgent issues: the duration of copyright, private copying, reprography, lending right and the exhaustion of the distribution right. Dr. Dietz' harmonization agenda was eventually carried out by the European lawmaker in the 1990s, albeit not in the order he suggested.

Interestingly, the Dietz study contemplated not only harmonizing but also eventually unifying copyright law in the Community. According to Dietz, immediate unification of copyright was less urgent since, unlike formality-based rights of industrial property such as patents and trademarks, copyright protection arises ex lege (automatically) in all countries of the Community. Unification could wait until harmonization was complete, Dietz suggested.[7]

The harmonization of copyright in Europe eventually occurred in three phases: a first, highly productive ten-year period during which the main harmonization directives were issued (1991-2001); a second decade of consolidation and "soft law"; and a third still ongoing period of "harmonization through jurisprudence", during which the Court of Justice seems to have taken over the harmonizing torch from the European legislator.[8]

With the adoption of the new DSM Directive copyright harmonization by directive is moving ever closer to completion. A dozen directives on copyright and neighboring rights have approximated the copyright laws of the Member States to a considerable degree.[9] First and foremost, the EU copyright *acquis* encompasses the main exploitation rights conferred by copyright: the rights of reproduction, communication to the public and distribution. Also harmonized are the main remuneration rights, such as the public lending right,[10] the private copying and reprography levies,[11] and the *droit de suite* (artist's resale right).[12] The same goes for the term of copyright,

7. *Ibid.*, 305-306.
8. *See*, P. Bernt Hugenholtz, *Copyright in Europe: Twenty Years Ago, Today and What the Future Holds* 23(2) Fordham Intellectual Property, Media & Entertainment Law Journal 503-524 (2013).
9. *Ibid.*
10. Directive 2006/115/EC of the European Parliament and of the Council12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Dec. 12, 2006) Official Journal L 376/28, 27/12/2006, pp. 28-35; replacing Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Nov. 19, 1992) Official Journal L 346/61, 27/11/1992, pp. 61-66.
11. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Art. 5(2)(a), (b) (May 22, 2001) Official Journal 167/10, 22/6/2001, pp. 10-19 (hereinafter InfoSoc Directive).
12. Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art (Sep. 27, 2001) Official Journal L 272/32, 13/10/2001, pp. 32-36.

which ends 70 years after the death of the creator throughout the Union.[13] Copyright exceptions and limitations are broadly harmonized by the Information Society Directive that lists one mandatory and twenty optional exceptions.[14] The Marrakesh Directive of 2017 offers a mandatory limitation for the benefit of visually impaired persons.[15] The DSM Directive introduces a number of additional binding exceptions, two of which—importantly—allow for text and data mining.[16]

The EU copyright *acquis* additionally encompasses a variety of specific (vertical) issues, ranging from computer software[17] and database protection[18] to the use of orphan works.[19] Governance and supervision of collective rights management have also been harmonized.[20] Last, not least, the rules on copyright enforcement have been extensively approximated by way of the EU Intellectual Property (IP) Enforcement Directive, which applies horizontally to all IP rights protected in the Union.[21] All in all, only few areas in copyright law are left untouched by EU legislation.

Mindful of Recital 7 to the Information Society Directive, which states that "differences not adversely affecting the functioning of the internal market need not be removed or prevented," some exclusive rights with

13. 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 and related rights (Sep. 27, 2011) Official Journal L 265/1, 11/10/2011, pp. 213-217.
14. InfoSoc Directive.
15. Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Art. 4 (Sep. 13, 2017) Official Journal L 242/6, 20/09/2017, pp. 6-13.
16. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Apr. 17, 2019) Official Journal 130, 17/5/2019, pp. 92-125.
17. Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Apr. 23, 2009) Official Journal L 111/16, 5/5/2009, pp. 16-22; Replacing Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (May 14, 1991) Official Journal L 122/42, 17/5/1991, pp. 42-46.
18. Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Mar. 11, 1996) Official Journal L 77/20, 27/3/1996, pp. 20-28.
19. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Oct. 25, 2012) Official Journal L 299/5, 27/10/2012, pp. 5-12.
20. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Feb. 26, 2014) Official Journal L 84/72, 20/3/2014, pp. 72-98.
21. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (Apr. 29, 2004) Official Journal L 195/16, 2/6/2004, pp. 45-86.

limited impact on the internal market, such as public performance and adaptation rights, have so far remained unharmonized. The same goes for moral rights (personality rights), which protect nonpecuniary interests of authors and have therefore escaped the attention of the European legislator until today. The rules on authorship and copyright ownership, which tend to vary greatly from one country to another, are mostly unharmonized as well. Concomitantly, copyright contract law is also largely unaffected by harmonization, except that the new DSM Directive does introduce a small number of rudimentary rules of author's contract law.[22]

