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Copyright in Europe: Twenty Years Ago, Today and What the Future Holds

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Cover Page Footnote

Dr. P. Bernt Hugenholtz is Professor of Law at the University of Amsterdam and Director of the Institute for Information Law (IViR). He is co-author with Prof. Paul Goldstein of *INTERNATIONAL COPYRIGHT* (Oxford University Press, 3rd ed., 2012), and has acted as an advisor to WIPO, the European Commission, and the European Parliament.

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Prof. P. Bernt Hugenholtz*

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INTRODUCTION¹

The history of the annual Fordham Intellectual Property Law and Policy Conference, now in its twentieth highly successful year, is directly connected to the beginnings of European copyright harmonization. As Professor Hugh Hansen, the indefatigable initiator, inspirer, moderator, mentor and, of course, Director of the Fordham Conference, describes in the preface to the very first volume of the event's proceedings, the idea to institute an annual

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¹ This article is partly based on studies that the Institute for Information Law (IViR) carried out for the European Commission. See MIREILLE VAN EECHOU, P. BERNT HUGENHOLTZ, STEF VAN GOMPEL, LUCIE GUIBAULT & NATALI HELBERGER, *HARMONIZING EUROPEAN COPYRIGHT LAW: THE CHALLENGES OF BETTER LAWMAKING* (P. Bernt Hugenholtz ed., 2009).

conference on European Commission (“the Commission”) copyright law originated with Jean-François Verstrynge, the former Head of Division DG III/E-4, the copyright unit of the European Commission.² While the Fordham Conference eventually became a much more ambitious undertaking, with a global rather than solely European reach, and encompassing the entire spectrum of intellectual property rights, it has always remained the prime forum for up-to-date debate on European copyright law and policy—even for Europeans.

The harmonization of European copyright law largely coincided with the first twenty years of the Fordham Conference. Since the early 1990s, the European Union (“EU”) (formerly the European Community) has carried out an ambitious agenda of copyright harmonization, which has resulted in eight directives on copyright and related rights adopted between 1991 and 2012.³

This article critically assesses the results of copyright harmonization across the European Union. It commences with a description of the harmonization process that has led to the current *acquis communautaire*,⁴ which has occurred in three distinct phases, as described in Section I. Section II thereafter assesses the costs and benefits of harmonization, while Section III looks at the future prospect of unitary copyright protection in the EU

² Hugh C. Hansen, *Conference Director’s Note* in 1 INTERNATIONAL INTELLECTUAL PROPERTY LAW AND POLICY, at v (Hugh C. Hansen, ed., 1996); *see also* Jörg Reinbothe, A Review of the Last Ten Years and A Look at What Lies Ahead: Copyright and Related Rights in the European Union, 1 10th Conference on International Intellectual Property Law & Policy 1 (Apr. 4, 2002).

³ *See* Reinbothe, *supra* note 2, at 5.

⁴ *Acquis communautaire*, EUROFOUND, <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/acquiscommunautaire.htm> (last updated Mar. 12, 2007) (“*Acquis communautaire* is a French term referring to the cumulative body of European Community laws, comprising the EC’s objectives, substantive rules, policies and, in particular, the primary and secondary legislation and case law—all of which form part of the legal order of the European Union (EU).”).

I. THE HARMONIZATION OF COPYRIGHT AND RELATED RIGHTS IN THE EU

Harmonization of copyright law in the European Union has largely occurred in three phases: an initial, very productive decade of harmonization by directive (1991–2001); a second, less productive decade of consolidation and “soft law” (2001–2009); and a third period of activist judicial interpretation by the Court of Justice of the EU that began in approximately 2009.

A. *The Decade of Directives (1991–2001)*

Of the eight directives in the field of copyright and related rights that are currently in place in the European Union, seven were adopted between 1991 and 2001.⁵ The first, on computer

⁵ See Reinbothe, *supra* note 2, at 3; Hansen, *supra* note 2, at v; Directive 2001/84, 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 O.J. (L 272) 32 (EC) [hereinafter Resale Rights Directive]; Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10 (EC) [hereinafter Information Society Directive]; Directive 96/9, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, 1996 O.J. (L 77) 20 (EC) [hereinafter Database Directive]; Council Directive 93/83, 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 O.J. (L 248) 15 (EC) [hereinafter Satellite and Cable Directive]; Council Directive 93/98, of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights, 1993 O.J. (L 290) 9, *amended by* Directive 2011/77, of the European Parliament and of the Council of 27 September 2011, 2011 O.J. (L 265) 1 (EU) [hereinafter Term Directive]; Council Directive 92/100, of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 1992 O.J. (L 346) 61, *amended by* Directive 2006/115, 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, 2006 O.J. (L 376) 28 (EC) [hereinafter Rental Rights Directive]; Council Directive 91/250, of 14 May 1991 on the Legal Protection of Computer Programs, 1991 O.J. (L 122) 42, *amended by* Directive 2009/24, of the European Parliament and of the Council of 23 April 2009 on the Legal Protection of Computer Programs, 2009 O.J. (L 111) 16 (EC) [hereinafter Computer Programs Directive]; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works, 2012 O.J. (L 299) 5 [hereinafter Orphan Works Directive]. At the time of finalizing this article one proposal for a directive was pending: 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,

programs, was adopted in 1991, while the seventh, dealing with artists' resale rights, dates from September 2001.

