1. The challenges of EU copyright: 'United in Diversity'[1] – Does it work?

SECTION I

1. THE EARLY DAYS OF EUROPEAN INTEGRATION: IP RIGHTS AND THE INTERNAL MARKET

In general, it can be said that European concerns with copyright and intellectual property grew steadily as information became more significant as an economic commodity.[2] So far, fourteen directives have been issued, directly or indirectly dealing with various aspects of copyright and related rights.[3] Accordingly, harmonization has resulted in a rich

[1] 'United in Diversity' is the motto of the European Union.

[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), 1.

[3] These relate to protection of computer programs (Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122, 42–46; 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); enforcement (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195, 16–25); resale rights (Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272, 32–36); copyright in the information society (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 [2001] OJ L 167, 10–19); protection of databases (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); term of protection (Council Directive 93/98/EEC of 29 October 1993 harmonizing the

body of case law, which has tackled copyright from several different perspectives.

Prior to the commencement of the harmonization process (the debate surrounding which flourished at the institutional and political level only at the end of the 1980s, although there had been earlier studies which tackled harmonization issues[4]), the intellectual property laws of the Member States had been affected by EC law to a limited extent. This was mainly through the treaty provisions on competition[5] and free movement of goods.[6] It is therefore apparent that, from its very onset, copyright harmonization at the EU level was viewed as functional to the broader internal market objective. The latter denotes an area without internal frontiers, in which the free movement of goods, persons, services and capital[7] is ensured in accordance with the provisions in the treaties.[8] Therefore, competence of the EU as regards the harmonization of the intellectual property laws of the Member States has been consistently

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term of protection of copyright and certain related rights [1993] OJ L 290, 9–13; 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; Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116 on the term of protection of copyright and certain related rights [2011] OJ L 265, 1–5); satellite and cable (Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] OJ L 248, 15–21*)*; rental rights (Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L 346, 61–66; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Codified version) [2006] OJ L 376, 28–35); semiconductors (Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products [1987] OJ L 24, 36–40); and certain permitted uses of orphan works (Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, [2012] OJ L 2995, 5–12).

[4] A notable example is Adolf Dietz, *Copyright law in the European Community* (Sijthoff & Noordhoff 1978), which was prepared at the request of the then Commission of the European Communities.

[5] Currently Title VII, Chapter I, of the consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2010] OJ C 83, 47–199.

[6] Currently Title II TFEU.

[7] Title IV TFEU.

[8] Article 26(2) TFEU.

justified in light of current Articles 26 and 114 TFEU. Article 26(1) TFEU sets out the EU competence to adopt measures aimed at establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the treaties. Article 114(1) TFEU states that the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market. As has been noted, rooting EU competence in the area of copyright within objectives pertaining to the realization of the internal market has resulted in EU lawmaking competence being perceived as practically limitless.[9]

As is made clear by Article 36 TFEU, provisions relating to the free movement of goods shall not preclude prohibitions or restrictions on imports, exports or goods in transit that are justified to protect industrial property. This is because the treaties shall in no way prejudice the rules in Member States governing the system of property ownership.[10] However, in no case may such prohibitions or restrictions constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[11]

This said, what exactly is meant by 'property' within the treaty system is far from clear. This can be explained because,

> In contrast, with the objective of establishing a common market, the rules aiming to guarantee competition and free movement of goods were listed amongst the fundamental principles of the European legal order. It is well known that the subsequent reconciliation of intellectual-property rights with the Treaty provisions on competition and free movement of goods did not proceed without conflicts and was only achieved by virtue of the judicial practice established by the Court of Justice … concerning the 'specific subject matter' and the 'essential function' of intellectual-property law.[12]

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[9] Theodore Georgopoulos, 'The legal foundations of European copyright law', in Tatiana-Eleni Synodinou (ed), *Codification of European copyright law. Challenges and perspectives* (Kluwer Law International 2012) 31, 34.

[10] Article 345 TFEU.

[11] Article 36 TFEU.

[12] Christophe Geiger, 'Intellectual "property" after the Treaty of Lisbon: towards a different approach in the new European legal order?' (2010) 32 EIPR 255, 255–6, referring to Guy Tritton (ed), *Intellectual property in Europe* (3rd edn, Sweet & Maxwell 2008), 36 ff.

Indeed, the relationship between intellectual property and free movement provisions has been difficult to define,[13] not helped by the fact that the latter are concerned with state measures, rather than actions of private individuals. Therefore, it seems difficult to see how reliance on a patent, trademark, copyright or design right by an individual rightsholder who seeks to prevent the importation and sale of infringing goods can be tantamount to a measure within the scope of free movement provisions.[14]

In a series of cases[15] the CJEU attempted to clarify under what conditions and to what extent the rules on competition and free movement may interfere with Member States' IP laws. According to the Court, this happens when national legislation empowers IP rightsholders to exercise their rights in a manner that adversely affects the functioning of the internal market, thus resulting in an arbitrary discrimination or disguised restriction on trade between Member States. As was made clear by the CJEU in its seminal decision in *Metro*:[16]

> Among the prohibitions or restrictions on the free movement of goods which it concedes Article 36 [EEC Treaty, now Article 42 TFEU] refers to industrial and commercial property … [I]t is … clear from that article that, although the

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[13] Guy Tritton, 'Articles 30 and 36 and intellectual property: is the jurisprudence of the ECJ of an ideal standard?' (1994) 16 EIPR 422, commenting on the then European Court of Justice's decision in Case C-9/93 *IHT Internationale Heitechnik GmbH and Uwe Danziger v Ideal Standard GmbH and Wabco Standard GmbH* [1994] I-2789. This was a reference for a preliminary ruling from the Oberlandesgericht (Higher Regional Court) Düsseldorf, seeking clarification as to the interpretation of Articles 30 and 36 EEC Treaty (now respectively, Articles 36 and 42 TFEU) in order to assess the compatibility with Community law of restrictions on the use of a name where a group of companies held, through subsidiaries, a trademark consisting of that name in several Member States but where it had been assigned to an undertaking outside the group, in one Member State only and covering only some of the products for which it had been registered.

[14] David T Keeling, *Intellectual property rights in EU law* (OUP 2003) Vol I, 23 ff.

[15] *See* Eechoud, Hugenholtz, Gompel, Guibault and Helberger, *Harmonizing*, *cit*, 3–4, and the case law cited therein.

[16] Case C-78/70 *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] 00487. This was a reference for a preliminary ruling from the Oberlandesgericht (Higher Regional Court) Hamburg, seeking clarification as to the interpretation of Articles 5, 85(1) and 86 EEC Treaty (now, respectively, Articles 5 of consolidated version of the Treaty on European Union (TEU) [2010] OJ C 83, 13–45, and Article 101(1) and 102 TFEU) concerning the distribution of sound recordings in various Member States.

> Treaty does not affect the existence of rights recognized by the legislation of a Member State with regard to industrial and commercial property, the exercise of such rights may nevertheless fall within the prohibitions laid down by the Treaty. Although it permits prohibitions or restrictions on the free movement of products, which are justified for the purpose of protecting industrial and commercial property, Article 36 only admits derogations from that freedom to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.[17]

2. THE EMERGENCE OF COPYRIGHT AS A EUROPEAN ISSUE

Following this first phase during which attention focused on the relationship between Member States' intellectual property laws and the internal market objective, European policy- and law-makers adopted the view that Member States' intellectual property laws, if harmonized, would also have contributed to the realization of the internal market.

1988 was the year when the first seeds of IP harmonization were sown. Council Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks was published on 21 December 1988.[18] This placed the legal foundations for the creation of an EC trademark system, and was shortly followed by the beginning of the copyright harmonization process. In June that year the Commission had already

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[17] *Ibid*, 11.

[18] [1989] OJ L 40, 1–7 (now replaced by Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (Codified version) [2008] OJ L 299, 25–33). The importance of harmonizing the Member States' trademark laws in view of establishing and ensuring the proper functioning of the internal market is highlighted at Recital 1 of the Directive. However, when Directive 89/104 was adopted, there was still the belief that the creation of an EC trademark system was not necessary: 'it does not appear to be necessary at present to undertake full-scale approximation of the trade mark laws of the Member States and it will be sufficient if approximation is limited to those national provisions of law which most directly affect the functioning of the internal market' (Recital 3). A Council Regulation appeared four years later (Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1994] OJ L 11, 1–36). This has now been replaced by Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark (Codified version) [2009] OJ L 78, 1–42.

issued its Green Paper on Copyright and the Challenge of Technology (hereinafter, also the GPCCT).[19]

2.1 The 1988 Green Paper

As is made clear at §1.3. of the GPCCT, the concerns of the then European Economic Community (EEC) in the field of copyright were strong enough to call for EC legislative intervention in this field. The issues which called for consideration were four-fold.

Firstly, the proper functioning of the internal market was to be ensured. To this end, creators and providers of copyright goods and services should have been able to treat the Community as a single internal market. This required the elimination of obstacles and legal differences that substantially impaired the functioning of the market by obstructing or distorting cross-frontier trade in such goods and services, as well as distorting competition.

Secondly, intervention was deemed necessary in order to improve the overall competitiveness of Europe in relation to its trading partners, particularly in areas of potential growth, such as media and information.

Thirdly, intellectual property resulting from creative efforts and substantial investments within the Community should not be misappropriated by third parties outside the territorial frontiers of the Community.

Finally, the Commission acknowledged that, in developing Community measures on copyright, due regard must be paid not only to the interests of the rightsholders but also to those of third parties and the public at large.

The GPCCT also anticipated some of the problems facing the digital revolution which had to get underway shortly:

> New dissemination and reproduction techniques have developed with an ever-increasing speed and have added, at a corresponding rate of speed, to the complexity of this relationship. These new technologies have entailed the *de facto* abolition of national frontiers and increasingly made the territorial application of national copyright law obsolete, while, at the same time, permitting for better and for worse in every country ever more rapid, easy, cheap and high-fidelity reproduction. This has at one and the same time been a cause of satisfaction and concern.[20]

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[19] Communication from the Commission of the European Communities, *Green Paper on copyright and the challenge of technology – copyright issues requiring immediate action*, Brussels, 7 June 1988, COM (88) 172 final.

[20] *Ibid*, para 1.4.1.

