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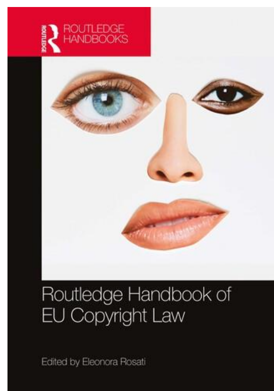

The Routledge Handbook of EU Copyright Law

Eleonora Rosati

The desirability of unification of European copyright law

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3

THE DESIRABILITY OF UNIFICATION OF EUROPEAN COPYRIGHT LAW

Tatiana-Eleni Synodinou

> "All changes, even the most desired ones, have their melancholy,
> because what we leave behind is a part of ourselves;
> you have to die in one life before you can enter to another"
>
> – *Anatole France, Le Crime de Sylvestre Bonnard*[1]

Abstract

This chapter critically examines the question of unification of European copyright law. Seen in the past as a utopian goal, the idea of unification of copyright laws in the EU has gradually gained significant ground. As it will be shown, both the economic and the cultural dimension of copyright law militate strongly in favor of European Union (EU) copyright unification. The real question is therefore not whether EU copyright law unification is necessary, but when is the best time to do it. Contrary to the EU Commission's hesitations and to the view that European copyright law unification is part of a long-term agenda, there are various reasons justifying the introduction of a mandatory European unified copyright law at an earlier stage. First of all, the road toward the unification of copyright law has been already been marked out by the Court of Justice of the European Union (CJEU), which has emerged as a major player in this field. Second, the tremendous challenges posed by the online dissemination, use and protection of copyright-protected works have shown the inherent limitations and weaknesses of national copyright-law policies on digital copyright law. It therefore appears that genuinely enforceable copyright law policies can be adopted only at the EU level through unified rules.

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1 Non-official translation from French: "Tous les changements, même les plus souhaités ont leur mélancolie, car ce que nous quittons, c'est une partie de nous-mêmes; il faut mourir à une vie pour entrer dans une autre".

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Introduction

European copyright law unification is a rather provocative idea. The unification of national laws is often seen as a taboo or a chimera, especially nowadays where federalist or unionist ideals are seriously called into question.

First of all, the concept of unification should be distinguished from similar or analogous concepts which also reflect the ideal of the adoption of common legal standards. Contrary to harmonization and the convergence of laws, which are methods of active or passive approximation of laws, the unification of laws seeks to establish a new legal order.

Methodologically speaking, the unification of laws should also be distinguished from the codification of law, which is a means or formula for achieving unification (probably the most comprehensive and effective means, as the experience of the Napoleonic or the German Civil Code demonstrate, but not the only one). Here too, some clarification is needed. Codification as a legal tool can either take the form of a consolidation or compilation of the existing body of law (codification *stricto sensu*), or the more advanced and controversial form of designing a unified rule which not only reflects the existing *acquis*, but is also the result of a more profound effort to achieve consensus on the fundamental principles of law.[2] The second one is the form of codification that is going to be discussed in this chapter.

The concept of unification of laws is polymorphous, and there are different methods and degrees of legal unification. So, generally speaking, unification of law can occur *de facto* as a corpus of uniform rules or principles, such as Anglo-Saxon common law. It can also take the advanced form – which is more relevant in relation to copyright law – of an officially established statutory body of law, such as a Code, which will either replace (maximalist approach) or complement national laws (minimalist approach). Furthermore, a Code can be either binding or optional (as with the idea of an Optional Code of General Contract Law,[3] which could be selected as the applicable law by the parties in a contract in a crossborder transaction) and can consist of legal concepts (such as the Common Frame of Reference in Contract Law), operative (working) rules[4] or both.

So, after this *tour d'horizon*, let's get to the point. Do we need to unify European copyright law and if so, why?

We'll see in the first part of this chapter that copyright law unification is mandatory in the light of EU law fundamental principles. The second part of this chapter will then identify where we are on the road toward unification.

2 Philippe Jougleux, 'The Plurality of Legal Systems in Copyright Law: An Obstacle to a European Codification?', In: Synodinou T. (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2012), 58, 59.

3 'Principles of European Contract Law'. <https://www.trans-lex.org/400200/_/pecl/> (last accessed 5 August 2020).

4 Those rules represent how the issue will be resolved by case law in a legal system. See: Gian Antonio Benacchio, Barbara Pasa, *A Common Law for Europe, A Guide to European Private Law* (CEU Press, 2005) 32.

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Copyright law unification as part of the European common project

Copyright law, due to its dual economic and cultural dimension, could be seen a legal oxymoron, or a kind of a legal Janus. Even though economic and cultural objectives do not often coincide, it is remarkable that both militate strongly in favor of EU copyright unification.

One market, one copyright law

European copyright law has a complex filiation with EU internal market values. Treated marginally in the Treaty on the Functioning of the European Union[5] (TFEU) as a possible limitation to market freedoms, and akin to a national antibody in the process of European Union (EU) economic integration, copyright law has been gradually transformed into an example of advanced harmonization of European private law.

Initially, copyright law and European Community (EC) primary law were seen as two distinct and independent bodies of legislation, which should take no account of one other.[6] In line with this approach, it was doubtful whether EU competence applies in the field of copyright law, since the latter was seen as a domain regulated exclusively by national sovereignty. Three main legal arguments have been advanced for supporting the exclusion of copyright law from the scope of application of EU law and from the sole competence of Member States: (i) the lack of an express reference to copyright law in Article 36 of the 1957 Treaty of Rome[7] (only "industrial and commercial property" is mentioned);[8] (ii) the unique nature of copyright law, which combines the protection of both the moral and economic interests of the author and (iii) the property-related nature of copyright law, which would exempt it from the influence of EU law on the basis of Article 222 of the Treaty.[9]

However, 30 years after the Treaty of Rome, technological changes had increased the levels of crossborder exploitation of copyright-protected works and the economic significance of copyright.[10] These changes brought about a paradigm shift. The initial association of copyright law with cultural policy[11] gradually faded away and was replaced by an internal market approach.

This internal market approach had two significant consequences in the field of copyright law. First, copyright law no longer enjoyed an "immunity" privilege against common market

5 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, pp. 47–390.

6 Agnès Lucas-Schloetter, 'Is there a Concept of European Copyright Law? History, Evolutions, Policies and Politics and the Acquis Communautaire', In: Stamatoudi I, Torremans P (eds.) *EU Copyright Law, A Commentary* (Cheltenham; Northampton, MA: Edward Elgar 2004), 8.

7 According to this provision, "The provisions of Articles 30 to 34 [of the Treaty] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member State".

8 See André Françon, *Le droit d'auteur et le Traité de Rome instituant la C.E.E.* (RIDA, 1979), No 100.

9 As it is stated in Article 222: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership".

10 Agnès Lucas -Schloetter, 'Is there a Concept of European Copyright Law? History, Evolutions, Policies and Politics and the Acquis Communautaire' (n 6), 10.

11 See European Parliament Resolution of 13 May 1974 on measures to protect the European cultural heritage [1974], OJ C62/5,6; Commission, 'Stronger Community action in the cultural sector, Communication to Parliament and the Council' COM (1982) 590 final, 2 (i).