2.1.1 Judicial Activism by the European Court

This brings me to the important role that the EU Court of Justice has played, and still plays, in completing the European harmonization agenda by closing various gaps in the copyright *acquis*. Starting with the landmark *Infopaq* case of 2009,[23] the Court has pursued an activist agenda of "harmonization by interpretation"[24] or by "stealth," as some commentators would have it.[25] In *Infopaq*—a case involving the unauthorized reproduction of eleven-word fragments of newspaper articles by a news alert service—the Court rather matter-of-factly held 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 that it is its author's own intellectual creation.[26]

From this the Court derived a harmonized copyright infringement standard:

> In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination.[27]

22. Directive 2019/790/EU.
23. Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening (2009) ECLI:EU:C:2009:465.
24. Jonathan Griffiths, *Infopaq, BSA and the "Europeanisation" of United Kingdom Copyright Law* 16 Media & Arts Law Review (2011), https://ssrn.com/abstract=1777027 (accessed May 5, 2019).
25. Lionel Bently, *Harmonization by Stealth* (paper presented at Fordham IP Conference, 2012). *See also* Gernot Schulze, *Schleichende Harmonisierung des urheberrechtlichen Werkbegriffs?* Gewerblicher Rechtsschutz und Urheberrecht 1019 (2009).
26. Case C-5/08 Infopaq International A/S v. Danske Dagblades Forening, para. 37.
27. *Ibid.*, para. 48.

While the Court's holding is roughly in line with the author's right conception of works of authorship that underlies the law of copyright in continental-European Member States, it came as a surprise since no general harmonized standards for works of authorship or copyright infringement formally exist. The directives have only harmonized three distinct categories of works—computer programs,[28] databases[29] and photographs[30]—along the common standard of "the author's own intellectual creation," whereas the directives are completely silent on the standard(s) for assessing copyright infringement. The Court has nevertheless confirmed and expanded its *Infopaq* holding in *BSA* and other cases, while consistently repeating that copyright subject matter in the EU requires that a work be "the author's own intellectual creation,"[31] which is the case if "it reflects the author's personality … by making free and creative choices."[32] In other words, EU law protects original creation; merely investing skill and labor is not sufficient.[33]

Not surprisingly, these decisions by the Court of Justice of the European Union (CJEU) have led to criticism and even condemnation, especially by commentators in the United Kingdom (UK). According to Griffiths, the decisions are "a striking example of judicial activism in the interests of harmonisation."[34] Not deterred by this criticism, the Court has continued to express similar judicial activism in other largely uncharted areas, such as the notion of "public" (communication). According to the Court communication to the public occurs both in a hotel that merely provides CDs and CD players to its guests;[35] in a public house where customers may view broadcast sports programs on television screens;[36] in a physical rehabilitation center where

28. Directive 2009/24/EC, Art. 1(3).
29. Directive 96/9/EC, Art. 3(1).
30. Directive 2006/116/EC, Art. 6.
31. Case C-393/09 Bezpečnostní softwarová asociace—Svaz softwarové ochrany v. Ministerstvo kultury (2010) ECLI:EU:C:2010:816 (hereinafter BSA). *See also* Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08) and Karen Murphy v. Media Protection Services Ltd (C-429/08) (2011) ECLI:EU:C:2011:631.
32. Case C-145/10 Eva-Maria Painer v. Standard Verlags GmbH and Others (2011) ECLI:EU:C:2011:798.
33. Case C-604/10 Football Dataco Ltd and Others v. Yahoo! UK Ltd and Others (2012) ECLI:EU:C:2012:115.
34. Griffiths (n. 24). *See* for a more positive assessment, Raquel Xalabarder, *The Role of the CJEU in Harmonizing EU Copyright Law* 47 International Review of Intellectual Property and Competition Law (IIC) 635-639 (2016).
35. Case C-162/10 Phonographic Performance (Ireland) Limited v. Ireland and Attorney General (2012) ECLI:EU:C:2012:141.
36. Joined Cases C-403/08 and C-429/08 Football Association Premier League Ltd and Others.

patients may watch television while undergoing treatment;[37] not however in a dentist's practice where a radio is playing music.[38]

The European Court of Justice (ECJ) has also developed complicated new rules on hyperlinking to copyright protected works. In *Svensson* the European Court ruled that a hyperlink is a "communication" that reaches a "public." But if it points to a work lawfully published online, the hyperlink does not reach a "new public," and therefore does not qualify as an act of communication to the public.[39] In *GS Media* the Court clarified that linking to unlawful content does amount to communication to the public unless the hyperlinking person is an individual acting without knowledge and financial motive.[40] In *Stichting Brein* the Court extrapolated this line of case law by holding that The Pirate Bay, the notorious platform that facilitates mass-scale "file sharing" of musical works and audiovisual content without the rightholders' permission, is directly liable for communicating these works to the public.[41] The Court's decision in *Stichting Brein* is a prime example of judge-made EU copyright law and stands in marked contrast to earlier decisions by national courts in Europe and the United States that dealt with file-sharing platforms principally in terms of secondary (contributory or vicarious) liability.