However, the GPCCT failed to acknowledge that differences in the laws of Member States had the potential to raise barriers to the functioning of the internal market. Instead, it noted that:

> Many issues of copyright law, do not need to be subject of action at Community level. Since all Member States adhere to the Berne Convention for the Protection of Literary and Artistic Works and to the Universal Copyright Convention, a certain fundamental convergence of their laws has already been achieved. Many of the differences that remain have no significant impact on the functioning of the internal market or the Community's economic competitiveness … The Community approach should therefore be marked by a need to address Community problems. Any temptation to engage in law reform for its own sake should be resisted.[21]

This said, the Commission identified six areas that required immediate legislative intervention by the EC. These were: piracy (enforcement); audiovisual home copying; distribution right, exhaustion and rental right; computer programs; databases; and multilateral and bilateral external relations.[22]

3. HARMONIZATION THROUGH THE 1990s

Over the course of the 1990s, plans from the 1988 agenda were implemented and several directives on copyright and related rights were issued. These provided harmonization as regards computer programs (1991), rental right (1992), term of protection (1993), satellite and cable (1993), and databases (1996).

In addition, along with the harmonization of specific aspects of copyright, the agenda of the Commission gradually became more ambitious.

In 1993, the Commission published a White Paper,[23] in which the term 'information society' was used for the first time. This expression is intended to signify a society in which management, quality and speed of

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[21] *Ibid*, paras 1.4.9 and 1.4.10.

[22] Further areas of possible intervention by the EC were identified in the *Follow-up to the Green Paper on copyright and the challenge of technology. Working programme of the Commission in the field of copyright and neighbouring rights*, Brussels, 17 January 1991, COM (90) 584 final.

[23] European Commission, White Paper on *Growth, competitiveness, employment. The challenges and ways forward into the 21st century*, Brussels, 5 December 1993, COM (93) 700, Bulletin of the European Communities, Supplement 6/93.

information are key factors for competitiveness; as an input to the industries as a whole and as a service provided to ultimate consumers, information and communication technologies influence the economy at all stages.[24] The Commission acknowledged that the competitiveness of the European economy depended on both the development and application of such technologies, as well as the creation of a common information area within the then Community. Thus, it recommended that efforts should be undertaken to achieve those objectives linked to the building of an efficient European information infrastructure, as well as taking the measures necessary to create new services.[25]

Thus, in 1994 the Council convened a group of experts to report on the specific measures to be adopted by the Community and the Member States alike for the infrastructures in the sphere of information. The Bangemann Report[26] acknowledged the importance of intellectual property rights (IPRs) in developing a competitive European industry, both in the area of information technology and more generally across a wide variety of industrial and cultural sectors. Hence, it recommended common rules be agreed and enforced by the Member States.[27]

This led to the publication of a Communication on *Europe's way to the information society: an action plan,*[28] in which the Commission recommended that measures adopted in relation to intellectual property rights be reviewed and new initiatives undertaken.[29]

Subsequently, in 1995 the Commission published its Green Paper on *Copyright and related rights in the information society* (GPCRRIS).[30] Therein, it was said that, due to the very nature of the networks operating in the information society, a wide variation in the level of protection of works and other protected matter between Member States was likely to give rise to obstacles to the development of the information society,[31] as

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[24] *Ibid*, 92.

[25] *Ibid*, 100.

[26] European Commission, Growth, competitiveness and employment. White Paper follow-up, *Europe and the global information society. Recommendations of the high-level group on the information society to the Corfu European Council (Bangemann Group)*, Bulletin of the European Union, Supplement 2/94.

[27] *Ibid*, 21.

[28] Communication from the Commission to the Council and the European Parliament and to the Economic and Social Committee of Regions, *Europe's way to the information society: an action plan*, Brussels, 19 July 1994, COM (94) 347 final.

[29] *Ibid*, 5.

[30] Brussels, 19 July 1995, COM (95) 382 final.

[31] *Ibid*, 4.

well as impairing the functioning of the internal market.[32] The position was said to be aggravated by the fact that, in the age of the information society, works would have been circulated increasingly in non-material forms. This meant that compliance with rules pertaining to the freedom to provide services ought to be ensured.[33] As a consequence,

> While respecting the principle of subsidiarity, … the Community has an obligation to take measures in respect of copyright and related rights in order to guarantee the free movement of goods and the freedom to provide services. This will involve harmonization of legislation, and mutual recognition too, in order to avoid creating distortions of competition which would confer an advantage on firms located in particular Member States.[34]

The following year the Commission issued its follow-up to the 1995 Green Paper,[35] in which four priority issues for legislative action were identified in relation to the exploitation of copyright-protected works. These concerned the reproduction right, the right of communication to the public, the legal protection of anti-copying systems and distribution right. While acknowledging that further harmonization was needed to adjust and complement the existing legal framework on copyright and related rights in light of the internal market objective, the Commission highlighted that parallel progress at the international level was also required. An isolated response from the EU would have not been sufficient, on account of the global reach of the information society. In 1996 the World Intellectual Property Organization (WIPO) Copyright Treaty and Performances and Phonograms Treaty were adopted. These were signed by the Member States, as well as by the EC, which became thus committed to implement the new international instruments and ensured harmonized transpositions into Member States' laws.[36]

A directive on copyright and related rights in the information society was first proposed in 1997 and finally adopted in 2001. As noted,

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[32] *Cf ibid*, 10.

[33] *Ibid*.

[34] *Ibid*.

[35] Communication from the Commission, *Follow-up to the Green Paper on copyright and related rights in the information society*, 20 November 1996, COM (1996) 568 final.

[36] *Cf* the recent ruling of the CJEU in Case C-510/10 *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau*, in particular [29] ff.

Directive 2001/29/EC[37] (the so-called 'InfoSoc Directive') is considerably broader than what was required by the digital agenda it was intended to implement. In particular, the Directive harmonized the basic economic rights (rights of reproduction, communication to the public, and distribution) in a broad and supposedly 'internet-proof' manner, and introduced special protection for digital rights management systems. In any case, the largest part of the Directive dealt with exceptions and limitations – a subject that was only incidental in the Green Papers which had been published prior to its adoption.[38] The InfoSoc Directive has been criticized under several angles, in particular with regard to the set of exceptions and limitations envisaged therein. Criticisms have focused – *inter alia* – on the apparent lack of flexibility in the system of exceptions and limitations then adopted by Member States,[39] as well as their narrow

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[37] *Cit*.

[38] *See* Eechoud, Hugenholtz, Gompel, Guibault and Helberger, *Harmonizing*, *cit*, 9.

[39] As highlighted by P Bernt Hugenholtz and Martin RF Senftleben, 'Fair use in Europe. In search of flexibilities' (2012), *Amsterdam Law School Research Paper No 2012-39 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959554*, 14, despite certain features of the regulatory framework provided under the InfoSoc Directive (in particular, its closed enumeration of exceptions and limitations), it should not be overlooked that the list included therein covers a wide variety of use privileges, reflecting the diversity of national copyright traditions in EU Member States. In addition, a closer analysis of the individual elements of the enumeration shows that many exceptions listed in Article 5 of the Directive constitute prototypes for national lawmaking, rather than precisely circumscribed exceptions with no inherent flexibility. Martin RF Senftleben, 'Does the Directive provide enough flexibility and sustainability?', presentation at InfoSoc @ Ten. Ten years after the EU Directive on Copyright in the Information Society: looking back and looking forward, CRIDS – IviR conference, hosted by Marielle Gallo (Member of the European Parliament), European Parliament, Brussels, 13 January 2012, suggests Member States should re-implement the InfoSoc Directive, allowing for more flexibility in the system of exceptions and limitations. Senftleben also highlights how, in contrast with US copyright law, flexible elements (such as an open-ended fair use provision) are to be sought in vain in the EU copyright system, as the InfoSoc Directive encourages the further restriction of precisely defined statutory exceptions in light of the EC three-step test which has been modelled on similar international provisions. Hence, he advocates the introduction of an EU fair use doctrine, which would open up the current restrictive system, offer sufficient breathing space for social, cultural and economic needs, and enable the EU copyright infrastructure to keep pace with the rapid development of the internet (Martin RF Senftleben, 'Bridging the differences between copyright's legal traditions – the emerging EC fair use doctrine' (2010) 57 J Copyr Socy 521).

scope,[40] and ineptness as regards scientific research[41] and technological development.[42]

4. HARMONIZATION THROUGH THE 2000s

One of the goals of the Lisbon Strategy[43] was to make Europe the most competitive and dynamic knowledge-driven economy by 2010. However,

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[40] Lucie Guibault, 'Has the directive achieved its goals of harmonization and greater legal certainty?', presentation at InfoSoc @ Ten. Ten years after the EU Directive on Copyright in the Information Society: looking back and looking forward, CRIDS – IviR conference, hosted by Marielle Gallo (Member of the European Parliament), European Parliament, Brussels, 13 January 2012, advocates more flexibility in the system of exceptions and limitations, as well as the need for guidance from the CJEU.

[41] Reto M Hilty, Sebastian Krujatz, Benjamin Bajon, Alfred Früh, Annette Kur, Josef Drexl, Christophe Geiger and Nadine Klass, 'European Commission – Green Paper. Copyright in the knowledge economy – Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law' (2008) *Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No 08/05*, who highlight how limitations most relevant to scientific research provided for in the InfoSoc Directive are important tools to facilitate access to relevant information for end-users at the scientific research level and need to be preserved or, where possible, adequately extended. In particular, at the end-user level, limitations most relevant to scientific research should be mandatory, immune from contractual agreements and technological protection measures, and should be construed as providing a bottom line, which national legislation should not fall below. In return, original rightholders should receive adequate compensation. Legislative intervention is also recommended at the level of intermediaries. In particular, it is advised to follow up closely the developments in the scientific publication market, concerning the situation of (publicly funded) research institutions *vis à vis* publishing companies and database producers.

[42] Martin Kretschmer, 'Digital copyright: the end of an era' (2003) 25 EIPR 333, who highlights (335) that '[t]he European Information Society Directive forgoes straightaway the already limited opportunity to explore new user rights in the digital environment. It prescribes an exhaustive list of 20 possible exceptions that Member States of the European Union may introduce or maintain. No new exceptions can be introduced nationally, if the information society should develop unexpected services!'

[43] During the meeting of the European Council in Lisbon in March 2000, the Heads of State or Government launched a 'Lisbon Strategy' aimed at, amongst the other things, achieving full employment by 2010. The strategy was grounded on three pillars. Firstly, an economic pillar preparing the ground for the transition to a competitive, dynamic, knowledge-based economy; secondly, a

following the publication of the InfoSoc Directive and despite the increasing number of studies that showed the economic relevance of copyright industries to the European economy,[44] the harmonization agenda lost momentum.