This initial, productive period of harmonization by directive happened in two stages, marking different approaches and ambitions of the European legislature.⁶ The “first generation”⁷ directives all have their roots in the *Green Paper on Copyright and the Challenge of Technology* published by the Commission in 1988.⁸ In it, the Commission identified six areas in which immediate action by the Community legislature was required: (1) piracy (enforcement), (2) audiovisual home copying, (3) distribution right, exhaustion and rental right, (4) computer programs, (5) databases, and (6) multilateral and bilateral external relations.⁹ In the *Follow-up to the Green Paper*, published by the Commission in 1990, several additional areas of possible Community action were identified—including the duration of legal protection, moral rights, reprography and artists' resale rights—and an entire chapter was devoted to broadcasting-related problems.¹⁰

Not coincidentally, many of the issues identified by the European Commission as requiring harmonization concerned new information technologies—areas where no or few disparities yet existed between the laws of the Member States.¹¹ Most likely, the European Commission saw these largely uncharted areas as ‘easy’ targets for early harmonization, since no deep-rooted national

COM (2012) 372 final (July 7, 2011) [hereinafter Proposal on Collective Management of Copyright].

⁶ See Reinbothe, *supra* note 2, at 1–3 (identifying a “first generation” and a “new generation” of EU copyright legislation).

⁷ *Id.*

⁸ *Commission Green Paper on Copyright and the Challenge of Technology—Copyright Issues Requiring Immediate Action*, COM (1988) 172 final (June 7, 1988) [hereinafter *Green Paper on Copyright and the Challenge of Technology*].

⁹ *Id.* at 15–16.

¹⁰ *Commission Follow-up to the Green Paper—Working Programme of the Commission in the Field of Copyright and Neighbouring Rights*, at 33, 35–37, COM (1990) 584 final (Jan. 17, 1991) [hereinafter *Follow-up to the Green Paper* or *Follow-up*]. The *Follow-up to the Green Paper* defines “reprography” as “reproduction by photocopying or by similar mechanical reproduction process.” *Id.*

¹¹ See *Green Paper on Copyright and the Challenge of Technology*, *supra* note 8, at 7.

copyright doctrines or established case law would pose obstacles to approximation.

Much of the Commission's work program, as announced in the 1998 *Green Paper on Copyright and the Challenge of Technology* and the 1990 *Follow-up*, materialized throughout the 1990s. In 1991 the Computer Programs Directive became the very first directive to concern copyright law.¹² In response to the spectacular growth of the software sector—particularly the then-emerging personal computer market—the Directive created a harmonized framework, which included economic rights and limitations, for the protection of computer programs as “literary works.”¹³ The Directive's success is particularly notable in light of its controversial decompilation exception, the subject of intense lobbying and political debate.¹⁴

The second directive to be adopted, the Rental Right Directive of 1992, harmonized—and for some Member States introduced—commercial rental and lending rights.¹⁵ More importantly, the Directive also established a horizontal harmonized framework for the protection of neighboring, or related, rights of performers, phonogram producers, broadcasting organizations and film producers¹⁶ at levels well exceeding the minimum norms of the Rome Convention.¹⁷

In 1993 two more directives were adopted. Departing from the prevailing approach of approximation of national laws, the Satellite and Cable Directive, more ambitiously, sought to achieve an internal market for transfrontier satellite services by applying a

¹² See *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Implementation and Effects of Directive 91/250/EEC on the Legal Protection of Computer Programs*, at 2, COM (2000) 199 final (Apr. 10, 2000) [hereinafter *Report on Directive 91/250/EEC*].

¹³ See Computer Programs Directive, *supra* note 5, arts. 1–6, at 44–45.

¹⁴ See Joseph Haff, *The EC Directive on the Legal Protection of Computer Programs: Decompilation and Security for Confidential Programming Techniques*, 30 COLUM. J. TRANSNAT'L L. 401, 401 (1992).

¹⁵ See Rental Rights Directive, *supra* note 5, art. 1(2)–(3), at 63.

¹⁶ *Id.* art. 9, at 64.

