By way of conclusion: what next?

Estelle Derclaye

There is no denying that the European copyright landscape has drastically changed since the 1971 *Deutsche Grammophon* case. And mostly for the better, despite some hiccups. To quote Ramón Casas Vallés’ metaphor in this book: ‘European copyright, still in a protean state, may be presented as an unfinished tapestry showing something similar to the old maps of the Holy Roman Empire: some enclaves of different nature and status, and wide empty spaces, one of them being originality.’ Should the tapestry nonetheless be completed? What is certain is that, despite a recent lull, the Commission has decided that harmonisation should go on, at least in certain areas. Recent initiatives include the proposed extension of the term of protection for sound recordings and performers to 95 years,¹ a recommendation on the collective cross-border management of copyright and related rights in relation to music² and a strategy for creative content online.³ In February 2008, the Commission also launched a new consultation (its first consultation being in 2006), indicating a renewed interest in harmonising the area of private copying.⁴ Besides these initiatives, to determine if further harmonisation is necessary, it is necessary to identify those aspects of copyright law which really need harmonisa-

---

¹ See [http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm](http://ec.europa.eu/internal_market/copyright/term-protection/term-protection_en.htm) (all websites in this conclusion were accessed on 8 October 2008).
³ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market of 3 January 2008, COM(2007) 836 final. See also [http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm](http://ec.europa.eu/avpolicy/other_actions/content_online/index_en.htm).
tion. For instance, as regards originality, the Commission said that in practice the difference in the level of the originality requirement does not lead to barriers to trade. According to Ramón Casas Vallés, this is mainly because many disputes do not go beyond the borders of a country. In this connection, the Commission harmonised originality for those works which are often commercialised beyond the borders of a country (software and databases). How does this statement fare for other areas of copyright law? This book’s contributors have revealed the current gaps and sometimes offered opinions as to whether or not they should be filled.

Of course, additional, and proper, harmonisation, where it is needed, can only bring more legal certainty, more transparency and ease in the application and respect for the law by copyright holders and users alike, and probably also reduce costs. In addition, right holders would not be able to benefit from the ‘strictest national law’ to ‘ransom’ users any more. This short conclusion is not the place to add in detail to what the contributors have already said as to areas of further harmonisation but it is useful here to pinpoint some important aspects which deserve the EU’s attention in the future.

The core aspect that the EU should begin to tackle is definitely the most daunting. It is both procedural and substantive. It is ‘simply’, instead of continuing to harmonise by way of Directives, to adopt a Regulation on the issues which affect the functioning of the internal market and to get rid of the corresponding aspects in national copyright laws. This would eliminate the territorial character of copyright laws (at least in those targeted areas) and the need to resort to private international law and avoid the latter’s detrimental effects. Indeed, if I want a licence to use a copyright work in several Member States, I will need to comply with all the laws involved where (the product incorporating) the copyright work will be marketed. In other words, I will have to make sure that such use does not infringe in any of the countries where the product will be marketed. Also, even if the work may not be protected in one country (e.g. the Tripp Trapp chair or perfumes), simply because one of the Member States where I intend to market the work itself or the product

---


6 See also K. Peifer, ‘Das Territorialitätsprinzip in Europäischen Gemeinschaftsrecht vor dem Hintergrund der technischen Entwicklungen’ [2006] 1 ZUM, pp. 3–4. Especially if it is done by way of a Regulation and if done by way of Directives, if those Directives do not leave options to Member States.

7 An explanation is provided below.

8 See respectively the contributions in this book by A. Quaedvlieg and A. Kamperman Sanders.
incorporating the work is protected in that Member State (although not in the others or many others), I will have to get a licence, and the right holder may well decide to ask for a price which would cover all Member States. This scenario will happen often, as markets have become increasingly global. In short, because according to conflict of laws rules for copyright, the law of the protecting country applies in most cases, the most protective national copyright law always wins. This of course always favours right holders. This in itself is a strong enough reason for adopting such a regulation. As stated in the introduction, the rule of the protecting country that all Member States are forced to adopt to respect the national treatment requirement of the Berne Convention, is not a panacea. Adopting such a rule does not magically create the coming together of national copyright laws as they themselves remain only partially or not at all harmonised (e.g. in the areas of ownership or moral rights to cite but two). The procedural aspects and obstacles linked to the adoption of a Regulation will be discussed further below.

