# EXTENDED TABLE OF CONTENTS

**List of contributors**

**Preface**

**Table of cases**

**Table of legal instruments**

**INTRODUCTION**

0.01

## PART I GENERAL PRINCIPLES OF EUROPEAN COPYRIGHT

### 1. IS THERE A CONCEPT OF EUROPEAN COPYRIGHT LAW? HISTORY, EVOLUTION, POLICIES AND POLITICS AND THE ACQUIS COMMUNAUTAIRE

1. The evolution of copyright law within the European Union 1.02
   1. The relationship between Copyright and Primary EC Law (1957–1987) 1.03
   2. The harmonisation of copyright law within the European Community (1987–2004) 1.07
   3. The increasing role of the ECJ since 2004 1.11
2. The achievement of a European copyright law? 1.14
   1. The assessment of the *acquis communautaire* 1.14
   2. From European common copyright principles to a genuine European copyright law 1.19
3. Conclusion 1.23

### 2. THE PRINCIPLE OF NON-DISCRIMINATION

1. Introduction 2.01
2. The principle of national treatment in the international legal framework 2.06
3. The principle of national treatment in the European legal framework 2.11
4. Conclusion 2.19

### 3. THE PRINCIPLE OF FREE MOVEMENT OF GOODS: COMMUNITY EXHAUSTION AND PARALLEL IMPORTS

1. Introduction 3.01
2. Consent of the IPR owner and placement on the market 3.06
3. International exhaustion 3.15

### 4. THE ESSENTIAL FACILITIES PRINCIPLE AND OTHER ISSUES OF COMPETITION

**ARTICLE 102 TFEU**

1. Article 102 and its context 4.01
   1. Introduction 4.01
   2. Deconstructing Article 102 4.05
   3. Competition 4.16
   4. Abuse of dominance 4.21
   5. A ‘defence’ of objective justification? 4.38
Extended Table of Contents

II. Magill and beyond – essential facility cases relating to copyright 4.42
   1. Magill 4.43
   2. Tiercé Ladbroke 4.49
   3. IMS 4.50
   4. Microsoft 4.55

III. Some queries and observations 4.63
   1. Nature of ‘essential facility’ or ‘indispensable input’ in copyright cases 4.63
   2. Nature of the remedy? 4.67
   3. What about interim measures? 4.68
   4. Essential facilities and WTO TRIPS 4.69

PART II THE EU DIRECTIVES

5. THE SOFTWARE DIRECTIVE
   I. Introductory remarks 5.01
      1. Preparatory documents 5.01
      2. General characteristics 5.02
   Article 1: Object of protection 5.05
      1. Protection as literary works (art. 1(1)) 5.05
      2. Protection for expression; not ideas (art. 1(2)) 5.13
      3. Condition of originality (art. 1(3)) 5.31
      4. Transitional provision (art. 1(4)) 5.38
   Article 2: Authorship of computer programs 5.40
      1. General rules 5.40
      2. Computer programs created by employees (art. 2(3)) 5.47
   Article 3: Beneficiaries of protection 5.55
   Article 4: Restricted acts 5.56
      1. Scope of the exclusive rights 5.56
      2. Right of reproduction 5.58
      3. Right of communication to the public 5.90
      4. Moral rights not regulated 5.92
   Article 5: Exceptions to the restricted acts 5.94
      1. General remarks 5.94
      2. Acts necessary for normal use and error correction 5.99
      3. Making of back-up copy 5.105
      4. Observing, studying or testing the functioning of the program 5.107
   Article 6: Decompilation 5.110
      1. General 5.110
      2. Conditions of the exception 5.112
   Article 7: Special measures of protection 5.128
      1. General remarks 5.128
      2. Particular remedies and sanctions 5.130
      3. Seizure 5.137
   Article 8: Continued application of other legal provisions 5.139
      1. No prejudice to other forms of protection 5.139
      2. Mandatory character of the exceptions 5.141
   Article 9: Communication 5.142
   Article 10: Repeal
   Article 11: Entry into force 5.144
   Article 12: Addressees 5.146