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freedoms and values. Second, the Treaty's provisions on the free movement of goods and services and on free competition would also be applicable to crossborder trade in copyright-protected works. The then European Court of Justice opted for a subtle approach by applying the legal construct of distinguishing between the "existence" of copyright law, which was an issue of national law, and the "exercising" of copyright, which fell under the provisions of the Treaty and was, therefore, controlled by the Court. EU law could regulate the "exercising" of Member States' domestic intellectual property laws in order to establish and maintain the internal market.[12] All this said, EU law could not prejudice the Member States' domestic laws on property ownership and on the "existence" (the essence, the "specific subject matter") of the intellectual property (IP) itself. The application of national measures that obstruct the free movement of goods or services has been permitted only if is deemed necessary for the purpose of safeguarding the 'specific subject matter' of copyright,[13] which has been broadly perceived as covering the exclusive right of exploitation of the work,[14] and also moral rights.[15]

This controversial distinction permitted a relatively peaceful co-existence between national copyright laws and EU law, which continued to co-exist remotely. National copyright laws remained untouched for the most part, and passed the specific subject-matter test fairly easily, since every form of exploitation has been understood by the then European Court of Justice as falling within the "specific subject matter".[16]

At the same time, the principle of copyright territoriality has not been challenged. According to this principle, copyright law applies to, and is enforceable only in, the territory of those Member States that grant it. Copyright territoriality is perceived as an expression of national sovereignty. It enables Member States to adjust their IP policies and subsequently their domestic IP laws to match their particular national needs.[17] Generally speaking, "the territoriality principle holds that a state has no competence to prescribe legal rules to govern activities that occur

12 Valérie-Laure Bénabou, *Droits d'auteur, droits voisins et droit communautaire* (Bruylant, Bruxelles, 1997), 41-44.

13 Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*, Information Law Series 19 (Alphen aan den Rijn: Kluwer Law International, 2009), 3.

14 See Case C-5/11, *Criminal Proceedings against Titus Alexander Jochen Donner*, [2012], ECLI:EU:C:2012:370, at [36]: "The application of provisions such as those at issue in the main proceedings may be considered necessary to protect the specific subject-matter of the copyright, which confers inter alia the exclusive right of exploitation. The restriction on the free movement of goods resulting therefrom is accordingly justified and proportionate to the objective pursued, in circumstances such as those of the main proceedings where the accused intentionally, or at the very least knowingly, engaged in operations giving rise to the distribution of protected works to the public on the territory of a Member State in which the copyright enjoyed full protection, thereby infringing on the exclusive right of the copyright proprietor".

15 Joined Cases C-92/92 and C-326/92, *Phil Collins v Imtrat Handelsgesellschaft mbH and Patricia Im- und Export Verwaltungsgesellschaft mbH and Leif Emanuel Kraul v EMI Electrola GmbH* [1993], ECLI:EU:C:1993:847, at [20]: "The specific subject-matter of those rights, as governed by national legislation, is to ensure the protection of the moral and economic rights of their holders. The protection of moral rights enables authors and performers, in particular, to object to any distortion, mutilation or other modification of a work which would be prejudicial to their honor or reputation. Copyright and related rights are also economic in nature, in that they confer the right to exploit commercially the marketing of the protected work, particularly in the form of licenses granted in return for payment of royalties (see the judgment in Joined Cases 55/80 and 57/80 *Musik-Vertrieb membran v GEMA* [1981] ECR 147, paragraph 12)."

16 Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (n 13), 4.

17 Annette Kur, Thomas Dreier, *European Intellectual Property Law: Text, Cases and Materials* (Cheltenham, Northampton, MA: Edward Elgar, 2013), 13.

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outside its national borders".[18] Consequently, there is no uniform EU copyright law, but there are 27 individual national copyright laws which apply, respectively, in the territory of each Member State. National copyright laws are independent of one another and might present significant differences. As a result, the same work can be protected in one Member State, but not in another. Its author or rightholder might be a different person, depending on which Member State's law applies, and divergent copyright exceptions apply within the territory of the EU.

The principle of territoriality is an obstacle to the free movement of goods and services in the internal market, since its direct effect is to segment the EU market into 27 national markets.[19] As Jane Ginsburg has noted, although authors and their works in a digital environment are no longer territorially tethered in all circumstances, "regimes must still derive their authority from territorial sovereigns".[20] Indeed, rightholders can diversify the terms of offer for services giving access to copyright-protected content, depending on the "territory" (the location) of the user. This result is contrary to the EU aim of abolishing restrictions on trade in goods and cultural products among EU Member States. Territorial licensing for content protected by copyright on a country-by-country basis in the EU "leads to extensive market fragmentation".[21]

The principle, which is enshrined in the rule of national treatment established in Article 5(2) of the Berne Convention,[22] has been repeatedly confirmed by the case law of the Court of Justice of the European Union (CJEU).[23] In this context, the legitimacy of business models, which rely on exclusive rights to exploit a copyright-protected work in a specific

18 Peter Goldstein, Hugenholtz P. Bernt, *International Copyright – Principles, Law and Practice* (New York: Oxford University Press, 2013), 97.

19 Tatiana Synodinou, 'EU Portability Regulation: In-depth Analysis of the Proposal' (Study prepared for the JURI Committee of the EU Parliament, 2016).

20 Jane C. Ginsburg, 'Cyberian Captivity of Copyright: Territoriality and Author's Rights in a Networked World', (1999) *Santa Clara Computer & High Tech Journal*, 15(2), (347) 349.

21 Jacklyn Hoffman, 'Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union', (2016) Vol. 49, *Washington International Law Review*, Ed. 143, (143)144.

22 P. Bernt Hugenholtz, Mireille van Eechoud, Stef van Gompel, Lucie Guibault and others, Report on 'The Recasting of Copyright & Related Rights for the Knowledge Economy', [2006] Institute for Information Law, (Study commissioned by the European Commission's Internal Market Directorate General) 23.

23 See: Case C-192/04, *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL),* [2005], ECLI:EU:C:2005:475, at [46] ("the principle of the territoriality of those rights, which is recognized in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalize conduct engaged in within national territory."); Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, [2014], ECLI:EU:C:2014:110, at [76], ("The observations submitted to the Court have not shown, as regards a communication such as that at issue in the main proceedings, that – as European Union Law stands at present – there is another method allowing the same level of copyright protection as the territory-based protection and thus territory-based supervision of those rights, a method of which legislation such as that at issue in the main proceedings forms a part"); Case C-462/09, *Stichting de Thuiskopie*, [2011], ECLI:EU:C:2011:397, at [36] ("It follows from the foregoing that, if a Member State has introduced an exception for private copying into its national law and if the final users who, on a private basis, reproduce a protected work reside on its territory, that Member State must ensure, in accordance with its territorial competence, the effective recovery of the fair compensation for the harm suffered by the authors on the territory of that State"). See further Article 3(3) and Annex of 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 ('Directive on electronic commerce') OJ L 178, 17.7.2000, pp. 1–16 (the country of origin rule under the electronic commerce Directive does not apply to IP rights).

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territory, was upheld as early as 1982 in the *Coditel II* case,[24] from which it can be deduced that EU law tolerates territorial fragmentation in certain industries. Even though there is some damage to market integration, the CJEU referred to the specific nature of the cinematographic industry (e.g., dubbing and subtitling, and the system of financing) and held that exclusive licenses need not necessarily restrict competition.

