

## The Future of Copyright in Europe

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### INTRODUCTION

Some would say that for there to be a future of copyright in Europe, there needs to be reform. Others would say that the best way to ensure any future for copyright is to refrain from intervention. My own view, as I will explain, is that a rational review of copyright rules is required to maintain the legitimacy and robustness of the system in Europe. I am also of the view—as you might expect from the head of the copyright department in the European Commission—that such review needs to be done not at the national but at the European level.

Ultimately, this Article will address the drivers and key issues in the ongoing discussions, as well as the possible steps going forward. Before doing that, however, it is important to place the conversation in context.

### I. COPYRIGHT AND THE EUROPEAN UNION

In order to understand the current debate in the European Union and the options going forward, it is important to first explain what it means to refer to the EU copyright rules and, even more important, why these rules exist in the first place.

#### A. BACKGROUND

There is no such thing as a European Copyright Act or Code, let alone—unlike trademarks<sup>1</sup> or patents<sup>2</sup>—a “European title.” As a result, works are protected on the basis of twenty-eight national laws, each of which establish national rights. Thus, copyright continues to be fundamentally attached to each of the twenty-eight

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\* Head of the Copyright Unit in the European Commission. This Article is based on the Horace S. Manges Lecture delivered on April 7, 2014 at Columbia Law School. The views expressed are purely those of the author and may not, under any circumstances, be regarded as stating an official position of the European Commission. 1. *See generally* Council Regulation 207/2009, on the Community Trade Mark, 2009 O.J. (L 78) 1 (EC); Directive 2008/95/EC, of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks, 2008 O.J. (L 299) 25.

2. *See generally* Convention on the Grant of European Patents, Oct. 5, 1973, 2527 U.N.T.S. 219; Council Agreement on a Unified Patent Court, 2013 O.J. (C 175) 1; Council Regulation 1260/2012, of 17 December 2012 Implementing Enhanced Cooperation in the Creation of Unitary Patent Protection with Regard to the Applicable Translation Arrangements, O.J. (L 361) 89; Council Regulation 1257/2012, of the European Parliament and of the Council of 17 December 2012 Implementing Enhanced Cooperation in the Area of the Creation of Unitary Patent Protection, 2012 O.J. (L 361) 1.

national jurisdictions that today constitute the Union. Indeed, a reading of, say, the U.K. Copyright, Designs and Patents Act and the French Intellectual Property Code shows important differences on issues such as authorship and ownership, assignment and licensing of rights, and limitations and exceptions.<sup>3</sup>

At the same time, we have a significant body of “common rules,” a large “Community acquis” as it is often called. This Community acquis has developed over more than two decades. The first Community measure in the area of copyright was the 1991 Directive on the Legal Protection of Computer Programs,<sup>4</sup> and the most recent was the Directive on Collective Management of Rights adopted in March 2014.<sup>5</sup> Right now, our body of “common rules” is made up of ten pieces of legislation.<sup>6</sup> It is important to note that so far all of them have been “directives,” which are legal instruments that are binding upon member states as to the results to be achieved but leave to them the choice of form and methods.<sup>7</sup> Directives therefore require the adoption of implementing measures in each member state, which normally will take the form of amendments to the existing national copyright laws.

One might ask why the European Union would try to harmonize the copyright laws of its member states. The final goal is sometimes forgotten, but is clearly established in the Treaty on the Functioning of the European Union: the establishment of an internal market—that is, an area without internal frontiers in

3. *Compare* Copyright, Designs and Patents Act of 1988, 1988 ch. 48 (U.K.), with CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C.P.I.] arts. L111-1–L811-4 (Fr.).

4. Directive 2009/24/EC, of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111) 16 [hereinafter Software Directive].

5. 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 Internet Market, 2014 O.J. (L84) 72 [hereinafter Collective Rights Management Directive].

6. *See generally* Collective Rights Management Directive, *supra* note 5; Directive 2012/28/EU, of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5 [hereinafter Orphan Works Directive]; Directive 2011/77/EU, of the European Parliament and of the Council of 27 September 2011 Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights, 2011 O.J. (L 265) 1 [hereinafter Term Directive II]; Software Directive, *supra* note 4; Directive 2006/115/EC, of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006 O.J. (L 376) 28 [hereinafter Rental Directive]; Directive 2006/116, of the European Parliament and of the Council of 12 December 2006 on the Term of Protection of Copyright and Certain Related Rights, 2006 O.J. (L 372) 12 [hereinafter Term Directive I]; Directive 2001/84, 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, 2001 O.J. (L 272) 32 [hereinafter Resale Right Directive]; 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 O.J. (L 167) 10 [hereinafter Information Society Directive]; Directive 96/9/EC, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 [hereinafter Databases Directive]; 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 O.J. (L 248) 15 [hereinafter Cable & Satellite Directive].

7. Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Dec. 13, 2007, O.J. (C 326) 47, 171–72.

which the free movement of goods and services is ensured.<sup>8</sup> Of course, there are public interest objectives that are taken into account when defining internal market policies,<sup>9</sup> but the establishment of an internal market is the legal basis for, and the objective of, EU action.<sup>10</sup> It is not always clear whether all of the existing directives in the area of copyright meet this objective, or whether they are sufficient in today's digital world.

EU copyright rules have grown somewhat organically. Some directives have tackled specific issues in terms of the subject matter of protection, like the Software Directive or the Directive on the Legal Protection of Databases.<sup>11</sup> Others have addressed specific rights, like the Directive on Rental and Lending Rights or the Directive on Satellite Broadcasting and Cable Retransmission, or specific issues, like the Directives on Term of Protection.<sup>12</sup>

The 2001 Directive—often referred to as the “Information Society Directive” or the “Copyright Directive”—is clearly the one that harmonizes rules in a more horizontal and systematic manner. It establishes most of the rights, including those involved in digital transmissions, and the exceptions to rights of authors, performers, phonogram producers, film producers and broadcasting organizations.<sup>13</sup> It is also the one that establishes legal protection for technical measures and rights management information systems.<sup>14</sup> This explains why calls for the review of copyright and calls for the review of the Information Society Directive should be understood to be synonymous in the ongoing debate.

There are two other directives that should be seen as part of the EU rules regulating copyright, even though they both have a broader scope: the 2004 Intellectual Property Rights Enforcement Directive, which applies to the enforcement of intellectual property rights horizontally, and the 2000 E-Commerce Directive, which establishes safe harbors for Internet service providers, including in cases of copyright infringement.<sup>15</sup> It is interesting to note that, generally speaking, those advocating for the need to review copyright in Europe have also maintained that there is no need to review these two directives.