6. THE RENTAL AND LENDING RIGHTS DIRECTIVE
   I. General remarks 6.01
   Chapter I: Rental and lending right
   Article 1: Object of harmonisation 6.09
      1. The exclusive rights 6.10
      2. Originals and copies 6.18
      3. The relation to the exhaustion of the distribution right 6.21
7. THE SATELLITE AND CABLE DIRECTIVE

Chapter I: Definitions
Article 1: Definitions 7.01
1. Introduction 7.01
2. Definition of a ‘satellite’ (art. 1(1)) 7.06
3. Communication to the public (art. 1(2)(a)) 7.09
4. The act of communication to the public occurs solely in one Member State (art. 1(2)(b)) 7.16
5. Encryption of signals (art. 1(2)(c)) 7.19
6. Extension of the communication to the public definition – satellite broadcasts from outside the EU (art. 1(2)(d)) 7.24
7. Cable retransmission (art. 1(3)) 7.26
8. Collecting society (art. 1(4)) 7.31
9. Authors of audiovisual works (art. 1(5)) 7.33

Chapter II: Broadcasting of programmes by satellite
Article 2: Broadcasting right 7.34
1. An Exclusive Broadcasting Right in the country-of-origin (art. 2) 7.34
Article 3: Acquisition of broadcasting rights 7.37
1. Acquisition by contract (art. 3(1)) 7.37
2. Collective licensing (art. 3(2)) 7.40
3. Cinematographic works (art. 3(3)) 7.43
4. Duty to inform (art. 3(4)) 7.44
Article 4: Rights of performers, phonogram producers and broadcasting organisations 7.45
1. Related rights (art. 4(1)) 7.45
## Extended Table of Contents

2. Wireless broadcasting (art. 4(2)) 7.48  
3. Presumption of transfer (art. 4(3)) 7.49  
Article 5: Relation between copyright and related rights 7.51  
Article 6: Minimum protection 7.52  
1. Minimum harmonisation (art. 6(1)) 7.52  
2. Focus on up-link country (art. 6(2)) 7.53  
Article 7: Transitional provisions 7.55  
1. Application in time (art. 7(1)) 7.55  
2. Transitional provisions for old contracts (art. 7(2)) 7.58  
3. Transitional provisions for co-production agreements (art. 7(3)) 7.60  
Chapter III: Cable retransmission  
Article 8: Cable retransmission right 7.63  
1. Acquisition of cable retransmission rights (art. 8(1)) 7.63  
2. Transitional provisions (art. 8(2)) 7.67  
Article 9: Exercise of the cable retransmission right 7.68  
1. Mandatory collective rights management (art. 9(1)) 7.68  
2. Treatment of outsiders (art. 9(2)) 7.71  
3. Statutory presumptions (art. 9(3)) 7.73  
Article 10: Exercise of the cable retransmission right by broadcasting organizations 7.74  
1. Broadcasters’ exception (art. 10) 7.74  
Article 11: Mediators 7.76  
1. Set up of a mediation system (art. 11(1)) 7.76  
2. Mediation procedure (art. 11(2) and (3)) 7.77  
3. Independence and impartiality of mediators (art. 11(4)) 7.78  
Article 12: Prevention of the abuse of negotiating positions 7.79  
1. Obligation to negotiate – but not to grant a licence (art. 12(1)) 7.79  
2. Transitional provisions (art. 12(2) and (3)) 7.82  
Chapter IV: General provisions  
Article 13: Collective administration of rights 7.83  
1. National rules unaffected (art. 13) 7.83  
Article 14: Final provisions 7.85  
1. Implementation deadline and duty of notification (art. 14(1) and (2)) 7.85  
2. Report of the Commission (art. 14(3)) 7.86  
Article 15: This Directive is addressed to the Member States 7.88  
1. No direct effect (art. 15) 7.88  
8. THE TERM DIRECTIVE  
Article 1: Duration of authors’ rights 8.01  
1. General remarks and introduction to the Directive 8.01  
2. Duration of author’s rights 8.09  
Article 2: Cinematographic or audiovisual works 8.19  
1. Authorship of cinematographic or audiovisual works 8.19  
2. Calculation of the term of protection 8.22  
Article 3: Duration of related rights (as modified by Directive 2011/77/EU) 8.26  
1. Duration of related rights: general rules 8.26  
Article 4: Protection of previously unpublished works 8.40  
Article 5: Critical and scientific publications 8.42  
Article 6: Protection of photographs 8.44  
Article 7: Protection vis-à-vis third countries 8.48  
Article 8: Calculation of terms 8.52  
Article 9: Moral rights 8.54  
Article 10: Application in time 8.55  
1. Longer terms of protection for copyright or related rights already running in a Member State 8.55  
2. Application in time of the Directive 8.56  
3. Application in time of the modifications introduced by Directive 2011/77/EU 8.61
## 9. THE DATABASE DIRECTIVE