Things changed in the late 1980s, when the European Economic Community abandoned the distinction between the existence and the exercising of IP rights and issued several directives intended to harmonize all aspects of Member States' intellectual property rules.[25] The EU's growing interest in the harmonization of copyright law was officially expressed in the 1988 Green Paper on Copyright and the Challenge of Technology,[26] where certain copyright issues were flagged up as matters of priority, requiring immediate action involving EU law. As stated in the Paper, four fundamental concerns would justify an EC intervention in the field of copyright law: the need to create a single market for copyright goods and services and to remove disparate copyright rules which resulted in market fragmentation, the objective of improving the competitiveness of the EU market for copyright goods and services by providing a legal framework comparable to that of the EC's main competitors; the protection of intellectual creations produced in the EC against their use outside the EC and the need to carefully balance copyright protection with competition law rules, by limiting the restrictive effects of copyright law on competition, especially in technology-related areas.[27]

In this context, the fundamental EU policy axiom which has guided the harmonization of copyright laws in the EU since the 1990s[28] is that copyright-protected assets are commodities, which should circulate without barriers throughout the EU internal market. The dogma of the internal market has led to a 25-year-long intensive harmonization effort, whose main legal basis has been Article 114 TFEU (formerly Article 95 of the Treaty of Rome). In this context, a key principle embodied in this axiom has been the doctrine of exhaustion of the distribution right (also discussed in Chapter 8) with regard to the distribution of tangible goods, since it enabled free movement, within the internal market, of a tangible good subject to copyright protection (an original work or copy) after its first sale or other transfer of ownership by the rightsholder or with his consent in the territory of a Member State.[29]

Even though a significant copyright *acquis* has emerged by virtue of these harmonization measures, together with the often-creative role played by the CJEU, the lack of a single legal rule is a critical flaw, which continues to hold back the EU internal market from becoming

24 Case C-262/81, *Coditel SA, Compagnie générale pour la diffusion de la télévision, and others v. Ciné-Vog Films SA and others (Coditel II)*, [1982], ECLI :EU :C :1982 :334, at [15].

25 Justine Pila, Paul Torremans, *European Intellectual Property Law* (Oxford: OUP, 2016) 55.

26 European Commission, 'Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action' COM (1988) 182 final, Section 5.2.4 at 171.

27 Mireille van Eechoud, P. Bernt Hugenholtz, Stef van Gompel, Lucie Guibault, Natali Helberger, 'Harmonizing European Copyright Law: The Challenges of Better Lawmaking' (n 13), 5.

28 Commission, 'Green Paper on Copyright and the Challenge of Technology: Copyright Issues Requiring Immediate Action' COM (1988) 182 final, Section 5.2.4 at 171(n 26).

29 Article 4(2) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society OJ L 167, 22.6.2001, pp. 10–19 (InfoSoc Directive), establishes the rule of Community-wide exhaustion of the distribution right. According to this rule, the right is exhausted within the territory of the Community and the European Economic Area if the first sale or other transfer of ownership of an original work or of a copy of it is made by the rightholder or with his consent. A similar rule exists in respect of software: see Article 4(2) of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, pp. 16–22.

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a single, and ultimately a unified, market. National copyright laws still present significant differences, and as a result, the same work can be protected in one Member State but not in another, while divergent copyright exceptions apply within the territory of the EU. One of the reasons for this situation is structural. The "harmonisation by directive" technique is accompanied by several weaknesses which have been pinpointed by Bernt Hugenholtz: its considerable expense, in terms of time, public money and other social costs; the length of time taken by the processes of EU lawmaking and of national implementation; the short-term negative effect on legal certainty in the Member States, especially where a directive introduces new rights or novel terminology and the impossibility of reaching a uniform norm due to the discretion left to the Member States.[30]

The EU copyright landscape consists of 27 sets of national copyright laws which share some common features but also contain fundamental differences. In the EU market for copyright-protected works, there are no barriers to crossborder commerce in works incorporated in tangible goods on the basis of the exhaustion doctrine, but there are national barriers to copyright-protected works provided as services. Furthermore, and even more importantly, justifying EU harmonization measures on the basis of the internal market has deprived the EU copyright *acquis* of its own identity and conceptual framework.

Given that the EU harmonization efforts did not result in a corpus of sound and coherent uniform rules, the unification of European copyright law appears to be a one-way solution. It would enable a true single market of copyright-protected works to come into being all over Europe, by enhancing legal certainty, reducing licensing and transaction costs, by neutralizing the asymmetries produced by the disparities between territorial copyright laws and by creating a tool for streamlining rights management across the Single Market, doing away with the need to administer a 'bundle' of 27 national copyright laws.[31] The appeal of the idea of codification of European copyright law was given a strong boost in the wake of the Lisbon Treaty[32] (in force from December 2009 onwards),[33] which introduced an explicit legal basis for EU copyright policy. Specifically, Article 118 TFEU is introduced as a concrete basis for establishing measures for the creation of IP rights in order to provide uniform regimes throughout the Union. In this context, the EU could create unitary copyright titles, in the same way that the EU legislator did in other fields of IP law.[34] One of the most significant elements of the decision-making process of Article 118 TFEU is that unanimity is not required at the level of the Council, and that a qualified majority will be sufficient, thereby

30 P. Bernt Hugenholtz, 'Harmonisation or Unification of European Union Copyright Law' (2012) Monash University Law Review. <http://www.austlii.edu.au/au/journals/MonashULawRw/2012/2.pdf> (last accessed 1 May 2020).

31 Trevor Cook, Estelle Derclaye, 'A EU Copyright Code: What and How, if Ever?' (2011) 3 IPQ 260.

32 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1–230.

33 Frank Gotzen, 'Comment mieux harmoniser ou unifier le droit d'auteur dans l'Union Européenne' (2017) Revue internationale du droit d'auteur, 11.

34 See: Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ L 11, 14.1.1994, pp. 1–36; Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 1.9.1994, pp. 1–30; Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ L 3, 5.1.2002, pp. 1–24; Regulation (EU) No 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, OJ L 361, 31.12.2012, pp. 1–8; and Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ L 361, 31.12.2012, pp. 89–92.

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helping achieve a breakthrough in talks on copyright matters that have reached deadlock.[35] Despite some academic hesitations as to whether Article 118 TFEU could also be used as a basis for copyright and related rights legislation,[36] in its 2011 Communication, the Commission expressly recognized such a possibility and announced that it would "examine the feasibility of creating an optional 'unitary' copyright title on the basis of Article 118 TFEU and its potential impact for the single market, right holders and consumers".[37]

So, the question is not whether an EU Copyright Code in the form of a regulation should be adopted, but when, and what the content and identity of the single rule should be. Admittedly, the road toward the unification of EU copyright law will be long and will not be a bed of roses. First, the question of the relationship between the new regime and national copyright laws needs to be resolved. While the idea of establishing the unified law as an additional layer of protection, which would be optional for rightholders, appears to be the solution most respectful of national traditions, the existence of the two regimes in parallel and their scope of application vis-à-vis one another might prove highly complex. The most successful road would therefore appear to be the replacement of national copyright laws by the new regime or at least giving precedence to the EU unified law over the national laws on core copyright issues.[38] Even though the replacement of national laws appears to be the most straightforward solution, it cannot have immediate effect for all copyright-protected works and other protected subject matter, but it would have to be accompanied by a series of transitional provisions. Indeed, at the time of the creation of the new EU copyright regime, national copyrights with the potential to remain valid for another 100 years will already be in existence.[39] The existing copyrights should be preserved in order to comply with Article 1 of the Protocol to the European Convention on Human Rights and Article 17 of the Charter of Fundamental Rights of the EU.[40]

Another fundamental issue is the question of the scope and content of the unified rule. Should the Code include every aspect of copyright law, even issues closely linked to the

35 Frank Gotzen, 'The European Legislator's Strategy in the Field of Copyright Harmonisation', In: Synodinou T (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Wolters Kluwer, 2012) 51.