In particular, intervention by the Commission was deemed necessary to build up a level playing field with regard to two aspects, these being enforcement (which was harmonized by an ad hoc directive issued in 2004[45]), and rights management (which was dealt with simply by way of a Communication from the Commission[46]).[47]

The 2004 Commission Staff Working Paper[48] was aimed at assessing whether any inconsistencies in the definitions or the rules on exceptions and limitations between the different copyright directives were such as to hamper the operation of the *acquis communautaire*, or would have a harmful impact on the fair balance of rights and other interests, including those of users and consumers. The paper supported only a minor adjustment to the definition of reproduction right and an extension in the application of the exception for certain temporary acts of reproduction under Article 5(1) of the InfoSoc Directive, to cover computer programs and databases. Since there were no apparent indications that the EU legislative framework in the field of substantive copyright law contained shortcomings that had a negative impact on the functioning of the internal market, no further harmonization measures were deemed necessary at that stage. In particular, the Working Paper contained an assessment of issues outside the current *acquis* (these being originality,

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social pillar designed to modernize the European social model by investing in human resources and combating social exclusion; and finally, an environmental pillar, emphasizing the need to rely upon natural resources.

[44] Robert G Picard, Timo E Toivonen and Mikko Grönlund, *The contribution of copyright and related rights to the European economy based on data from the year 2000*, final report prepared for European Commission – Directorate General – Internal Market, 20 October 2003.

[45] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, *cit*.

[46] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, *The management of copyright and related rights in the internal market*, Brussels, 19 April 2004, COM (2004) 261 final.

[47] Jörg Reinbothe, 'A review of the last ten years and a look at what lies ahead: copyright and related rights in the European Union', presentation at Fordham Intellectual Property Conference, New York, 4 April 2002.

[48] Commission Staff Working Paper on the review of the EC legal framework in the field of copyright and related rights, 19 July 2004, SEC (2004) 995.

ownership, definition of the term 'public', points of attachment, moral rights, and the exhaustion of rights), and concluded that no harmonization was necessary in respect of these.[49]

Subsequently, former Commissioner for the Internal Market and Services Charlie McCreevy highlighted the need for Europe to improve drastically the economic performance of the internal market, by way of modernization.[50] To this end, he advocated the introduction of a modern, light-touch set of company law rules which could cut red tape while ensuring sound corporate governance, along with a reform of Europe's IP rules to promote innovation and reward innovators. In relation to the latter, McCreevy pointed out that:

> The protection of intellectual and industrial property – copyright, patents, trademarks or designs – is at the heart of a knowledge-based economy and central to improving Europe's competitiveness. This is a priority for reform: grounded on sound economics, not just legal concepts, and concentrating on solutions that foster innovation and investment in real life.[51]

With these words McCreevy indicated the approach to be taken in order to pursue a sensible intellectual property policy at the European level. In parallel to this, the need to promote free movement of knowledge and innovation was identified by the Commission as the 'Fifth Freedom' in the single market.[52]

However, the 2008 Commission's Green Paper on *Copyright in the knowledge economy* (GPCKE)[53] appeared to be 'remarkably less ambitious than its predecessors, at least when one views its objective and the means thought able to meet these.'[54] This was because the Green Paper directly tackled none of the aforementioned issues. Neither the scope of exclusive rights, nor the delineation of protected subject-matter, nor the

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[49] *See* below *sub* Chapter 2, Section I, §3.

[50] Charlie McCreevy, 'Charlie McCreevy speaks to the European Parliament JURI Committee', Brussels, 21 November 2006, SPEECH/06/720.

[51] *Ibid*.

[52] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for the 21st Century Europe*, 20 November 2007, COM (2007) 725 final, 9.

[53] Green Paper on *Copyright in the knowledge economy*, 16 July 2008, COM (2008) 466/3.

[54] Eechoud, Hugenholtz, Gompel, Guibault and Helberger *Harmonizing*, *cit*, 9.

duration of protection are dealt with therein.[55] The purpose of the GPCKE was instead to foster a debate on how knowledge for research, science and education would be best disseminated in the online environment. This was also in light of the fact that 'a forward looking analysis requires consideration of whether the balance provided by the [InfoSoc] Directive is still in line with the rapidly changing environment.'[56]

The first part of the GPCKE dealt with general issues regarding exceptions to exclusive rights introduced in the InfoSoc Directive. The second part tackled specific issues relating to those exceptions and limitations that are most relevant for the dissemination of knowledge, and whether these exceptions should evolve in the era of digital dissemination. In particular, the GPCKE focused on the exceptions to copyright for the benefit of libraries and archives; the exception allowing dissemination of works for teaching and research purposes; the exception for the benefit of people with a disability; and a possible exception for user-generated content (UGC). In addition, the GPCKE launched a public consultation, aimed at gathering the views of stakeholders as to whether technological and legal developments challenged the balance achieved by the law up until that point. In particular, due consideration was paid to the operation of broad exclusive rights as combined with specific and limited exceptions, most significantly asking whether these achieved a fair balance of rights and interests between the different categories of rightsholders and users.

The 2009 follow-up to the GPCKE[57] reported on the results of the public consultation in relation to the exceptions dealt with in the GPCKE. It concluded along the lines that 'copyright policy must be geared toward meeting the challenges of the internet-based knowledge economy',[58] while highlighting that '[a]t the same time a proper protection of Intellectual Property Rights is decisive to stimulate innovation in the knowledge-based economy. Different interests have to be carefully balanced.'[59] Just to add something more to such a 'Pontius Pilate-esque' approach, the Commission made it clear that '[i]n the immediate future, the preferred tool for many of the issues raised in the Green Paper [on

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[55] *Ibid*, 10.

[56] GPCKE, 20.

[57] Communication from the Commission, *Copyright in the knowledge economy*, Brussels, 19 October 2009, COM (2009) 532 final.

[58] *Ibid*, 10.

[59] *Ibid*.

Copyright in the Knowledge Economy] is a structured dialogue between relevant stakeholders, facilitated by services of the European Commission.'[60]

The year 2009 was to remain a fairly irrelevant period for copyright policy, at least on the part of the Commission. However, as will be examined below, this was not the case for the EU judiciary.

Towards the end of 2009, DG INFSO and DG MARKET jointly published a Reflection Document,[61] aimed at starting (!) a reflection and broad debate about the possible responses of the EU to the challenges facing dematerialization of content. In particular, digital technologies were said to have brought about a number of changes to the way creative content is created, exploited and distributed. The Reflection Document thus addressed issues relating to UGC and rights management.

With regard to UGC, the Commission acknowledged that, whilst content is created by traditional players such as authors, producers and publishers, user-generated content plays a new and important role.[62] The co-existence of these two types of content was said to require a framework designed to guarantee both the freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity.[63] However, the outcome of the public consultation launched by the GPCKE highlighted the sentiment that most of the stakeholders believed that it was too early to regulate UGC. This resulted from the uncertainty as to whether amateurs and professionals should benefit from special rules on UGC, or simply from existing exceptions to copyright such as criticism or review, incidental use and caricature, parody and pastiche.

If we now turn to consider rights management, traditional practices for licensing rights were said not to be always fit for digital distribution.

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[60] *Ibid*.

[61] Reflection Document of DG INFSO and DG MARKT on *Creative Content in a European digital single market: challenges for the future*, 22 October 2009.

[62] *See* Nobuko Kawashima, 'The rise of "user creativity" – Web 2.0 and a new challenge for copyright law and cultural policy', presentation at the annual congress of the Society for Economic Research on Copyright Issues (SERCI), Berkeley, 9–10 July 2009, arguing that copyright law and policy have paid little attention to the contribution to cultural progress brought about by mini-creators, ie people who get inspiration from existing works and add to them to create new expressions. Thus, the need for copyright law to recognize the creativity present in those works is advocated, as well as the acknowledgement of their contribution to the enrichment of culture.

[63] Reflection Document, *cit*, 3–4.

Digital technologies have brought new actors and new roles into the value chain, with previously separate services now converging. This has implied a change in the way in which creative content is distributed, in particular due to the integration of mobile operators, internet service providers (ISPs), telecom companies, broadband technology companies, websites, online shops, online rights aggregators and social networking platforms. In addition, making professionally produced creative content available online was considered to be a risky business, because of market fragmentation, high development and production costs and the need to fund as yet unprofitable new services from the declining revenue streams of 'traditional' analogue and physical distribution.[64] However, as recently shown by some case studies,[65] the presence of a digital sales channel may be important for encouraging the legal acquisition and use of works. In fact, when a digital sales channel is not available, users will probably turn to piracy and begin to consume much more content through illegal channels than they had previously purchased legally. This is because piracy has high fixed costs but negligible variable ones, the fixed costs being those associated with the purchase/rental of copying devices and the variable ones those influenced by the level of output, ie the amount of pirated material.[66] Once the fixed costs are paid, it is unlikely that users, who have the choice between free pirated and lawful fee-paying content, will decide to switch back to obtaining content lawfully. These considerations demonstrate the importance of developing a level playing field for new business models and innovative solutions for the distribution of creative content[67] in order to counteract the growth and spread of pirated works.

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[64] *Ibid*, 4.

[65] *See* Brett Danaher, Samita Dhanasobhon, Michael D Smith and Rahul Telang, 'Converting pirates without cannibalizing purchasers: the impact of digital distribution on physical sales and internet piracy', presentation at the annual congress of the Society for Economic Research on Copyright Issues (SERCI), Berkeley, 9–10 July 2009. The study concerns the removal of NBC content from Apple's iTunes store in December 2007, due to dissatisfaction with iTunes's price policy, and its restoration in September 2008. NBC's decision was causally associated with an 11.5% increase in the demand for pirated content, which led to a complete *revirement* of the decision taken in September 2008. The study also shows that the restoration of the content to the iTunes store led to a statistically insignificant decrease in piracy for the same content.

[66] *Ibid*, 10–11.

[67] *Cf* José Manuel Barroso, *Political guidelines for the next Commission*, 3 September 2009.

5. TOWARDS FULL COPYRIGHT HARMONIZATION?

For what was probably the first time in an official document, the Reflection Document (despite the flaws highlighted above) specifically tackled the issue of copyright full harmonization. This was in the context of discussions on to how improve the licensing framework at the European level.

According to the Commission, a 'European Copyright Law' might be established by means of an EU regulation, the legal basis for which might be new Article 118(1) TFEU, as introduced by the Lisbon Reform Treaty. This provision reads as follows:

> In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.

Although the introduction of an EU-wide copyright title was discussed along with other possibilities (such as alternative forms of remuneration), the Commission seemed to welcome such an option. It viewed this as beneficial, *inter alia*, to the functioning of the internal market, as well as to consumer access in relation to exceptions and limitations to copyright.[68] In the Reflection Document, it was stated that:

> A Community copyright title would have instant Community-wide effect, thereby creating *a single market* for copyrights and related rights. It would overcome the issue that each national copyright law, though harmonised as to its substantive scope, applies only in one particular national territory. A Community copyright would enhance *legal security and transparency*, for right owners and users alike, and greatly *reduce transaction and licensing costs*. Unification of EU copyright by regulation could also restore the

[68] Reflection Document, *cit*, 15 (footnotes omitted): 'Community rules on copyright have harmonised the scope and tenor of the exclusive rights without, however, providing clear boundaries for these rights by means of uniform exceptions. This is indeed a state of affairs that should not persist in a truly integrated internal market. The unclear contours of strong 'exclusive rights' are neither beneficial for the internal market in knowledge products nor for the development of internet services. Further harmonization of copyright laws in the EU, in particular relating to the different and optional limitations and exceptions, would create more certainty for consumers about what they can and cannot do with the content they legally acquire.'

> balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonization directives mandate basic economic rights, but merely permit certain exceptions and limitations. A regulation could provide that rights and exceptions are afforded the same degree of harmonization.
>
> By creating a single European copyright title, European Copyright Law would create a tool for streamlining rights management across the Single Market, doing away with the necessity of administering a 'bundle' of 27 national copyrights. Such a title, especially if construed as taking precedence over national titles, would remove the inherent territoriality with respect to applicable national copyright rules; a softer approach would be to make such a Community copyright title an option for rightsholders which would not replace, but exist in parallel to national copyright titles.[69]

It is apparent that such an EU-wide copyright title would raise important issues for the organization of rights management. Hence, further reflection on the future of European rights management would have to precede the introduction of an EU-wide copyright title.[70] Finally, noting that new online services require a more dynamic and flexible framework in which they can legally offer diverse, attractive and affordable content to consumers, the Reflection Document recommended that careful analysis be undertaken as to the challenges facing the three main groups in the value chain – consumers, commercial users and rightsholders.[71]

5.1 The Legacy of the 2000s

From the GPCKE – as well as its follow-up and the Reflection Document – two main threads seem to emerge.

Firstly, that difficulties remain as regards the balancing of the different interests involved in copyright law and policy,[72] this being the so-called public/private divide which has been well highlighted by, amongst others, Peter Jaszi.[73]

Secondly, that increasing digitization and online distribution of cultural goods requires a reflection on the possible outcomes that might arise out of further and deeper harmonization of the copyright laws of EU Member

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[69] *Ibid*, 18–19 (emphasis added).

[70] *Ibid*, 19.

[71] *Ibid*, 9.

[72] *Cf Follow-up* to the Green Paper on Copyright and the challenge of technology, 10, and Reflection Document, 9 ff.

[73] Peter Jaszi, 'Toward a theory of copyright: the metamorphoses of "authorship"'(1991) 40 Duke LJ 455, 463 ff.

States.[74] As mentioned above, one of the goals of the Lisbon Strategy was to make Europe the most competitive and dynamic knowledge-driven economy by 2010. As expressly stated by the GPCKE, creation, circulation and dissemination of knowledge in the single market are directly linked to the broader goals of the Lisbon Strategy.[75] It is clear that a good protection model is the *condicio sine qua non* in order to achieve, or in the first instance, approach, these objectives.

6. THE DEBATE IN 2010–2013: THE INTERNAL MARKET, THE ROLE OF ACADEMIA AND EU LEGISLATION

Following the Reflection Document, debate around copyright full harmonization at the EU level has constantly increased.

In 2010 alone, two important documents were published.

The first was the European Copyright Code, released by the Wittem Group, composed of leading European copyright academics, in April of that year. The Code, as was clearly stated therein, 'might serve as a model or reference tool for future harmonization or unification of copyright at the European level'.[76] The contents of the Code will be discussed below, *sub* Chapter 6, Section I, §2.

The second document of some relevance was released just one month later. The report entitled *A new strategy for the single market at the service of Europe's economy and society* was produced by Mario Monti and addressed to the President of the European Commission, José Manuel Barroso.[77] This became known as the 'Monti Report'.

6.1 The Monti Report

The Report examines the challenges facing initiatives aimed at re-launching the internal market. Monti identifies three main obstacles to

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[74] *Cf* Reflection Document, 10–13.

[75] GPCKE, 3.

[76] Wittem Group, *European Copyright Code*, 26 April 2010, Introduction, 5, available at copyrightcode.eu.

[77] 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.

the functioning of the internal market.[78] The first challenge is said to come from the erosion of the political and social support for market integration in Europe. The second challenge comes from uneven policy attention given to the development of the various components of an effective and sustainable single market. The final challenge is due to what the Report defines as a 'sense of complacency', which has gained strength in the past decade. This sentiment has led to a belief that the single market has really already been completed, and can thus be put to rest as a political priority. Hence, the report advocates the adoption of a new strategy to safeguard the single market from the risk of economic nationalism, to extend it into new areas key for Europe's growth and to build an adequate degree of consensus around it. From these objectives, it is clearly not accidental that the actual Report is preceded by a quote from Paul-Henri Spaak:

> Tous ceux qui ont essayé de régler les problèmes économiques que posait le traité de Rome en oubliant le coté politique de la chose sont allés à un échec et aussi longtemps qu'on examinera [ces] problèmes uniquement sur le plan économique et sans penser à la politique, je le crains, nous irons à des échecs répétés.[79]

Indeed, it is important to highlight that EU integration and development in relation to copyright requires not just 'sound economics' (as was stated in 2006 by Charlie McCreevy), but also the political will to engage in such a debate.

The Monti Report specifically tackles the issue of copyright harmonization, saying that:

> The European markets for online digital content are still underdeveloped as the complexity and lack of transparency of the copyright regime creates an unfavourable business environment. It is urgent to simplify copyright clearance and management by facilitating pan-European content licensing, by developing EU-wide copyright rules, including a framework for digital rights management … Additional measures should also be examined to take into

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[78] In a speech delivered at 'The State of the Union' conference in Florence on 9 and 10 May 2012, Mario Monti highlighted that the points raised in his 2010 Report were still those on which the EU should focus in order to favour the progression of the internal market.

[79] 'All those who, in trying to meet the economic challenges set out by the treaty of Rome, neglected the political dimension have failed. As long as [those] challenges will be addressed exclusively in an economic perspective, disregarding their political angle, we will run – I am afraid – into repeated failures.' (speech at the Chamber of Representatives, 14 June 1961).

> account the specificities of all the different forms of on-line content, such as further harmonization of copyright, creation of an EU copyright title, considering that cross-border online transactions take place at the location of supply and extended collective licensing.[80]

The political dimension of EU copyright debate is apparent if one looks at the 2011 Commission's blueprint for intellectual property rights to boost creativity and innovation,[81] and, prior to this, the follow-up to the Monti Report: the Commission's Single Market Act.[82]

6.2 The Single Market Act

In April 2011, following the fifty proposals which it had put up for debate,[83] the Commission issued its action plan aimed at re-launching growth and strengthening confidence in the internal market. As the shortcomings of the latter had been highlighted in the Monti Report, the

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[80] Monti, *A new strategy*, *cit*, para 2.3, 45–6. Key recommendations as regards online digital content in the Report include: 1) proposals for an EU copyright law, including an EU framework for copyright clearance and management; and 2) proposals for a legal framework for EU-wide online broadcasting.

[81] 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*, 24 May 2011, COM (2011) 287 final.

[82] 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.

[83] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act for a highly competitive social market economy – 50 proposals for improving our work, business and exchanges with one another*, Brussels, 27 October 2010, COM (2010) 608 final. The public consultation attracted more than 800 responses, reflecting the points of view of Member States, non-governmental organizations, social partners at national and European level, local and regional authorities, industrial and professional organizations, trade unions, businesses, consumer organizations, think tanks, academics and many individuals. As highlighted by the Commission, '[t]he consultation revealed high expectations from civil society, in terms both of the development of the Single Market's potential to foster growth and employment as well as the social dimension of the internal market and the protection of public services. Priorities identified by respondents in the economy confirm strong support for

adoption of a proactive and cross-cutting strategy was deemed necessary. In its Communication on the Single Market Act, the Commission set forth:

> This means putting an end to market fragmentation and *eliminating barriers and obstacles to the movement of services, innovation and creativity.* It means strengthening citizens' confidence in their internal market and ensuring that its benefits are passed on to consumers. A better integrated market which fully plays its role as a platform on which to build European competitiveness for its peoples, businesses and regions, including the remotest and least developed.[84]

The Single Market Act includes twelve levers to boost growth and strengthen confidence in the internal market. Among these, intellectual property rights are regarded as playing an important role. This is not only because between 45% and 75% of the value of large enterprises is linked to their intellectual property rights,[85] but also because industries which make intensive use of intellectual property rights have a fundamental role in the sustainable development of European states' economies.[86]

This said, the Commission's action plan suggested that legislation be enhanced to set up a unitary patent protection for the greatest possible number of Member States and a unified patent litigation system. The trademark system also requires updating, in order to improve the protection of trademarks and to make the European and national trademark systems more coherent, by simplifying procedures, reducing costs and enabling the system to benefit fully from new technologies to facilitate research.

In relation to copyright, the Single Market Act echoes Proposal No 2, which was part of the group of fifty proposals within the public consultation. This had followed from considerations as to how the absence of an EU-wide framework for the efficient management of copyright across the EU makes it difficult to disseminate knowledge and

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the common goal of a highly competitive social market economy.' (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act*, *cit*, 4).

[84] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Single Market Act*, *cit*, 3 (emphasis added).

[85] *Ibid*, 8.

[86] *Ibid*.

cultural goods online.[87] Therefore, current systems for the granting of copyright licences for legal online distribution should be simplified and made more transparent. In addition, collective management must be able to evolve towards European models, allowing for licences to cover several territories, whilst at the same time providing a high level of protection for rightsholders.

The hints contained in the Single Market Act were discussed and developed in the May 2011 blueprint for intellectual property rights.

6.3 The 2011 Commission's Blueprint

In May 2011, one month after the publication of the Single Market Act, the Commission issued its blueprint for intellectual property rights. This was aimed at setting an agenda to release the potential of European inventors and creators, as well as empowering them to turn ideas into high-quality jobs and promoting economic growth. In particular, according to the Commission, growth may be achieved only by putting in place a seamless, integrated and modern single market for intellectual property rights, which has not yet been realized. The fragmentation of the IP landscape in the EU is said to have problematic implications for Europe's growth, job creation and competitiveness. In particular, difficulties are deemed to exist in relation to both exploitation and enforcement of IP rights.[88] Licensing transactions are impaired by high costs and complexity. This results, *inter alia*, in ecommerce not having yet realized its full potential in the EU. In addition, existing intellectual property regimes have to cope with increasingly fast technological progress, which changes the way products and services are produced, disseminated and consumed. As a consequence, Europe is not always at the forefront of providing new digital services.