### Chapter I: Scope

- Article 1: Scope
- 1. Paragraph 1
- 2. Paragraph 2
- 3. Paragraph 3

### Article 2: Limitations on the scope

### Chapter II: Copyright

- Article 3: Object of protection
- 1. Paragraph 1
- 2. Paragraph 2

- Article 4: Database authorship

- Article 5: Restricted acts
- 1. Reproduction
- 2. Translation
- 3. Distribution
- 4. Communication to the public
- 5. Exhaustion
- 6. Infringement

- Article 6: Exceptions to restricted acts
- 1. Paragraph 1
- 2. Paragraph 2
- 3. Paragraph 3
- 4. Other copyright aspects not regulated by the Database Directive

### Chapter III: Sui generis right

- Article 7: Object of protection
- 1. The nature of the sui generis right
- 2. Reasons for the sui generis right
- 3. Protection requirement: qualitative or quantitative substantial investment in the obtaining, verification or presentation of the database’s contents
- 4. Ownership
- 5. The rights
- 6. Infringement

- Article 8: Rights and obligations of lawful users
- 1. Concept of lawful user
- 2. Paragraph 1
- 3. Paragraph 2
- 4. Paragraph 3

- Article 9: Exceptions to the sui generis right

- Article 10: Term of protection
- 1. Paragraphs 1 and 2
- 2. Paragraph 3

- Article 11: Beneficiaries of protection under the sui generis right

### Chapter IV: Common provisions

- Article 12: Remedies
- 9.70

- Article 13: Continued application of other legal provisions
- 9.71

- Article 14: Application over time
- 1. Paragraph 1
- 2. Paragraph 2
- 3. Paragraphs 3, 4 and 5
Extended Table of Contents

Article 4: Distribution right 11.36
1. Introduction 11.36
2. ‘Authors’ 11.39
3. ‘Original of their works or of copies thereof’ 11.41
4. ‘By sale or otherwise’ 11.47
5. Exhaustion of rights 11.48

Article 5: Exceptions and limitations 11.62
I. Commentary 11.62
II. Method of harmonisation of Article 5 11.64
III. Effect of Article 5 11.74
IV. Possible revision of Article 5 11.93
V. Fair compensation, remuneration and the link to collective management 11.104

Chapter III: Protection of technological measures and rights-management information
Article 6: Obligations as to technological measures 11.107
1. Background 11.107
2. Similar provisions in EU law 11.108
3. Effective technological measures (para. 3) 11.109
4. Circumvention (para. 1) 11.114
5. Preparatory acts (para. 2) 11.120

Article 7: Obligations concerning rights-management information 11.129
1. Background 11.129
2. Rights management information 11.130
3. ‘Adequate legal protection’ for persons ‘knowingly’ performing ‘unauthorised’ acts of ‘works or protected subject matter’ 11.132
4. Actionable acts 11.137
5. Other issues 11.141

Chapter IV: Common provisions
Article 8: Sanctions and remedies 11.143
1. Introduction 11.143
2. Article 8(1) 11.146
3. Article 8(2) 11.148
4. Article 8(3) – Injunctions against intermediaries 11.149

Article 9: Continued application of other legal provisions 11.171
Article 10: Application over time 11.173
Article 11: Technical adaptations 11.175
1. Article 11(1) 11.175
2. Article 11(2) 11.177