Yet another area where the Court has acted in a harmonizing manner is private copying. While the Information Society Directive, which compels Member States that permit private copying to provide for "fair compensation" to the authors, seemed to have left ample leeway to the Member States,[42] the Court has issued around a dozen judgments on the issue, constructing an elaborate set of rules on private copying levy schemes.[43]

In *Padawan* the Court justifies its judicial intervention as follows:

37. Case C-117/15 Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v. Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA) (2016) ECLI:EU:C:2016:379.
38. Case C-135/10 Società Consortile Fonografici (SCF) v. Marco Del Corso (2012) ECLI:EU:C:2012:140.
39. Case C-466/12 Nils Svensson and Others v. Retriever Sverige AB (2014) ECLI:EU:C:2014:76.
40. Case C-160/15 GS Media BV v. Sanoma Media Netherlands BV and Others (2016) ECLI:EU:C:2016:644.
41. Case C-610/15 Stichting Brein v. Ziggo BV and XS4All Internet BV (2017) ECLI:EU:C:2017:456.
42. InfoSoc Directive, Art. 5(2)(b).
43. *See* e.g., Case C-467/08 Padawan SL v. Sociedad General de Autores y Editores de España (SGAE) (2010) ECLI:EU:C:2010:620; CJEU 27 June 2013, Joined Cases C-457/11 to C-460/11 Verwertungsgesellschaft Wort (VG Wort) v. Kyocera and Others (C-457/11) and Canon Deutschland GmbH (C-458/11) and Fujitsu Technology Solutions GmbH (C-459/11) and Hewlett-Packard GmbH (C-460/11) v. Verwertungsgesellschaft Wort (VG Wort) (2013) ECLI:EU:C:2013:426; Case C-435/12 ACI Adam BV and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding (2014) ECLI:EU:C:2014:254.; Case C-463/12 Copydan Båndkopi v. Nokia Danmark A/S (2015) ECLI:EU:C:2015:144; Case C-166/15 Aleksandrs Ranks and Jurijs Vasiļevičs v. Finanšu

> according to settled caselaw, the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union; that interpretation must take into account the context of the provision and the objective of the relevant legislation.

Consequently, the concept of "fair compensation" in Article 5(2)(b) of the Information Society Directive:

> which does not contain any reference to national laws must be regarded as an autonomous concept of European Union law and interpreted uniformly throughout the European Union.[44]

In *Deckmyn,*[45] another case where the Court was asked to interpret one of the optional limitations of the copyright *acquis* (in this case, parody), the European Court similarly came up with an "autonomous" interpretation of the limitation at issue. This is especially remarkable since the Information Society Directive has left the choice of limitations and exceptions to the Member States. As Prof. Xalabarder concludes:

> Member States may choose which limitations to implement in their national laws, but they cannot freely design their scope: the scope of limitations comes "standardized" as designed in the corresponding paragraph of Art. 5.[46]

In *Luksan* the European Court, once again, ventured into previously unharmonized terrain: here, the law of film production contracts. The Court held that the economic rights to exploit a cinematographic work vest by operation of law, directly, in the author (i.e., principal director) of the film. Consequently, national (Austrian) law that allocated these rights to the film producer was deemed incompatible with EU law.[47]

In the recent *Levola Hengelo* case, which concerned the copyright protection of the taste of a food product, the European Court confirmed that the notion of a work of authorship is fully governed by EU law:

> "Accordingly, in view of the need for a uniform application of EU law and the principle of equality, that concept must normally be given an

un ekonomisko noziegumu izmeklēšanas prokoratūra and Microsoft Corp. (2016) ECLI:EU:C:2016:762.

44. Case C-467/08 Padawan SL v. Sociedad General de Autores y Editores de España (SGAE), paras 32-33.
45. Case C-201/13 Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others (2014) ECLI:EU:C:2014:2132.
46. Xalabarder (n. 34) 635-639.
47. Case C-277/10 Martin Luksan v. Petrus van der Let (2012) ECLI:EU:C:2012:65.

autonomous and uniform interpretation."[48] The European Court went on to deny copyright protection to the taste of a food product (in the case at hand, a cheese spread), on the ground that the taste of a food product cannot "be pinned down with precision and objectivity."[49]

As a result of these and other decisions, important areas of copyright law have now been judicially harmonized by the Court. One can only wonder what topics will remain for the EU legislature to tackle within the years to come. According to Prof. Van Eechoud:

