HARMONISATION OR UNIFICATION OF EUROPEAN UNION COPYRIGHT LAW*

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I INTRODUCTION

Over the past 20 years, the European Union ('EU') (formerly the European Community) has carried out an ambitious agenda of copyright harmonisation, with the aim of promoting the Internal Market by removing disparities between the laws of the Member States. This has resulted in seven directives on copyright and related rights that were adopted between 1991 and 2001. While the seven directives have created a measure of uniformity between the laws of Member States, harmonisation has come at considerable cost to the Member States. Also, the directives have largely ignored the single-most important obstacle to the creation of an Internal Market in content-based services: the territorial nature of copyright. Despite extensive harmonisation, copyright law in the EU is still largely linked to the geographic boundaries of sovereign Member States. Consequently, copyright markets in the EU remain vulnerable to compartmentalisation along national borderlines.

This article critically assesses the results of copyright harmonisation in the EU, and argues that territoriality in national copyright law should be confronted in light of the emerging European market for copyright-based services. It commences with an assessment of the benefits and costs of copyright harmonisation in the EU; thereafter explains the still-prevailing rule of territoriality in national copyright law in the Member States; goes on to discuss various legal doctrines that mitigate its detrimental effect on the Internal Market; then examines in which way territoriality affects authors, other right holders, service providers and consumers; and finally looks at the prospect of unitary copyright protection in the EU by way of a true European Copyright Law.

II THE PROS AND CONS OF HARMONISATION

At first impression, 20 years of harmonisation of copyright and related rights have been remarkably productive. Despite initial scepticism about the EU's legislative competence in the realm of copyright among Member States, stakeholders and scholars, the EU legislature has carried out an ambitious and broad ranging agenda of harmonisation that has touched upon many of the most important issues in the

* This article is partly based on Bernt Hugenholtz et al, 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (Final Report, Institute for Information Law, University of Amsterdam, 2006).

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field of copyright and related rights. From the early directives dealing primarily with specific subject matter or rights, to the later broad *Information Society Directive*,[1] the harmonisation process has produced a sizeable body of European law on the subject matter, scope, limitations, term and enforcement of copyright and related rights.

Although many inconsistencies remain, the harmonisation machinery has undeniably produced a certain *acquis communautaire*. While far from complete, it has a normative effect, not only on the Member States that are obliged to transpose the directives, but also at the international level. Where the directives have provided precise instructions, leaving the Member States little discretion for deviation, such as in the case of the *Computer Programs Directive*,[2] the harmonisation process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency and predictability of norms in these distinct sectors. Another somewhat more controversial example is the harmonised standard for works of authorship. While the directives have only formally harmonised three distinct categories of works — computer programs,[3] databases,[4] and photographs[5] — along the common standard of 'the author's own intellectual creation',[6] the Court of Justice of the European Union ('ECJ') has in recent years extended this standard to basically all categories of copyright works.

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

1 *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* [2001] OJ L 167/10 ('*Information Society Directive*').

2 *Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs* [1991] OJ L 122/42; *Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs* [2009] OJ L 111/16 ('*Computer Programs Directive*').

3 Ibid art 1(3).

4 *Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases* [1996] OJ L 77/20, art 3(1).

5 *Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights* [2006] OJ L 372/12, art 6 ('*Term Directive*').

6 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (Court of Justice of the European Union, C-393/09, 22 December 2010).

Clearly, the instrument of a harmonisation directive is ill-suited to quickly respond to the challenges of a constantly evolving, dynamic information market. But even a relatively unambitious consolidation exercise, such as a 'recasting' of the *acquis*,[7] would take several years to complete and then transpose, assuming that Member States and stakeholders could exercise enough self-restraint to refrain from adding new policy options to the agenda.