¹⁷ See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations art. 7, Oct. 26, 1961, 496 U.N.T.S. 43.

country-of-origin rule to acts of satellite broadcasting.¹⁸ This directive was promulgated in precise response to the deployment of new technologies—namely satellite and cable—in the transmission of broadcast programs. These new technologies greatly facilitated the accessibility of television programs across national borders. Indeed, the Directive envisioned the establishment of an internal market for broadcasting services.¹⁹ In addition to its innovative legal regime for satellite broadcasting the Directive also introduced a scheme of mandatory collective rights management with regard to acts of cable retransmission.²⁰ The unique characteristics of the Directive can be attributed to its origin, which we find not in the Green Paper of 1988, but in an earlier Green Paper that dealt primarily with broadcasting regulation,²¹ and which eventually resulted in the *Television Without Frontiers* Directive of 1989.²²

The year 1993 also saw the adoption of the Term Directive that harmonized the duration of protection for copyright at the relatively high level of seventy years *post mortem auctoris*, and set the duration of neighboring rights at fifty years.²³

Three years later, in 1996, the Database Directive was adopted. The Directive created a two-tier protection regime for electronic and non-electronic databases.²⁴ Member States were obliged to protect databases by copyright as intellectual creations, and provide for a “*sui generis*” right, or database right, to protect the contents of a database in which the producer has substantially invested.²⁵

¹⁸ See Satellite and Cable Directive, *supra* note 5, ¶¶ 2, 13–14, at 15–16.

¹⁹ See *id.* ¶. 2, at 15.

²⁰ See *id.* art. 9, at 20–21.

²¹ *Television Without Frontiers: Green Paper on the Establishment of the Common Market for Broadcasting, Especially by Satellite and Cable*, at 105–125, COM (84) 300 final (June 14, 1984).

²² Council Directive 89/552, of October 1989 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Pursuit of Television Broadcasting Activities, 1989 O.J. (L 298) (EC).

²³ See Term Directive, *supra* note 5, arts. 1, 3, at 11–12.

²⁴ See Database Directive, *supra* note 5.

²⁵ *Id.* art. 7, at 25–26.

However, despite these advances, the directive on home copying of sound and audiovisual recordings prioritized in the *Follow-up to the Green Paper* was never proposed. The issue of private copying was eventually harmonized, to a limited extent, by the Information Society Directive.²⁶ But the thorny issue of levies, previously mentioned in the Green Paper of 1988, has remained on the Commission's agenda until this day.²⁷

Of the issues mentioned but not prioritized in the *Follow-up to the Green Paper*, two eventually resulted in directives. In 2001, after barely surviving its perilous journey between the Commission, the European Parliament and the Council, the Resale Right Directive was finally adopted.²⁸ The Commission's original work program was eventually completed by the adoption in 2004 of the Enforcement Directive that provides for harmonized remedies against piracy and other acts of intellectual property rights infringement.²⁹

By the mid-1990s, however, the Commission's harmonization agenda had become more ambitious. The emergence of the Internet promised seamless trans-border services involving a broad spectrum of subject matter protected by copyright and related rights. This brought a new urgency to the harmonization process, which had slowed considerably after its productive beginnings.

Early in 1994, work commenced on a new round of copyright law harmonization, eventually leading to the publication of yet another Green Paper in 1995.³⁰ Simultaneously, ongoing discussions at the World Intellectual Property Organization

²⁶ Information Society Directive, *supra* note 5.

²⁷ As recently as April 2, 2012, a special European mediator was appointed to explore ways of bringing the perennial issue of copyright levies forward at the European level. See Statement by Mr. Antonio Vitorino on the Mediation Process Concerning Private Copying and Reprography Levies (Apr. 2, 2012), *available at* http://ec.europa.eu/commission_2010-2014/barnier/headlines/speeches/2012/04/20120402_en.htm.

²⁸ Resale Rights Directive, *supra* note 5.

²⁹ Directive 2004/48, of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights, 2004 O.J. (L 195) 16 [hereinafter Enforcement Directive].

³⁰ *Copyright and Related Rights in the Information Society*, COM (1995) 382 final (July 19, 1995).

(WIPO) on a possible Protocol to the Berne Convention accelerated and eventually led to the signing of the WIPO Copyright Treaty (W.C.T.) and WIPO Performances and Phonograms Treaty (W.P.P.T.) in 1996.³¹ Both treaties were signed by the Commission on behalf of the European Union, which thereby assumed a commitment to implement the new international norms in a harmonized fashion.

Surprisingly, the scope of the Information Society Directive, which arose from the 1995 Green Paper, turned out to be considerably more broad than the “digital agenda” it was intended to address. While the Directive harmonizes the basic economic rights (i.e., the rights of reproduction, communication to the public, and distribution) in a broad and Internet-conscious manner, and also introduces special protection for digital rights management systems, the largest part of the Directive deals with exceptions and limitations—a subject that was never on the agenda of any green paper.