The enforcement of intellectual property rights within Europe and at its borders remains imperfect, not least because the EU enforcement regime is not in line with the new digital environment. In particular, enforcement needs to be strengthened, in order to effectively respond to the challenges facing dematerialization of works and their distribution.

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[87] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *Towards a Single Market Act*, *cit*, 8.

[88] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market*, *cit*, 6.

From the foregoing, it is apparent that the construction of a single market for intellectual property rights is to become a major objective of EU policy. This is considered necessary not only to favour growth, sustainable job creation and competitiveness of the EU economy, these being also key objectives of the EU 2020 agenda,[89] but also as an essential element to sustain the EU's recovery from the economic and financial crisis. Indeed, the development of sectors, such as ecommerce and digital industries, is deemed essential for EU economy, in that these offer the greatest potential for future growth.[90] Most of the new jobs in the EU which have been created over the past decade have been in the knowledge-based industries, where employment has increased by 24%. In contrast, employment in the rest of the EU economy has increased by

[89] Communication from the Commission, *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, Brussels, 3 March 2010, COM (2010) 2020 final. The five targets for the EU in 2020 concern: employment: 75% of 20–64 year-olds to be employed; R&D/innovation: 3% of the EU's GDP (public and private combined) to be invested in R&D/innovation; climate change/energy: greenhouse gas emissions 20% (or even 30%, if the conditions are right) lower than 1990, 20% of energy from renewables, 20% increase in energy efficiency; education: reducing school drop-out rates below 10%, at least 40% of 30-34 year-olds completing third level education; poverty/social exclusion: at least 20 million fewer people in or at risk of poverty and social exclusion.

[90] As also recently highlighted by Neelie Kroes, 'What we are seeing at the moment is huge growth and diversity. First, growth in consumer expectations. They expect an offer that is open rather than limited, "on demand" rather than on a fixed schedule, interactive and targeted rather than passive and controlled. We cannot ignore that: because these days if consumers don't get what they want, they won't be afraid to switch off. Second, growth in the scope of creative content. It's not just about taking "old media" like music, TV and film and digitising them – although that is in itself lucrative. It's also about new media that didn't even exist before, content which is interactive, social, even user-created. Remember: the more widely we define culture and entertainment, the bigger are the market opportunities, the more unlimited our horizons … And third, growth in the number of ways you can make money, and better reward creators, using content. Possibilities way beyond the old models … As the range of consumer demands, the range of creative works and the range of business models become more diverse, then the ways to operate them have tended to converge.' (Neelie Kroes, 'Creativity for the creative sector: entertaining Europe in the electronic age', speech at European Parliament Intellectual Property Forum, European Parliament, Brussels, 24 January 2012, SPEECH/12/30).

just under 6%.[91] Copyright-based creative industries contributed 3.3% to the EU GDP in 2006.[92]

This said, the blueprint also contains proposals to improve the EU intellectual property framework. Starting with patents, the Commission discusses the advantages of having a unitary patent protection and litigation system. As regards trademarks, it is suggested that the EU trademark system is ameliorated by updating Regulation No 207/2009.[93] The blueprint also tackles issues pertaining to complementary protection of intangible assets, these being trade secrets, parasitic copies, and non-agricultural geographical indications. It also calls for a heightened fight against counterfeiting and piracy, to be instigated by improving the structure of the European Observatory on Counterfeiting and Piracy, which is meant to serve as a platform to join forces, exchange experiences and information and to share best practices on enforcement. On 19 April 2012, the European Parliament and the Council adopted Regulation No 386/2012.[94] This entrusts the Office of Harmonization in the Internal Market (OHIM) with tasks related to the enforcement of IPRs, including the assembling of public- and private-sector representatives as an EU Observatory on infringements of IPRs.

In addition, the Commission aims to pursue its objective of enhancing respect for intellectual property right standards at an international level

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[91] Ian Brinkley and Neil Lee, The Work Foundation – *The knowledge economy in Europe. A report prepared for the 2007 EU Spring Council*, 7. As reported at 4–5 of the blueprint, 1.4 million European SMEs operate in the creative industries. IP-based industries represent above average potential for growth and job creation. Creative industries account for 3% of employment (2008) and are among the most dynamic sectors in the EU. The number of employees in the creative industries in the EU-27 was 6.7 million in 2008. Overall employment in the creative industries increased by an average of 3.5% a year in the period 2000–2007 compared to 1% a year for the total EU economy. In 2009, it was estimated that intangible assets represented about 81% of the value of the S&P 500 market (Commission Staff Working Document, *European Competitiveness Report 2010*, Accompanying document to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An integrated industrial policy for the globalisation era putting competitiveness and sustainability at the front stage*, Brussels, 28 October 2010, SEC (2010) 1276 final, Volume I,11).

[92] Commission Staff Working Document, *European Competitiveness Report 2010*, *cit*.

[93] Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark, *cit*.

[94] [2012] OJ L129, 1–6.

by engaging in cooperation with third countries in the context of the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the International Union for the Protection of New Varieties of Plants. It will also contribute to the promotion of technological innovation and to the transfer and dissemination of technology. Further, in the context of WIPO, it will continue to support large-scale ratification of the 1996 WIPO Internet Treaties and their proper implementation into domestic laws,[95] as well as to negotiate intellectual property right provisions in the EU's free trade agreements with third countries.[96] The Commission is also committed to enhancing intellectual property protection and enforcement at the EU borders. To this end, it proposes that a new regulation replacing Regulation No 1383/2003[97] be adopted with the objective of strengthening enforcement while streamlining procedures.[98]

At §3.3 the blueprint discusses the creation of a comprehensive framework for copyright in the digital single market, touching upon the following issues: copyright governance and management, user-generated content, private copying levies, access to Europe's cultural heritage and fostering media plurality, performers' rights, audiovisual works and artists' resale rights.

6.4 Full Harmonization is on its Way (via Licensing?)

The analysis carried out by the Commission is closely linked to what is considered as the state of the art in relation to dematerialization and dissemination of works through digital channels,[99] and raising awareness

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[95] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market*, *cit*, 20.

[96] *Ibid*, 21.

[97] Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights [2003] OJ L 196, 7–14.

[98] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market*, *cit*, 21.

[99] As recently highlighted by Neelie Kroes, 'More and more Europeans are going online. In 2004, a mere 40% of European households had access to the Internet at home. Just 6 years later, 70% of households are online … Because as more and more citizens get online, so they expect and demand more stuff to do online. This produces a virtuous circle of demand: in turn stimulating the supply

as to how territorial constraints of Member States' copyright laws are at odds with such a barrier-less environment:

> The internet is borderless but online markets in the EU are still fragmented by multiple barriers. Europe remains a patchwork of national online markets and there are cases when Europeans are unable to buy copyright protected works or services electronically across a digital single market. Technology, the fast evolving nature of digital business models and the growing autonomy of online consumers, all call for a constant assessment as to whether current copyright rules set the right incentives and enable right holders, users of rights and consumers to take advantage of the opportunities that modern technologies provide.[100]

This said, the agenda of the Commission includes a reform of copyright licensing, which has also recently been held to be of primary importance to future Commission actions.[101] The creation of a European framework for online copyright licensing is said to have the potential to stimulate greatly the legal offer of protected cultural goods and services across the EU and to benefit rights holders, collecting societies, service providers and consumers alike. The new framework for copyright licensing should establish common rules on governance, transparency and effective supervision, including collectively managed revenue streams. It is within this

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of new content, new material, new services. These services are expanding rapidly, in terms of diversity, intensity and sophistication. Once it was about checking email or reading text online. Now Europeans increasingly want access to any content, at any time, on any device … More users, expecting more sophisticated services online, each consuming more bandwidth. That all means more traffic on our networks. And more traffic means we need a better infrastructure. An infrastructure that is the backbone, not the bottleneck, of the digital revolution. This is the kind of support that next generation access, NGA [next-generation access], can provide.' (Neelie Kroes, 'Investing in the future: meeting the internet's astonishing promise', speech at 'Talk in Brussels' – Deutsche Telekom Annual Reception, Brussels, 29 November 2011, SPEECH/11/857).

[100] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market*, *cit*, 9.

[101] *See* the speeches of Maria Martin-Prat, current Head of Unit – Copyright, DG Internal Market & Services, at the Fordham IP Conference, New York, 12–13 April 2012 (as reported in Eleonora Rosati, 'EU copyright at Fordham: a report (Part I)' (The 1709 Blog, 17 April 2012) <http://tinyurl.com/ansc3lz> accessed 14 June 2013 and Neelie Kroes, 'What does it mean to be open online?', speech at World Wide Web Conference 2012, Lyon, 19 April 2012, SPEECH/12/275.

broader context that the 'Licences for Europe' initiative, which was launched at the beginning of 2013, is to be seen.[102] As was announced by the Commission at the end of 2012, this is a project which is aimed at tapping the potential and exploring 'the possible limits of innovative licensing and technological solutions in making EU copyright law and practice fit for the digital age.'[103]

The blueprint also addresses how to foster the development of new online services covering a greater share of the world repertoire. It suggests that an enforceable European rights management regime facilitating cross-border licensing should be put in place. Furthermore, effective cross-border management of copyright for online services should be taken into consideration. The Commission advises that means are provided to ensure that all operators comply with a high level of service standards for both rightsholders and users and that competition is not distorted.

In order to tackle a more far-reaching overhaul of copyright at the EU level, the Commission expressly suggests considering the adoption of a European Copyright Code. For the second time in an official document (the first being the 2009 Reflection Document) the Commission not only mentions the possibility of harmonizing copyright fully at the EU level, but also indicates how this objective might be achieved. In particular, the Commission explains that full harmonization may be sought through two distinct and alternative routes: either a codification of the current *acquis,* or the issuing of an ad hoc regulation aimed at creating an optional EU copyright title. The blueprint provides:

> [A European Copyright Code] could encompass a comprehensive codification of the present body of EU copyright directives in order to harmonise and consolidate the entitlements provided by copyright and related rights at EU level. This would also provide an opportunity to examine whether the current exceptions and limitations to copyright granted under the [InfoSoc] Directive need to be updated or harmonised at EU level. A Code could therefore help to clarify the relationship between the various exclusive rights enjoyed by rights holders and the scope of the exceptions and limitations to those rights.

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[102] *See* the speeches of Androulla Vassiliou (member of the European Commission for Education, Culture, Multilingualism and Youth) on 'Culture and copyright in the digital environment', Brussels, 4 February 2013, SPEECH/13/94, and Neelie Kroes, 'Digital technology and copyright can fit together', Brussels, 4 February 2013, SPEECH/13/96.

[103] Communication from the Commission, *On content in the digital single market*, Brussels, 18 December 2012, COM (2012) 789 final, 3.