Another structural deficiency of the harmonisation process is the asymmetric normative effect of harmonisation by directive. The harmonised norms of copyright and related rights in the seven directives in many cases exceed the minimum standards of the *Berne* and *Rome* Conventions to which the Member States have adhered. More often than not the norms also surpass average levels of protection that existed in the Member States prior to implementation, as exemplified by the *Term Directive*,[8] that has harmonised the duration of copyright at a level well above the normal European term of 50 years *post mortem auctoris*. Surely, this trend of 'upwards' harmonisation is driven, at least in part, by the desire of the European legislature to seek 'a high level of protection of intellectual property', which would lead to 'growth and competitiveness of European industry'[9] — a proposition that has yet to be proven.[10] But some up-scaling of protection is probably inevitable, considering the political and legal problems that a scaling back of intellectual property rights would cause those Member States offering protection in excess of the European average.

A related problem is the 'ratcheting-up' effect that a harmonisation directive inevitably has on national levels of protection, even in the rare case that a directive would later be repealed. Repealing a directive does not automatically lead to the undoing of implementation legislation at the national level, unless a national legislature has provided for a sunset clause. This makes harmonisation by directive essentially a one-way street, from which there is no turning back. For example, despite the European Commission's scathing assessment of the EU *Database Directive*,[11] no initiative to repeal the directive or its controversial sui generis database right has so far been taken.

7 European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Updating and Simplifying the Community Acquis*, COM(2003) 71 final, 11 February 2003. For a proposal for a 'European Copyright Code' that would consolidate the existing directives, see European Commission, *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights, Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, COM(2011) 287 final, 24 May 2011.

8 *Term Directive* [2006] OJ L 372/12.

9 *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* [2001] OJ L 167/10, recital (4).

10 For the argument that the positive effect of the introduction of the sui generis right on the EU information economy cannot be proven, see Commission of the European Communities, 'First Evaluation of *Directive 96/9/EC on the Legal Protection of Databases*' (DG Internal Market and Services Working Paper, 12 December 2005) <http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf>.

11 Ibid.

This phenomenon of 'upwards' approximation is inherent to the process of harmonisation by directive, and a reason for serious concern. The effectiveness, in economic and social terms, and credibility, in terms of democratic support, of any system of intellectual property depends largely on finding that legendary 'delicate balance' between the interests of right holders in maximising protection and the public at large, in having access to products of creativity and knowledge. Moreover, a constant expansion of rights of intellectual property due to 'upwards' harmonisation is likely to create new obstacles to the establishment of an Internal Market, rather than remove them, as long as exclusive rights remain largely territorial and can be exercised along national borders.

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

Another structural drawback of the instrument of harmonisation is its limited potential to provide for true unification of law. Harmonisation directives usually leave a broad measure of discretion to the Member States, and are often vague as a result of political compromise. It is common for directives to provide minimum standards of protection, or optional provisions. In some cases, the norms in a directive leave national legislatures so much leeway that their actual harmonising effect must seriously be called into doubt. A noteworthy example is arts 5(2)–(3) of the *Information Society Directive*,[12] which allows Member States to 'pick and mix' limitations from a 'shopping list' of some 21 broadly worded categories of exemptions.

Yet another criticism concerns the lack of transparency of the legislative process. Lawmaking by directive involves a highly complex interplay between all three legislative powers of the European Community. Almost inevitably this complexity reduces the transparency of the legislative process, and invites lobbying and rent-seeking. More often than not, harmonisation initiatives are driven by hidden political agendas. Indeed, the stated aim of a directive (removing 'differences between the national laws'[13]) rarely tells the full story, and in some cases appears to be rather far-fetched.

A final critique concerns the quality of the final legislative product. The complex legislative procedure leading to a harmonisation directive, involving input from three EU institutions and some 27 Member States, simply cannot produce norms of the quality that the EU — the largest market in the world — requires. To make matters worse, pressure from powerful lobby groups and from the EU's main trading partners does not allow enough time for the reflection needed to produce good quality regulation. At the national level, to avoid the risk of rushing into

12 *Information Society Directive* [2001] OJ L 167/10.

