

Introduction

1. COPYRIGHT HARMONIZATION: THE AGE OF INNOCENCE?

We are on the cusp of the convergence of two great trends: the pervading influence of the digital environment and the progression of European integration.

The process of European Union (EU) harmonization in the field of copyright has brought about several changes in the domestic legal systems of the Member States. The impetus behind EU legislative initiatives in this area has been the awareness that differences between the copyright laws of Member States had the potential to impede the full realization of the internal market objective. In the early days of European integration, intervention in the intellectual property (IP) laws of the Member States was infrequent and – when it happened – was justified in light of eliminating obstacles to free movement or competition. At the end of the 1980s, IP – and so copyright – became part of a broader strategy, aimed at favouring growth and competitiveness throughout Europe. During the 1990s, it became clear that copyright was to play a pivotal role in this respect. As such, the then European Community (EC) copyright agenda became gradually more ambitious. However, from the end of the century and throughout the 2000s, legislative interventions in the field of copyright have been piecemeal and more sporadic than they were previously. It was only at the end of the 2000s that the Commission's copyright agenda regained momentum. It is submitted that this was no accident as, in parallel, the Court of Justice of the European Union (CJEU, formerly the European Court of Justice, ECJ) gave a decisive boost to the area of copyright harmonization by touching upon a basic copyright principle: the originality requirement.

So far, legislative discourse on copyright at the EU level has mostly focused on the harmonization of the scope of exclusive rights, the delineation of protected subject-matter and the duration of protection. Although European harmonization has moved forward by strengthening the protection afforded to copyright owners, EU directives have allowed Member States to maintain what are differing regimes, at least in certain

respects. The result has been that many major fields have been left untouched or quasi-harmonized. In the words of Advocate General Jääskinen: ‘Copyright in the EU, as is the case elsewhere, remains largely a creature of national law ... Harmonisation of copyright law in the EU has been a mixed process of partial and full harmonisation.’¹

Moreover, the harmonization process has been deemed to be ‘blind to the structural impediment that territoriality presents to the free movement of goods and services, given that the copyrights and related rights that underlie these disparities are drawn along national borders’.² The inherent territoriality of current EU copyright is indeed likely to impede the operation of an internal market free from barriers to trade. In light of the development of the digital environment and the challenges it has brought with it, the establishment of a strong internal market for copyright-related goods and services calls for a definitive confrontation of the issue of territoriality. Although territoriality is a practical feature of the current copyright landscape, it is important to note that this term does not appear in any of the international IP treaties.³

It is submitted that a narrow and sporadic approach to EU copyright is no longer adequate. Further (more precisely: full) harmonization of copyright is currently at the centre of heated debates as to its desirability and feasibility. In the course of 2010, the Wittem Group published its European Copyright Code⁴ and the Monti Report tackled the role of copyright in light of proposing a new strategy for the internal market.⁵ In 2011, the Commission published its blueprint for intellectual property

¹ Opinion of Advocate General Niilo Jääskinen, Case C-5/11 *Criminal proceedings against Titus Donner*, 29 March 2012, [24]–[25].

² Mireille van Eechoud, P Bernt Hugenholtz, Stef van Gompel, Lucie Guibault and Natali Helberger, *Harmonizing European copyright law. The challenges of better law making* (Kluwer Law International 2009) 308.

³ Paul Torremans, ‘Copyright territoriality in a borderless online environment’, in Johan Axhamn (ed), *Copyright in a borderless online environment* (Kluwer Law International 2012) 23, 25–6, highlights how the deepest cause of territorial approach to copyright lies on national treatment rules. For a discussion on territoriality in EU copyright law, see Philippe Jougoux, ‘The plurality of legal systems in copyright law: an obstacle to European Codification?’, in Tatiana-Eleni Synodinou (ed), *Codification of European copyright law* (Kluwer Law International 2012) 55, 61–3.

⁴ Wittem Group, European Copyright Code, 26 April 2010, available at copyrightcode.eu.