> The Commission will also 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, rights holders and consumers.
>
> These issues require further study and analysis. The Commission will examine these issues, inter alia, in the context of the dialogue with stakeholders foreseen in the Digital Agenda for Europe and report in 2012, in particular on whether the [InfoSoc] Directive needs to be updated.[104]

As reported in the Annex to the blueprint, which contains a list of future Commission actions, the next couple of years promise to be crucial to the future of EU copyright. As recently as May 2011, the Commission issued its proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works,[105] and the relevant directive was eventually adopted in October 2012.[106] In the foreseeable future, following publication in 2012 of a proposal for a specific directive,[107] a legal instrument to create a European framework for online copyright licensing in order to create a stable framework for the governance of copyright at the European level should also be issued.

Other initiatives include an evaluation of whether further measures in the area of copyright should be implemented, a revision of the Enforcement Directive (this should have taken place in 2012), and a stakeholder consultation over user-generated content (also this should have been launched in 2012). In relation to the latter, the Commission notes that there is a growing realization that solutions are needed to make it easier and affordable for end-users to use third-party copyright-protected content in their own works. In other words, users who integrate copyright-protected materials into their own creations, which are then uploaded on the internet, should have access to a simple and efficient permissions system. This is found to be particularly pertinent in the case of amateur uses of copyright-protected materials for non-commercial purposes.

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[104] *Ibid*, 11.

[105] Brussels, 24 May 2011, COM (2011) 289 final.

[106] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, *cit*. For a critical analysis of the directive, *see* Eleonora Rosati, 'The Orphan Works Directive, or throwing a stone and hiding the hand' (2013) 8 (4) JIPLP 303.

[107] Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, Brussels, 11 July 2012, COM (2012) 372 final, 2012/0180 (COD), on which *see* João Pedro Quintais, 'Proposal for a Directive on collective rights management and (some) multi-territorial licensing' (2013) 35 EIPR 65.

According to the Commission, UGC of this type should not expose authors to infringement proceedings if they upload material without the rightsholders' consent. Discussion on this issue was scheduled to take place in the course of 2013, within the framework of a structured stakeholder diologue.[108] Indeed, a working group working on UGC and licensing for small-scale users of protected material has now been established within the Licences for Europe initiative. The Commission's objective is to 'foster transparency and ensure that end-users have greater clarity on legitimate and non-legitimate uses of protected material, and easier access to legitimate solutions'.[109]

Finally, as mentioned above and still in the course of 2012, the Commission should have reported on the application of the InfoSoc Directive and assessed whether this needed to be updated. However, as was recently announced by current Head of Unit for Copyright within DG Internal Market & Services, Maria Martin-Prat, the review of the InfoSoc Directive would not result in any legislative initiatives until 2013 at the very earliest.[110]

Closely linked to this, the Commission appeared also committed to assessing and discussing with concerned stakeholders the feasibility and desirability of producing a European Copyright Code. In relation to this, Martin-Prat made it clear that, whilst it is true that the priority of the Commission is to facilitate licensing across the EU and this implies facing the issue of territoriality, the possible establishment of an EU-wide licensing system is not going to affect the territoriality of EU Member States' copyright laws.[111] Therefore, debate as to the future of EU licensing is not necessarily linked to that on whether or not to adopt an EU-wide copyright.

7. WHY THE EU COPYRIGHT IS NOT JUST ABOUT COPYRIGHT

On 11 January 2012, the Commission published a Communication on *A coherent framework to build trust in the digital single market for*

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[108] Communication from the Commission, *On content in the digital single market*, *cit*, 3–4.

[109] *See* http://ec.europa.uk/licences-for-europe-dialogue/node/5 (accessed 14 June 2013).

[110] *See* Rosati, 'EU copyright at Fordham', *cit*.

[111] *Ibid*.

e-commerce and online services.[112] The Communication highlights the advantages of building a genuine digital single market. This is said to favour several categories of stakeholders,[113] as well as to generate new types of growth, which the EU has not yet achieved[114] – not least because 'internet Europe' is still a patchwork of different laws,[115] rules, standards and practices with little or no interoperability. In particular, the Commission highlights that, '[t]he European Union cannot just resign itself to bearing the costs of a fragmented digital market after having set ambitious objectives for renewed, sustainable, smart and inclusive growth by 2020.'[116] Hence, the Commission is committed to working with all the

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[112] Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A coherent framework for building trust in the digital single market for e-commerce and online services*, Brussels, 11 January 2012, COM (2011) 942.

[113] According to the Commission (*ibid*, 3–4), increased trust in the digital single market will be advantageous for consumers (who will benefit from lower prices, more choice and better quality of goods and services, due to cross-border trade and easier comparison of offer), small and medium-sized enterprises (which will have the possibility of accessing new markets beyond national and European borders), citizens (who will use the internet to carry out cross-border activities), workers (thanks to online services, high-quality jobs will be created, even in rural or isolated areas, and it will be possible to respond to job offers even outside the country), and the environment (growth generated through the development of ecommerce will be greener and more sustainable).

[114] The Communication reports (1–2) that in the G8 countries, South Korea and Sweden, the internet economy has brought about 21% of the growth in GDP in the last five years and generates 2.6 jobs for every job cut, at times accounting for 25% of net employment creation. Despite this, the share of the internet economy in European GDP remains small, as it was no more than 3% in 2010. Similarly, although the growth rate of ecommerce at national level is high, this new vector remains marginal at only 3.4% of European retail trade, which is much less advanced than in the United States or Asia-Pacific and tends not to go beyond national borders. Furthermore, according to the Copenhagen Economics – European Policy Centre (EPC), *The economic impact of a European digital single market*, final report, March 2010, 4, the cost of failure to complete the European digital single market is expected to be at least 4.1% of GDP between now and 2020, ie EUR 500 billion or EUR 1000 per EU citizen.

[115] *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions, *A Single Market*, *cit*, 9.

[116] Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A coherent framework*, *cit*, 2, referring to Communication from the Commission *Europe 2020*, *cit*.

stakeholders to enhance an EU digital single market. Such an objective is to be achieved by 2015, as also recently stated by the European Council, whilst highlighting that, to this end, priority should be given to measures aimed at further developing cross-border online trade, boosting demand for the roll-out of high-speed internet, modernizing Europe's copyright regime and facilitating licensing.[117] In relation to the latter, it is believed that any proposed measure should seek to reduce the administrative burdens and transaction costs associated with the licensing of content.[118]

Fragmentation of the legal framework pertaining to online services is said to be at odds with the growth objectives set out by the Commission. Copyright is within this legal framework and, although the Communication does not specifically tackle the issue of full copyright harmonization, from the identification of the main obstacles to the development of the digital single market it is apparent that, amongst other things, copyright needs to be discussed from this perspective.

According to the Commission itself, the following problems have to be solved: the supply of legal, cross-border online services, which is still said to be inadequate; the amount of information for online service operators or protection for internet users, which is not enough; payment and delivery systems, which are said to be poor; settlement of disputes, where this avenue is still difficult to pursue; and high-speed communication networks and hi-tech solutions, which remain insufficient.[119]

From the foregoing, it is apparent that the issue concerning the future of copyright at the EU level cannot be placed outwith the discourse concerning the enhancement of an EU digital single market. The development of legal and cross-border offers of online products and services cannot rely solely upon the kind of harmonization brought about by the Ecommerce Directive. This, indeed, did remove a series of obstacles to cross-border online activities. In particular, its internal market clause,[120]

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[117] Conclusions of the European Council, CO EUR 4 CONCL 2, Brussels, 29 June 2012, EUCO 76/12, 10.

[118] European Parliament resolution of 11 September 2012 on the online distribution of audiovisual works in the European Union, 2011/2313(INI).

[119] Such obstacles are not an exhaustive list, points out the Commission, which stresses how (*ibid*, 4, footnotes partially omitted) '[t]he plan places emphasis on strengthening a single harmonised framework for e-commerce and other commercial online services. It opens a new chapter on this subject in the digital approach for Europe, continuing the logic, of the Single Market Act, and is part of a wider commitment from the European Union aimed at boosting the economy and the information society, ranging from promoting online administration and digital literacy to standardization and online security.'

[120] Article 3(2) of the Ecommerce Directive.

which forbids Member States from restricting the freedom to provide information society services from another Member State, is considered to be the cornerstone of the digital single market. Albeit a revision of the Ecommerce Directive is deemed unnecessary at this stage, an amelioration of its implementation, as well as clarification of certain aspects (such as the liability of ISPs), should be provided.

In order to achieve the objective of facilitating cross-border offers of online products and services, the Commission deems it necessary to assess the way in which a number of obstacles are still impeding the development of online services and access to them. In particular, businesses are said to be reluctant to commit to innovative activities, due to the costs and risks arising from the fragmentation of rules. This is a clear consequence of having co-existing national legal systems, each having special regard to consumer law. However, this is not the only field in which fragmentation is seen as detrimental to the achievement of the single digital market objective.[121]

As far as the market for digital content is concerned, legal offers of both music and audiovisual entertainment are evolving at different rates throughout the Member States. This does not always meet consumers' expectations, in part due to the limited availability of transnational or pan-European offers. This said, the Commission stresses the need for collective management of copyrights to become more European in structure, so as to allow for licences to cover a number of European regions. In addition, it is trusted that ambitious implementation of the recommendations included in the May 2011 blueprint of the Commission will foster the development of a richer and more suitable offer on a European scale.[122]

As has been mentioned, the Commission document of January 2012 does not expressly mention the issue of copyright full harmonization. However, this is implicit in the main actions that are indicated as being necessary. Among the other things, the Commission

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[121] The complexity of the VAT system is also regarded as a factor which dissuades businesses from selling online in another Member State. Simplification of the administrative burden on businesses under the current VAT system, in particular the establishment of one-stop shops, would encourage and facilitate cross-border ecommerce (Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A coherent framework*, *cit,* 7).

[122] *Ibid*, 6.

> will ensure that the European strategy for intellectual property rights [indicated in the May 2011 blueprint] is implemented rapidly and *ambitiously*, in particular by means of a legislative initiative on … the review of the Directive on copyright in the information society …[123]

The review of the InfoSoc Directive that the Commission intends to carry out sometime in the near future will involve a discourse on whether and to what extent full copyright harmonization is a desirable objective. As expressly stated in the May 2011 blueprint – and here recalled once again – one option aimed at ensuring a more far-reaching overhaul of copyright at the EU level would be to create an EU-wide copyright title, either by means of a codification of the present body of EU copyright directives, in order to harmonize and consolidate the entitlements provided by copyright and related rights at EU level, or by an ad hoc regulation issued pursuant to Article 118 TFEU. Discussion on this and other issues will be carried out in the context of the dialogue with relevant stakeholders. In the January 2012 document, the Commission made it clear that the EU intellectual property rights agenda is to be implemented rapidly and *ambitiously*. This rules out any possibility for full EU harmonization to be left outside the discourse on the possible amendments to the InfoSoc Directive.