13 See, eg, *Term Directive* [2006] OJ L 372/12, recital (2).

immature or unnecessary legislative initiatives, legislatures often seek advice from (committees of) academic advisors. Similarly, academic experts could play an important role as 'quality controllers' at the European level.

On balance, the process of harmonisation in the field of copyright and related rights has produced mixed results at great expense, and its beneficial effects on the Internal Market are limited at best, and remain largely unproven. Twenty years of harmonisation of copyright law have not produced a solid, balanced and transparent legal framework in which the knowledge economy in the EU can truly prosper. Even worse, the harmonisation agenda has largely failed to live up to its promise of creating uniform norms of copyright across the EU. This sobering conclusion calls for caution and restraint when considering future initiatives of harmonisation by directive.

III TERRITORIALITY IN EUROPEAN COPYRIGHT

However, the real Achilles heel of harmonisation is territoriality. Despite 20 years of harmonisation, copyright law remains essentially national law, with each of the EU's Member States having its own national law on copyright and neighbouring (related) rights. The exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the member state where the right has been granted. In its *Lagardère* ruling,[14] the ECJ confirmed the territorial nature of copyright and related rights. The territorial nature of copyright has various legal consequences.

In the first place, since copyright is granted autonomously by each member state for its own territory, rules on copyright will vary from one member state to another. Although the seven harmonisation directives in the field of copyright and related rights have removed disparities in distinct fields (eg computer programs, rental and lending, satellite broadcasting and cable retransmission, term of protection, databases, artists' resale right, rights of reproduction and communication), important areas remain largely or completely unharmonised. Examples include moral rights, rules on authors' contracts and rules on the collective administration of rights.

A second and related aspect of territoriality is that according to the rule of private international law, the law of the country where protection is sought (the so-called *Schutzland*) governs instances of copyright infringement.[15] This rule implies that

14 *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable* (C-192/04) [2005] ECR I-7199 [46]:

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

15 *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40, art 8.

making a work available online (ie over the internet) affects as many copyright laws as there are countries where the posted work can be accessed. In other words, copyright licences for such acts need to be cleared in all countries of reception — normally, all 27 Member States of the EU.

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

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

A *Community Exhaustion*

The Court recognised early on that the territorial exercise of rights of intellectual property negatively affects the free circulation of goods, which is a core characteristic of the Internal Market. In a series of decisions preceding the harmonisation of copyright and related rights, the Court held that the right to control the distribution of copyright protected goods is exhausted following the initial putting on the market of these goods inside the Community with the consent of right holders.[16] This so-called rule of 'Community exhaustion' was codified much later in art 4(2) of the *Information Society Directive*.[17] As a consequence, markets for copyright protected goods can no longer be partitioned according to national borders; parallel importing of goods that incorporate copyrighted works, such as books or CD's, that originate from other EU Member States, is legitimate. No exhaustion, however, occurs if these goods have their origin outside the EU, eg from the United States; in such cases, right holders in the EU may legitimately oppose parallel imports.

However, no similar rule of exhaustion has been developed in respect of the provision of content-related services. These services therefore remain vulnerable to the concurrent exercise of rights of public performance, communication to the public, cable retransmission or making available in all the Member States where the services are offered to the public. In its *Coditel I* decision, the ECJ expressly refused to recognise a rule of Community exhaustion in respect of acts of

16 See, eg, *Deutsche Grammophon Gesellschaft v Metro-SB-Großmärkte* (C-78/70) [1971] ECR 487.

17 *Information Society Directive* [2001] OJ L 167/10.

secondary cable transmission.[18] The right holder in a neighbouring member state (in this case Belgium) could legitimately oppose the unauthorised retransmission of a film broadcast in another state (Germany) via cable networks, without unduly restricting trade between Member States. The EU legislature has, much later, codified the *Coditel I* rule in respect of the rights of communication and making available to the public in art 3(3) of the *Information Society Directive*.[19]