So far, EU intervention in the copyright area has been triggered by one of two

8. *Id.* arts. 26, 59.

9. *Id.* art. 167, ¶ 4 (“The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.”).

10. *Id.* arts. 26, 114, 153. Directives in the area of copyright are adopted on the basis of provisions in the Treaty on the Functioning of the European Union establishing the competence for the European Union to legislate with the goal of increased harmonization of the laws in member states that affect the establishment and functioning of the internal market. *Id.*

11. See Information Society Directive, *supra* note 6; Databases Directive, *supra* note 6.

12. See Term Directive II, *supra* note 6; Rental Directive, *supra* note 6; Term Directive I, *supra* note 6; Cable & Satellite Directive, *supra* note 6.

13. Information Society Directive, *supra* note 6, arts. 2–5.

14. *Id.* arts. 6–7.

15. Corrigendum to Directive 2004/48/EC, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16; Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, arts. 12–15, 2000 O.J. (L 178) 1, 12–13 [hereinafter E-Commerce Directive].

things: (1) differences in member states' standards of protection which were identified, often by the Court of Justice of the European Union (CJEU), as an obstacle to the functioning of the internal market<sup>16</sup> or (2) the need to reflect international standards of protection in the EU body of rules, the obvious example being the Information Society Directive, incorporating the 1996 World Intellectual Property Organization (WIPO) Treaties into the European Union's legal regime.<sup>17</sup>

Thus, when assessing the challenges the European Union faces today, it is important to keep in mind that most of the directives have harmonized aspects of copyright that either were already found in the laws of some member states or were already agreed to at an international level. It was an easier task in a way, as the objectives to be met by EU intervention were predetermined. There was also a general acceptance that "[a]ny harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation."<sup>18</sup> Future copyright reviews may be very different in that respect.

### B. CURRENT APPLICATION OF THE EU COPYRIGHT RULES

As described above, EU copyright rules are normally implemented by member states by making modifications to their own copyright laws. As a result, member states' copyright laws contain a fair amount of commonality even if they also keep some national specificities. It is, in any event, correct to say that the existing directives establish the main elements of the definition of rights and limitations, their exercise and enforcement.

A number of these directives are intertwined. For instance, the protection of software and original databases is partly based on specific directives but, since they are protected as "works," their protection also relies on the Information Society Directive.<sup>19</sup> We also find provisions of a horizontal nature in sector-specific directives, which may trigger questions as to their exact scope of application.<sup>20</sup> These factors are occasionally the source of some degree of uncertainty. Notably, there have recently been some important judgments of the CJEU on software and databases<sup>21</sup> that addressed key questions of a cross-cutting/horizontal nature: Is

16. See Case C-341/87, *EMI Electrola GmbH v. Patricia Im- und Export Verwaltungsgesellschaft mbH*, 1989 E.C.R. 79, ¶¶ 10–13 (noting the lack of harmonization of the term of protection of works and other protected subject matter); Case 158/86, *Warner Bros. Inc. v. Christiansen*, 1988 E.C.R. 2605, ¶ 18 (noting the lack of harmonization as regards the recognition of rental rights).

17. See Information Society Directive, *supra* note 6, recital 15. At the time that the Rental Directive, *supra* note 6, ch. II, was adopted, it was the vehicle for incorporating the standards of protection of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct. 26, 1961, 496 U.N.T.S. 43, in all of the member states' legislation.

18. See Information Society Directive, *supra* note 6, recital 9.

19. See *id.* recital 20.

20. See, e.g., Rental Directive, *supra* note 6, art. 2(7) (transfer of rights from performers to film producers); see also Software Directive, *supra* note 4, art. 1(3) (discussing the concept of originality); Databases Directive, art. 3(1) (same).

21. See Case C-173/11, *Football Dataco Ltd. v. Sportradar GmbH*, 2012 EUR-Lex CELEX 62011CJ0173 (Oct. 18, 2012); Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 EUR-Lex CELEX 62011CJ0128 (July 3, 2012).

there an exhaustion of the distribution right in digital copies acquired by transmission?<sup>22</sup> In which territories does an act of making available take place?<sup>23</sup> It is not clear how long the principles developed in these judgments will remain specific to software and databases.

It was probably unavoidable that the development of different directives over the years would result in some inconsistencies. For instance, we have harmonized the right of public performance—understood as the performance of a work or other protected subject matter for those who are present at the place of the performance—for holders of related rights but not for authors.<sup>24</sup>

And it was certainly unavoidable that having such a wide body of legislation would place the CJEU at the center of the interpretation of copyright law in Europe. Indeed, in the last decade the role of the CJEU in copyright has grown exponentially, leading many scholars to conclude that the court is harmonizing through the back door. I shall not enter into this debate, but the reasons for the court's central role are clear. The adoption of the various copyright directives has resulted in the incorporation into EU law of a large number of basic concepts such as “originality,”<sup>25</sup> “communication to the public”<sup>26</sup> and “fair compensation.”<sup>27</sup>

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22. The right of distribution is harmonized both in the Software Directive and in the Information Society Directive. See Software Directive, *supra* note 4, art. 4; Information Society Directive, *supra* note 6, art. 4. The Information Society Directive explicitly confirms that “the question of exhaustion does not arise in the case of services and on-line services in particular.” Information Society Directive, *supra*, recital 29. In *UsedSoft*, the CJEU ruled that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorized the downloading of the copy from the Internet has also conferred the right to use that copy for an unlimited period. See *UsedSoft*, 2012 EUR-Lex CELEX 62011CJ0128, ¶ 52 (expressing the view that the existence of a transfer of ownership changes an “act of communication to the public” into an “act of distribution”). Despite the acknowledgement by the court of the character of *lex specialis* of the Software Directive (and of the differences in the wording of the Information Society Directive), it remains to be seen whether the court would apply the same principles beyond the case of software.