What are the other pressing areas where harmonisation is necessary?

Another important and urgent aspect is exceptions to infringement. Whatever form the future harmonisation of substantive copyright law is to take, and that might be the most difficult issue to agree on, the proposals by Marie-Christine Janssens and Lucie Guibault, and others before them, to render exceptions underlain by human rights and the public interest imperative, beyond articles 9 and 15 of respectively the Software and Database Directives, should definitely be implemented. The Danish and Portuguese examples could be followed. In addition, the same imperativity should a fortiori be provided in respect of unilateral measures such as technological protection measures (TPMs). The requirement that only lawful users may benefit from exceptions, proposed by M.C. Janssens, may be more debatable. First, it would involve a drastic change in current copyright laws, as at present, this requirement only applies to software and databases, perhaps because of their more vulnerable nature (owing to their digital format, in most cases). This does not detract from the fact that the meaning of the concept should be clarified because as M.C. Janssens notes, three different interpretations now exist in the Member States. Second, what about the burden of proof? Who should bear it and how can users in every case determine that they are lawful users? In any case, the concept of lawful user is not one which is in fact properly ‘harmonised’ but would deserve to be, as different terms are used both in the Software Directive itself and in the Database Directive.

In this connection, the database sui generis right is probably the next most important area that definitely needs amending. Proposals to do so have been

---

9 For more information, see Chapter 20.
discussed in this book and elsewhere. In short, more exceptions need to be added and made mandatory for Member States to adopt as well as (for most) rendered imperative. Although every compulsory licence system may create its own costs, such licences must also be available for some commercial uses when the database producer has a monopoly and should be preferred to competition law’s by nature ex post and costlier solution. Pre-emption of the unfair competition law tort of slavish imitation is also necessary. As for most copyright exceptions in general, a similar pre-emption must also apply to TPMs and anti-circumvention provisions.

Another area which deserves academic attention, if not harmonisation, is that of the relationships between copyright law and other intellectual property laws or so-called overlaps. Many questions remain unanswered: can the term of a copyright work be prolonged by the latter’s protection under trade mark law? What if a copyright work also protected by a trade mark is parodied: which of the two laws applies? How should the rules relating to authorship and ownership be articulated when a work is also protected by a trade mark, design right or a patent? And even inside copyright law itself: what is the exact articulation between copyright and the database sui generis right, between databases and computer programs? Some partial rules already exist in some national laws. The EU could definitely do with a more precise definition of what it meant in the last articles of Directives (famously or infamously called ‘Continued application of other legal provisions’). This clarification was proposed above for the relationship between copyright and contract law. That with unfair competition (or at least with slavish imitation or parasitism), proposed above for databases, urgently needs more general consideration. Although the relationship between intellectual property rights and unfair

---

10 Chapter 17.
12 Matthias Leistner’s suggestion to apply article 82 ECT to sui generis right databases only when two conditions are fulfilled (namely indispensability and no objective justification) might arguably go too far in the other direction and nip some important investments in the bud.
14 See in the UK, ss. 224 and 236 of the Copyright Act which organise some relationships between copyright, registered and unregistered design rights.
competition law is a sisterly one and academic literature has often addressed the issue and rung alarm bells, it has never been dealt with by the EU.

In the same vein, it is a platitude to say that the relationship between copyright and competition law is unharmonised. Until recently, the case law has been relatively ‘soft’ on copyright, albeit (until IMS Health) to say the least, unclear. Now, it is not only unclear again but also much more pervasive. As Valérie-Laure Benabou argues, copyright and other IPR are arguably different and deserve special and rather urgent treatment. Unfortunately, the Microsoft case has silently but surely dented the rather clear precedent set out in IMS Health that took almost 10 years for the ECJ to reach. As argued above in relation to the sui generis right, the relationship needs to be tackled and for better results, internalised, as has already been partly done for agreements between undertakings.

Next follows a list of the areas where harmonisation is not pressing but would nevertheless be welcome.