> Inevitably … once national courts are taken further down the road to an all-inclusive Community-wide notion of what constitutes a work, there will be no escape from a Community-wide notion of authorship (and initial ownership). And eventually also of moral rights, which has been kept out of the discussion in EU institutions so far with the convenient "excuse" that it has no particular internal market relevance.[50]

The Court's judicial activism is reminiscent of the important role that the Court of Justice played in the years leading up to harmonization. In a series of landmark decisions the Court measured the exercise of IP rights against the basic freedoms of the internal market—in particular, the free circulation of goods and services.[51] Where the exercise by rightholders was found to be outside the "specific subject matter" of IP, e.g., to impede parallel imports of copyrighted goods between Member States, the Court found conflict with these freedoms. The decisions of the Court can be seen as a prelude to the harmonization process, and certainly provided an important impetus for the European Commission's original harmonization initiative.[52]

48. Case C-310/17 Levola Hengelo BV v. Smilde Foods BV (2018) ECLI:EU:C:2018:899, para. 33.
49. Case C-310/17 Levola Hengelo BV v. Smilde Foods BV, paras 42-43.
50. Mireille van Eechoud, *Along the Road to Uniformity—Diverse Readings of the Court of Justice Judgments on Copyright Work* 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 76 (2012).
51. *See* e.g., Case 78/70 Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG (1971) ECLI:EU:C:1971:59; Case 62/79 SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v. Ciné Vog Films and others (1980) ECLI:EU:C:1980:84 (hereinafter Coditel I); Case 58/80 Dansk Supermarked A/S v. A/S Imerco (1981) ECLI:EU:C:1981:17; Case 262/81 Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films SA and others (1982) ECLI:EU:C:1982:334 (hereinafter Coditel II); Case 158/86 Warner Brothers Inc. and Metronome Video ApS v. Erik Viuff Christiansen (1988) ECLI:EU:C:1988:242; Case 341/87 EMI Electrola GmbH v. Patricia Im- und Export and others (1989) ECLI: EU:C:1989:30.
52. Jean-François Verstrynge, *Copyright in the European Economic Community* 4 Fordham Intellectual Property, Media & Entertainment Law Journal 6 (1993).

2.2 THE FIGHT AGAINST TERRITORIALITY

Nevertheless, the edifice of European copyright still suffers from one structural weakness: territoriality. Despite three decades of harmonization, copyright in the EU has largely remained national law, with each Member State holding on to its own copyright law. As in the case of other IP rights, the protection conferred on copyright holders by these laws is limited to the borders of each State. Copyright's territoriality reflects the *Schutzland* principle of the Berne Convention, a rule that was confirmed by the ECJ in its *Lagardère* decision.[53]

In all countries where his work is protected by copyright, the right-holder therefore enjoys a "bundle" of national copyrights. Each national right in this bundle can, in principle, be exercised separately, licensed or transferred in whole or in part. Territorial fragmentation of national copyrights is indeed quite common in actual practice. For example, film distribution and screening rights tend to be granted and exploited per Member State.[54] Territoriality is also at the heart of the collective management and exercise of musical performance rights. Composers and songwriters normally entrust their rights per territory to a locally operating collective management organization with a remit that is traditionally limited to the national borders of its place of establishment.[55]

Another feature of territoriality is that, according to European conflicts rules, the law of the country where protection is invoked (the "Schutzland") determines whether there is copyright infringement.[56] In *Hejduk* a German company was sued before an Austrian court for making photographs available on its website without the permission of the Austrian photographer. The European Court held that the Austrian court had jurisdiction:

> on the basis of the place where the damage occurred, to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its

53. Berne Convention for the Protection of Literary and Artistic Works (Sep. 9, 1886), S. Treaty Doc. No. 99-27 (hereinafter Berne Convention), Art. 5(2); Case C-192/04 Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) (2005) ECLI:EU:C:2005:475, para. 46.
54. Joost Poort, P. Bernt Hugenholtz, Peter Lindhout, *Film Financing and the Digital Single Market: Its Future, the Role of Territoriality and New Models of Financing* (Study for CULT Committee, Policy Department for Structural and Cohesion Policies, Directorate-General for Internal Policies, PE 629.186, European Parliament, 2019).
55. *See* Daniel J. Gervais, ed., *Collective Management of Copyright and Related Rights* xxx (3d ed., Wolters Kluwer, 2016).
56. Regulation (EC) No. 864/2007 of 11 July 2007on the law applicable to non-contractual obligations (Rome II), Art. 8 (Jul. 11, 2007) Official Journal L 199, 31/7/2007, pp. 40-49.