23. The act of “re-utilisation” as defined in Article 7(2)(b) of the Databases Directive covers both acts of physical distribution and acts of communication to the public, including by online transmission. See Databases Directive, *supra* note 6, art. 7(2)(b). The latter seems to be conceptually equivalent to the act of making available established by Article 3 of the Information Society Directive. See Information Society Directive, *supra* note 6, art. 3 (“[M]aking available to the public of . . . works in such a way that members of the public may access them from a place and at a time individually chosen by them”). In *Football Dataco*, the CJEU ruled that the sending by one person, by means of a web server located in Member State *A*, of data previously uploaded by that person from a database protected by the sui generis right, to the computer of another person located in Member State *B*, at that person's request, constitutes an “act of re-utilisation” which takes place at least in Member State *B*, where there is evidence of an intention on the part of the person performing the act to target members of the public in Member State *B*. *Football Dataco*, 2012 EUR-Lex CELEX 62011CJ0173, ¶ 47. It remains to be seen whether the same approach would be followed by the court in a discussion about the localization of the act of making available under Article 3 of the Information Society Directive.

24. Information Society Directive, *supra* note 6, recital 23 & art. 3; see also Case C-283/10, *Circul Globus Bucuresti v. Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor*, 2011 E.C.R. I-12031.

25. For CJEU's interpretation of the concept of originality, see Case C-145/10, *Painer v. Standard VerlagsGmbH*, 2011 E.C.R. I-12533, ¶¶ 87–99; Case C-393/09, *Bezpečnostní Softwarová Asociace v. Ministerstvo Kultury*, 2010 E.C.R. I-13971, ¶ 48; Case C-5/08, *Infopaq Int'l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569, ¶¶ 37–74.

These have, in turn, become what the court defines as “autonomous concepts of Community law,” that is, concepts that—in view of the need for a uniform application of EU law—must normally be given an independent and uniform interpretation throughout the European Union.<sup>28</sup> In the last few years, the court has been doing this extensively. Of course, the Berne Convention and the WIPO Treaties, which form part of the Union legal regime because of the ratification of the WIPO Treaties by the European Union and its member states, will inform the court’s interpretation of these concepts.<sup>29</sup> They will not, however, prevent the court from going further in its guidance, including balancing the protection of copyright with the protection of the basic freedoms of the EU Treaty<sup>30</sup> and the fundamental rights protected by the Union legal order.<sup>31</sup>

All in all, the role taken by the CJEU was foreseeable, as certain concepts in copyright—many of those that have now become autonomous concepts of Community law—will always need development through case law.<sup>32</sup> Having said

26. For the CJEU’s interpretation of the concept of communication to the public, see Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 EUR-Lex CELEX 62012CJ0466, ¶¶ 14–32 (Feb. 13, 2014); Case C-607/11, *ITV Broad. Ltd. v. TV Catch Up Ltd.*, 2013 EUR-Lex CELEX 62011CJ0607, ¶¶ 19–40 (Mar. 7, 2013); Case C-135/10, *Società Consortile Fonografici v. Del Corso*, 2012 EUR Lex CELEX 62010CJ0135, ¶¶ 70–102 (Mar. 15, 2012); Case C-162/10, *Phonographic Performance (Ir.) Ltd. v. Ireland*, 2012 EUR-Lex CELEX 62010CJ0162, ¶¶ 60–69 (Mar. 15, 2012); *Circul Globus Bucuresti*, 2011 E.C.R. I-12031; Joined Cases C-431/09 & C-432/09, *Airfield NV v. SABAM*, 2011 E.C.R. I-09363, ¶¶ 71–84; Case C-306/05 *Sociedad General de Autores y Editores de España v. Rafael Hoteles SA*, 2006 E.C.R. I-11543, ¶¶ 37–46.

27. For the CJEU’s interpretation of the concept of fair compensation, see Case C-192/04, *Lagardère Active Broad. v. SPRE*, 2005 E.C.R. I-07199, ¶¶ 45–55.

28. According to settled case law, the need for a uniform application of EU law and the principle of equality require that the terms of a provision of EU law that 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. See Case C-5/08, *Infopaq Int’l A/S v. Danske Dagblades Forening*, 2009 E.C.R. I-06569, ¶ 27; see also Case C-510/10, *DR & TV2 Danmark A/S v. NCB - Nordisk Copyright Bureau*, 2012 EUR-Lex CELEX 62010CJ0510, ¶ 33 (Apr. 26, 2012); Case C-34/10, *Brüstle v. Greenpeace eV*, 2011 E.C.R. I-09821, ¶ 25.

29. See, e.g., *Sociedad General de Autores y Editores*, 2006 E.C.R. I-11543, ¶¶ 35, 40–41.

30. See, e.g., Joined Cases C-403/08 & C-429/08, *Football Ass’n Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-09083, ¶¶ 106–21 (discussing the free movement of services); Case 78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co.*, 1971 E.C.R. 487, ¶ 12 (discussing the free movement of goods).

31. See, e.g., Case C-275/06, *Productores de Música de España v. Telefónica de España SAU*, 2008 E.C.R. I-00271, ¶ 68.

32. There may also sometimes be a problem with national courts referring questions to the CJEU on issues that should already be sufficiently clear. For example, the concept of communication to the public has been tested with respect to hotel rooms, thermal baths, private dental practices, circuses, cabaret shows and pubs. See Case C-162/10, *Phonographic Performance (Ir.) Ltd. v. Ireland*, 2012 EUR-Lex CELEX 62010CJ0162 (Mar. 15, 2012) (hotel rooms); *Sociedad General de Autores y Editores*, 2006 E.C.R. I-11543 (same); see also Case C-351/12, *OSA - Ochranný svaz Autorský pro Práva k Dílům Hudebním o.s. v. Léčebné Lázně Mariánské Lázně a.s.*, 2014 EUR-Lex CELEX 62012CJ0351 (Feb. 27, 2014) (thermal baths); Case C-135/10, *Società Consortile Fonografici v. Del Corso*, 2012 EUR Lex CELEX 62010CJ0135 (Mar. 15, 2012) (private dental practices); Case C-283/10, *Circul Globus Bucuresti v. Uniunea Compozitorilor și Muzicologilor din România – Asociația pentru Drepturi de Autor*, 2011 E.C.R. I-12031 (circuses & cabaret shows); *Football Ass’n Premier League*, 2011 E.C.R. I-09083 (pubs).

that, the clear will of the CJEU to specify the parameters for a number of these concepts is remarkable.