To start at the beginning, one area which has hardly been harmonised and would need to be, if there is evidence of market distortions, is subject-matter. As noted by Tanya Aplin, the main discrepancy is between common law and civil law countries, the latter being more generous as they do not require categorisation before protection can arise. Characters, titles, and some functional works, some artistic works and most recently and notably, perfumes, can therefore be protected only on the continent. If this divergence distorts the market, and it may well do so, the case for harmonisation is ripe. The main question is whether to opt for an open or closed list of protectable works. For several reasons, Community legislative action in this area might be best rather than leaving this issue to the courts. Notwithstanding the doctrine of precedent, which anyway only exists in the UK and Ireland, judicial harmonisation could take a long time as on the one hand, certainty would only be achieved once the highest court had heard a case, and on the other, a long-standing lower court precedent could always be overturned with one strike of the highest court’s hand. In addition, the composition of courts changes (judges move up the ladder and eventually retire), so rulings may inevitably fluctuate.

---

17 Apart from the Technology Transfer Block Exemption Regulation 772/2004.
18 Ibid.
19 As a reminder, only computer programs and databases have been harmonised in respect of subject-matter and very partially, also photographs.
Harmonisation of the criterion of originality has been very limited. In 2004, the Commission clearly stated that it did not envisage further harmonisation as there was no evidence of effects on the single market. If that is still the case, there is indeed no need to act. Otherwise, in principle it would be good to harmonise. Contrary to Ramón Casas Vallés, my view is that it would not be such a symbolic move as the UK’s sufficient skill, judgement and labour or capital criterion still protects many works which would not be protected in continental Europe. However, this may prove impossible as it would necessitate, if not harmonisation of unfair competition in general, at least the introduction into UK law of the tort of slavish imitation; and this is bound to meet fierce opposition. This may therefore be the most difficult area to legislate, if it ever gets onto the EU’s agenda.

Economic rights do not need to be further harmonised (with the exception perhaps of the rights of adaptation and performance) but as Ansgar Ohly suggests, a simple codification of the existing Directives on the subject would not be a luxury.20

In 2000, a study commissioned by the EU concluded that moral rights did not create distortions in the internal market. Perhaps the fear of downward harmonisation was the main driver in the study’s conclusion. Nevertheless, collecting societies and/or authors and performers’ associations, even in the United Kingdom, where moral rights are arguably protected the least, may now be strong enough to voice their concerns in this regard21 and this fear may be overcome. In addition, the Member States’ weight has now definitely shifted to civil law systems with the enlargement, making it normally more possible to harmonise upwards rather than downwards. In addition, as pointed out by Jacques de Werra, some specific issues seem to have an effect on the internal market and would deserve to be harmonised.

The Software Directive would only need a few fixes here and there, among other things, as stated above, a clarification of the concept of lawful user which it shares with the Database Directive. Another important change would be to provide the possibility of making more than one back-up copy when it is

---


21 As shown by L. Bentley’s study, Between a Rock and a Hard Place: The Problems Facing Freelance Creators in the UK Media Market Place, London: Institute of Employment Rights, 2002.
justified by the circumstances or the user’s activity or business. Other features could be revisited for added clarity and consistency, such as article 7’s anti-circumvention provision, which is more lenient than that in article 6 of the InfoSoc Directive.

Finally, duration might be in need of a revamp, but for other reasons. These will be discussed below.

On the other hand, some areas of copyright law do not need to be harmonised.

As we know, the idea–expression dichotomy is by definition harmonised because of TRIPs. Even if all Member States adhere to the concept, it is by nature woolly and its application will always be a question of fact. This does not mean that most national courts would arrive at different results if the same case was litigated in different Member States. Even if there are differences between the UK and Ireland and continental Europe, there is also no need to harmonise the issue of fixation as shown by A. Latreille. These differences do not in practice give dissimilar results. It would therefore be a lot of effort for nothing and might open a can of worms.

It is evident that authorship and ownership are not harmonised enough. However, these areas often touch the property and contract laws of the Member States and may be outside the competence of the EU. This may be the reason why harmonisation on these issues has been minimal. For this reason and because of the GNU Free Documentation Licence (GFDL) and the fact that people expressly or implicitly relinquish their copyright when contributing to wikis, Jeremy Phillips’ proposal may only be applicable in a handful of situations (mainly when such licences do not exist on other wikis or Web 2.0 platforms). Maybe these new situations will trigger harmonisation concerns. The effects on the internal market may be more pronounced than for traditional forms of exploitation but again it would have to be checked if the EU is competent to legislate on such issues. In addition, the issue may often go beyond the EU’s borders and may be more efficiently tackled at international level.