> territorial jurisdiction. That court has jurisdiction only to rule on the damage caused in the Member State within which the court is situated.[57]

The *Hejduk* ruling implies that making a work available over the Internet has copyright consequences in all jurisdictions where the work can be accessed online. As a result, an online provider wishing to offer a content service throughout the EU is forced to obtain licenses from all rightholders in all Member States.

The territorial nature of copyright thus poses an immediate obstacle to the integration of the European internal market. Over the years, the European Court and the EU legislator have therefore sought solutions that might eliminate or at least mitigate the negative effects of territoriality on the internal market. However, these solutions are still incomplete and, in particular with regard to the cross-border exploitation of works online, do not yet provide sufficient solutions. A number of these partial solutions are briefly summarized below.

2.2.1 Exhaustion of the Distribution Right

The Court of Justice has recognized at a very early stage that the territorial exercise of IP rights negatively affects the free movement of goods. In a series of judgments predating the harmonization process, the Court ruled that the distribution right is exhausted once goods protected by rights of IP are introduced on the Community market with the rightholder's consent.[58] This rule of Community exhaustion (or "first sale") was eventually consolidated in the Information Society Directive.[59] Consequently, parallel imports of copyrighted goods (such as books and cd's) are permitted between Member State, and markets for copyrighted goods can no longer be divided along national borders.

However, no comparable rule has as yet been developed regarding the provision of copyright-related services. In its *Coditel* judgment of 1980, the ECJ expressly refused to recognize a rule of Community exhaustion in respect of acts of broadcasting and cable transmission.[60] The rightholder in a neighboring Member State (in this case Belgium) could therefore legitimately oppose the unauthorized retransmission of a feature film broadcast on television in another State (Germany) and retransmitted in Belgium over cable networks, without unduly restricting trade between Member States. The Coditel principle was eventually codified as well in the Information

57. Case C-441/13 Pez Hejduk v. EnergieAgentur.NRW GmbH (2015) ECLI:EU:C:2015:28.
58. *See, inter alia*, Case 78/70 Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co. KG.
59. InfoSoc Directive, Art. 4(2).
60. Case 62/79 Coditel I.

Society Directive. According to Article 3(3) the right of communication to the public cannot be exhausted.[61]

Nevertheless, the ECJ has—rather controversially—applied the exhaustion rule to computer software "distributed" in intangible form over an Internet server, insofar as this mode of dissemination is economically equivalent to the sale of physical copies of software. According to the Court in *UsedSoft*:

> the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorised, even free of charge, the downloading of that copy from the Internet onto a data carrier has also conferred, in return for payment of a fee intended to enable him to obtain a remuneration corresponding to the economic value of the copy of the work of which he is the proprietor, a right to use that copy for an unlimited period.[62]

Whether the Court's holding in *UsedSoft* applies more generally to works sold and "distributed" over electronic networks, remains an open question.[63]

2.2.2 The Rise of Country of Origin Rules

Another solution to the problem of market fragmentation through territorial rights can be found in the Satellite and Cable Directive of 1993.[64] Under the rules of this Directive, a satellite broadcast is deemed to be a communication to the public solely in the country of origin of the signal, i.e., the country where the "injection" of the program-carrying signal takes place.[65] Consequently, copyright licenses for satellite broadcasting are needed only in the country of origin of the broadcast.

The recently adopted EU Online Broadcasting Directive similarly provides for a country-of-origin rule in respect of "ancillary online services" offered by broadcasting organizations, such as online simulcasting and catch-up services.[66] The scope of the new rule is however fairly limited since it applies only to radio programs, television news and current affairs

61. InfoSoc Directive, Art. 4(2). According to Recital 29, in such cases the "question of exhaustion does not arise."
62. Case C-128/11 UsedSoft GmbH v. Oracle International Corp (2012) ECLI:EU:C:2012:407.
63. *See,* Case C-263/18 Nederlands Uitgeversverbond and Groep Algemene Uitgevers, pending.
64. 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 (Sep. 27, 1993) Official Journal L 248/15, 6/10/1993, pp. 15-21 (hereinafter Satellite and Cable Directive).
65. Satellite and Cable Directive, Art. 1(2)(b).
66. Directive 2019/790/EU.

programs and "fully financed own [television] productions of the broadcasting organization."[67] It therefore remains to be seen what positive impact, if any, the new Directive will have on the DSM. The EU Portability Regulation, adopted in 2017, also comprises a country-of-origin rule.[68] This Regulation obliges providers of online audiovisual service offered on a subscription basis (e.g., Netflix) to provide subscribers staying temporarily in another Member State with the same film offering as they enjoy in their home country. In order to make this obligation work, the Regulation Regulation stipulates that:

> [t]he provision of an online content service under this Regulation stipulates that the providing the audiovisual service to a subscriber who is temporarily present in another Member State "shall be deemed to occur solely in the subscriber's Member State of residence."[69]