It is undeniable, however, that the CJEU occasionally comes very close to establishing new rules. For instance, as I mentioned earlier, in its 2012 *UsedSoft* judgment the court ruled that the right of distribution of a copy of a computer program is exhausted if the copyright holder who has authorized the downloading of the copy has also conferred the right to use that copy for an unlimited period.<sup>33</sup> So, despite clear indication in the Information Society Directive that “the question of exhaustion does not arise in the case of services and *on-line services in particular*,”<sup>34</sup> the court ruled that there is something like “distribution by transmission” for purposes of exhaustion in EU law, at least for software.<sup>35</sup> To do that, the court needed to highlight, on the one hand, the concept of *lex specialis* of the Software Directive in relation to the Information Society Directive,<sup>36</sup> and on the other hand leave aside its own doctrine that concepts used in different directives must in principle have the same meaning.<sup>37</sup> In my view, the court was trying to bring the copy of the computer program back into the realm of “goods” (i.e., distribution) to facilitate the functioning of an internal market (as there is a principle of Community exhaustion of the distribution right).<sup>38</sup>

This is not the only instance in recent years where the CJEU has intervened with the clear objective of removing obstacles to the internal market, even where it required bending some copyright principles. The principle that the court likes bending the most is “territoriality,” as it can constitute a clear obstacle—in particular for online services—to the freedom to provide services across borders.<sup>39</sup> You can see this in the 2011 Premier League cases, in which the court struck down legislation in the United Kingdom that prohibited the importation and selling of foreign decoders that gave access to encrypted satellite broadcasting services from other member states.<sup>40</sup> Broadcasters had been relying on this legislation to enforce license agreements with absolute territorial exclusivity clauses. These license agreements prevented cross-border access to the satellite broadcasting services. The CJEU ruled that the restriction on the free movement of services through the prohibition set out in the U.K. legislation could not be justified by the protection of

33. See Case C-128/11, *UsedSoft GmbH v. Oracle Int’l Corp.*, 2012 EUR-Lex CELEX 62011CJ0128 (July 3, 2012).

34. Information Society Directive, *supra* note 6, recital 29 (emphasis added).

35. See *UsedSoft*, 2012 EUR-Lex CELEX 62011CJ0128, ¶ 61.

36. See Information Society Directive, *supra* note 6, recitals 51–60.

37. See, e.g., Joined Cases C-403/08 & C-429/08, *Football Ass’n Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-09083, ¶¶ 187–88.

38. See Software Directive, *supra* note 4, art. 4(2); Information Society Directive, *supra* note 6, art. 4(2).

39. It is established jurisprudence that a restriction to the freedom to provide services cannot be justified by the protection of intellectual property unless such restriction is necessary for the purpose of safeguarding the “specific subject matter of the intellectual property concerned” and proportionate (i.e., not going beyond what is necessary to safeguard it). See *Football Ass’n Premier League*, 2011 E.C.R. I-09083, ¶ 188.

40. See *id.*

intellectual property because this protection—which the court equates to the protection required to ensure that right holders can obtain “appropriate remuneration”—could be achieved by means of the license granted by the right holder without the need to impose territorial exclusivity.<sup>41</sup> Clearly, the court is trying to find a balance between the protection of copyright, which may be based upon territorial exploitation, and the freedom to provide and receive services across borders.

In other words, the CJEU is actively shaping EU copyright rules to inject a degree of internal market friendliness where the legislator—or the market—may have failed to do so.

## II. COPYRIGHT REVIEW IN EUROPE: DRIVERS AND KEY ISSUES

The debate about the need for a review of the EU copyright rules has been ongoing for some time now. During its 2010–2014 term, the European Commission has been particularly active in the area of copyright, with: (1) the negotiation and adoption of two new directives—the Orphan Works Directive<sup>42</sup> and the Collective Rights Management Directive;<sup>43</sup> (2) a Memorandum of Understanding on out-of-commerce works,<sup>44</sup> (3) a mediation process on the issue of private copying levies<sup>45</sup> and (4) a stakeholders’ dialogue under the name of “Licences for Europe.”<sup>46</sup> In parallel, the Commission undertook a number of legal and economic studies.<sup>47</sup> In December of 2013, it launched a broad consultation process that closed in March of 2014.<sup>48</sup>

In the last few years, some member states have also launched national processes assessing the need to review their own copyright laws.<sup>49</sup> To date, however, the

41. *Id.* at ¶¶ 108–16.

42. Orphan Works Directive, *supra* note 6.

43. Collective Rights Management Directive, *supra* note 5.

44. *Memorandum of Understanding: Key Principles on the Digitisation and Making Available of Out of Commerce Works* (Sept. 20, 2011), available at <http://perma.cc/T8JN-6WE3>.

45. António Vitorino, *Recommendations Resulting from the Mediation on Private Copying and Reprography Levies* (Jan. 31, 2013), available at <http://perma.cc/5J4L-REJL>.

46. *Licences for Europe: Structured Stakeholder Dialogue*, EUROPEAN COMM’N, <http://perma.cc/N5CE-SEQS> (last visited Oct. 4, 2014) (collecting speeches given at and documents related to “Licences for Europe”).

47. These studies covered topics such as digital transmissions and territoriality, exceptions in the area of libraries, education and research, disabilities, press clippings, private copying, user generated content and text and data mining. See, e.g., JULIAN BOULANGER ET AL., *ASSESSING THE ECONOMIC IMPACTS OF ADAPTING CERTAIN LIMITATIONS AND EXCEPTIONS TO COPYRIGHT AND RELATED RIGHTS IN THE EU: ANALYSIS OF SPECIFIC POLICY OPTIONS* (2014), available at <http://perma.cc/E5LX-99GA>; GREGOR LANGUS ET AL., *ECONOMIC ANALYSIS OF THE TERRITORIALITY OF THE MAKING AVAILABLE RIGHT IN THE EU*, (2014), available at <http://perma.cc/BFB2-4MFA>; JEAN-PAUL TRIAILLE ET AL., *STUDY ON THE LEGAL FRAMEWORK OF TEXT AND DATA MINING (TDM)*, (2014), available at <http://perma.cc/4BLQ-9WPP>.

48. See *Public Consultation on the Review of the EU Copyright Rules* (June 26, 2013), available at <http://perma.cc/XKC7-Q2CJ>; *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules* (July 2014), available at <http://perma.cc/B2VZ-TJP7>.

49. See, e.g., DEP’T FOR BUS., INNOVATION & SKILLS, *THE GOVERNMENT RESPONSE TO THE HARGREAVES REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* (2011), available at

ongoing legislative processes in Europe constitute, to a large extent, the type of adjustments you would expect to happen from time to time in copyright legislation.