Article 12: Final provisions 11.179
1. Article 12(1) 11.179
2. Article 12(2) 11.180
3. Article 12(3) and (4) 11.181

Article 13: Implementation 11.183
Article 14: Entry into force 11.184
Article 15: Addresssees 11.185

12. THE ENFORCEMENT DIRECTIVE
1. Introduction 12.01

Chapter I: Objective and scope
Article 1: Subject matter 12.06
1. ‘Measures, procedures and remedies’ 12.06
2. ‘Intellectual property rights’ 12.07

Article 2: Scope 12.09
1. Article 2(1) 12.09
2. Article 2(2) and (3) 12.15

Article 3: General obligation 12.22
Extended Table of Contents

Article 4: Persons entitled to apply for the application of the measures, procedures and remedies
1. Introduction 12.27
2. Article 4(a) and ‘holders’ of intellectual property rights 12.31
3. Article 4(b) and ‘all other persons authorised to use those rights’ 12.34
4. Article 4(c) and (d) 12.37

Article 5: Presumption of authorship or ownership
1. Introduction 12.42
2. ‘Author’ 12.43
3. ‘On the work in the usual manner’ 12.47
4. ‘Holders of rights related to copyright’ 12.49

Section 2: Evidence
Article 6: Evidence
1. Introduction 12.51
2. Article 6(1) 12.53
3. Article 6(2) 12.70

Article 7: Measures for preserving evidence
1. Introduction 12.82
2. Article 7(1) 12.83
3. Article 7(2) 12.94
4. Article 7(3) 12.95
5. Article 7(4) 12.96
6. Article 7(5) 12.98

Article 8: Right of information
1. Introduction 12.99
2. Article 8(1) 12.102
3. Article 8(2) 12.110
4. Article 8(3) 12.111
5. Conflicts between copyright protection and privacy in the light of the case law of the CJEU concerning ISPs 12.125

Article 9: Provisional and precautionary measures
1. Introduction 12.126
2. Provisional measures against ‘intermediaries’ 12.137
3. Seizure of goods 12.140
4. Precautionary seizure of assets to secure financial claims 12.143

Article 10: Corrective measures

Article 11: Injunctions
1. Introduction 12.161
2. Enforcing an injunction 12.165
3. Injunctions against intermediaries 12.167

Article 12: Alternative measures

Section 6: Damages and legal costs
Article 13: Damages
1. Introduction 12.179
2. Article 13(1) 12.181
3. Article 13(2) 12.191

Article 14: Legal costs 12.192

Section 7: Publicity measures
Article 15: Publication of judicial decisions 12.198

Chapter II: Sanctions by Member States
Article 16: Sanctions by Member States 12.205

Chapter III: Codes of conduct and administrative cooperation
Article 17: Codes of conduct 12.208
Article 18: Assessment 12.211
Article 19: Exchange of information and correspondents 12.215

Chapter IV: Final provisions
Article 20: Implementation 12.216
## Extended Table of Contents

| Article 21: Entry into force | 12.218 |
| Article 22: Addressees |

### 13. THE ORPHAN WORKS DIRECTIVE

#### Chapter I: Objective and scope

| Article 1: Subject-matter and scope | 13.01 |
| 1. Rationale and objectives | 13.01 |
| 2. Beneficiaries | 13.05 |
| 3. Subject matter | 13.10 |
| 4. Collective management and the Memorandum of Understanding on out-of-commerce works | 13.21 |

| Article 2: Orphan works | 13.25 |
| 1. Defining an orphan work | 13.25 |
| 2. Multiple right holders | 13.29 |

| Article 3: Diligent search | 13.31 |
| 1. Summary of ‘diligent search’ rules | 13.31 |
| 2. ‘Diligent search’ and ‘good faith’ | 13.33 |
| 3. ‘Appropriate sources’ | 13.34 |
| 4. Extent and effect of diligent search | 13.37 |
| 5. Recordation and public register | 13.39 |