36 Silke von Lewinski, 'Introduction', In: Walter MM, von Lewinski S (eds.) *European Copyright Law, A Commentary* (Oxford: Oxford University Press, 2010), paras. 1.0.19, 13.

37 See European Commission, 'A Single Market for Intellectual Property Rights. Boosting creativity and innovation to provide economic growth, high quality jobs and firstclass products and services in Europe' COM (2011) 287 final, 9-10.

38 Frank Gotzen, 'The European Legislator's Strategy in the Field of Copyright Harmonisation', In: Synodinou T (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Wolters Kluwer, 2012), 51. For Reto Hilty, EU unitary copyright law and national copyright laws should co-exist, but national copyright legislation should not produce effects insofar as European legislation may apply. See Reto Hilty, 'Reflections on a European Copyright Codification', In: Synodinou T (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Wolters Kluwer, 2012) 361. However, there is certainly no consensus on this issue. For Alain Strowel, if the adoption of such a unitary title is considered, it should remain optional and national copyrights should remain available. See Alain Strowel, 'Towards a European Copyright Law', In: Stamatoudi I, Torremans P (eds.) *EU Copyright Law, A Commentary* (Cheltenham: Edward Elgar, 2014), 1136, paras 21.29.

39 Trevor Cook, Estelle Derclaye, 'A EU Copyright Code: What and How, if Ever?' (n 31).

40 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, pp. 391–407. See Marco Ricolfi, 'Towards a EU Copyright Code? A Conceptual Framework', In: Stamatoudi I (ed.), *New Developments in EU and International Copyright Law* (Alphen aan den Rijn: Wolters Kluwer, 2016) 462.

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national copyright identities of Member States?[41] Nowadays, it appears that the content of that rule should be comprehensive, because every part of copyright law – including authorship, contracts and moral rights – has an impact on crossborder commerce in cultural goods. The CJEU has led the way on this aspect (see also the discussion in Chapters 4, 5 and 22), as it did not hesitate to enforce a common definition of originality, rightly considering that the definition of the fundamental criterion of protection has an indirect but very real impact on the cultural single market.

Lastly, the unification/codification debate touches on the sources and justifications of copyright law. Here, the question is not about what to include in the unified rule, but more profoundly what this rule should aim for and its conceptual identity. This identity can no longer be based on a monolithic perception of copyright law as a proprietary tool, but should also highlight the importance of copyright-protected works as cultural goods. The cultural dimension of copyright law, which at the genesis of European copyright law, has been seen as an obstacle to harmonization, should nowadays be seen as an additional justification for the "One EU copyright law" objective, as it will now be explained.

Human rights and access to culture

The copyright law of each country has an organic link with that country's culture. This link between copyright law and culture is the main reason for the worldwide diversity in national copyright laws. However, the cultural dimension of copyright law has often been seen as a secondary, and rather obscure, element of copyright laws' identity.

At the European level, the thesis that the cultural and social function of copyright law is an obstacle to EU intervention has gradually faded away[42] and has been replaced by an ambitious EU copyright law harmonization agenda. Cultural objectives have been expressed primarily in the "unity in diversity" principle, which was enshrined in Article 167 (4) TFEU (formerly Article 151 of the 1997 Treaty of Amsterdam).[43] In the copyright field, cultural diversity has gradually evolved into a promoter of EU copyright harmonization, in light of an approach whose aim was to overcome the dichotomy between culture and trade. In this context, free trade and the flourishing of cultural expression are not seen as incompatible, since the liberalization of exchanges enhances the diversity of content and the dynamism of cultural production.[44] For Craufurd Smith, the internal market itself embodies a "cultural prerequisite", because it is assumed that economic integration can lead to more culturally diverse societies.

41 For Reto Hilty although a number of issues could reasonably only be addressed on the basis of unitary European copyright law, rather important questions might remain subject to harmonization only. See Reto Hilty, 'Reflections on a European Copyright Codification', In: Synodinou T (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Wolters Kluwer, 2012) (n 36), 371. For Kingston, a regulation dealing with all aspects of copyright and related rights would reduce diversity. See W. Kingston, 'Intellectual Property in the Lisbon Treaty' [2008] E.I.P.R. 439, 443.

42 See Stéphanie Carre, 'Le role de la Cour de Justice dans la construction du droit d'auteur de l'Union', In: Geiger C (ed.) *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe* (Paris: Collection du CEIPI, Lexis Nexis, 2013) 4, 5.

43 Philip Schlesinger, 'Whither the Creative Economy? Some Reflections on the European Case', In: Brown AEL, Waelde C (eds.) *Research Handbook on Intellectual Property and Creative Industries* (Cheltenham: Edward Elgar, 2018), 13.

44 Oriane Calligaro, avec la contribution d'Antonios Vlassis, 'La politique européenne de la culture Entre paradigme économique et rhétorique de l'exception', (2017) *Politique européenne* 2(56), 8, 28, 26.

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However, in order for it to be successful, it also requires those societies to be culturally open.[45] This has been the approach of the InfoSoc Directive[46] and of the DSM Directive.[47]

The cultural dimension of copyright law has been recognized both in the Universal Declaration of Human Rights (Article 27) and the International Covenant on Economic, Social and Cultural Rights (Article 15). According Article 15 (1)(a), everyone has "the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits", while in Article 15 (1)(b), it is stated that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author".

The unclear relationship of copyright law with the protection of culture,[48] in the way in which the latter has been recognized in the above provisions, has contributed to the lack of a coherent conceptual framework for the cultural "component" of copyright law. The growing interaction between copyright law and human rights in the information society has revived the long-forgotten debate[49] about the cultural objectives and justifications of copyright law. The latter, however, have not benefited from an individual assessment, but have mainly been seen as part of the broader question of how to balance copyright law with freedom of expression.[50]

45 R. Craufurd Smith, 'Introduction', In: Smith C (ed.) *Culture and European Union Law* (Oxford: OUP, 2004), 3–4.

46 See recital 4: "A harmonised legal framework on copyright and related rights, through increased legal certainty and while providing for a high level of protection of intellectual property, will foster substantial investment in creativity and innovation, including network infrastructure, and lead in turn to growth and increased competitiveness of European industry, both in the area of content provision and information technology and more generally across a wide range of industrial and cultural sectors. This will safeguard employment and encourage new job creation". See also recital 8: "The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services." Furthermore, according to recital 12 "Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action".

47 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, pp. 92–125. As it stated in recital 2 "The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action".

48 As it is highlighted by Sganga, "For more than half a century, neither academics nor practitioners have elaborated on the content and scope of the two provisions, and the silence of national constitutions and regional charters have never compelled them to proceed otherwise". See Caterina Sganga, 'Right to Culture and Copyright: Participation and Access', In: Geiger C (ed.) *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015), 560–576.