Any substantial change or update of copyright rules in the member states will need to be done at the European level. Because the European Union is deemed to have exercised the competence previously devolved to the member states in the field of intellectual property, the member states are bound by the process of harmonization that has taken place during the last two decades as clearly established by the case law of the CJEU.<sup>50</sup> Notably, the court has ruled that member states cannot give wider protection to copyright holders by defining the concepts harmonized at the EU level to include a wider range of activities than those referred to in the directives.<sup>51</sup> This is far-reaching, as the concepts harmonized are many and include reproduction, distribution, communication to the public and making available. The logic behind the court's reasoning is not a surprise: the objective of the directives is to eliminate legislative differences and legal uncertainty, and reintroducing these differences would adversely affect the functioning of the internal market.

The same reduction of flexibility of member states has happened with regard to limitations of rights. The case law establishes that even when member states are free to introduce an exception into domestic law, they are not free to place conditions on the exception that would hamper its effectiveness and purpose or give rise to inconsistencies between member states.<sup>52</sup> Furthermore, the CJEU has noted that, in the context of the application of limitations and exceptions, a “fair balance” must be safeguarded between the rights and interests of rights holders on the one hand and, on the other, the rights of users.<sup>53</sup>

It is therefore fair to conclude that any review or reform—if there is one—will need to happen at the EU level.

#### A. GLOBAL DRIVERS OF COPYRIGHT REVIEW

More than a decade has passed since the 2001 Information Society Directive updated rights to digital networks. The changes that have taken place since then—in terms of technology and services, terms of uses and content—are quite obvious.

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<http://perma.cc/Y5BC-6D58?type=pdf> (U.K.); DEP'T FOR JOBS, ENTERPRISE & INNOVATION, MODERNIZING COPYRIGHT: THE REPORT OF THE COPYRIGHT REVIEW COMMITTEE (2013), available at <http://perma.cc/V96E-5SA2> (Ireland); Superior Council of Literary & Artistic Prop., *Missions*, <http://perma.cc/L9YG-4N4F> (last visited Oct. 31, 2014) (France).

50. See, e.g., Case C-510/10, *DR & TV2 Danmark A/S v. NCB - Nordisk Copyright Bureau*, 2012 EUR-Lex CELEX 62010CJ0510, ¶ 31 (Apr. 26, 2012); Case C-277/10, *Luksan v. van der Let*, 2012 EUR-Lex CELEX 62010CJ0277, ¶ 64 (Feb. 9, 2012).

51. See Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 EUR-Lex CELEX 62012CJ0466, ¶ 41 (Feb. 13, 2014).

52. See, e.g., *DR & TV2 Danmark*, 2012 EUR-Lex CELEX 62010CJ0510, ¶ 36.

53. See Case C-145/10, *Painer v. Standard Verlags GmbH*, 2011 E.C.R. I-12533, ¶ 134. Fair balance and proportionality requirements have also been used to assess the implementation of other provisions, such as the availability of injunctive relief against intermediaries whose services are used by a third party to infringe copyright. See, e.g., Case C-275/06, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, 2008 E.C.R. I-00271, ¶ 68.

## 1. Technology and Services

Since 2001, there has been major growth in Internet access, devices have become ubiquitous, memory storage has increased massively, new peer-to-peer technologies have developed and social media and sharing platforms are part of daily life for many. It is evident that this has placed considerable strain on copyright systems all over the world, since some of the underlying concepts—the concept of “copy,” the concept of “public” and even the concept of a right “to authorize or prohibit,” for example—are not always easy to apply in digital networks. This has led, in the view of some, to an overstretching of copyright, while others would argue that the recognition and protection of rights is shrinking.

In Europe, the evolution of technology and services raises questions related to the application of the (broadly defined) reproduction right and of the (technology-specific) mandatory exception for temporary copies to cache copies and to copies that occur while browsing or receiving a stream.<sup>54</sup> It has also raised questions regarding the scope of the private copying exception when the copy is made from an illegal source,<sup>55</sup> copies made as part of an online service licensed by right holders<sup>56</sup> and copies made by third parties for consumers’ private use.<sup>57</sup> Other questions have arisen with respect to the right of communication to the public and its application to hyperlinks.<sup>58</sup> The evolution of technology and new services has brought calls for new exceptions, notably for user-generated content and for text and data mining.<sup>59</sup> There are also calls—this time from right holders—to review the liability safe harbors of the E-Commerce Directive, which they see as unbalanced and an obstacle to the enforcement of copyright online.

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54. See Case C-360/13, *Public Relations Consultants Ass’n Ltd. v. Newspaper Licensing Agency Ltd.*, 2014 EUR-Lex CELEX 62013CJ0360 (Jun. 5, 2014).

55. See Case C-435/12, *ACI Adam BV v. Stichting de ThuisKopie*, 2014 EUR-Lex 62012CJ0435 (Apr. 10, 2014).

56. See Joined Cases C-457/11–C-460/11, *Verwertungsgesellschaft Wort v. Kyocera*, 2013 EUR-Lex CELEX 62011CJ0457 (Jun. 27, 2013).

57. This is an issue currently discussed in the context of online personal video recorders; it has not yet been examined by the CJEU, but there is divergent case law in member states. Compare *Cour d’appel [CA] [regional court of appeal] 1e ch.*, Dec. 14, 2011 (Fr.) (*Wizzgo v. Metropole Television*) (unpublished), available at <http://perma.cc/C7HT-ESNH> (finding that the person who makes the copy of a work, or who merely intervenes in the reproduction by providing the technical means to do so, is responsible for the reproduction, even if the person acted upon the request of the final user (e.g., the user of an online personal video recording system)), with *Bundesgerichtshof [BGH] [Federal Court of Justice]* Apr. 4, 2009, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 845, 2009 (*Internet-Videorecorder*) (Ger.) (finding that it is the user of an online personal video recorder system who makes the reproduction of the protected work, not the company providing the online video recording services).

58. See Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 EUR-Lex CELEX 62012CJ0466 (Feb. 13, 2014).

59. There is not necessarily a clear definition as to the meaning of “user generated content,” in particular whether it requires a certain degree of originality. Neither is there clarity as to the exact definition of “text and data mining,” in particular whether it includes re-using parts of the text and data “mined,” which raises the issue of a possible exception for search engines or aggregators.