B *The Satellite Broadcasting Solution*

Apart from the codification of the rule of Community exhaustion, which permits the further circulation of copyrighted goods within the EU upon their introduction on the market in the EU with the local right holder's consent, the only structural legislative solution to the problem of market fragmentation by territorial rights can be found in the *Satellite and Cable Directive* of 1993.[20] According to art 1(2)(b) of the Directive, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, ie where the program-carrying signal is injected into the satellite broadcast transmission chain. Thus the directive departed from the so-called 'Bogsch theory', which held that a satellite broadcast requires licences from all right holders in all countries of reception (ie within the footprint of the satellite).[21] Since the transposition of the *Satellite and Cable Directive*, only a licence in the country of origin (home country) of the satellite broadcast is needed. As a result — at least in theory — a pan-European audiovisual space for satellite broadcasting has been created, and market fragmentation along national borders is avoided, by steering away from the cumulative application of several national laws to a single act of satellite broadcasting. Paradoxically, in the market for online content where the problem of territoriality has now become acute,[22] no similar legislative solution has been achieved. Unlike satellite broadcasters, content providers offering trans-border online services across the EU will have to clear the rights from all right holders concerned for all the Member States of reception.

C *The Online Music Recommendation*

Providers of online services comprising musical works may find some comfort in the *Online Music Recommendation* that was adopted by the European

18 *Compagnie Général pour la Diffusion de la Télévision v Ciné Vog Films* (C-62/79) [1980] ECR 881 ('*Coditel I*').

19 *Information Society Directive* [2001] OJ L 167/10.

20 *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* [1993] OJ L 248/15 ('*Satellite and Cable Directive*').

21 See Gunnar W G Karnell, 'A Refutation of the Bogsch Theory on Direct Satellite Broadcasting Rights' (1990) 18 *International Business Lawyer* 263, 263–6.

22 See European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*, COM(2007) 836 final, 24 May 2011.

Commission in 2005.[23] This non-binding recommendation seeks to facilitate the grant of Union-wide licences for online uses of musical works by requiring collective rights management societies to allow right holders to withdraw their online rights and grant them to a single collective rights manager operating at EU level. Nevertheless, the Recommendation does not address the more fundamental problem of territorially divided rights. Moreover, its scope is limited to musical works, phonograms and performances — subject matter that is traditionally exploited through collecting societies. The Recommendation does not concern existing contractual arrangements between, for instance, film producers and distributors or broadcasters, or writers and publishers.

In view of its non-binding status it is difficult to assess whether the Recommendation has had any real effect on the behaviour of right holders and rights managers. Nevertheless, there is presently a noticeable tendency amongst holders of large catalogues of music copyrights, particularly music publishers, to withdraw their 'online rights' from smaller national collecting societies, and entrust these to larger societies that operate on a European scale.

D *EU Competition law*

Even less structural, but sometimes effective nonetheless, are the remedies found in EU competition law, notably arts 101 and 102 of the *Treaty on the Functioning of the European Union* ('*TFEU*'),[24] formerly arts 81 and 82 of the *EC Treaty*,[25] against the exercise of intellectual property rights along national borders that result in the unjustified partitioning of the internal market. The ECJ has produced extensive case law on the issue, applying both former arts 81 (anti-trust) and 82 (abuse of a dominant position). With regard to the former article, the Court has held in *Coditel II* that a contract providing for an exclusive right to exhibit a film for a specified time in the territory of any Member State may well be in violation of that provision if it has as its object or effect the restriction of film distribution or the distortion of competition on the cinematographic market.[26] In *Tiercé Ladbroke*, the Court of First Instance ruled that an agreement, by which two or more undertakings commit themselves to refusing third parties a licence to exploit televised pictures and sound commentaries of horse races within one Member State,

> may have the effect of restricting potential competition on the relevant market, since it deprives each of the contracting parties of its freedom

23 *Commission Recommendation 2005/737/EC of 18 May 2005 on Collective Cross-border Management of Copyright and Related Rights for Legitimate Online Music Services* [2005] OJ L 276/54 ('*Online Music Recommendation*'). See also *European Parliament Resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services*, T6-0064/2007.