⁵ Mario Monti, *A new strategy for the single market at the service of Europe’s Economy and Society. Report to the President of the European Commission José Manuel Barroso*, 9 May 2010.

rights to boost creativity and innovation,⁶ and its follow-up to the Monti Report: the Single Market Act.⁷

An EU copyright, if construed as taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules. Therefore, the idea of an EU-wide copyright law, which might be established by means of an EU regulation or through a codification of the relevant *acquis communautaire*, has been receiving increasing attention in both political and academic circles. The benefits of having a strong harmonization law would be seen through the enhancement of legal security and transparency, as well as reduction in transaction costs.

2. THE TOPICALITY OF ORIGINALITY TO EU COPYRIGHT DISCOURSE

Traditionally, the originality requirement has been used in a different way between continental Member States and the UK. While the latter has adopted it as a loose notion referring to sufficient skill, labour and effort, continental European copyright laws have embraced stricter meanings of originality.

It is argued that originality, being at the basis of copyright protection, plays a fundamental policy role and, therefore, cannot be left outside the harmonization discourse. This contribution will attempt to show the policy implications which come about from the adoption of one understanding of originality over another. By referring to paradigmatic experiences in the US and the UK, this work will try to offer an insight into the way the legal understanding of this concept has changed over time. Further, above all, it will look at how originality has been shaped and re-shaped to achieve precise policy objectives.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe*, Brussels, 24 May 2011, COM (2011) 287 final.

⁷ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act – Twelve levers to boost growth and strengthen confidence – ‘Working together to create new growth’*, Brussels, 13 April 2011, COM (2011) 206 final.

While the process of EU harmonization in the field of copyright has brought about several changes to the domestic legal systems of the Member States, originality has been harmonized to a very limited extent. Where this has happened (in relation to computer programs, databases and photographs), originality has been interpreted as ‘the author’s own intellectual creation’. This meaning of the originality requirement is akin to the standard adopted in continental Member States.

While the EU legislature has not deemed it necessary to adopt a harmonized understanding of originality for subject-matter other than computer programs, databases and photographs, the CJEU has acted in a proactive way towards the actual harmonization of copyright, by adopting an EU-wide notion of originality. The 2009 decision in *Infopaq International A/S v Danske Dagblades Forening* (*‘Infopaq’*),⁸ as followed in 2010 in *Bepečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* (*‘Bepečnostní softwarová asociace’*),⁹ provided for the harmonization of the originality requirement. In these cases, the continental understanding of ‘the author’s own intellectual creation’ was adopted as the standard for originality in EU copyright, for subject-matter other than computer programs, databases and photographs.

Later decisions have further clarified and developed the EU concept of originality. These are: *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen and Karen Murphy v Media Protection Services Ltd* (*‘Murphy’*);¹⁰ *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG 8* (*‘Painer’*);¹¹ *Football Dataco Ltd and Others v Yahoo! UK Ltd and*

⁸ Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] I-06569.

⁹ Case C-393/09 *Bepečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] I-13971.

¹⁰ Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton, Derek Owen and Karen Murphy v Media Protection Services Ltd*.

¹¹ Case C-145/10 *Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, SPIEGEL-Verlag Rudolf AUGSTEIN GmbH & Co KG and Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG*.

Others ('Football Dataco');¹² and *SAS Institute Inc v World Programming Ltd* ('SAS').¹³

The phrase the 'author's own intellectual creation' is to be found in the Software,¹⁴ Database¹⁵ and Term Directives.¹⁶ As noted above, it was adopted as the standard for originality in *Infopaq*, and is to be understood as involving 'creative freedom' (*Murphy*), a 'personal touch' (*Painer*) and 'free and creative choices' (*Football Dataco*). To put it otherwise, originality is not simply a matter of sense, but also of sensibility. This is probably because, as was noted by Jean-Sylvestre Bergé back in 1996,

Cette définition de l'œuvre protégée semble intégrer les deux éléments de la conception médiane de l'originalité-individualité: une création intellectuelle et une création personnelle.¹⁷