After this extremely productive initial decade of harmonization by directive, no new directives in the field of copyright were passed for many years. For reasons known only to the Commission, three directives—the Rental Rights Directive, the Term Directive and the Computer Programs Directive—were renumbered, despite receiving only very minor updates, between 2006 and 2009.³² Further, in 2011, the Term Directive underwent a more far-reaching amendment by way of Directive 2011/77/EU. That Directive instructs Member States to extend from fifty to seventy years the term of neighboring rights protection received by phonogram producers and performing artists with respect to their musical sound recordings.³³ The amending directive has attracted near-universal criticism from copyright scholars in Europe,³⁴ and

³¹ Jan Rosen, *SERVER COPYRIGHT LIABILITY—NOTES ON THE SWEDISH ACT ON LIABILITY FOR INTERMEDIARIES AND TWO RECENT DECISIONS OF THE SWEDISH SUPREME COURT*, Stockholm Inst. for Scandinavian Law, 147, 147 n.1 (2002).

³² See Rental Rights Directive, *supra* note 5; Term Directive, *supra* note 5; Computer Programs Directive, *supra* note 5.

³³ See generally Term Directive, *supra* note 5.

³⁴ See, e.g., Natali Helberger, Nicole Dufft, Stef Van Gompel, & Bernt Hugenholtz, *Never Forever: Why Extending the Term of Protection for Sound Recordings is a Bad Idea*, 5 EUR. INTELL. PROP. REV. 174 (2008) (U.K.).

was passed by only the smallest of margins in the European Council.

B. The Consolidation Decade (2001–2009)

In the years following 2001, the pace of copyright harmonization slowed considerably. Other than the Enforcement Directive that was adopted in 2004 to handle the enforcement of intellectual property rights generally,³⁵ and the Orphan Works Directive of 2012,³⁶ there have been no new directives concerning copyright. Explanations for this decline in legislative activity vary. Surely, an important factor was the rapid growth of EU membership, which made lawmaking at the EU level increasingly complex and difficult. Further, since the new EU Member States came from less-developed parts of Europe, these states were less inclined to automatically support an agenda of ever-increasing rights. Additionally, a gradual loss of faith in the quality of the EU legislative product, and in the Union generally, may have played a role.

All this suggests a gradual policy shift by the European Commission, which has the sole authority to initiate harmonization directives, towards softer legislative instruments such as the Online Music Recommendation issued by the Commission in 2005.³⁷ This non-binding recommendation sought to facilitate the grant of Union-wide licenses for online uses of musical works by requiring collective rights management societies to allow rightsholders to withdraw their online rights and grant them to a single collective rights manager operating at the EU level.³⁸

While rather short on substantive law, the 2001–2009 period did generate a flurry of European Commission policy papers, surely the most intriguing of which is the Commission's 2005

³⁵ See Enforcement Directive, *supra* note 29.

³⁶ See Orphan Works Directive, *supra* note 5.

³⁷ Commission Recommendation 2005/737, on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services, 2005 O.J. (L 276) 54 [hereinafter Online Music Recommendation].

³⁸ *Id.* ¶ 5(c), at 56.

evaluation of the Database Directive.³⁹ In marked contrast to the reports the Commission usually produces praising its progeny of directives,⁴⁰ this evaluation report is a scathing review of a directive once heralded as a model for the world. According to the Commission,

[f]rom the outset, there have been problems associated with the “sui generis” right: the scope of the right is unclear; granting protection to “non-original” databases is perceived as locking up information, especially data and information that are in the public domain; and its failure to produce any measurable impact on European database production.⁴¹

The Commission then proposes various policy options, including repealing the entire Directive.⁴²

Other noteworthy documents from this period include a 2008 Green Paper⁴³ and a 2009 Communication⁴⁴—both concerning copyright in the knowledge economy—that introduced various future dossiers, such as the issues of orphan works and user-generated content.⁴⁵ The former eventually led to a directive on orphan works that was adopted in October 2012.⁴⁶

The new decade indeed seems to promise years of increased productivity for the European lawmaker. The year 2011 produced two papers that set out the harmonization agenda of the European

³⁹ DG Internal Market and Services Working Paper, *First Evaluation of Directive 96/9/EC on the Legal Protection of Databases*, EUROPA (Dec. 12, 2005), http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf [hereinafter *First Evaluation of Directive 96/9/EC*].

⁴⁰ See, e.g., *Report on Directive 91/250/EEC*, *supra* note 12, at 2.

⁴¹ *First Evaluation of Directive 96/9/EC*, *supra* note 39, at 23.

⁴² *Id.* at 25–27.

⁴³ *Commission Green Paper on Copyright in the Knowledge Economy*, COM (2008) 466 final (July 16, 2008).

⁴⁴ *Communication from the Commission on Copyright in the Knowledge Economy*, COM (2009) 532 final (Oct. 19, 2009).

⁴⁵ *Id.* at 5–6, 9.

⁴⁶ See Orphan Works Directive, *supra* note 5.