24 *Treaty on the Functioning of the European Union,* opened for signature 7 February 1992, [2009] OJ C 115/199 (entered into force 1 November 1993) ('*TFEU*').

25 *Treaty Establishing the European Community*, opened for signature 7 February 1992, [1992] OJ C 224/6 (entered into force 1 November 1993) ('*EC Treaty*').

26 *Coditel II* (C-262/81) [1982] ECR 3381, [17].

> to contract directly with a third party and granting it a licence to exploit its intellectual property rights and thus to enter into competition with the other contracting parties on the relevant market.[27]

The *GVL* case demonstrates that art 102 of the *TFEU* may also serve as a remedy against the territorial exercise of copyright.[28] According to the ECJ:

> a refusal by an undertaking having a *de facto* monopoly to provide its services for all those who may be in need of them but who do not come within a certain category of persons defined by the undertaking on the basis of nationality or residence must be regarded as an abuse of a dominant position within the meaning of the first paragraph of Article [82] of the Treaty.[29]

Issues of territorial exclusivity are also at the heart of several more recent competition cases concerning licensing practices of collecting societies.[30] In the *CISAC* case, the European Commission prohibited a large number of European collecting societies, members of CISAC, from restricting competition as regards the conditions for the management and licensing of authors' public performance rights for musical works.[31] The collecting societies were found to have restricted the services they offer to authors and commercial users outside their domestic territory.[32]

The groundbreaking *Premier League Decoder* cases that were decided by the Court in October 2011 confirm that EU competition law militates against licensing contracts that confer absolute territorial exclusivity.[33] These cases essentially turned on the trade in satellite decoder cards that provide access to encrypted foreign satellite transmissions of live Premier League football matches from Greece at lower prices than domestic pay TV services in the United Kingdom. According to the Court the exclusive licensing contracts that the Premier League entered into with the Greek satellite pay television vendor, which included an obligation not to sell decoder cards to consumers abroad, led to absolute territorial exclusivity, which the Court held to be not justified and therefore in conflict with both the freedom to provide services and competition law. Interestingly, the Court expressly rejected the argument of price discrimination — ie the possibility of differentiating consumer prices — as a valid justification for segmenting markets inside the EU.[34]

27 *Tiercé Ladbroke SA v Commission* (T-504/93) [1997] ECR II-923, [158].

28 *GVL v Commission, European Court of Justice* (C-7/82) [1983] ECR 483.

29 Ibid [56].

30 See, eg, *Commission Decision of 8 October 2002 Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014 — IFPI Simulcasting)* [2003] OJ L 107/58.

31 *Commission Decision of 16 July 2008 Relating to a Proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.698 — CISAC)*.

32 Ibid.

33 *Football Association Premier League Ltd v QC Leisure; Karen Murphy v Media Protection Services Ltd* (Court of Justice of European Union Communities, joined cases C-403/08 & C-429/08, 4 October 2011).

34 Ibid [115].

IV SUMMARY AND CONCLUSIONS

The harmonisation directives in the field of copyright and related rights adopted by the European legislature since 1991 have largely ignored the territorial nature of the economic rights. As a consequence, even in 2012, content providers aiming at European consumers need to clear rights covering some 27 Member States. This clearly puts them at a competitive disadvantage vis-à-vis their main competitors outside the EU, such as the United States, where copyright is regulated at the federal level, and copyright protection at state level is preempted.

Whereas European case law has tackled the problem of territoriality head-on for the distribution of physical goods, by establishing a rule of Union-wide exhaustion incorporating intellectual property, the territorial nature of rights of communication online has been left intact. While the Commission's *Online Music Recommendation* does address some of the problems caused by territoriality in the field of collective rights management of musical works, even the Recommendation does not question the territorial nature of copyright and related rights as such.