SECTION II

Debate on copyright harmonization commenced about twenty-five years ago, with the 1988 GPCCT. Therefore, in relation to the history of EU integration as a whole, intellectual property (and copyright in particular) was not perceived, at first, as functional to achieving the internal market objective. It was only when awareness arose as to the key role of copyright in relation to its functioning that harmonization was pursued.

Progress and assessment of EU copyright harmonization may be viewed from three different angles. The first angle concerns the structural character of harmonization; the second, its overall ambitiousness; and the third, its merits. These will be examined in turn.

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[123] *Ibid*, 7 (emphasis added).

1. THE STRUCTURAL CHARACTER OF COPYRIGHT HARMONIZATION

Since the 1988 GPCCT, harmonization of copyright at the EU level has been characterized by the interdependence of its objective(s) and overall scope.

As far as the objective of harmonization is concerned, measures taken in this respect have often (if not always) been justified in light of eliminating obstacles and legal differences between the laws of the EU Member States, which were such as to impair the functioning of the internal market.[124] In particular, this was because the presence of differing legal solutions distorted cross-frontier trade of goods and services, as well as competition. Thus, from the very beginning of copyright harmonization, removal of internal barriers has been at the centre of EU debate. This, however, has not been the only objective. Indeed, the enhancement of the overall competitiveness of the EU economy in relation to its trading partners has also been an important aspect. This can now rightly be considered as being at the centre of the EU harmonization model. In addition, effective enforcement of intellectual property rights, as well as the development of new business models aimed at favouring access to works by EU citizens, have become increasingly relevant to the harmonization discourse.

As regards the scope of harmonization, this has always occurred on an ad hoc basis and when differences in the laws of Member States were deemed to be detrimental to the internal market objective. Hence, the EU approach to copyright has occurred following a sector-by-sector approach, and has been both functional and fragmented. From this point of view, the political breadth of the harmonization process can be said to have been minimal, also (but not only) because intellectual property as such is an area in which the EU has no exclusive internal competence.

Compliance with the principle of subsidiarity requires that action at the EU level in an area of non-exclusive competence, such as intellectual property, shall occur only when the objectives of the proposed intervention may not be sufficiently achieved by Member States' action in the framework of their national constitutional system and are therefore to be

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[124] In this sense also P Bernt Hugenholtz, Mireille van Eechoud, Stef van Gompel, Lucie Guibault, Natali Helberger, Mara Rossini, Lennert Steijger, Nicole Dufft and Philipp Bohn, *The recasting of copyright and related rights for the knowledge economy*, final report, November 2006, <http://tinyurl.com/ab9vlwy accessed> accessed 14 June 2013, 16.

better achieved by action at the EU level.[125] In addition, the principle of proportionality, which disciplines the method and intensity of EU intervention, requires that this does not go beyond what is necessary to achieve the objectives of the treaties.[126] Furthermore, the form of EU action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. In addition, all things being equal, directives should be preferred to regulations and framework directives to detailed measures.[127]

In light of the foregoing, both the primary objective and scope of EU intervention in the field of copyright have been compliant with the principles of subsidiarity and proportionality. However, neither a fully functioning internal market nor a digital single market have been completely achieved as yet.

In relation to the internal market, it is true that – as highlighted by Monti in his 2010 report – obstacles to its functioning derive from a series of challenges. Among these, there is what the Report referred to as a 'sense of complacency', as if the single market had been really completed and could thus be put to rest as a political priority. Contrary to such a belief, the internal market still needs not only to be improved, but also modernized.[128]

As regards the digital single market, the Commission has clearly pointed out that digital technologies have brought about a number of changes and challenges to the way creative content is created, exploited

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[125] *See* TEU, Section 5 of Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997), which clarifies that the following guidelines should be used in examining whether the principle of subsidiarity is respected: (1) the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; (2) actions by Member States alone or a lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion), or would otherwise significantly damage Member States' interests; (3) action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.

[126] *See* TEU, Section 1 of Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997).

[127] *See* TEU, Section 6 of Protocol (No 30) on the application of the principles of subsidiarity and proportionality (1997).

[128] *Cf* McCreevy, 'Charlie McCreevy speaks to the European Parliament JURI Committee', *cit*.

and distributed.[129] Differences in the laws of EU Member States have thus far impeded the achievement of a digital single market and the costs of a fragmented digital market are still to be borne.[130]

2. THE AMBITIOUSNESS OF THE COMMISSION'S COPYRIGHT AGENDA

Before copyright – and, more generally, intellectual property – harmonization got underway, the laws of the Member States had been affected by EU law through the EC treaties' provisions on competition and free movement of goods, although only to a limited extent. It was therefore apparent that in the early days of European integration an EU copyright policy as such did not exist. Any intervention in the field of copyright had to be justified in light of the broader objective pertaining to the realization of the internal market. However, awareness increased at the EU level as to the strategic importance of intellectual property to the overall competitiveness of the European economy. Such a role was expressly acknowledged by the Commission in its 1988 GPCCT. This marked a shift in the part the EU legislature was to play in the field of copyright in subsequent years. No longer was a negative approach to copyright adopted, ie legislative intervention aimed at eliminating obstacles to the functioning of the internal market, but also a positive approach came to play a role, seeking to favour growth and competitiveness throughout Europe, as well as to protect the creative efforts of European authors. This approach required stronger and more effective enforcement of copyright outside European borders.

The shift marked by the GPCCT inaugurated an ambitious agenda, which led to the adoption of five directives pertaining to various aspects of copyright over the course of the 1990s. Alongside these, awareness continued to increase as to the need for a level playing field for copyright to be created, in order to enhance the European IP model.

In parallel to the implementation agenda set out in 1988, the Commission started to address the challenges facing the information society, a term – as mentioned above – first used in 1993. In particular, the Commission indicated the need to favour both the development and

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[129] Reflection Document of DG INFSO and DG MARKT on *Creative content*, *cit*, 3.

[130] Commission Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A coherent framework*, *cit*, 2.

application of information and communication technologies, as well as the creation of a common information area. This was targeted at enhancing European competitiveness.

The documents published throughout the second half of the 1990s continued to emphasize the key role copyright plays both in light of the internal market objective and the overall competitiveness of the EU. In particular, attention was paid to economic rights (rights of reproduction, communication and making available to the public, and distribution), the harmonization of which quickly became a priority, not just in Europe, but also internationally.

From the end of the 1980s until the beginning of the 2000s, the EU copyright agenda continued to gain momentum and breadth. However, following the adoption of the InfoSoc Directive – and despite the ambitious objectives set out in the Lisbon Strategy – both the scope and results of the various measures adopted were modest. In particular, attention focused mostly on enforcement and rights management. Inconsistencies in definitions or rules on exceptions and limitations between the different directives were deemed to neither be in contrast to the building of an *acquis communautaire* nor to have a harmful impact on the fair balance of rights and interests. Moreover, the reviews which were carried out in the mid-2000s concluded that no further harmonization measures were necessary, as differences in the laws of Member States were not such as to impair the functioning of the internal market. Among the issues outside the current *acquis*, and for which harmonization was not deemed necessary, was originality. As will be explained below, such an attitude caused a marked delay in the harmonization process and, above all, resulted in a legislative gap which was only to be filled by EU judiciary at the end of the 2000s. Indeed, the relevance of the originality requirement to the determination of the scope of protection has been constantly overlooked, as its role was not understood fully until relatively recently. For instance, in his 1978 study on the copyright laws of the then nine EC Member States, Dietz did not consider the different thresholds to originality in the various national copyright laws, when addressing the ideal standard of protectability under EC copyright law. He argued that only the definition of 'work', which is to include the design, sketch or study (if these on their own have been expressed in a sufficiently concrete form and have not merely remained an unformed idea), ought to be retained to determine the protectability standard. Any characterization of the originality requirement was to be avoided and left to courts and case law to define. According to Dietz, even in those countries (Germany, Italy, UK, Ireland in his study) where the law provided additional hints as

to the kind of 'work' protected by copyright, the actual meaning could be defined only by courts in each individual case.[131]

Lip-service was paid to the promotion of free movement of knowledge and innovation. However, there was still no sign of a return to an ambitious harmonization agenda by the second half of the 2000s. As such, the 2008 GPCKE was simply aimed at fostering a debate on how knowledge for research, science and education could be best disseminated in the online environment. Attention clearly focused on copyright exceptions and limitations. However, no actual legislative measures followed the Green Paper, as its 2009 follow-up merely acknowledged the need for copyright policy to address the challenges facing the internet-based knowledge economy and indicated that the preferred tool for many of the issues raised in the Green Paper was a structured dialogue between relevant stakeholders. Similarly, in its 2009 Reflection Document, the Commission indicated the issues arising from dematerialization of contents and their exchange that were such as to call for consideration. These only included user-generated content and rights management. However, the Reflection Document changed the approach followed by the Commission until then.

It can be said that from 2009 onwards, the Commission's copyright agenda quite suddenly regained momentum, thus marking a shift from the developments (or lack thereof) that occurred in the 2000s. In addition to the Reflection Document – which, overall, was not particularly ambitious – the following have contributed to reinvigorating discourse around copyright at the EU level. Firstly, the 2010 Monti Report. This, while examining the shortcomings of the internal market objective, contributed to highlighting its political dimension and, alongside this, the role of Member States in its re-launch. Moreover, the importance of copyright for this objective was highlighted by the Commission in its follow-up to the Monti Report, ie the Single Market Act, as well as in its 2011 Communication on *A single market for intellectual property rights.* The latter, in particular, confirmed the renewed interest of the Commission in pursuing an EU copyright policy. The blueprint contained a fairly detailed agenda aimed at realizing the broader objective of favouring European authors, as well as economic growth and competitiveness, by putting in place an integrated and modern single market for IPRs. In addition, following the acknowledgement in the Reflection Document of the debate surrounding copyright full harmonization, the 2011 blueprint went further and mentioned the possibility of issuing a European

[131] Dietz, *Copyright law*, *cit*, 33–4.

Copyright Code, by means of a codification of the copyright directives adopted so far, or by a regulation pursuant to Article 118 TFEU.

3. THE ACHIEVEMENTS AND MERITS OF HARMONIZATION

As mentioned, the process of copyright harmonization has resulted in piecemeal legislation, which has firstly and primarily occurred where differences in the laws of Member States were deemed to impair the functioning of the internal market. Only at a later stage did legislative intervention occur for other reasons.