Similarly, secondary infringement and dealings with copyright are arguably again in the remit of the Member States and harmonisation would therefore not be possible. For these areas, however, codes of practice or more generally soft law tools might achieve indirect harmonisation and would be useful although they would often lack the legitimacy of ‘hard law’.

How can these discrepancies be remedied? What are the obstacles and advantages and disadvantages of each option? And what if the EU decides not to harmonise them?

As stated above, the Directive has been the main instrument used so far. An indirect harmonisation tool could be soft law (e.g. codes of practice issued by right holders, for instance collecting societies with or without consultation of
In fact, the Commission has recently made more use of such legal instruments by way of recommendations, but as noted by Marie-Christine Janssens in her chapter, this instrument is not binding and therefore not entirely satisfactory. Recommendations, as well as interpretative communications can be seen as a good start and testing ground but they should be followed by binding law (Directives or Regulations) so as to have the enforcement effect and the possibility for the Community courts to further harmonise by interpreting Community terms. Also, as noted above, they will often not have the legitimacy of ‘hard law’. Ideally, and as proposed by Bernt Hugenholtz, a Regulation, and one that overrides the national laws (unlike the Trade Mark and Designs Regulations) would solve most if not all unharmonised issues. Whatever the form (Directive or Regulation), as the cost of harmonisation is high (Member States have had to implement Directives almost every year), it would be better to legislate on the remaining issues all in one go.

In addition to the obvious advantage of a Regulation over a Directive (direct legal effect and with it, reduced cost and added transparency), another advantage is that it ‘might provide a certain “rebalancing” of rights and limitations, in order to rectify the overprotection resulting from 15 years of “upwards” harmonisation’. The choice of a Regulation has however some disadvantages. It may attract greater opposition from Member States and may therefore take longer to adopt and if it is not based on article 95 but on article 308 of the EC Treaty (ECT), it will require unanimity in the Council, an added obstacle to (swift) adoption. Other potential obstacles to further harmonisation, be it achieved by Directive or Regulation, can be identified. A first and perhaps obvious one is the increase in the number of Member States from 25 in 2004 to 27 in 2007, and possibly even more in the future. Notably, the last Directive in the field of copyright (on the resale right) dates from 2001 and the last horizontal one applying to copyright (the Enforcement Directive) was literally adopted just two days before the accession of the new Member States on 1 May 2004.

22 Could proposals by academics fall into this category?
24 As implicitly advocated by the IVIR Study 2006, Chapter 7.
25 IVIR Study 2006, p. 11 of the Executive Summary and p. 219 of the study.
26 IVIR Study 2006, p. 221.
Regulation may become an uphill struggle, if not an impasse. If achieved, it may lead, as has already been seen with the InfoSoc Directive, to a situation as bad if not worse than before harmonisation, owing to complex compromises to please all Member States and exacerbated by vigorous and generally one-sided lobbying. In addition, according to the principles of subsidiarity and proportionality, the EU can only adopt measures for the approximation of national laws ‘which have as their object the establishment and functioning of the internal market’. In other words, differences must exist in the Member States which distort the internal market, otherwise harmonisation (be it by Directive or Regulation) cannot be initiated. It could however act on the basis of article 308 (residual competence) as it did for the Community Trade Mark and Design Regulations but only if the Community Copyright Regulation leaves intact territorial copyrights. If this path is followed, as stated above, it would require unanimity in the Council which is a considerable disadvantage. Also, now that many areas have been harmonised, there may be a shift towards the protection of cultural identities (which copyright laws arguably influence) and a reluctance to harmonise the national copyright laws further to preserve them. With the risk of downward harmonisation in some areas (such as moral rights), this argument (which could be based on the subsidiarity principle) might gain weight.

If the worst comes to the worst and further harmonisation is not achieved by way of binding or non-binding instruments, extra harmonisation may be achieved gradually by the Community and national courts on the basis of the current Directives. Whilst it may take a long time for a question to be asked at the Community courts and then for them to interpret Community copyright concepts, national courts can also play a significant role in the harmonisation of EU copyright law. This has recently been seen in the area of designs where both the High Court and the Court of Appeal of England and Wales followed rulings of the OHIM and other national courts. This way of proceeding will also reduce the need to refer questions to the ECJ, which is already overburdened.