More generally, country-of-origin rules seem to be on the rise in copyright-related EU legislation. For example, the Orphan Works Directive of 2012 accords "orphan work" status in all Member States to any work or phonogram that is considered an orphan work in a Member State under the rules of the Directive.[70] The "Marrakesh Directive" on the use of works for the benefit of visually impaired persons allows an "authorized entity" established in any Member State to make accessible-format copies works and to make these available to beneficiaries and other "authorities" anywhere in the Union, subject to the substantive conditions of the Directive.[71]

2.2.3 Remedies in Competition Law

Less structural, but occasionally effective nonetheless, are the solutions that can be found in EU competition law to prevent territorial market fragmentation through the exercise of national copyright, notably Articles 101 (anti-trust) and 102 (abuse of dominance) of the Treaty for the Functioning of the European Union (TFEU)—formerly Articles 81 and 82 of the European Community (EC) Treaty. Over the years, the European Commission, which is tasked with competition oversight, and the ECJ, have produced

67. Directive (EU) 2019/790, Art. 3(1).
68. Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market (Jun. 14, 2017) Official Journal L 168/1, 30/6/2017, pp. 1-11 (hereinafter Portability Regulation).
69. Portability Regulation, Art. 4.
70. Directive 2012/28/EU, Art. 4.
71. Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Art. 4 (Sep. 13, 2017) Official Journal L 242/6, 20/9/2017, pp. 6-13.

extensive case law on the issue. For example, in 1982 the European Court ruled that an exclusive territorial license in respect of a film does not per se infringe anti-trust law, but that such a contract may well amount to a violation "if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market."[72]

In its *Premier League* decision of 2011, the ECJ held that an exclusive pay television license agreement that obliges the pay-television broadcaster not to supply decoding devices to users outside the territory covered by that license agreement, infringes Article 101 TFEU.[73] The decision is in line with general EU competition law,[74] which distinguishes between active and passive sales to consumers in Member States not covered by a territorial license. Whereas competition law does allow a licensor to oblige a licensee not to actively seek customers outside the licensed territory, a licensee may not be prevented from "passively" selling to such consumers. In other words, an exclusive territorial broadcasting license may never be absolute.

Following the Court's decision in Premier League, the European Commission has started an investigation into anti-competitive licensing practices in the pay television sector. The investigation focuses on licensing contracts entered into by a number of major film studios and Sky UK Limited (and subsidiaries). So far, this has led to commitments by Paramount and Disney to remove or no longer enforce restrictions in their licensing contracts that prevent pay television providers from responding to unsolicited (passive) requests from consumers outside the licensed territory.[75] If similar restrictions were to be imposed on film producers with regard to online audiovisual streaming services, the implication would be that film producers could no longer oblige their licensees to "geo-block" consumers residing outside the licensed territory.

2.2.4 Multiterritorial Licenses

The EU Collective Rights Management Directive of 2014 explores a completely different solution to the problem of territoriality.[76] In addition to offering detailed rules on good governance and transparency of collective

72. Case 262/81 Coditel II.
73. Joined Cases C-403/08 and C-429/08 Football Association Premier League and others.
74. *See*, e.g., Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Art. 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted partnership, Art. 4(b)(i) (Apr. 20, 2010) Official Journal L 102, 23/4/2010, pp. 1-7.
75. Case AT.40023—Cross-border access to pay-TV (Paramount); Case AT.40023—Cross-border access to pay-TV (Disney).
76. Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Feb. 26, 2014) Official Journal L 84/72, 20/3/2014, pp. 72-98.

rights management societies, the Directive obliges collecting societies to conclude multi-territorial licenses for online uses of music. Rightholders who have entrusted their rights to a collecting society that is unwilling or unable to do so may withdraw their rights and transfer them to another collecting society that is willing and able to license on a multi-territory basis. In this way, the EU legislator hopes to break the territorial partitioning of the market through collectively managed music rights and to promote pan-European licensing for the Internet.

2.3 GROWING IMPACT OF THE EU CHARTER AND PRIMARY UNION LAW

Parallel to the step-by-step "deterritorialization" of copyright, a small revolution is occurring in European case law that bolsters the trend toward a unitary European copyright. The inclusion of IP rights in the EU Charter (Article 17(2) of the Charter) has given copyright entitlements fundamental rights status.[77] The same goes for a variety of copyright exceptions justified by fundamental freedoms, such as freedom of expression (Article 11 of the Charter).