## 2. Uses

There has also been a trend towards the dematerialization of content distribution and a shift from ownership to access-based consumption models. This is supported by the development of cloud computing technology and subscription-based services. In the European Union, this has raised questions about the exhaustion of rights online, as well as issues related to contractual clauses, technological protection measures and limitations and exceptions.<sup>60</sup> In my view, these discussions are particularly difficult. It is as difficult to conclude that users do not have property rights in content acquired online as it is to assess the consequences of a second-hand market of perfect digital copies. Another area where there may be no easy equivalence between the offline and the online world relates to the limitations for the benefit of libraries and similar institutions. In that context, libraries see the new subscription or access-based systems as an unjustified restraint on activities such as preservation or e-lending. Right holders, on the other hand, may fear that library services could become equivalent to commercial services under an exception. Finally, all of this triggers discussions on private copying levies with calls for and against extending levies to cloud-based services and the technology associated with them.

## 3. Content

It is obvious that digital networks multiply the possibilities for the dissemination of works and make it possible to restore works to the public that would not otherwise have been available. This, along with the lengthening of the terms of protection, has increased difficulties in the clearance of rights for some types of works, particularly in the context of so-called mass digitization projects. In the European Union, this has prompted discussions of orphan and out-of-commerce works and on the increased need for extended collective licensing or similar mechanisms. Some are calling for an exception to allow for the dissemination of these works by, *inter alia*, libraries and film heritage institutions for cultural purposes. Needless to say, right holders oppose any action beyond facilitating voluntary licensing.

Partly as a consequence of these changes, there have been other equally important developments in terms of the expectations of consumers and of users in general, and in terms of the involvement of civil society on intellectual property discussions. Thus, the nature and scope of the debate has also changed, as shown by the nearly ten thousand replies to the Commission's latest public consultation.<sup>61</sup>

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60. See Case C-128/11, *UsedSoft GmbH v. Oracle Int'l Corp.*, 2012 EUR-Lex CELEX 62011CJ0128 (July 3, 2012).

61. *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules*, at 3 (July 2014), available at <http://perma.cc/B3UQ-KTL4>.

## B. EU-SPECIFIC DRIVERS OF COPYRIGHT REVIEW

The drivers and issues described above are common to many parts of the world, but there are also some EU-specific drivers. I will highlight three: territoriality, level of harmonization of limitations and exceptions and flexibility.

### 1. Territoriality

The question is not whether the EU member states' copyright laws are territorial (they are), but whether this affects the dissemination of, and the access to, copyright-protected content in the European Single Market. If territoriality is not a new characteristic of copyright, why is it prominent now? In my view, it is because of the shift in means used to disseminate content from goods to services.

Free movement of goods is much more of a reality in Europe than free movement of services. This is also true for copyright-protected content and services. In a pre-digital era, we managed to handle territoriality relatively well. The distribution of copyright protected content consisted mostly of the distribution of goods, and, quite early on, the CJEU established that a copyright holder cannot rely on the territoriality of national laws "to prevent the importation of a product which has been lawfully marketed in another Member State by the right holder himself or with his consent."<sup>62</sup> Acts of communication to the public stayed mostly within national boundaries.<sup>63</sup> Then, when satellite broadcasting emerged, the European Union enacted the Cable and Satellite Directive, which established a legal fiction according to which the act of communication to the public by satellite takes place in the country where the program-carrying signal originates.<sup>64</sup> The regional exhaustion of the distribution right and the definition of the act of satellite broadcasting on the basis of one territory only adequately reconciled copyright territoriality with the internal market before the Internet.

The more that dissemination of content moves from goods to services via digital networks, however, the more territoriality of copyright comes to the forefront of

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62. See Joined Cases 55/80 & 57/80, *Musik-Vertrieb Membran GmbH v. GEMA - Gesellschaft für Musikalische Aufführungs und Mechanische Vervielfältigungsrechte*, 1981 E.C.R. I-00147. This judgment, based on the free movement of goods, resulted in the principle of Community exhaustion of the distribution right, introduced in earlier sector-specific directives and then horizontally in the Information Society Directive. See *id.*

63. The exploitation of content via communication to the public remained most often within national boundaries, raising few issues linked to territoriality. Those raised related mostly to cable retransmission. See Case 62/79, *SA Compagnie Générale pour la Diffusion de la Télévision, Coditel v. Ciné Vog Films*, 1980 E.C.R. I-00881.

64. Cable & Satellite Directive, *supra* note 6, art. 1(2). As a result of the establishment of the principle of "country of origin," no acts restricted by copyright take place in those countries within the footprint of the satellite (the countries of reception) although the actual or potential audience in these countries would have to be taken into account when negotiating the (legally strictly non territorial) licence. See *id.* recital 17. The objective was to simplify the clearance of rights and, by doing away with the territoriality of copyright, foster the emergence of pan-EU satellite broadcasting services; the latter objective was not achieved as European citizens remained attached to their national services and languages, and territoriality was reintroduced in the contractual arrangements between holders of rights and broadcasters.

discussions. Under European rules, digital transmissions are, in principle, covered by the “making available right” established in the Information Society Directive.<sup>65</sup> The Directive is silent, though, in terms of what constitutes an act of making available or that act’s territorial reach. The *Svensson* case provided some clarity to the thorny issue of hyperlinks by reaffirming that the making available of a work to the public is sufficient irrespective of whether the members of the public “avail themselves of that opportunity.”<sup>66</sup> Uncertainty remains, however, as to where the act of making available takes place. Does it take place in all of the countries where the content can be or is accessed? Only in those countries targeted by the communication? As mentioned above, the closest the CJEU has come to addressing this point has been in relation to the online access of a database, where it has said that the act of making available takes place “at least” in the countries where the act demonstrates an intention to target members of the public.<sup>67</sup> Right holders tend to consider territoriality essential to ensuring adequate remuneration. They also have fears relating to the limited existing harmonization of issues such as ownership, transfer of rights, or the uneven availability of certain remedies such as injunctive relief, which may lead to situations where they are deprived of protection. From a user’s point of view, territoriality is simply seen as an obstacle to cross-border access and portability of content services in Europe.

So, for the time being, the definition of the rights relevant to digital transmissions at the EU level remains territorial.<sup>68</sup>

## 2. Limitations and Exceptions

The same happens with the definition of most limitations and exceptions, where it is undeniable that only a limited harmonization has been achieved.<sup>69</sup> Whereas the catalogue of limitations and exceptions in EU law is exhaustive—no other exceptions can be applied to the rights harmonized at the EU level—these limitations and exceptions are often optional in the sense that member states are free to reflect in their legislation as many or as few of them as they wish.<sup>70</sup> Moreover, the formulation of certain of the limitations and exceptions is general

65. See discussion of *UsedSoft*, *supra* note 23.

66. See Case C-466/12, *Svensson v. Retriever Sverige AB*, 2014 EUR-Lex CELEX 62012CJ0466, ¶ 19 (Feb. 13, 2014); see also Case C-306/05, *Sociedad General de Autores y Editores de España v. Rafael Hoteles SA*, 2006 E.C.R. I-11543, ¶ 43.