Union for the near future.⁴⁷ High on the list is harmonization of the rules of governance of collective rights management organizations—a dossier that has been on the Commission’s desk since at least 2004, when it published an ambitious Communication expressing an urgent need for community action in this complex field.⁴⁸ The Commission’s long-awaited proposal for a directive on collective rights management was finally published in July, 2012.⁴⁹ The proposal pursues two goals: (1) to promote greater transparency and improve the governance of collecting societies through strengthened reporting obligations and rightsholders’ control over their activities; and (2) to encourage and facilitate multi-territorial and multi-repertoire licensing of authors’ rights in musical works for online uses in the EU, by way of a “passport system” that favors collective rights management organizations that are capable of offering such licenses under competitive conditions.⁵⁰

C. *The Age of Judicial Activism (2009–Present)*

Despite the Commission’s renewed ambitions, the center of copyright harmonization in the EU has in recent years shifted from the lawmaker to the judiciary—the Court of Justice of the European Union. Beginning with the landmark *Infopaq* case of 2009, the Court seems to pursue an activist agenda of harmonization by interpretation—or by “stealth,” as one commentator would have it.⁵¹ In *Infopaq*—a case involving the

⁴⁷ *Commission Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges Towards a Digital Single Market*, COM (2011) 427 final (July 13, 2011); *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on 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*, COM (2011) 287 final (May 24, 2011) [hereinafter *Communication on a Single Market for Intellectual Property Rights*].

⁴⁸ *See Communication on Collective Rights Management*, COM (2004) 261 final (Apr. 16, 2004), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0261:EN:NOT>.

⁴⁹ *Proposal on Collective Management of Copyright*, *supra* note 5.

⁵⁰ *See id.* at 2–3.

⁵¹ Lionel Bently, Professor of Law, Univ. of Cambridge, Address at the 20th Annual Fordham Intellectual Property Law and Policy Conference: Harmonization by Stealth: Copyright and the ECJ (Apr. 13, 2012); *see also* Gernot Schulze, *Schleichende*

unauthorized reproduction of eleven-word fragments of newspaper articles by a news alert service—the Court rather matter-of-factly held that “copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author’s own intellectual creation.”⁵² From this the Court derived a harmonized copyright infringement standard:

In the light of those considerations, the reproduction of an extract of a protected work which, like those at issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author’s own intellectual creation; it is for the national court to make this determination.⁵³

The Court’s holding is roughly in line with the author’s rights conception of works of authorship that underlies copyright law in continental European Member States. Nonetheless, it came as a surprise since no general harmonized standards for works of authorship or copyright infringement formally exist. The directives have only harmonized three distinct categories of works—computer programs,⁵⁴ databases⁵⁵ and photographs⁵⁶—along the common standard of “the author’s own intellectual creation,” whereas the directives are completely silent on the standard(s) for assessing copyright infringement.⁵⁷ The Court nevertheless has confirmed and expanded its *Infopaq* holding in *Bezpečnostní softwarová asociace v. Ministerstvo kultury (BSA)* and various later cases, consistently repeating that copyrightable

Harmonisierung des urheberrechtlichen Werkbegriffs?—Anmerkung zu EuGH “Infopaq/DDF” [Gradual Harmonization of Copyright Work Concept?—Note on ECJ “Infopaq/DDF”], GRUR 1019 (2009).

⁵² *Infopaq*, 2009 E.C.R. I-06569, ¶ 37.

⁵³ *Id.* ¶ 48.

⁵⁴ Computer Programs Directive, *supra* note 5, art 1(3), at 18.

⁵⁵ Database Directive, *supra* note 5, art. 3(1), at 25.

⁵⁶ Term Directive, *supra* note 5, art. 6, at 14.

⁵⁷ *Infopaq*, 2009 E.C.R. I-06569, ¶ 6.

subject matter in the EU must be the “author’s own intellectual creation.”⁵⁸

Not surprisingly, the *Infopaq* and *BSA* decisions have attracted criticism, mostly from commentators in the United Kingdom. One such commentator believes the decisions are “a striking example of judicial activism in the interests of harmonization.”⁵⁹ Not deterred by this criticism, in more recent decisions the Court has continued to practice similar judicial activism on other frontiers, such as that of the right of communication to the public.⁶⁰ According to the Court, communication to the public occurs both in a hotel that merely provides CDs and CD players to its guests,⁶¹ and in a public house where customers may view broadcast sports programs on television screens,⁶² but not in a dentist’s waiting room.⁶³

In another landmark decision, *Martin Luksan v. Petrus van der Let*, the Court once again ventured into unharmonized terrain—here, the law of film production contracts.⁶⁴ In *Luksan*, the Court held that the economic rights to exploit a cinematographic work vest by operation of law, directly and originally, in the principal director of the film.⁶⁵ Consequently, a national Austrian law that

⁵⁸ See, e.g., *BSA*, 2010 E.C.R. I-13971, ¶¶ 42, 46 (holding that graphical user interface of a computer program, while failing to qualify as a ‘computer program’, was protected by copyright if it is its author’s own intellectual creation); see also *Joined Cases C-403/08 & C-429/08, Football Association Premier League Ltd. v. QC Leisure*, 2011 E.C.R. I-____ (delivered Oct. 4, 2011) (not yet reported) [hereinafter *FA Premier League*] (holding that football matches are not considered works of authorship).