The question that therefore must be asked is whether similar solutions can be found in respect of copyright-related online services. In search of such solutions, three different approaches might be considered.

One possible solution would be to extend, or apply by analogy, to the internet the 'injection right' model of the *Satellite and Cable Directive*, which was explained above. This is not a novel idea. Already in the 1995 Green Paper that preceded the *Information Society Directive*,[35] the European Commission toyed with the idea of applying to the internet the country of origin approach that typifies the *Satellite and Cable Directive*. But this suggestion was immediately and unequivocally discarded by all right holders consulted. Right holders feared they would lose control of copyrighted content once it was offered online, under a licence, somewhere within the EU. It was also pointed out that transmission of works over the internet is not merely an act of communication to the public, as is satellite broadcasting, but also concerns the right of reproduction. Works made available online are stored on servers and copied repeatedly on their way from the content provider to the end user.

In a Staff Working Document that accompanied the Communication of the Commission on 'Creative Content Online', the possibility of extending the *Satellite and Cable Directive's* country-of-origin approach to the internet is once again extensively discussed:

> Some stakeholders, including representatives from the broadcasters suggest that the country-of-origin principle should be considered for online services along the lines of the *Satellite and Cable Directive*. They consider that in particular, internet streaming/simulcasting is comparable

35 European Commission, *Commission Green Paper on Copyright and Related Rights in the Information Society*, COM(95) 382 final, 19 July 1995, 41–3.

> to the case of satellite broadcasting. While internet streaming and indeed simulcasting may indeed be structurally similar to broadcasting, this is less true for a host of 'on-demand' services and 'online retail' of music or film. In the case of online purchases, legal doctrine has established that the relevant act under copyright laws takes place in the country where the consumer has access to the relevant services. In depth analysis will be needed before considering the extension of a technology specific solution. … Furthermore, the extension of the country of origin principle raises a number of concerns, such as the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and licence were to be applied to the whole Internal Market, or of a 'race to the bottom' both regarding the emergence of the protection and the scope of the protection. Hence, the question of whether or not the *Satellite and Cable Directive* (93/83/EEC) should be made technologically neutral by extending the country-of-origin principle to online services should be addressed through a review of this Directive.[36]

A much less ambitious approach would be to keep the territorial nature of copyright as a matter of principle intact, but to promote multi-territorial licensing. This is the approach apparently advocated by the Commission in its recent IPR Strategy paper. The Commission no longer discusses the country-of-origin approach of the *Satellite and Cable Directive* as a viable solution. Instead it announces its intention 'to create a legal framework for the collective management of copyright to enable multi-territorial and pan-European licensing'.[37] This 'framework', presumably a directive, would partly reiterate the approach of the *Online Music Recommendation*, while taking into account the interests of smaller collecting societies. The Commission proposes:

> [t]o foster the development of new online services covering a greater share of the world repertoire and serving a greater share of European consumers, the framework should allow for the creation of European 'rights brokers' able to license and manage the world's musical repertoire on a multi-territorial level while also ensuring the development of Europe's cultural diversity. To that end, an enforceable European rights management regime that facilitates cross-border licensing should be put in place.[38]

Nevertheless, if the EU is really serious about achieving a Single Market for content-related goods and services, the problem of territoriality in copyright must be confronted in a more fundamental way. As the Institute for Information Law has suggested in a major study on the future of European copyright law that

36 European Commission, *Commission Staff Working Document — Document Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*, SEC(2007) 1710, 3 January 2008, 25–6.

37 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights: Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe*, COM(2011) 287 final, 24 May 2011, 10.