67. See Case C-173/11, *Football Dataco v. Sportradar*, 2012 EUR-Lex CELEX 62011CJ0173, ¶ 34 (Oct. 18, 2012).

68. And, to some extent, so does the licensing of those rights. In principle, the territoriality of the rights does not prevent multiterritorial licensing. Indeed, a fair amount of multiterritorial licensing of rights is on-going, if anything going even beyond pan-EU rights. It is nevertheless the case that territoriality does have effects on licensing either in instances where rights in different territories are in different hands or where the licensing of rights is done by collective management organizations.

69. See Orphan Works Directive, *supra* note 6; Software Directive, *supra* note 4; Rental Directive, *supra* note 6; Information Society Directive, *supra* note 6; Databases Directive, *supra* note 6.

70. With the exception of the limitations in: (1) the Computer Programs Directive; (2) the Database Directive; (3) Article 5(1) of the Information Society Directive and (4) the Orphan Works Directive.

enough to give significant flexibility to the member states as to how, and to what extent, to implement them. As a result—and despite the CJEU’s efforts to avoid this—there are considerable differences between European countries as regards, for instance, what libraries can do for the purposes of preservation or what teachers can use for the purpose of illustration.<sup>71</sup> This situation is not surprising, as the definition of limitations and exceptions has always been seen as a matter specific to national legal systems, traditions and policy objectives.

In addition, and probably as a result of this situation, the current EU rules do not provide for any cross-border effect of exceptions. If, for instance, a library makes a book available online under an exception in France, this does not mean that patrons residing in Belgium can benefit from that exception. The cross-border effect of limitations and exceptions also raises the question of fair compensation of right holders. In some instances, member states are obliged to compensate right holders for the harm inflicted by a limitation or exception to their rights. In other instances, member states are not obliged, but may decide, to provide for such compensation. If a limitation or exception triggering a mechanism of fair compensation were to be given cross-border effect, then there would also be a need to clarify which national law should determine the level of that compensation and who should pay it.

This situation may not have been much of a concern in the past, but today it is seen as an obstacle to cross-border use of works, which could be increasingly frequent in a number of areas covered by exceptions, such as cross-border research projects, distance learning programs or the cross-border exchange of accessible format copies for people with disabilities. The proof of this evolution is that the latest exception that has been introduced in the EU body of rules—the Orphan Works Directive—does not only require implementation by all member states, but also includes a mechanism for the mutual recognition of the orphan works’ status and their cross border access.<sup>72</sup>

### 3. Flexibility

Today, calls to increase the flexibility of copyright laws to adapt to the evolution of technology are commonplace. Interestingly enough, flexibility is normally called upon only to expand the uses that can take place without right holders’ consent. It could, however, cut both ways. I think that the quest for flexibility is a justified one. The difficulty is achieving flexibility while keeping a sufficient degree of legal certainty and a fair balance between the interests of users and right holders (and, in our case, the smooth functioning of the internal market). Most countries in Europe see that fair balance as something that needs to be determined by a legislative process, not solely by judicial review.

This leads me, of course, to the issue of fair use. Fair use is increasingly

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71. See DE WOLF PARTNERS, *STUDY ON THE APPLICATION OF DIRECTIVE 2001/29/EC ON COPYRIGHT AND RELATED RIGHTS IN THE INFORMATION SOCIETY* (2013), available at <http://perma.cc/RLY3-CZLB>.

72. Orphan Works Directive, *supra* note 6, art. 4.

presented outside of the United States as the way forward to ensure that copyright evolves with technology and does not stifle innovation. It is also sometimes presented as providing a degree of legal certainty equivalent to the one provided by exceptions. I think this latter presentation is questionable in precisely those areas of technological change and innovation that the advocates of fair use want to facilitate.

The question gets even more complicated in the context of twenty-eight different jurisdictions. In my view, it would not be unthinkable to give a larger degree of flexibility to judges in European countries when determining if certain uses should or should not be restricted by copyright. The question under this hypothetical scenario—and it is not a minor one—is how to avoid courts in different member states from going in very different directions. How long does it take to develop a sufficient body of precedent? What would the effects of this be in terms of legal certainty for the functioning of the national markets, let alone the single European one? How long will it take for the CJEU to be unable to cope with references for preliminary rulings coming from courts in twenty-eight different countries?

The current situation in Europe is somewhat paradoxical. Due to the closed list of limitations and exceptions, the current EU system lacks flexibility as far as the introduction of new exceptions is concerned. At the same time, the general formulation of certain of the exceptions provides member states with a large margin of flexibility, limited to their national markets. Maybe the answer to the question of flexibility starts by first agreeing at which level, national or European, the flexibility needs to be injected.

There is still another issue that is difficult to define but is clearly becoming a driver in the European debate. It could be referred to as the “sharing of the value in the Internet chain”—the view held by many right holders that the value of the exploitation of protected content on the Internet is not being fairly shared, but rather is being taken by platforms and other Internet intermediaries to the detriment of those who create and invest in protected content. This is a difficult debate in free market economies, when those being accused are not engaging in illegal activities. It is nevertheless there and reflects a reality on the ground, whether justified or not. This discussion is often mixed with another debate that, in my view, raises a separate issue: the fair remuneration of individual creators, authors and performers, and the best mechanisms to achieve it. This debate is relevant both for the online and offline exploitation of content and relates largely to the relationship between individual creators, producers and publishers.

In some member states, these two issues drive calls for remuneration rights that can be claimed directly from the user (for example, a streaming platform), for an expansion of the system of levies or for equivalent mechanisms, perhaps in the form of licenses to be paid by Internet service providers.

### III. NEXT STEPS

The preceding description of the drivers of the debate includes most of the

issues that are at the center of discussions in Europe. As mentioned earlier, a number of these issues have been the subject of recent studies and stakeholders' dialogues.<sup>73</sup> In addition, the public consultation we recently closed had a very large scope, covering most, if not all, of these issues.<sup>74</sup>

As of April 2014, the assessment of the replies to the consultation is ongoing, as are the political discussions within the European Commission as to the next step in this process. The European Union is at the end of a political cycle, so the next likely step is to release a policy document—a white paper—to identify the issues and help to frame the debate and decisions for the next Commission.

Thus, at this stage, only my personal impression of the general objectives and form of a possible future intervention at the EU level is available.