⁵⁹ Jonathan Griffiths, *Infopaq, BSA and the ‘Europeanisation’ of United Kingdom Copyright Law*, 16 MEDIA & ARTS L. REV. (manuscript at 1–2) (2011), available at <http://ssrn.com/abstract=1777027>.

⁶⁰ See, e.g., *Case C-162/10, Phonographic Performance (Ir.) Ltd. v. Ir.*, 2012 E.C.R. I-____, ¶ 26 (delivered March 15, 2012) (not yet reported) (explaining that, “under article 8(2) of Directive 2006/115, Member States are to provide a right in order to ensure that a single equitable remuneration is paid by the user, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public”).

⁶¹ See *id.* ¶ 78.

⁶² See *FA Premier League*, 2011 E.C.R. I-____, ¶ 211 (delivered Oct. 4, 2011).

⁶³ See *Case C-135/10, Società Consortile Fonografici (SCF) v. Marco Del Corso*, 2012 E.C.R. I-____, ¶ 103 (delivered Mar. 15, 2012) (not yet reported).

⁶⁴ See *Case C-277/10, Martin Luksan v. Petrus van der Let*, 2012 E.C.R. I-____, ¶ 2 (delivered Feb. 9, 2012) (not yet reported).

⁶⁵ See *id.* ¶ 72.

allocated these rights to the film producer was deemed incompatible with EU law.⁶⁶

As a result of these and similar decisions, important areas of copyright that had largely been left formally untouched by harmonization directives have been de facto harmonized by the Court. One can only wonder what topics, if any, will remain for the EU legislature to tackle in the years to come.

The Court's recent judicial activism reminds one of the important role that the Court of Justice played in the years leading up to harmonization. In a series of landmark decisions throughout those years, the Court measured the exercise of intellectual property rights against the basic freedoms of the internal market—in particular, the free circulation of goods and services.⁶⁷ Where the exercise of IP rights was found to be outside the specific subject matter of intellectual property (e.g., to impede parallel imports of copyrighted goods between Member States), the Court found such exercise to conflict with these market freedoms. These early decisions of the Court can be seen as a first step in the harmonization process, and they certainly provided an important impetus for the European Commission's harmonization initiative.⁶⁸

II. THE PROS AND CONS OF HARMONIZATION

The question remains: how to assess the European harmonization experience after twenty years? At first impression, these two decades of harmonization of copyright and related rights have been remarkably productive. Despite initial skepticism about the European Union's legislative competence in the realm of copyright among Member States, stakeholders and scholars, the

⁶⁶ See *id.* ¶¶ 34–35.

⁶⁷ See, e.g. Case C-78/70, *Deutsche Grammophon Gesellschaft mbH v. Metro-SB-Großmärkte GmbH & Co.*, 1971 E.C.R. 487; Case C-62/79, *Coditel v. Ciné Vog Films*, 1980 E.C.R. 881; Case C-262/81, *Coditel v. Ciné Vog Films (Coditel II)*, 1982 E.C.R. 3381; Case C-58/80, *Dansk Supermarked v. Imerco*, 1981 E.C.R. 181; Case C-158/86, *Warner Bros. v. Christiansen*, 1988 E.C.R. 2605; Case C-341/87, *EMI Electrola GmbH v. Patricia Im- und Export*, 1989 E.C.R. 79; Case C-395/87, *Ministère Public v. Tournier*, 1989 E.C.R. 2521; Case C-61/97, *Egmont Film v. Laserdisken*, 1998 E.C.R. I-5171.

⁶⁸ See Jean-François Verstrynge, *Copyright in the European Economic Community*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 5, 6 (1993).

EU legislature has carried out an ambitious and broad-ranging agenda of harmonization that has touched upon many of the most important issues in the field of copyright and related rights. From the early directives dealing primarily with the specific subject matter of rights, to the later Information Society Directive, the harmonization process has produced a sizeable body of European law on the subject matter, scope, limitations, term and enforcement of copyright and related rights.

Although many inconsistencies remain, the harmonization machinery has undeniably produced a certain *acquis communautaire*.⁶⁹ While far from complete, it has normative effect not only in the Member States, which are after all obliged to implement the directives, but also at the international level.⁷⁰ Where the directives have provided precise instructions, leaving the Member States little discretion for deviation (such as in the case of the Computer Programs Directive⁷¹) the harmonization process has led to fairly uniform legal rules throughout the EU, and thereby enhanced legal certainty, transparency and the predictability of norms in these distinct and often distant political sectors.