For example, in *Luksan* the Court of Justice, referring to Article 17 of the Charter, held that a provision in Austrian copyright law providing for the statutory transfer of filmmakers' rights to film producers is contrary to EU law.[78] And in *Deckmyn* the Court ruled that the parody exception provided for in Article 5(3) of the Information Society Directive is motivated by freedom of expression and is, therefore, to be liberally interpreted.[79] It is worth noting that this is a limitation that is optional for the Member States; only a limited number of States (including France, the Netherlands and Belgium) have codified a parody exception. The explicit reference in the judgment to freedom of expression enshrined in the Charter raises the question of whether a parody exception should not also be introduced in all other Member States, given that it is the expression of an underlying fundamental right. In his opinion in the *Pelham* case, Advocate-General Szpunar seems to accept this argument. While denying Member States the freedom to introduce exceptions not included in the Information Society Directive's "shopping list," the Advocate-General admits that:

> some … exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights, in particular the

77. *See* Christophe Geiger, *"Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union* 37(4) International Review of Intellectual Property and Competition Law (IIC) 371 (2006).
78. Case C-277/10 Martin Luksan v. Petrus van der Let.
79. Case C-201/13, Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others.

freedom of expression. Failing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter.[80]

The Court's increasingly frequent references to the fundamental rights enshrined in the EU Charter suggest that there are, in principle, no limits to the European Court's competence to opine in copyright cases. If the *acquis* codified in the directives is simply the expression of general legal principles enshrined in the Charter, there is no reason for the Court to be cautious, even where there is no written secondary law to rely on.

Primary Union law is also occasionally invoked by the ECJ to protect the internal market from fragmentation by territorial copyright. In the *Premier League* case discussed above, the Court ruled that a ban on the resale of Greek decoder cards not only violates antitrust law but also Article 56 TFEU, which guarantees the free movement of services.[81] And in *UsedSoft* the European court relied on its long-standing exhaustion caselaw that is directly grounded in the free movement of goods, to extend the exhaustion rule to computer software downloaded from the Internet.[82]

In connection with the judicial harmonization by the Court described above, the freedom of the Member States to devise their own solutions within the existing harmonized framework is rapidly diminishing. Driven by fear of state liability for damages resulting from (retrospectively) incorrect transposition,[83] this increasingly leads Member States to (near-)literal transposition of directives. This moves us ever closer to actual unification.

2.4 THE LAST STEP: FORMAL UNIFICATION

As we have seen in the previous sections of this chapter, the unification of copyright is progressively effectuated by way of a variety of legal instruments and doctrines, such as the country-of-origin principle, competition law, application of the EU Charter and other primary Union law. In the meantime, ECJ is filling up any remaining gaps in the copyright *acquis*. Nonetheless, a truly unified European copyright has yet to be realized.

80. Opinion AG Szpunar, Case C-476/17 Pelham and others (2018) ECLI:EU:C:2018:1002, para. 77.
81. Joined Cases C-403/08 and C-429/08 Football Association Premier League and others, paras 85 et seq.
82. Case C-128/11 UsedSoft GmbH v. Oracle International Corp, paras 62-63.
83. ECJ 19 November 1991, Case C-6/90 Andrea Francovich and Danila Bonifaci and others v. Italian Republic (1991) ECLI:EU:C:1991:428. For example, following CJEU 10 April 2014, Case C-435/12 ACI Adam BV and Others v. Stichting de Thuiskopie and Stichting Onderhandelingen Thuiskopie vergoeding (2014) ECLI:EU:C:2014:254. The Netherlands was held liable for damages to rightholders for permitting downloading from illegal sources. SEKAM v. The Netherlands, ECLI:NL:RBDHA:2018:10645 (Court of The Hague, 2018).

Ideally, this should be achieved in the form of an EU Copyright Regulation that provides for a unitary copyright title and replaces existing national copyright laws. Significantly, the Lisbon Reform Treaty has introduced a specific competence for the EU legislature to create Union-wide IP rights. Article 118 TFEU expressly instructs the European Parliament and the Council to "adopt measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union … ."

In 2006 the Institute for Information Law (IViR) carried out a comprehensive evaluation of the copyright *acquis* at the request of the European Commission. One of the study's main recommendations was to initiate a unification project that might, one day, lead to unified EU copyright law.[84] According to the IViR study, the advantages of unitary EU copyright are undeniable. An EU Copyright Regulation would immediately establish a truly unified legal framework, replacing the multitude of national rules of the present. It would have instant Union-wide effect, creating an unfragmented single market for copyrights and related rights, both online and offline. It would enhance legal security and transparency, for right owners and users alike and greatly reduce transaction costs. Unification could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights, but merely permits limitations.[85]

In recent years, the idea of unification has become gradually accepted in scholarly[86] and political circles. For example, at the end of 2014 the European Copyright Society, a group of leading European copyright professors, sent a public letter to the European Commission urging it to initiate a unification project.[87] A year later, the European Commission committed itself to the idea of unitary copyright in an official communication to the

