Contents

Foreword xii
Acknowledgements xiii
List of abbreviations xvi
Table of cases (in chronological order) xviii
Table of EU/EC/EEC legislation (in chronological order) xxiv
Table of EU/EC policy documents (in chronological order) xxvi

Introduction 1
  1. Copyright harmonization: The age of innocence? 1
  2. The topicality of originality to EU copyright discourse 3
  3. Scope and aim of this contribution 7
  4. Methodology 8

1. The challenges of EU copyright: ‘United in Diversity’ – Does it work? 10
Section I
  1. The early days of European integration: IP rights and the internal market 10
  2. The emergence of copyright as a European issue 14
    2.1 The 1988 Green Paper 15
  3. Harmonization through the 1990s 16
  4. Harmonization through the 2000s 20
  5. Towards full copyright harmonization? 26
    5.1 The legacy of the 2000s 27
  6. The debate in 2010–2013: The internal market, the role of academia and EU legislation 28
    6.1 The Monti Report 28
    6.2 The Single Market Act 30
    6.3 The 2011 Commission’s blueprint 32
    6.4 Full harmonization is on its way (via licensing?) 35
  7. Why the EU copyright is not just about copyright 39
Section II
  1. The structural character of copyright harmonization 44
2. The ambitiousness of the Commission’s copyright agenda 46
3. The achievements and merits of harmonization 49

2. Originality as a policy tool: Shaping the breadth of protection 54
Section I 54
1. On creativity, authorship and originality 54
2. Difficulties in defining originality 59
3. Originality in EU reform policy: The invisible man 61
4. The ‘author’s own intellectual creation’ standard in the Software, Database and Term Directives 64
5. Understanding originality: The continental approach 69
6. Understanding originality: The UK approach 75

Section II 80
1. Following the originality brick road in the US 80
   1.1 The ‘originality’ of Feist 80
   1.2 Did Feist raise the bar of protection? 82
   1.3 The unveiled story of originality 84
   1.4 Originality as creativity 85
   1.5 Originality as the market value of a work 85
2. Originality in UK copyright: a tale of two cities 88
   2.1 Originality over time: Hard times 90
   2.2 UK and EU originality: Great expectations? 93
   2.3 Traditionally intended originality: The old curiosity shop 95

Conclusion 96

3. Originality in a work, or a work of originality: The effects of the Infopaq decision 97
1. Recalling the debate on copyright in 2010 97
2. A different approach 97
3. Precedent in the CJEU 100
4. The Infopaq decision: a coup de main? 102
   4.1 Facts and questions referred to the CJEU 102
   4.2 The InfoSoc Directive and a harmonized concept of originality 104
   4.3 Substantial implications of the Infopaq decision 108
5. Applying Infopaq: the originality requirement gets a new shape in UK courts 111
   5.1 From a quantitative to a qualitative test 112
   5.2 Proudman J’s views in Meltwater do not melt away before the Court of Appeal 114
   5.3 The importance of Meltwater 115
6. The CJEU goes on: The Bezpečnostní softwarová asociace decision
6.1 Facts and questions referred to the CJEU
6.2 Originality under the InfoSoc Directive
6.3 A one-size-fits-all rule for originality and copyright assessment
7. The Football Dataco reference
Conclusion

4. The CJEU goes ahead: The decisions in Murphy, Painer, Football Dataco and SAS
1. Murphy: On TV decoders, football matches and the internal market
   1.1 Background to the cases: The exclusive licence system
   1.2 Background to the cases: The breach to market segmentation of licences
   1.3 IP at the crossroads with treaty freedoms
   1.4 Restrictions imposed by IPRs: Precondition is that the work is protectable
   1.5 Is Murphy’s originality at odds with Berne?
   1.6 What protection for sporting events then?
   1.7 Is unfair competition the path to follow?
   1.8 The responses of the High Court and Court of Appeal
2. Painer: No photos deserve more protection than others
   2.1 Facts and questions referred to the CJEU
   2.2 The CJEU follows Infopaq and goes even further …
   2.3 … Clarifying the meaning of originality …
   2.4 … Playing a requiem for subject-matter categorization, and …
   2.5 Making it clear that copyright is not a story of the prince and the pauper
3. Football Dataco: Farewell to the arms (of UK copyright)?
   3.1 Background to the case
   3.2 Copyright in databases: What type of originality?
      AG Mengozzi explains
   3.3 An intellectual creation in not just labour and skill
   3.4 There is little to do if copyright cannot do
   3.5 The decision of the CJEU
      3.5.1 The requirements for copyright protection under the Database Directive
Originality in EU copyright

3.5.2 Might there be other rights in databases? 167

3.6 The implications of the Football Dataco decision 168

3.7 Pre-emption and EU copyright: Is there any marge de manoeuvre left for Member States? 172

4. SAS: Shake-and-Strain the scope of copyright protection 174
   4.1 Background to the case 175
   4.2 The findings of the High Court and the reference to the CJEU 176
   4.3 The Opinion of Advocate General Bot 179
   4.4 The decision of the CJEU 182
   4.5 Problems with the interpretation of Advocate General Bot, as confirmed by the CJEU 184
   4.6 The response of the High Court 186

Conclusion 187

5. Challenging the UK understanding of copyright: Originality and subject-matter categorization at the forefront of the debate 189
   1. The ‘Red Bus’ decision 189
      1.1 Background to the case 189
      1.2 Originality in photographs 190
      1.3 Reading too much into Infopaq and Painer: Aesthetic merit and visual significance as originality? 193
      1.4 Is a cropped portrait version equally infringing? 195
      1.5 The implications of the decision 196
   2. The Lucasfilm decision: a different outcome if decided today? 200
      2.1 Background to the case 200
      2.2 Whether the Stormtrooper helmet is a sculpture 202
      2.3 Would an originality-based approach have led to a different solution? 204

Conclusion 206

6. The future of copyright at the EU level: The shape of harmonization 208
   Section I 208
      1. The US debate on the future of copyright 208
         1.1 The 2010 CPP 210
         1.2 Originality and fixation as pre-requisites to protection. Reinvigorating the role of formalities 211
         1.3 Difficulties in assessing infringement cases: The idea/expression dichotomy, exceptions and limitation, safe harbour reform 213
## Contents

1. CPP’s proposals. Reforming Section 102(b) of the Copyright Act but neglecting originality 216
2. The next great copyright act 217

2. How to reform copyright: a view from the EU 218
2.1 The Wittem Group and the project of a European copyright code 219
2.2 The objectives of the Project 220
2.3 Congenital weaknesses … 220
2.4 … But a Sensible Approach 225
2.5 Integrating copyright and droit d’auteur traditions 226
2.6 Copyright limitations: An inspiration for reform 228

## Section II

1. EU copyright harmonization: How? 231
2. EU copyright harmonization: When if ever? 236

## Bibliography

241

## Index

259