49 For Christophe Geiger, the inherent social dimension of copyright law has progressively been lost, while in the recent discourse copyright is more frequently presented as an investment-protection mechanism than a vehicle of cultural and social progress. See Christophe Geiger, 'Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests', In: Giblin R, Weatherall K (eds.) *What if We Could Reimagine Copyright?* Max Planck Institute for Innovation & Competition Research Paper No. 15-07 (Canberra: ANU Press, 2017), 73–109. <http://ssrn.com/abstract=2643304> (last accessed 5 August 2020).

50 This has been also the approach in European copyright law. As Advocate General Szpunar noted in his Opinion in the *Pelham* case: "The freedom of the arts, referred to in the first sentence of Article 13 of the Charter, is a form of freedom of expression, set out in Article 11 of the Charter. The system provided for under the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 ('the ECHR'), does not provide for such a freedom as an autonomous right, with the freedom of the arts being inferred from the freedom of expression enshrined in Article 10 of that convention" (Opinion

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In this context, a fundamental rights or constitutional law approach (see also the discussion in Chapter 2) perceives copyright protection not only as a component of but also as a possible limitation on freedom of expression, including artistic freedom.[51] This complex relationship, which is inherently complementary[52] yet antagonistic at the same time, calls for a fine balancing of the individualistic nature (protection of the individual author's economic and moral rights) and the social function of copyright law (enabling participation, through access and expression of new creativity). From an international human rights perspective, while no reference is officially made to the possible connection between the exercising of the right protected by Article 1 (1)(a) and the protection of the entitlements recognized by Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights,[53] the two provisions, as the two sides of the same coin, should be perceived as closely interrelated. This could also lead to specific consequences in the field of European copyright law, which needs to be designed, constructed and interpreted in a way which harmoniously safeguards both of these objectives.[54]

In light of the above, the project of EU copyright harmonization should not neglect or elude the cultural identity of copyright law, but should, on the contrary, integrate it and combine it with the justification of "internal market" harmonization. Copyright law's link with culture is also a key component of the harmonization of copyright laws, since cultures and the cultural goods in which they are embodied are innately destined to move beyond borders. In this context, copyright law's unique connection with culture could – rather than restricting as it happened with the discussion around geoblocking in the copyright field[55] – justify or legitimize a maximalist unionist approach. Specifically, if culture is seen as a liberating and integrating force with an inherent destiny to be communicated, the principle of copyright territoriality appears ill-fitting.

As EU law stands now, there is no EU competence over cultural matters, and there is no express recognition of a right of access for European citizens to the cultures of EU Member States.

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of Advocate General Szpunar in *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, C-476/17 [2018] ECLI:EU:C:2018:1002, at [91]).

51 Christophe Geiger, 'Copyright as an Access Right, Securing Cultural Participation through the Protection of Creators' Interests', In: Giblin R, Weatherall K (eds.) *What if We Could Reimagine Copyright?* (n 49).

52 For a recognition of the complementary relationship, see [83] of Advocate General Szpunar's Opinion in the *Pelham* case (n 50), where it is stated that "Accordingly, the opposition between the freedom of the arts and the right related to copyright seems, at first view, paradoxical. The main objective of copyright and related rights is to promote the development of the arts by ensuring artists receive revenue from their works, so that they are not dependent on patrons and are free to pursue their creative activity".

53 For this issue, see Caterina Sganga, 'Right to Culture and Copyright: Participation and Access', In: Geiger C (ed.) *Research Handbook on Human Rights and Intellectual Property* (Cheltenham: Edward Elgar, 2015) 560–576 (n 47).

54 This follows from constitutional traditions common to the Member States (Article 6 (3) Treaty on European Union; see also Case C-73/08 *Bressol and Others* [2010] ECLI:EU:C:2010:181.

55 As has been noted in Communication from the Commission on a Digital Single Market Strategy for Europe (COM(2015)192 final, 6 May 2015, part 3, para 1.2), a side-effect of pan European licensing and of abolishing the territoriality principle within the EU might be less investment in local and culturally more differential content and this would impact negatively on the preservation of cultural and linguistic diversity and heritage. In this context, it has been argued that territorial restrictions could be acceptable, and even desirable as they are "supporting cultural creations targeted at national audiences and having no (or little) international appeal": see Giuseppe Mazziotti, 'Is Geo-Blocking a Real Cause for Concern in Europe?' (2016) EUI Department of Law Research Paper No 2015/43 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id¼2728675> (last accessed 5 August 2020).

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Nonetheless, in light of the growing significance of human rights within the EU legal order, the fundamental EU economic freedoms could be interpreted in a way that favors crossborder access to cultural goods.[56]

In this context, enjoying copyright protection based on the same prerequisites within the EU and accessing copyright-protected works under the same mandatory exceptions could be perceived as a concrete form of EU citizens' right to protect and access cultural goods under the same conditions within the whole of Europe. For instance, prohibiting a German tourist in France from posting a photo of the Pompidou center in Paris, either on Facebook or on their personal blog, could be seen as a kind of regulatory frontier which is not compatible with the objective of creating a pan-European cultural forum. Indeed, as stated by Bertoni and Montagnani "'public art' works may express the identity of a community, a state, a nation; they can embody cultural, economic, social, environmental interests, and have civic, commercial, and touristic value".[57] That is why the so-called panorama exception, such as it has been introduced in France, has a scope that is limited to non-commercial uses,[58] while most social media platforms permit commercial reuse of their content.

The increasing role played by fundamental rights, especially in the wake of the Lisbon Treaty, dynamically militates in favor of the adoption of unified copyright exceptions, especially in cases where the exception is justified by fundamental rights (see also the discussion in Chapters 2 and 14). To go one step further, in light of a systematic perception of copyright law as a complex yet coherent legal ecosystem, the driving force of human rights toward unification should not be restricted to a core of exceptions where the link with fundamental rights is direct. Most copyright exceptions have an underlying basic or additional human rights justification. Moreover, copyright exceptions often act in a collaborative way. This holistic approach to copyright justifies the unification of all copyright exceptions in an EU Copyright Code, and these exceptions should be mandatory.[59]

The harmonious balancing of the author's protection with fundamental rights through a unified EU legislative norm appears to be the only way to achieve a genuinely effective

56 In this context, the CJEU in *Commission v Spain* found that Spain had violated the freedom of movement of EU citizens when applied different conditions for the visit to museums for Spanish and other EU citizens. Even though a pan-European right of transborder access to culture has not been explicitly affirmed in this decision, an implicit link of the freedom of receive services and of the freedom movement with the access to cultural goods has been recognized: Case C-45/93 *Commission of the European Communities v Kingdom of Spain* [1994] ECLI:EU:C:1994:101.

57 Aura Bertoni, Maria Lillà Montagnani, 'Public Architectural Art and its Spirits of Instability', (2015) *Queen Mary Journal of Intellectual Property*, 5(3), 247–263: <http://doi.org/10.4337/qmjip.2015.03.01> (last accessed 5 August 2020).