| Article 4: Mutual recognition of orphan work status | 13.47 |

| Article 5: End of orphan work status | 13.48 |

| Article 6: Permitted uses of orphan works | 13.50 |
| 1. Scope of permitted use | 13.50 |
| 2. Beneficiaries | 13.51 |
| 3. Compensation to right holders | 13.54 |

| Article 7: Continued application of other legal provisions | 13.56 |

| Article 8: Application in time | 13.59 |

| Article 9: Transposition | 13.61 |

| Article 10: Review clause | 13.62 |

| Article 11: Entry into force |
| Article 12: Addressees |

### 14. COLLECTIVE RIGHTS MANAGEMENT DIRECTIVE

#### Introduction | 14.01 |

**Title I: General provisions**

| Article 1: Subject matter | 14.09 |
| Article 2: Scope | 14.13 |
| Article 3: Definitions | 14.15 |

**Title II: Collective management organisations**

| Chapter 1: Representation of rightholders and membership and organisation of collective management organisations | 14.23 |
| Article 4: General principles | 14.24 |
| Article 5: Rights of rightholders | 14.28 |
| Article 6: Membership rules of collective management organisations | 14.32 |
| Article 7: Rights of rightholders who are not members of the collective management organisation | 14.38 |
| Article 8: General assembly of members of the collective management organisation | 14.41 |
| Article 9: Supervisory function | 14.42 |
| Article 10: Obligations of the persons who effectively manage the business of the collective management organisation | 14.44 |

| Chapter 2: Management of rights revenue | 14.46 |
| Article 11: Collection and use of rights revenue |
| Article 12: Deductions |
| Article 13: Distribution of the amounts due to rightholders |
Extended Table of Contents

Chapter 3: Management of rights on behalf of other collective management organisations
   Article 14: Rights managed under representation agreements
   Article 15: Deductions and payments in representation agreements

Chapter 4: Relations with users
   Article 16: Licensing
   Article 17: Users’ obligations

Chapter 5: Transparency and reporting
   Article 18: Information provided to rightholders on the management of their rights
   Article 19: Information provided to other collective management organisations on the management of rights under representation agreements
   Article 20: Information provided to rightholders, other collective management organisations and users on request
   Article 21: Disclosure of information to the public
   Article 22: Annual transparency report

Title III: Multi-territorial licensing of on-line rights in musical works by collective management organisations
   Article 23: Multi-territorial licensing in the internal market
   Article 24: Capacity to process multi-territorial licences
   Article 25: Transparency of multi-territorial repertoire information
   Article 26: Accuracy of multi-territorial repertoire information
   Article 27: Accurate and timely reporting and invoicing
   Article 28: Accurate and timely payment to rightholders
   Article 29: Agreements between collective management organisations for multi-territorial licensing
   Article 30: Obligation to represent another collective management organisation for multi-territorial licensing
   Article 31: Access to multi-territorial licensing
   Article 32: Derogation for online music rights required for radio and television programmes

Title IV: Enforcement measures
   Article 33: Complaints procedure
   Article 34: Alternative dispute resolution procedures
   Article 35: Dispute resolution
   Article 36: Compliance
   Article 37: Exchange of information between competent authorities
   Article 38: Cooperation for the development of multi-territorial licensing

Title V: Reporting and final provisions
   Article 39: Notification of collective management organisations
   Article 40: Report
   Article 41: Expert group
   Article 42: Protection of personal data
   Article 43: Transposition
   Article 44: Entry into force
   Article 45: Addressees

PART III EU POLICIES AND ACTIONS

15. THE EU POLICIES AND ACTIONS IN THE FIGHT AGAINST PIRACY
   I. Introduction
   II. From the Berne Convention to the WIPO Internet Treaties
   III. The awakening of the European Union to the problem of piracy
      1. Genesis and development of the EU policies and actions in the fight against piracy
      2. The EU approach to the fight against piracy in a nutshell
Extended Table of Contents

3. ‘It’s the economy (redux)’: why copyright reform alone may not lead to growth and prosperity 17.28
V. Concluding remarks 17.32