The last question is perhaps the most important: as differences inevitably exist between Member States, the issue of upwards or downwards harmonisation always arises. This question is bound to recur and perhaps sooner than one thinks, for instance on the issue of duration, with the recent proposal to

28 If a unitary copyright ‘were deemed necessary to ensure the functioning of the internal market, it could however be argued that article 95 does constitute an adequate legal basis’. See IVIR Study 2006, pp. 14 and 15.

29 And provided the Community courts do not give cryptic answers or leave it entirely to national courts. See for instance the notion of equitable remuneration in the SENA v. NOS case, ECJ, C-245/00, [2003] All ER (D) 67; [2003] ECR-I 1251.
prolong the term of protection of sound recordings and performers to 95 years probably driven by ever growing life expectancy.\textsuperscript{30} As the issue of upward or downward harmonisation will arise with any future legislative action in the field of copyright, it is crucial to think beyond the specific aspect at hand before a Directive or Regulation (re)sets this aspect in stone (as we know it is extremely difficult to revise statutory law once it is passed). Therefore, a return to the history of copyright, its general justifications and those for its specific conditions and limits, with a comparative outlook, and an analysis of the consequences of legislating upwards or downwards beforehand, combined with some empirical or at least theoretical economic evidence, is necessary before adopting a Directive or a Regulation on any copyright aspect. The copyright term can usefully be discussed here, as it is a good example of upwards harmonisation and provides food for thought on all future ‘harmonisable’ areas.

Was it absolutely necessary to harmonise the term upwards? Probably not. And it need not be that way in future. If one simply rethinks along the lines of the justifications for having copyright, arguably, if the incentive to create is the rationale, or even natural rights, the authors’ heirs do not need royalties, as they are not the ones who created the work in the first place. Arguably, it may even discourage them from creating themselves (and arguably the same goes for any legal entity that owns the rights) if they sit on a nice royalties stream all their life (and 70 years will still for the most part cover it)!\textsuperscript{31} Perhaps the term of copyright should be set at the life of the author only.\textsuperscript{32} This should be backed by empirical or at least theoretical economic analysis. An examination of the reasons for the gradual increase in the length of the copyright term in the different Member States would also help us to understand how we got there and see whether it was justified in view of the rationales. As hinted by Brigitte Linder in her historical account of the German copyright act, (one-sided?) lobbying, and/or national protectionism (noting that the term of protection was increased to 30 years in 1841 primarily to secure protection in the works of Goethe and Schiller), may have been and may still be the main 

\textsuperscript{30} An argument that can be seen as a pretext used by holders of related rights to expand the term of protection to their single advantage.


\textsuperscript{32} An exception could be made when the author dies very young leaving his or her family, if s/he had one, with no income stream, as generally heirs will welcome this revenue. A counter-argument would be that any widower, widow or orphan will always have the same problem whatever the source of the income stream. Thus, why should an exception be made for widows, widowers and orphans of authors?
reason for upwards harmonisation and this may not only apply to duration but to all other areas of copyright law. Since Germany was the most powerful country which had one of the longest terms of protection in Europe when the Directive was adopted, it would be interesting to revisit as well why the term of protection in Germany more than doubled in a little more than a century (from 30 p.m.a in 1837 to 70 p.m.a. in 1965). As for human rights, according to John Adams in his chapter, ECHR case law concerning article 1 of the First Protocol to the ECHR (right to the respect of property) means that ‘when the term of copyright is altered, it should not be done in a way which divests owners of the unexpired part of their copyright term’. This needs further explanation. One interpretation of this case law leads to the consequence that harmonising upwards may be the only way forward! Such interpretation, without safeguards, may lead to a vicious escalating circle. Another interpretation could be in line with the German Federal Constitutional Court’s decisions noted by Brigitte Lindner in her contribution: ‘neither the downgrading of the protection from an author’s to a related right nor the shortening of the term of protection as such was contrary to constitutional law. However, the change of the starting point of a term of protection which was already running at the time the law is modified was considered incompatible with constitutional law’. In addition and more generally, with human rights now firmly in the picture, could not it be said that some ‘expropriations’ of intellectual property rights could sometimes be in the public interest? As the example of the copyright term shows, there is definitely a lot to be studied, and in many different ways, before any new harmonisation initiative in the field of copyright should be undertaken.33

33 In the area of duration, the 2006 IVIR Study (chapter 3) has already made a fairly comprehensive analysis of the arguments for and against an upwards harmonisation of the term of sound recordings and recommended the status quo.