58 See Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique, JORF n°0235 du 8 octobre 2016. <https://www.legifrance.gouv.fr/eli/loi/2016/10/7/ECFI1524250L/jo/texte> (last accessed 4 August 2020). For an analysis, see Mélanie Dulong de Rosnay, P-C Langlais, 'Public artworks and the freedom of panorama controversy: a case of Wikimedia influence', (2017) Internet Policy Review, Journal on Internet Regulation <https://policyreview.info/articles/analysis/public-artworks-and-freedom-panorama-controversy-case-wikimedia-influence> (last accessed 5 August 2020). Manara C, 'La Nouvelle « Exception De Panorama ». Gros Plan Sur L'Article L. 122-5 10° Du Code Français De La Propriété Intellectuelle' (The New 'Panorama Exception' in French Copyright Law), (2016) Revue Lamy Droit de l'Immatériel, n° 4049, 40–43 SSRN: <https://ssrn.com/abstract=2828355> (last accessed 5 August 2020).

59 For Frank Gotzen, the technique of mandatory exceptions is the only one capable of leading to real harmonization. See: Frank Gotzen, 'Comment mieux harmoniser ou unifier le droit d'auteur dans l'Union Européenne' (2017) Revue internationale du droit d'auteur (n°252), 9.

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safeguard for both criteria, after the CJEU's decision in the cases of *Pelham,* (C-476/17),[60] *Funke Medien* (C-469/17)[61] and *Spiegel Online GmbH v Volker Beck* (C-516/17).[62] The CJEU held that it is not possible to use fundamental rights as external limitations on copyright protection. A closer analysis of the CJEU's line of reasoning shows that the Court does not wish to place copyright law in a sphere of operation that is independent from the Charter. The obligation incumbent on the national courts to safeguard the effectiveness of copyright exceptions established by law, and to interpret them in a way which is fully compliant with the Charter of Fundamental Rights of the EU, means that the mechanism of balancing of interests is positioned at the heart of the interpretation and implementation of copyright exceptions and limitations. To go one step further, a proper balancing of the authors' protection and user interests within the EU presupposes a workable unified EU core of exceptions. As the law stands now, the CJEU has distinguished two kinds of exceptions: those that constitute a full harmonization measure and those that do not. In this context, the scope of the Member States' discretion in transposing a particular exception into national law must be determined on a case-by-case basis, in particular, according to the wording of each provision. Such a piecemeal and complex approach is not satisfactory and does not promote legal certainty as regards the uniform respect of fundamental rights in all EU Member States.

The growing importance of the claim to uniform access to culture in the EU has also taken on a concrete legislative form in the Portability Regulation.[63] The Regulation seeks to increase crossborder online access to content in order *inter alia* to "improve people's access to cultural content online, thereby nurturing cultural diversity".[64] The Regulation introduces a new consumer right or "user right" to access a portable online content service when traveling in the EU. At the heart of the new portability right lies the legal fiction of Article 4 therein, which establishes the "country of origin" principle for the act of communication to the public. This act should be deemed to occur solely in the Member State of the subscriber's place of residence and not in the place where it physically occurs (the Member State where the consumer is "temporarily" present). Even though the portability right has strong roots and orientations in consumer law, its cultural function should not be underestimated. The portability right is an exception – albeit a modest one – to the principle of copyright territoriality, which enables a copyright user to access an online content service to which he/she has a lawful access throughout the EU, despite copyright territorial restrictions. This is a paradigm shift with great symbolic value.

Copyright law and unification: all players are in position

Thirteen directives and two regulations already apply on copyright law issues,[65] creating an imperfect, *de facto* and chaotic feeling of harmonization. The real question, as mentioned, is thus

60 Judgment of the Court (Grand Chamber) Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624.

61 Judgment of the Court (Grand Chamber) Case C-469/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623.

62 Judgment of the Court (Grand Chamber) Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:625.

63 Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market, OJ L 168, 30.6.2017, pp. 1–11.

64 European Commission, Press Release (06.05.15) 'A Digital Single Market for Europe: Commission sets out 16 initiatives to make it happen' (IP/15/4919).

65 See the EU copyright *acquis* at <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> (last accessed 5 August 2020).

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not whether EU copyright law unification is necessary, but when is the best time to do it. Contrary to the EU Commission's hesitations and to the view that European copyright law unification is part of a long-term agenda, there are various reasons justifying the introduction of a mandatory European unified copyright law at an earlier stage. First of all, the road toward the unification of European copyright law has been already been marked out by the CJEU, which has emerged as a major player in this field (see also the discussion in Chapter 22). Second, the tremendous challenges posed by the online dissemination, use and protection of copyright-protected works have shown the inherent limitations and weaknesses of national copyright-law policies on digital copyright law. It therefore appears that genuinely enforceable copyright law policies can be adopted only at the EU level through unified rules.

The CJEU's judicial activism: the finishing touch to a covert unification

Even though the EU copyright law harmonization process has followed a piecemeal approach, it certainly has to be admitted that the multiplicity of laborious EU interventions in the field of copyright law has created a weighty *acquis*, which could be used as a sound basis for building an EU unified copyright law. Indeed the CJEU, which affirmed its competence over copyright matters at the beginning of the 1980s, has gradually completed the *acquis*.[66] The most significant shift toward an interventionist and more audacious approach was made in 2009, with the *Infopaq* judgment.[67] Subsequently, as noted by Griffiths, the CJEU's judgments from 2009 onwards "demonstrate an increased determination to interpret the copyright acquis in a manner that promotes the construction of as a complete body of EU copyright law as possible".[68]

The Court has often 'creatively' interpreted the EU legislative *acquis* provisions by clarifying, completing or forming their meaning with a strong emphasis on their autonomous and uniform interpretation. In this context, important areas of copyright that had been largely left untouched by harmonization directives have been *de facto* harmonized by the Court.[69] The pro-active approach taken by the CJEU as a promoter of the construction of EU copyright law has necessarily impacted on the interpretation methods used by the Court. As a result, the praetorian construction of the EU *acquis* is based on the methods of teleological[70] and systematic interpretation (in light of international copyright law where possible), which seek to provide conceptual coherence among the disparate rules to be found in the various EU copyright law directives. Furthermore, the Court's approach is inherently and necessarily case-based, as it has designed the scope of EU copyright law notions with reference to the questions put to it.[71]

66 Stéphanie Carre, 'Le role de la Cour de Justice dans la construction du droit d'auteur de l'Union', In: Geiger C (ed) *La contribution de la jurisprudence à la construction de la propriété intellectuelle en Europe* (Paris: Collection du CEIPI, Lexis Nexis, 2013) 19.

67 Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening,* Judgment of the Court (Fourth Chamber) [2009]. ECLI:EU:C:2009:465.

68 Jonathan Griffiths, 'The role of the Court of Justice in the development of European Union Copyright Law', In: Stamatoudi I, Torremans P (eds.) *EU Copyright Law, A Commentary* (Cheltenham: Edward Elgar, 2014) 1098, 1099.

69 P. Bernt Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis', In: Pila J, Ohly A (eds.) *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford: OUP, 2013) <https://www.ivir.nl/publicaties/download/Is_harmonization_a_good_thing.pdf> (last accessed 5 August 2020).

70 Valérie-Laure Bénabou, 'Retour sur dix ans de jurisprudence de la Cour de justice de l'Union européenne en matière de propriété littéraire et artistique: les méthodes' (2012) Propriétés Intellectuelles, 147.

71 Alexandra Bensamoun, 'Réflexions sur la jurisprudence de la CJEU: du discours à la méthode' (2015) Propriétés Intellectuelles, 140.