## A. OBJECTIVES

### 1. Make Sure the Definition of Rights Is as Clear as Possible and Avoids Technology-Specific Concepts

This objective is as obvious as it is difficult to achieve. If we were to start from scratch I think many of us would plead for abandoning a system based on separate reproduction and distribution or communication rights (with all the subcategories of the latter that have been developed over the years) and just have an exploitation right. However, at this stage, it seems too difficult to get there without seriously disrupting functioning markets as well as the balances and compromises built around some of these concepts. It is nevertheless undeniable that the more technology accelerates, the less copyright should rely on technology-bound concepts. What is the purpose and meaning of a “temporary copy”—will there continue to be copies? Does it make sense to keep relying on the concept of “on demand” to define certain rights—should “on demand” relate to the triggering of a transmission or to the fact that the content is available or accessible at any time?

At least we could begin by enhancing clarity in the definition of the rights we have harmonized at the EU level. As discussed before, there are a number of questions relating to the definition and boundaries of rights, and the different aspects of the case law developed by the CJEU are not always clear.

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73. See *supra* notes 44–48 and accompanying text.

74. The questions raised related to: (1) cross-border access to online content services; (2) the need to clarify the scope of the reproduction and making available right, including as regards issues such as linking and browsing; (3) the issue of exhaustion online; (4) the benefits of registration systems; (5) the adequacy of the term of protection; (6) the need to further update and harmonize further certain of the existing limitations and exceptions and the need to make their implementation by member states mandatory—the limitations identified were those related to libraries, archives, educational establishments and museums as well as the teaching, research and disabilities exception; (7) the need for new exceptions, notably for user-generated content and for text and data mining; (8) flexibility in limitations and exceptions; (9) the scope of the existing private copying exception and the functioning (or not functioning) of the private copying levy system; (10) the fair remuneration of author and performers and (11) the enforcement of rights. At the end—and unsurprisingly, given the breadth of the issues and questions that had been put on the table—stakeholders were also asked whether a copyright code for the European Union would be a long-term objective worth pursuing.

## **2. Develop the Internal Market in the European Copyright System More Fully**

We will need to consider the definition and licensing of rights to facilitate cross-border access to and portability of services. The challenge is how to do so while taking into account the importance of the territorial exploitation of rights for certain sectors, and the difficulties in defining in legislation the criteria for balancing the protection of copyright and contractual freedom, on the one hand, with the need to avoid unjustified restrictions on the freedom to provide services, on the other. These discussions will also need an assessment of whether we have the required level of harmonization to ensure that measures to eliminate territoriality do not also eliminate the protection of some right holders in some territories.

Getting more internal market into the European copyright system also implies examining whether the current system of enforcement of rights is equipped to function across borders.

Finally, we need to establish mechanisms such as mutual recognition to ensure that an act covered by an exception in one member state is also recognized as permitted in another member state. This will only be possible, however, after we determine which are the most important exceptions to further harmonize based on public policy objectives and cross-border use potential.

## **3. Achieve a Higher Level of Harmonization of Limitations and Exceptions Where There is the Required Evidence to Do So**

Obvious candidates for this discussion—without meaning that the required evidence is there or that the way forward is always necessarily an exception—include the exceptions for libraries (where some exceptions need to be assessed in view of the evolution of technology), education and research (where there is very limited harmonization despite the obvious cross-border potential), disabilities and those most closely linked to freedom of expression like parody or quotation.

## **4. Consider Further Steps to Facilitate the Digitizing and Dissemination of European Cultural Heritage**

We already have in place some of the pieces of the jigsaw—the Orphan Works Directive and the Memorandum of Understanding on out-of-commerce books and learned journals—but, in my view, further efforts are needed in certain sectors where difficulties associated with the clearance of rights seem undeniable, such as audiovisual works out of distribution (films and documentaries) and photographs. Different mechanisms could be considered, as well as a graduation of intervention based on the amount of time remaining in the work's term of protection. The difficulty here would be to define mechanisms that are compatible with the Berne Convention and other international treaties.

Finally we should consider two more objectives that—even if not often raised by those asking for a review of copyright—are important as part of a balanced and fair discussion: the need to improve enforcement mechanisms, particularly as regards

infringements committed with a commercial purpose, and the need to identify measures to help ensure the fair compensation of individual creators, authors and performers.

### B. FORM

There are two options going forward. One option is to take another step in the process of harmonizing EU rules based on a higher level of harmonization of needed provisions, combined with mechanisms to mitigate territoriality. We could do this through a directive of a similar horizontal nature as the Information Society Directive that would clarify and, where necessary, update it. It is likely that such a measure would affect other existing directives.

The other option is a copyright code. This would need to take the form of a regulation establishing a European copyright title (and all the conditions attached to it), replacing member states' copyright laws. Some would say this is an impossible goal. Certainly, it is one that would take a considerable amount of time and would face some formidable obstacles, including possibly requiring the establishment of a specialized jurisdiction—but that is another discussion.

### IV. CONCLUSION

The last ten years have not been easy for copyright in Europe. The idea that copyright is required to incentivize and reward creativity as much as to facilitate access to culture, knowledge and entertainment has often been challenged, and many have denied the harm that piracy inflicts on the industry and those that want to be remunerated for use of their works. Some have portrayed copyright as an obstacle to innovation. Equally important, a part of the public does not understand what copyright does or does not do, and as a result does not see any merit in respecting it. At the same time, it is undeniable that there has been an explosion of new and innovative means to legally disseminate copyright-protected content in the last ten years. Today there is more, and not less, legal access to culture, knowledge and entertainment than ever before.

In my view, going forward will require rebalancing and de-dramatizing the debate. To do so, we need a common acknowledgement of the value of copyright for society as a whole and an understanding of the fact that rights are meaningless unless they are respected and there is the possibility of enforcing them. In parallel, we would also need a common acknowledgement that the current rules may need clarification or readjustment when their application in the digital environment leads to unwanted results (both in cases of overstretching and undermining of rights), and a willingness to consider updating limitations and exceptions in light of changes in technology and uses. In Europe, we also have to convince everybody, including member states, that the single market is an opportunity for all the stakeholders in this debate.

Copyright is likely to remain high on the political agenda in Europe. The opportunity to do a meaningful review of our rules may be ahead of us during the

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next five-year political cycle, once a new European Parliament is elected and a new President of the Commission and College of Commissioners are in place. It will require vision and a strong political commitment. Wish us luck.