Harmonization of copyright has also empowered the European Community to negotiate agreements in the field of copyright and neighboring rights with Europe's trading partners, thereby providing opportunities to export European copyright standards.⁷² The European Commission over time has negotiated a host of international, bilateral and regional trade arrangements on behalf of the European Union and its Member States. For example, the European Economic Area (E.E.A.) Agreement concluded between the European Community, its Member States, and Iceland, Liechtenstein, and Norway, contains an obligation to implement

⁶⁹ See *supra* note 4 and accompanying text.

⁷⁰ See Verstrynge, *supra* note 68, at 9.

⁷¹ See *supra* notes 12–14 and accompanying text.

⁷² See generally Silke von Lewinski, *Copyright Within the External Relations of the European Union and the EFTA Countries*, 16 *European Intellectual Property Review* [E.I.P.R.] 429 (1994) (U.K.) (tracing the rise of the inclusion of copyright in international trade agreements).

the entire *acquis* in the field of copyright and neighboring rights.⁷³ The more recent 2009 EU-Korea Free Trade Agreement contains various European standards, including an obligation that contracting parties protect authors' rights for a term no less than the life of the author and seventy years after the author's death.⁷⁴

However, despite some positive results, the harmonization has a few structural deficiencies. First, these arguably positive results have cost the European Community and its Member States considerable "time, finance, and other social costs."⁷⁵ Further, "[d]ue to the complexity of the European law-making procedure . . . the time span between the first proposal of a directive and its final implementation can easily exceed ten years."⁷⁶

Second, harmonization by directive produces an asymmetric normative effect. "[T]he harmonized norms of copyright and related rights in the seven directives in many cases exceed the minimum standards of the Berne and Rome Conventions to which the Member States have adhered."⁷⁷ Often, the norms surpass the levels of protection existing in the Member States even before implementation, as exemplified by the Term Directive that has harmonized the duration of copyright at a level well above the normal European term of 50 years *post mortem auctoris*.⁷⁸ This trend of upward harmonization is driven by the European legislature's desire to seek "a high level of protection of intellectual property," which would lead to "growth and increased competitiveness of European industry"⁷⁹—a proposition that has yet

⁷³ Agreement on the European Economic Area Annex XVII 9(e), June 14, 2012, 2011 O.J. (L 127) 1. See von Lewinski, *supra* note 72, at 433.

⁷⁴ See Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, EU-S.Kor., art. 10.6, Oct. 15, 2009, 2011 O.J. (L 127) 6, 44.

⁷⁵ Bernt Hugenholtz et al., *The Recasting of Copyright & Related Rights for the Knowledge Economy*, INSTITUTE FOR INFORMATION LAW [IViR] 211 (2006) (Neth.).

⁷⁶ *Id.* at 211–212. See *id.* for a short outline on the adoption of a directive.

⁷⁷ *Id.* at 212; see, e.g. Term Directive, *supra* note 5, paras. 1–7, at 12.

⁷⁸ See Hugenholtz, *supra* note 75, at 212.

⁷⁹ Information Society Directive, *supra* note 5, para. 4, at 10.

to be proven.⁸⁰ However, some Union-wide scaling up of protection is probably inevitable. The alternative, namely scaling back protection, would cause legal and political problems in Member States that offer protection in excess of the European average.⁸¹

A related problem is the upward effect that “a harmonization directive inevitably has on national levels of protection, even in the rare case that a directive would later be repealed. Repealing a directive does not automatically lead to the undoing of implementation legislation at the national level, unless a national legislature has provided for a sunset clause.”⁸² This makes harmonization by directive essentially an upward, one-way street. For example, despite the European Commission’s scathing assessment of the EU Database Directive in 2005, no initiative to repeal the Directive or its controversial *sui generis* database right has so far been taken.⁸³

Upward approximation is inherent to the process of harmonization by directive, and a reason for serious concern. The economic and social effectiveness and credibility of any system of intellectual property depends largely on finding that delicate balance between the interests of right holders in maximizing protection and those of the public in having access to products of creativity and knowledge.⁸⁴ Moreover, a constant expansion of rights of intellectual property due to upward harmonization will create new obstacles to the establishment of an internal market as long as exclusive rights remain largely territorial and can be exercised along national borders.⁸⁵

⁸⁰ See *First Evaluation of Directive 96/9/EC*, *supra* note 39, at 5 (arguing that a positive effect of the introduction of the *sui generis* right on the EU information economy cannot be proven).

⁸¹ Hugenholtz, *supra* note 75, at 212.

⁸² *Id.*; see H.M. Government, *Transposition Guidance: How to Implement European Directives Effectively*, para. 2.27 (2011), available at <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/t11-775-transposition-guidance.pdf> (requiring a sunset clause or five-year Ministerial review for all implemented EU Directives).

⁸³ See *First Evaluation of Directive 96/9/EC*, *supra* note 39.

⁸⁴ See Hugenholtz, *supra* note 75, at 212.

⁸⁵ See *id.* at 213.