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From this point of view, the sense of an enhanced "Europeanisation" of copyright law has undoubtedly been amplified by the activist role played by the CJEU. Much has been written about the activity of the CJEU,[72] whose creative interventions in the field of EU copyright law have been often criticized on the grounds of a lack of legitimacy,[73] limited clarity and vision[74] or incarnating an overwhelming enthusiasm to harmonize.[75] Despite these concerns, it cannot be denied that the CJEU has systematically made a covert effort to achieve a deeper harmonization of EU copyright law, by using the autonomous EU law concepts as the main legal tool for creating unified EU copyright law core notions.[76] So, the seeds of EU copyright law unification have already been planted and are growing. However, even though this *acquis* is admirable in terms of its volume and the variety of its content, it is nothing more than a piecemeal and anarchic collection of legislative and jurisprudential rules. The time has come to reconstruct this amorphous and incomplete acquis into a coherent corpus of unified rules based on a clear normative background. This reconstruction of EU copyright law presupposes both continuity and a break with the past, at the same time. On the one hand, unified copyright law should be based on the codification of existing rules which were painfully established over the past three decades. On the other hand, unified EU copyright law should also be conceptually reformed, with an emphasis on the cultural dimension of copyright law and enhancement of the status of exceptions as user rights. This would necessarily mean the same mandatory exceptions throughout the EU. Furthermore, a unified EU copyright law ecosystem should also include a core of unified rules covering the fields of moral rights, authorship, employees' works and contract law. If unification is opted for, national copyrights will gradually fade away and give way to the unified norm.

The rise of "GAFA"[77] and the effectiveness of copyright law policymaking

The recent heated discussions about the "value gap" in the context of the DSM Directive have shed light on a new problematic of international copyright law. An EU member is not strong enough to impose its own national copyright law agenda on the powerful actors to

72 See Jonathan Griffiths, 'The role of the Court of Justice in the development of European Union Copyright Law' In: Stamatoudi I, Torremans P (eds.) *EU Copyright Law, A Commentary* (Cheltenham: Edward Elgar, 2014) (n 68) 1098, 1099. Tatiana Synodinou, 'Réflexions autour de la récente et féconde oeuvre jurisprudentielle européenne en droit d'auteur', (2015) Propriétés Intellectuelles, 151; Dionysia Kallinikou, 'CJEU Policy and Practice in the field of European Copyright Law', In: Synodinou T (ed.) *Codification of European Copyright Law, Challenges and Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2012) (n 2), 69; C. Castets-Renard, 'L'interprétation autonome est systémique du droit d'auteur par la CJUE: et maintenant ?' (2013) RLDI 13.

73 Jonathan Griffiths, 'The Role of the Court of Justice in the Development of European Union Copyright Law', In: Stamatoudi I, Torremans P (eds.) *EU Copyright Law, A Commentary* (Cheltenham: Edward Elgar, 2014) (n 68), 1124; Alexandra Bensamoun, 'Réflexions sur la jurisprudence de la CJEU: du discours à la méthode' (2015) Propriétés Intellectuelles (n 71), 140.

74 Bernault C, (2015) *Le droit d'auteur dans la jurisprudence de la CJEU*, Propriétés Intellectuelles, p. 123.

75 See Lionel A.F. Bently, 'Harmonization by Stealth: Copyright and the ECJ' (University of Cambridge, Presentation at Fordham IP Conference, 2012).

76 As it is noted by Rosati, the CJEU has often employed this standard (the principle of autonomy of EU law) in its case law, with the practical effect of strengthening harmonization of copyright laws across the EU, See Eleonora Rosati, 'Copyright and the Court of Justice of the European Union' (Oxford: OUP, 2019), 42, 43.

77 GAFA is an acronym for Google, Apple, Facebook and Amazon. The acronym serves to identify the dominant companies as an entity – effectively an oligopoly that controls much of the tech industry market. For this definition, see: <https://whatis.techtarget.com/definition/GAFA> (last accessed 5 August 2020).

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be found on the internet. It appears that the only way to promote copyright rules capable of achieving international respect and enforcement is through the EU.

In this context, the EU Digital Single Market Strategy has added two unique instruments which, despite being highly controversial, should also be seen as the most innovative mechanisms in the field of copyright law in recent years: the regime for online content sharing service providers in Article 17 of the DSM Directive[78] and the new press publisher's neighboring right in Article 15 therein. Why were these measures not adopted at national level? Why was an EU intervention deemed necessary? The answer is both simple and difficult to admit. In the global village, internet protagonists have acquired a tremendous amount of negotiating power, through lobbying and threats. Characteristically, previous attempts by some Member States to introduce a new neighboring right for press publishers at national level have failed.

The German and Spanish experiences provide strong evidence of the impossibility, in practical terms, to enforce such a right at national level.[79] As regards the German press publishers' right, which was introduced in 2013 (§§ 87f-h UrhG, 2013, "Presseleistungsschutz"), publishers mandated their rights to the collecting society VG Media. However, Google refused to obtain a license and started indexing only websites that decided to opt in to be indexed in Google News. While the majority of publishers granted permission to Google for free,[80] the members of VG Media denied this and traffic to their websites went down. As a result, shortly afterwards, they too decided to license Google for free.[81] As of 2017, the society had issued only five licenses and collected a total of EUR 714,000.[82] VG Media brought an action for infringement of the new right against Google for the use of content without authorization and without paying a license fee.[83] A German court stayed the proceedings so that the CJEU could decide on the question of the validity of the law, due to a lack of notification to the EU Commission of the legislative proposal. On 12 September 2019, the CJEU decided that the German provision on the press publishers' right constituted a 'technical

78 For a detailed analysis, see Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?' (2020) Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ) (forthcoming), SSRN: <https://ssrn.com/abstract= > (last accessed 5 August 2020).

79 For both, see: Martin Kretschmer, Séverine Dusollier, Christophe Geiger, P. Bernt Hugenholtz, 'CREATe Working Paper 2016/09, The European Commission's public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society', (2016) CREATe Working Paper Series DOI:10.5281/zenodo.56650.

80 Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, María del Carmen Calatrava Moreno, Alfred Radauer, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) Study for the JURI committee, PE 596.810 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf>
(last accessed 5 August 2020).

81 Raquel Xalabarder, 'Lecture 2: Why the Proposed Related Right for Press Publishers is Not a Good Idea', In: Höppner T, Kretschmer M, Xalabarder R (eds.) *CREATe Public Lectures on the Proposed EU Right for Press Publishers* (2017) *European Intellectual Property Review*, 39(10), 607–622.

82 Pamela Samuelson, *Legally Speaking: Questioning A New Intellectual Property Right For Press Publishers* (Kluwer Law International, 2018) <http://copyrightblog.kluweriplaw.com/2018/11/19/legally-speaking-questioning-a-new-intellectual-property-right-for-press-publishers/> (last accessed 5 August 2020).

83 For the proceedings in Germany, see: Jan Bernd Nordemann, Stefanie Jehle (Nordemann), 'The German press publishers' right before the CJEU – will it survive? The AG's opinion in VG Media/Google (C-299/17) and some background from Germany' (2019) Kluwer Law International <http://copyrightblog.kluweriplaw.com> Accessed 2 May 2020.