18. INTELLECTUAL PROPERTY AND THE EU RULES ON PRIVATE INTERNATIONAL LAW: MATCH OR MISMATCH?
I. Introduction 18.01
II. Jurisdiction 18.02
1. The starting point 18.02
2. Article 8.1 Brussels I (recast) 18.03
3. Article 24(4) 18.08
III. Choice of law 18.30
1. The Rome I Regulation 18.31
2. The Rome II Regulation 18.64
IV. Conclusion 18.93

PART IV PRESENT AND FUTURE OF COPYRIGHT IN THE EUROPEAN UNION

19. THE EU STANCE IN INTERNATIONAL MATTERS
I. Introduction 19.01
1. The EU’s mandate in international matters 19.01
2. The role of the European Commission 19.04
3. A new EU player on the IP scene – The European External Action Service (EEAS) 19.05
II. The Beijing Treaty on audiovisual performances 19.06
1. The follow-up to the WPPT 19.06
2. Proposal for a Protocol concerning audiovisual performances 19.09
3. The establishment of the SCCR in 1998 19.12
4. Position of the EU on the draft Protocol 19.13
5. Transfer of rights 19.14
6. The Diplomatic Conference of 2000 and its aftermath 19.16
7. The breaking of the deadlock 19.17
III. The draft treaty on the protection of broadcasting organisations 19.20
1. The existing international framework for the protection of broadcasting organisations 19.20
2. WIPO programme on the protection of broadcasting organisations 19.22
3. The position of the EU 19.24
4. The emergence of a draft treaty 19.27
IV. Proposals concerning exceptions and limitations to copyright 19.32
1. The initial proposal from Chile 19.32
2. The position of the EU 19.35
3. EU proposal for a recommendation on access to works by persons with print disabilities 19.36
4. Other proposals 19.37
5. The EU response 19.38
6. Emergence of draft texts on limitations and exceptions 19.40
V. Proposals for the protection of folklore (traditional cultural expressions) 19.47
1. Background 19.47
2. EU stance on folklore 19.49
3. Ongoing work in the IGC on folklore 19.51
4. Issues still to be resolved 19.53
5. Future work 19.55
VI. Conclusions 19.56

20. THE ROLE OF THE COURT OF JUSTICE IN THE DEVELOPMENT OF EUROPEAN UNION COPYRIGHT LAW
I. Introduction 20.01
II. Originality/creativity 20.08
III. The ‘Work’ 20.13
IV. Exclusive rights 20.14
  1. Reproduction / adaptation 20.15
  2. Distribution 20.17
  3. Public lending 20.22
  4. Communication to the public 20.23
V. Ownership of rights 20.27
VI. Term of protection 20.29
VII. Exceptions and limitations 20.31
  1. Principles of interpretation 20.32
  2. Article 5(1) 20.34
  3. Optional exceptions and limitations under the Information Society Directive 20.40
  4. Exceptions and limitations under the Rental Right Directive 20.44
  5. ‘Fair compensation’ 20.45
  6. Exceptions and limitations under the Software Directive 20.49
VIII. Conclusion 20.52

21. TOWARDS A EUROPEAN COPYRIGHT LAW: FOUR ISSUES TO CONSIDER
I. Introduction 21.01
II. The territoriality issues: what can be done? What are the problems? 21.09
III. The argument for a EU-wide copyright title and a regulation 21.22
IV. The need for EU rules on copyright contracts 21.30
  1. Overview of the rules on copyright contracts in the EU 21.34
  2. Example of protective rules in continental Europe 21.35
  3. Extended collective licensing in the Scandinavian countries 21.40
  4. The need for new rules with regard to the new online business models 21.45
  5. The facilitation of pan-European licensing in certain sectors 21.46
V. The flexibility needed for copyright exceptions and the need for harmonising private copying levies 21.49
  1. The need to take technology-enabled uses into account 21.50
  2. The need to revisit the exceptions applicable in the field of non-commercial education 21.59
  3. Alignment of the private copying exception with the reasonable expectations of users and harmonisation of copyright levies 21.61

22. CONCLUSION 1155

Index 1159