The aforementioned judgments have also raised doubts as to whether a system of exhaustive subject-matter categorization (as it is under UK law, pursuant to what has been incisively called a 'pigeon-hole approach'¹⁸) is still in line with EU law. Following *Murphy*, *Painer* and *SAS*, the level of scrutiny in the EU for determining whether a work may qualify for copyright protection seems to require solely that the work is original, not that it also falls within a specific copyright-protected subject-matter. This may be somewhat at odds with the Berne Convention for the Protection of Literary and Artistic Works (Paris Act of 24 July 1971), as amended on 28 September 1979, which, although providing for a non-exhaustive

¹² Case C-604/10 *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others*.

¹³ Case C-406/10 *SAS Institute Inc v World Programming Ltd*.

¹⁴ 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) [2009] OJ L 111, 16–22.

¹⁵ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases [1996] OJ L 77, 20–28.

¹⁶ Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (Codified version) [2006] OJ L 372, 12–18.

¹⁷ Jean-Sylvestre Bergé, *La protection internationale et communautaire du droit d'auteur. Essai d'une analyse conflictuelle* (L.G.D.J. 1996), 141 (footnotes omitted) ('This definition of a protected work seems to combine the two elements of the intermediate notion of originality as individuality: an intellectual creation and a personal creation').

¹⁸ Jeremy Phillips and Alison Firth, *Introduction to intellectual property law* (4th edn, Butterworths 2001), 138.

list of copyright-protected works, seems to imply that any assessment of the actual originality of a work is only to be made once it has been determined that it is a production in the literary, scientific or artistic domain.

Finally, as was made clear in *Football Dataco*, not only has the CJEU harmonized the originality requirement and, with it, the standard for protection under EU copyright but – possibly in compliance with a strict application of the doctrine of pre-emption – also ruled out any possible alternative (quasi-copyright) protection for subject-matter such as databases. This may give rise to problematic gaps in a country – the primary example being the UK – which lacks a law of unfair competition and has traditionally relied on copyright and its low originality threshold (as well as passing off, although in a more limited way) to protect works.¹⁹ In a continental Member State, these same works would probably not have qualified for such protection, due to their limited (even below the minimal) degree of originality. However, it is worth recalling that the doctrine of ‘small change’, which is to be found in some continental Member States’ copyright laws, is actually intended to relax the originality threshold.

The impact of these judgments on UK copyright law is indeed likely to be relevant, as was (partially) made clear by the ruling of the High Court of England and Wales in *The Newspaper Licensing Agency Ltd and Others v Meltwater Holding BV and Others*,²⁰ as recently upheld by the Court of Appeal of England and Wales,²¹ and also in the decision of Judge Birss QC (as he then was) in *Temple Island Collections Ltd v New English Teas Ltd and Nicholas John Houghton*.²² In addition, as previously mentioned, the rulings in *Bezpečnostní softwarová asociace, Murphy, Painer, Football Dataco*, and *SAS* seem to imply that for copyright the subject-matter categorization is merely exemplificative as far as the EU legal architecture is concerned. As will be explained in relation to the recent decision of the UK Supreme Court in *Lucasfilm Ltd and Others v Ainsworth and Another*,²³ this may lead UK courts to adopt different perspectives in the future and, as a consequence, achieve different outcomes.

¹⁹ Daniel J Gervais, ‘The compatibility of the skill and labour standard with the Berne Convention and the TRIPs Agreement’ (2004) 26 EIPR 75, 78.

²⁰ [2010] EWHC 3099 (Ch).

²¹ [2011] EWCA Civ 890.

²² [2012] EWPC 1.

²³ [2011] UKSC 39.

3. SCOPE AND AIM OF THIS CONTRIBUTION

Overall, the present work wishes to analyze and understand the reasoning underlying the aforementioned CJEU decisions, as well as their implications as far as UK copyright is concerned.