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regulation' within the meaning of Article 1(11) of Directive 98/34[84] and that, in such cases, the draft of such laws would be subject to prior notification to the European Commission, pursuant to Article 8(1) therein.[85]

The Spanish experience was similarly discouraging. Spanish law, instead of establishing a new right, amended the quotation exception in order to introduce, in 2014, a limitation that allows news aggregation of non-significant fragments of content available online, subject to payment by the aggregators of an unwaivable equitable compensation, mandatorily managed by collecting societies.[86] Immediately after the introduction of the new law, Google News closed googlenews.es and, as a result, traffic to news websites declined.[87]

In this context, the Impact Assessment on the Modernization of EU copyright rules has suggested that intervention at EU level, with the establishment of a European press publishers' right, is expected to strengthen publishers' bargaining powers more effectively than has happened under national measures such as the 'ancillary rights' adopted in Germany and Spain.[88] Furthermore, as noted by Rosati, the "European way" might be the only permissible route to follow for a new neighboring right, given that a systematic interpretation of the CJEU's judgments in the *Svensson*,[89] *C More Entertainment*[90] and *Reprobel*[91] cases that the freedom of Member States in the area of neighboring rights does not go so far as to suggest that Member States also have the freedom to create new categories of rightholders in respect of neighboring rights.[92]

84 Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ L 204, 21.7.1998, pp. 37–48.

85 Case C-299/17, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC* [2019], ECLI:EU:C:2019:716.

86 See Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its Compliance with International and EU Law' (2014) infojustice.org, <http://infojustice.org/archives/33346> (last accessed 5 August 2020; Raquel Xalabarder, 'Lecture 2: Why the proposed related right for press publishers is not a good idea', op.cit.

87 Pedro Posada de la Concha, Alberto Gutiérrez Garcia, 'Impact of the New Article 32.2 of the Spanish Intellectual Property Act' (2015), Study by Nera Consulting commissioned by Spanish Association of Publishers of Periodicals AEEPP, <https://www.nera.com/publications/archive/2015/impact-of-the-new-article-322-of-the-spanish-intellectual-proper.html> (last accessed 5 August 2020). See also: Lionel Bently, Martin Kretschmer, Tobias Dudenbostel, María del Carmen Calatrava Moreno, Alfred Radauer, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) Study for the JURI committee, PE 596.810 <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf> (last accessed 5 August 2020).

88 European Commission, 'Impact Assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organizations and retransmissions of television and radio programmes', SWD (2016) 301 final, Brussels, PART 1/3, 167.

89 Case C-466/12, *Nils Svensson and Others v Retriever Sverige AB*, Judgment of the Court (Fourth Chamber) [2014], ECLI:EU:C:2014:76.

90 Case C-279/13, *C More Entertainment AB v Linus Sandberg*, Judgment of the Court (Ninth Chamber) of [2015] ECLI:EU:C:2015:199.

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92 Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National (Possible) EU Initiatives Lawful?' (2016) *International Review of Intellectual Property and Competition Law* 47(5), 569–594.

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Despite the legitimate criticisms of both Article 17[93] and 15[94] of the DSM Directive, one of the major weaknesses of both, and especially of Article 17, is that a significant margin of discretion has been left to the Member States to decide on significant issues of implementation and application of both mechanisms. In this context, legal certainty would have required a more uniform, more "European" approach. Furthermore, and more broadly, it appears that the possibility of introducing novel approaches in the field of online copyright law remains only at European level, since GAFA would be much more reluctant to block the whole EU market, than the isolated markets of a few Member States.

It should also be noted that it is not only GAFA but the functioning of the internet itself that calls for a revolutionary transformation in copyright law, toward a global (or at least a regional) approach. This is no longer a question of crossborder transactions. In the information age, all transactions involving cultural goods are potentially crossborder in nature. It is really interesting to see that, in this context, the geoblocking of streaming content is increasingly perceived as unjust by the Europeans.

Conclusion

EU copyright law harmonization has been hampered by the iconic divide between the civil law ("droit d'auteur") tradition and the common law vision of copyright, whose most prominent representative has been the UK. Even though these divergences are in practice less flagrant than they might appear, this conceptual split has impeded the process of harmonization in domains where the differences are more striking, such as in the case of authorship, copyright ownership, moral rights and copyright contracts. Therefore, the idea of EU copyright unification has been mainly seen as a long-term prospect. However, would it remain the same now that UK's influence does not have to be taken into consideration in the decision-making process? Brexit could be seen not only as a tragedy for Europe, but also as an opportunity for deeper integration in European copyright law. Theoretically, the absence of this major player could at first sight enable a more "continental" perception of copyright law to emerge.[95] In any case, this dichotomy has lost much of its pertinence. In the same way that traditional political divisions are gradually evolving into pro- and anti-European approaches,[96] a new line of opposition is emerging at copyright law level between global and local approaches. In this context, the global approach enjoys the advantage

93 For instance, see: Sebastian Felix Schwemer, Jens Schovsbo, 'What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime', In: Torremans P (ed.) *Intellectual Property Law and Human Rights*, 4th ed. (Alphen aan den Rijn: Wolters Kluwer, 2020) doi:10.31228/osf.io/g58ar (last accessed 5 August 2020); João Quintais, Giancarlo Frosio, Stef van Gompel, P. Bernt Hugenholtz, Martin Husovec, Bernd Justin Jütte and Martin Senftleben, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations From European Academics', 2019. SSRN: <https://ssrn.com/abstract=3484968> or <http://dx.doi.org/10.2139/ssrn.3484968> (last accessed 5 August 2020).

94 For instance, see Academics Against Press Publishers' Right, 2018 <https://www.ivir.nl/academics-against-press-publishers-right/> (last accessed 5 August 2020).

95 See Tatiana Synodinou, *Brexit and European Copyright Law: Some Conclusions and Delusions* (Alphen aan den Rijn: Wolters Kluwer, 2016) <http://copyrightblog.kluweriplaw.com> (last accessed 5 August 2020); Eleonora Rosati, 'Copyright in CJEU Case Law: What Legacy?' (2019) *Journal of Intellectual Property Law & Practice* 14(2), 79.

96 For an approach against EU copyright law harmonization, see Andreas Rahmatian, 'European Copyright Inside or Outside the European Union: Pluralism of Copyright Laws and the "Herderian Paradox"' (2016) *International Review of Intellectual Property and Competition Law* 47(8), 912–940.

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of historical argument: ever since the Berne Convention, copyright law has always been marked by global influences.

Nonetheless, even if the adoption of a European Copyright Code were to be facilitated, the aim of such a Code should not simply be to reflect common denominators and compromises, or to naïvely appear to "impose" a certain copyright tradition over another. First, significant differences exist between copyright laws following the same copyright tradition, and even with the absence of a strong UK "common copyright law" voice, disagreements will still exist between the various continental law visions of copyright. Second, a move as radical as the introduction of the Code calls for an extremely thoughtful approach in relation to the content of the Code, given that such a monumental edifice would leave little or no scope for retreating from it, at least for a few decades. So it is highly important for the drafters of the Code to think pro-actively, in a technologically neutral way, and also to bear in mind that the EU unified copyright law is seen internationally as a regional law. Indeed, as the world grows more and more digitally interconnected, national and regional copyright laws are also likely to be seen, in the medium or long-term future, as regulatory barriers to a global cultural and economic forum.

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