38 Ibid 11.

was carried out for the European Commission,[39] a truly structural and consistent solution that would immediately remove all copyright-related territorial obstacles to the creation of a Single Market, could be the introduction of a unified European Copyright Law. Long considered taboo in copyright circles, the idea of a unified copyright law is gradually receiving the attention it deserves, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner Vivian Redding expressly endorsed the idea of a European Copyright Law:

> Last, but not least, one could think of a more profound harmonisation of copyright laws in order to create a more coherent licensing framework at European level. A 'European Copyright Law' — established for instance by an EU regulation — has often been mooted as a way of establishing a truly unified legal framework that would deliver direct benefits. This would be an ambitious plan for the EU, but not an impossible one.[40]

Significantly, the *TFEU* has introduced a specific competence for Union-wide intellectual property rights. Article 118 of the *TFEU* provides:

> In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorization, coordination and supervision arrangements.[41]

Arguably, art 118 *TFEU* would allow not only for the introduction of Union-wide copyright titles, but also for the simultaneous abolishment of national titles, which would be necessary for such an initiative to take its full effect and remove territorial restrictions.

The potential advantages of such a Union-wide copyright title are undeniable. A European Copyright Law would immediately establish a truly unified legal framework, replacing the multitude of sometimes conflicting national rules of the present. It would have instant Union-wide effect, thereby creating a 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

39 Bernt Hugenholtz et al, 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (Final Report, Institute for Information Law, University of Amsterdam, 2006) 210. See also Mireille van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International, 2009) 317.

40 Viviane Reding, 'Bringing Down Walls and Barriers in the Digital World — Priorities for the European Digital Agenda' (Speech delivered at Visby Agenda: Creating Impact for an eUnion 2015, Visby/Gotland, Sweden, 9 November 2009) <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>. Similar ideas are expressed in DG INFSO and DG MARKT, 'Creative Content in a European Digital Single Market: Challenges for the Future' (Reflection Document, 22 October 2009) <http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf>.

41 The 'ordinary procedure' that art 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote.

transaction costs. Unification could also restore the asymmetry that is inherent in the current *acquis*, which *mandates* basic economic rights, but merely *permits* limitations.

Devising a European Copyright Law would be an ambitious undertaking — at best a project of the long term. With copyright law today in a state of constant crisis, due in particular to the problems of mass infringement associated with the internet, the question arises whether time would allow the EU legislature to embark on such an undertaking. The answer, in the opinion of this author, is yes. Work on a European Copyright Law could be undertaken in parallel with improvement, at the national level or in the form of further harmonisation, of copyright in the EU. Indeed, such work could be less dependent on the mood of the day, and might allow for sufficient reflection, thereby enhancing the quality of the final legislative product. In this respect, the slow but certain development of a body of European contract law in an institutionalised cooperation between the Commission and a group of qualified academic experts might serve as an example.[42] Ideally, such an 'unhurried' drafting process might produce the technologically neutral norms that make up a transparent, consistent, supranational legal framework, free from territorial restrictions, for many years to come.

The European Commission's recent IPR Strategy paper entertains the possibility of consolidating the entire body of harmonised copyright law into a single 'European Copyright Code'.[43] According to the Commission, '[t]his could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level.' The paper also states the Commission's intention to examine the feasibility of creating an optional 'unitary' copyright title based on art 118 of the *TFEU*, which would exist in parallel to national copyrights. While these statements demonstrate that the prospect of a unification of European copyright is no longer beyond the political horizon, the European Commission apparently is not yet ready to consider the creation of a truly unified European Copyright Law that would effectively replace national copyright laws in the Member States.

In anticipation of a future EU initiative towards unification, a self-appointed group of European copyright scholars (the Wittem Group) have drafted a model *European Copyright Code* that was published in April 2010.[44] Interestingly, the Group comprised scholars from both the continental-European authors' right tradition and the British copyright tradition, demonstrating that a European Copyright Law that assimilates both traditions can actually be realised.

42 See European Commission, *Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the Acquis: The Way Forward*, COM(2004) 651 final, 11 October 2004.

43 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*, COM(2011) 287 final, 24 May 2011, 11.

44 Wittem Group, *European Copyright Code* (26 April 2010) <www.copyrightcode.eu>.