It has been noted[132] that, from the survey of EU directives constituting the current *acquis communautaire* and their implementation trends and pitfalls, there emerges a certain lack of consistency in the assumptions underlying current EU copyright law policy. In particular, though the harmonization process has been constantly rooted within the notion of 'adequate legal protection'[133] as a means to increase production and dissemination of works, this has resulted in harmonization moving upwards, even where economic evidence suggested that this would have led to unnecessary monopolies over non-rival resources such as cultural and information goods. There is no need to recall the heated debate

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[132] Maria Lillà Montagnani and Maurizio Borghi, 'Promises and pitfalls of the European copyright law harmonization process', in David Ward (ed), *The European Union & the culture industries: regulation and the public interest* (Ashgate 2008) 213, 213 ff.

[133] *See*, *inter alia*, Recitals 10 ('Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.') and 12 in the preamble to the InfoSoc Directive ('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 of the European Community, now Article 167 TFEU] of the Treaty requires the Community to take cultural aspects into account in its action.'). Article 167(1–2) TFEU provides that '(1) The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore. (2) Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas: improvement of the knowledge and dissemination of the culture and history of the European peoples, conservation and safeguarding of cultural heritage of European significance, non-commercial cultural exchanges, artistic and literary creation, including in the audiovisual sector.'

surrounding the extensions of the term of copyright protection, both at the time when the Term Directive[134] was issued and, more recently, with Directive 2011/77/EU, which was adopted on 12 September 2011.[135]

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[134] According to Achilles C Emilianides, 'The author revived: harmonization without justification' (2004) 26 EIPR 538, the Term Directive was an important step forward in the copyright harmonization process in the EU, but it failed to pursue the significant policy issue of the justification of copyright duration in a convincing manner. The drafters of the Directive did not concern themselves with the philosophical foundations of copyright, or with the position of authors in literary interpretation: their sole objective was the immediate effectiveness of the Directive. The rationale underlying the term extension is indeed fairly vague. Recital 2 to the Directive states that as the 'differences between the national laws governing the terms of protection of copyright and related rights [were] liable to impede the free movement of goods and freedom to provide services, and to distort competition in the common market … the laws of the Member States [were] harmoni[s]ed so as to make terms of protection identical throughout the Community'. This was not, however, the only rationale supporting the Directive: '[T]he minimum term of protection laid down by the Berne Convention, namely the life of the author and 50 years after his death, was intended to provide protection for the author and the first two generations of his descendants; … the average lifespan in the Community has grown longer, to the point where this term is no longer sufficient to cover two generations' (Recital 5 to the Directive). As a result of such vague justifications, the provisions contained in the Directive were loosely drafted and confusing, and the harmonization process was unnecessarily perplexing, concludes Emilianides (541).

[135] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, *cit*. As highlighted by Recital 5: 'Performers generally start their careers young and the current term of protection of 50 years applicable to fixations of performances often does not protect their performances for their entire lifetime. Therefore, some performers face an income gap at the end of their lifetime. In addition, performers are often unable to rely on their rights to prevent or restrict an objectionable use of their performances that may occur during their lifetime.' As pointed out – *inter alia* – by Andrew Gowers in the review which former UK Prime Minister Tony Blair's Government had commissioned to establish whether UK intellectual property law was fit for purpose in an era of globalization, digitization and ever-growing economic specialization, '[i]ncreasing the length of sound term [from fifty to seventy years after the fixation in a record] increases the length of time during which royalties accrue. Once copyright in a sound recording ends, no royalties are due for that recording, and fewer licences are required to play those songs (copyright in the composition would continue, and therefore would continue to require a licence) … Because the cost of the licences reflects the royalties payable on the copyrights, as those copyrights expire, so the cost of the licences will fall. Term extension would keep the cost of sound recording licences higher

This extended the term of protection for performers and sound recordings from fifty to seventy years. The main argument against excessive extension of the term of protection has been that, as a consequence, access to culture is denied, while no incentives to creation of new works are provided.[136] According to some commentators, term extension has contributed to the aggravation of issues concerning orphan works, in that it has made it more difficult to locate authors and so to seek and obtain licences for using third parties' works. The result is that '[i]f you can't track down who owns rights in the work, you can't use it no matter how beneficial your use may be and no matter how likely it is that the copyright owner has lost all interest in exploiting the work.'[137]

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for longer. Extension would increase costs for all businesses that play music … The impact of extension would therefore be felt throughout the economy. In conclusion, the Review finds the arguments in favour of term extension unconvincing.' (Andrew Gowers, *Gowers review of intellectual property*, December 2006, <http://tinyurl.com/af3gyqc> accessed 14 June 2013, 56.) Arguments against extension of the term of protection for sound recordings in Europe are also presented and discussed in Susanna Monseau, '"Fit for purpose": why the European Union should not extend the term of related rights protection in Europe' (2009) 19 Fordham Intell Prop Media & Ent LJ 629.

[136] For a law and economics assessment of copyright duration, *see* William M Landes and Richard A Posner, *The economic structure of intellectual property* (Belknap Press of Harvard University Press 2003) 210 ff, who highlight, *inter alia*, that (238) empirical analysis suggests that most copyrights have very little economic value after twenty-eight years.

[137] William Patry, *How to fix copyright* (OUP 2011), 190, who reports the data according to which the British Library estimates that 40% of works in its collections are orphans and over 1 million hours of television programming from the BBC archives are not used due to the impossibility, or the disproportionate cost, of tracing rightholders, as well as the risk of subsequent legal actions (British Library, 'Orphan Works and Mass Digitisation', 29 September 2010). As was made clear by Neelie Kroes, 'Addressing the orphan works challenge', IFRRO (The International Federation of Reproduction Rights Organizations) launch of ARROW+ (Accessible Registries of Rights Information and Orphan Works towards Europeana), Brussels, 10 March 2011, SPEECH/11/163, the uncertainty due to the impossibility of identifying copyright owners benefits neither the rightholders, who cannot be traced, nor the creative industries or the wider public. In addition general copyright issues pertaining to preservation and access to cultural heritage arise in respect of public domain works, too. On problems facing restoration and, reconstruction and digitization of such works, *see* Andreas Rahmatian, 'Copyright protection for restoration, reconstruction and digitization of public domain works', in Estelle Derclaye (ed), *Copyright and cultural heritage: preservation and access to work in a digital world* (Edward Elgar Publishing 2010) 51.

As mentioned above, the InfoSoc Directive has not been immune from criticism. Some commentators have called it a 'badly drafted, compromise-ridden, ambiguous piece of legislation',[138] which has not only not contributed to improving legal certainty – a goal expressly stated at recitals 4, 6, 7 and 21 therein – but was the result of 'another round of lobbying and infighting at the national level'. This has led to additional work for the Court of Justice, which had 'to finish the job left largely undone by the European legislature.'[139] In relation to this last remark, the analysis Hugenholtz carried out more than ten years ago is impressively precise. This will be seen in relation to the issue of originality, which the EU legislature has deemed so far not necessary to address and harmonize.

Such a piecemeal approach has also given rise to concerns re the actual consistency of the EU legal framework, both at the level of the *acquis* and within national systems of intellectual property rights.[140] This is because:

> Although harmonization of copyright and related rights is the stated aim, the existing directives may in effect also contribute to the preservation and in theory even proliferation of differences between Member States' laws. One reason is that sometimes only a minimum level of protection is prescribed … or that Member States may be allowed to introduce new rights … Another reason is that rights and limitations may be optional … But harmonization efforts so far have also attracted criticism for other reasons. The proportionality principle especially seeks to ensure that a legislative measure is fit for its purpose. Various elements of directives have been criticised for failing precisely that test.[141]

Even if the above lays down the flaws of the copyright harmonization process, it should be pointed out that its merits cannot be underestimated. The rationale underlying the entire process has been the removal of barriers that impeded the functioning of the internal market. Indeed, the copyright agenda of the Commission has always been functional to the broader objective of making a single market for copyright works. In addition, the process of harmonization has favoured the emergence of

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[138] P Bernt Hugenholtz, 'Why the Copyright Directive is unimportant, and possibly invalid' (2000) 22 EIPR 499, 500.

[139] *Ibid*.

[140] *Cf* Michael Hart, 'The Copyright in the Information Society Directive: an overview' (2002) 24 EIPR 58, 58.

[141] Hugenholtz, Eechoud, Gompel, Guibault, Helberger, Rossini, Steijger, Dufft and Bohn, *The recasting of copyright*, *cit*, 17.

common principles, thus contributing to the creation of a peculiar EU copyright, and to strengthened legal certainty in EU commerce.[142] Harmonization, where it occurred, was needed since the differences in the laws of Member States were at odds with the internal market objective. It is now clear that it could have been better, with particular regard to the provisions relating to technology and technological impact. These lack the flexibility required in an ever-changing marketplace.

The real question which lies before us is not whether harmonization was necessary in the first place – it was – but whether, instead, it should go further with increased momentum, as recent case law developments and inputs from the Commission suggest. The answer to this issue is definitively 'yes'. This is for two reasons.

The first supports *further* harmonization because progress so far has involved only specific aspects of copyright. This has left untouched the very basics of copyright protection, for instance the meaning of 'work' or 'original'. These gaps have been filled by the Court of Justice. Some commentators (notably Lionel Bently) have argued that the harmonizing effects of CJEU jurisprudence touched upon concepts which could not possibly be harmonized with legislation alone.[143] In any case, an EU-wide copyright discourse cannot be construed without assigning an EU meaning to very basic concepts of copyright. As will be argued below *sub* Chapter 6, Section II, any legislative intervention aimed at harmonizing such concepts will be an *ex post* codification of principles developed by the CJEU.

The second reason supports *full* harmonization. As the market for copyright works is no longer bound to analogical barriers, but is characterized by instant transmission, availability and exploitation of digital works through digital channels, it is no longer conceivable that the EU lacks an EU-wide copyright title and remains instead a fragmented legal order. This is in contrast to a market (the EU one – to say the least) in which no fragmentation is actually supposed to exist.

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[142] *Cf* P Bernt Hugenholtz, 'Harmonization or unification of copyright in the EU?', presentation at InfoSoc @ Ten. Ten years after the EU Directive on Copyright in the Information Society: looking back and looking forward, CRIDS – IviR conference, hosted by Marielle Gallo (Member of the European Parliament), European Parliament, Brussels, 13 January 2012.

[143] *See* the presentation of Lionel Bently at the Fordham IP Conference, New York, 12–13 April 2012, as reported in Eleonora Rosati, 'EU copyright at Fordham: a report (Part II)' (The 1709 Blog, 17 April 2012) <http://the1709blog.blogspot.it/2012/04/eu-copyright-at-fordham-report-part-ii.html.http://tinyurl.com/b2gkp54> accessed 14 June 2013.