84. Institute for Information Law, *The Recasting of Copyright & Related Rights for the Knowledge Economy* (DG Internal Market, 2006); Mireille van Eechoud, P. Bernt Hugenholtz, Lucie Guibault, Stef van Gompel & Natalie Helberger, *Harmonizing European Copyright Law. The Challenges of Better Lawmaking* (Kluwer, 2009).
85. *Ibid.*, 316-317.
86. Reto Hilty, *Copyright in the Internal Market* 35 International Review of Intellectual Property and Competition Law (IIC) 760 (2004); Estelle Derclaye & Trevor Cook, *An EU Copyright Code: What and How, if Ever?* 3 Intellectual Property Quarterly 259 (2011); Frank Gotzen, *The European Legislator's Strategy in the Field of Copyright Harmonization* at Codification of European Copyright Law 43-54 (Tatiana-E. Synodinou ed., Kluwer, 2012); Reto Hilty, *Reflections on a European Copyright Codification* at Codification of European Copyright Law 355 (Tatiana-E. Synodinou ed., Kluwer, 2012).
87. European Copyright Society, *Letter to Commissioner Oettinger on Unification of Copyright Law*, https://europeancopyrightsociety.org/letter-to-commissioner-oettinger-on-unification-of-copyright-law/ (accessed May 23, 2019).

Council and the European Parliament.[88] In doing so, the Commission acknowledged that the road to a European Copyright Regulation is still long and complex. Evidently, as the European Commission observes in its Communication:

> Towards a modern, more European framework for copyright', the introduction of a unitary copyright system would have to be accompanied by the establishment of EU copyright courts operating at various levels, similar to the courts already designated under the EU trademark and design right systems. But "these difficulties should not lead to the abandonment of this vision as a long-term objective".

Earlier, the Wittem Group had already demonstrated with its European Copyright Code[89] that there is sufficient support in academic circles for European unification, and that remaining differences between the copyright laws of the Member States are by no means unbridgeable.

All in all, a transition from the current, highly harmonized—and increasingly "deterritorialized" —system to a truly unitary copyright system would be evolutionary rather than revolutionary. The real question is not whether we will ever get there, but when. As Dr. Dietz predicted in 1976, such a transition will become easier, indeed almost natural, after the harmonization of substantive copyright law has been completed. In any case, any remaining doctrinal resistance against unification based on diverging national legal traditions[90]—objections that have, in the past, marred both harmonization and unification efforts—is becoming obsolete, now that substantive copyright law in the Member States has been all but approximated.

The main remaining obstacles to unification are political and economical. Several major stakeholders, such as collective rights management organizations and film production companies, will not be keen on abandoning their business models based on territorial exclusivity. And some Member States will be reluctant to fully relinquish their remaining autonomy in the field of copyright, even if advanced harmonization has not left much room for national discretion or digression. Moreover, whether the EU wishes to

88. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a Modern, More European Framework for Copyright* (Dec. 9, 2015) COM(2015) 626 final.
89. Wittem Group, *European Copyright Code*, https://www.ivir.nl/copyrightcode/european-copyright-code/ (accessed May 5, 2019). *See* P. Bernt Hugenholtz, *The European Copyright Code. The Wittem Project* at Codification of European Copyright Law 339-354 (Tatiana E. Synodinou ed., Kluwer, 2012); Eleonora Rosati, *The Wittem Group and the European Copyright Code* 5(12) Journal of Intellectual Property Law and Practice 862 (2010).
90. *See* Andreas Rahmatian, *European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the "Herderian Paradox"* 47 International Review of Intellectual Property and Competition Law (IIC) 912-940 (2008).

invest any political capital at all in a copyright unification project seems rather unlikely in the current Brexit-controlled climate. However, Brexit may present an unexpected opportunity. Absent the UK, only a few smaller Member States (Ireland, Cyprus and Malta) will represent the British "copyright" tradition inside the EU. This will, most likely, make a unified European copyright law that is systematically based on "author's rights" principles much easier to accomplish.

So how do we get there from here? Commentators and the European Commission have in the past advocated a variety of interim steps,[91] such as recodification of the entire *acquis* in a single EU Copyright Directive,[92] the introduction of an optional EU copyright title that would co-exist with national copyrights,[93] codification of EU copyright standards in a Commission Recommendation, etc. As this chapter has demonstrated, unification is already creeping into the system of EU copyright law at various levels and in different ways. We have, in my opinion, reached a phase where interim steps are no longer needed. The time to start formal unification is now.

91. *See* Gotzen (n. 86) 49-54; Hilty (n. 86) 360-363.
92. European Commission, *A Single Market for Intellectual Property Rights. Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe, Strategy Paper* 11 (24 May 2011) COM(2011) 287 final.
93. *Ibid.*