Particular attention to UK copyright experience is justified in light of the fact that the harmonization provided by CJEU jurisprudence now definitely means that EU copyright is in line with continental traditions. Hence, the UK is the Member State in which the effects of the *Infopaq* string of case law has the potential to be most relevant.

Although analysis of the actual legitimacy of CJEU harmonizing jurisprudence, as well as its merits, is of fundamental importance to EU political and legal discourse, this will not be part of the present work. Attention will be devoted mainly to the analysis of judicial decisions which have touched upon originality, so as to assess the current challenges facing EU copyright harmonization. The case of originality, which will be analyzed from a legal standpoint, serves the objective of showing that full harmonization is already in place at the EU level, outwith legislative and political initiatives. It is submitted that if EU legislative initiatives should in future decide to harmonize copyright fully, this process would result in CJEU case law being codified.

The structure of this work reflects the research themes it is meant to explore. These can be summarized as follows:

- (1) EU copyright harmonization
 - What have been the objectives and achievements of EU copyright harmonization so far?
 - Have the scope and objectives of the harmonization process changed over time?
 - How can harmonization be seen in light of its structural character, overall ambition and merits?
- (2) Meaning and functions of the originality requirement
 - What is originality and how is this to be seen in light of other basic concepts such as authorship and creativity, and in the context of copyright legal understanding?
 - How has originality been understood in EU copyright reforms?
 - Is the meaning of originality different in the EU Member States?
 - Does originality play a policy role?
- (3) EU policy on originality
 - Why has originality been harmonized only to a limited extent?

- (4) CJEU case law on originality
 What is the relevant CJEU case law in this respect and what are its implications, also in relation to internationally binding legal instruments?
 What does a harmonized concept of originality imply?
 What is the EU understanding of subject-matter categorization?
- (5) UK copyright and the EU
 To what extent has the new EU originality standard affected the traditional UK understanding of originality?
 Is the bar to copyright protection higher after *Infopaq* and subsequent case law than previously?
 How is the bar to a finding of copyright infringement affected?
 Is the UK exhaustive subject-matter categorization at odds with EU law?
 Might having an open subject-matter categorization have led to different outcomes in cases such as *Lucasfilm*?
- (6) The future of copyright at the EU level
 Is it possible to improve current copyright regimes?
 What are the terms of the debate in the US and Europe?
 Can the proposals of the Wittem Group and their Copyright Code be used to harmonize copyright further at the EU level?
 What are the legal tools that can be used to harmonize copyright further at the EU level?
 Is full harmonization a desirable objective?

4. METHODOLOGY

The approach this contribution adopts is mainly inductive. Significant attention will be devoted to the study and analysis of recent decisions of the CJEU, which shall be assessed in light of relevant EU policy documents and discussions as to the future of EU copyright that are ongoing at the Commission level and in leading academic circles. By adopting a methodology which takes into account multiple legal and judicial sources, as well as doctrinal approaches, this work wishes to assess the impact that relevant CJEU judgments have had on Member States' copyright laws, notably the UK, as well as drawing their implications for the future of copyright at the EU level.

Within this framework, attention will be paid firstly to relevant legislative sources and policy documents, especially at the EU level. This is necessary to outline the EU understanding and evolution of copyright

policy, along with the main objectives underlying EU intervention in this area of the law.

Secondly, in relation to the analysis of the originality requirement, relevant literature, mainly from EU and UK scholarships, will be reviewed. This is required to define the legal foundations of the concept of originality, as well as its understanding in the broader context of EU and UK copyright regimes.

Finally, the most relevant part of this work will be devoted to the reading and analysis of relevant judicial decisions, both at the level of the CJEU and of national (in particular, UK) courts.

This work shall attempt to combine the various rationales extracted from the sources mentioned above, in order to address the research themes it is meant to explore. As EU copyright harmonization is a work in progress, at the time of writing this contribution literature specifically tackling this issue was not particularly rich and, as far as the Author of this work was aware, no major contributions dedicated to the analysis of EU copyright harmonization in light of CJEU case law on originality had emerged yet.