Yet another weakness of the harmonization process is the short-term diminishing of legal certainty in the Member States, particularly when a directive creates new rights or uses novel terminology. Because harmonization by directive creates additional legal rules which must first be interpreted by local courts at the national level, and later by the Court of Justice of the EU, this uncertainty is not dispelled until the Court has ruled definitively on the most contentious issues.

Next, the significant discretion afforded to the Member States results in only limited unification of law. Due to political compromise, directives are often vague, providing only for minimum protections or suggesting optional provisions. Sometimes, directives give national legislatures so much interpretive space that the goal of harmonization is frustrated. For example, Article 5(2) and (3) of the Information Society Directive allows Member States to pick from a “shopping list” of twenty-one broad categories of exemptions.

Law-making by directive can also be critiqued for its lack of transparency. This is in part attributable to the highly complex interactions of all three legislative powers of the Community, which permit ample opportunity for lobbying and rent-seeking. Often, the stated aim of a directive (“removing national disparities,” for example), only serves to mask the hidden political agendas actually driving the harmonization initiative.

Even when legislation makes it to the end of this process, its quality leaves much to be desired. The complexity of a legislative process involving opinions from three different EU institutions and twenty-seven different Member States regularly fails to produce norms of quality commensurate with the needs of the European union—the largest market in the world. Nevertheless the real Achilles’ heel of harmonization is territoriality. After twenty years of copyright harmonization, the EU remains essentially national law, with each Member State holding on to its own national law on copyright and neighboring rights.⁸⁶ The territorial nature of copyright has various legal consequences, the most vexing of

⁸⁶ See *id.* at 307.

which is the *lex protectionis* principle.⁸⁷ By operation of the principle, a single act of communicating a work online may affect as many copyright laws as there are countries where the posted work can be accessed.⁸⁸ In other words, copyright licenses for such acts need to be cleared in all countries of reception—normally, all twenty-seven Member States of the EU—a daunting task for any enterprise aspiring to offer content-based services online.⁸⁹

On balance, the process of harmonization in the field of copyright and related rights has produced mixed results at great expense, and its beneficial effects on the Internal Market are limited at best, and remain largely unproven. This sobering conclusion calls for caution and restraint when considering future initiatives of harmonization by directive.

III. THE WAY FORWARD: TOWARDS THE UNIFICATION OF EU COPYRIGHT LAW

As this paper has demonstrated, harmonization of copyright law in the EU has occurred in three different phases, with different means and with various levels of ambition and effectiveness. Could there be a fourth phase on the horizon?

As the Institute for Information Law has suggested in a major study on the future of European copyright law that was carried out for the European Commission,⁹⁰ the next logical step in this process towards uniformity of European copyright law would be the introduction of a truly unified European Copyright Law.⁹¹ Long considered taboo in copyright circles, the idea of copyright

⁸⁷ *Lex protectionis* is a conflict-of-law rule that “applies the law of the county for which protection is sought.” Anita B. Frohlich, *Copyright Infringement in the Internet Age—Primetime for Harmonized Conflict-of-Laws Rules?*, 24 BERKELEY TECH. L.J. 851, 854 (2009).

⁸⁸ Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II), art. 8, 2007 O.J. (L 199) 40, 45.

⁸⁹ See VAN EECHOUDE ET AL., *supra* note 1, at 307–08.

⁹⁰ See Hugenholtz, *supra* note 75, at 210; VAN EECHOUDE ET AL., *supra* note 1, at 317.

⁹¹ See Hugenholtz, *supra* note 75, at 218–19; VAN EECHOUDE ET AL., *supra* note 1, at 316–17.

unification is gradually receiving the attention it deserves, both in scholarly debate and political circles. For example, in one of her last public speeches on copyright, former Commissioner Vivian Redding endorsed the idea of a European Copyright Law:

Last, but not least, one could think of a more profound harmonisation of copyright laws in order to create a more coherent licensing framework at European level. A “European Copyright Law”—established for instance by an EU regulation—has often been mooted as a way of establishing a truly unified legal framework that would deliver direct benefits. This would be an ambitious plan for the EU, but not an impossible one.⁹²

Significantly, the Lisbon Reform Treaty has introduced a specific competence for Union-wide intellectual property rights. Article 118 TFEU provides:

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 authorization, coordination and supervision arrangements.⁹³

⁹² See Viviane Reding, Member of the European Commission Responsible for Information Society and Media, Bringing Down Walls and Barriers in the Digital World—Priorities for the European Digital Agenda, Speech at Visby Agenda: Creating Impact for an eUnion 2015 (Nov. 9, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/519&format=HTML&aged=0&language=EN&guiLanguage=nl>, CREATIVE CONTENT IN A EUROPEAN DIGITAL SINGLE MARKET: CHALLENGES FOR THE FUTURE 18 (2009), available at http://ec.europa.eu/internal_market/consultations/docs/2009/content_online/reflection_paper%20web_en.pdf.

⁹³ The Treaty on the Functioning of the European Union, art. 118, Mar. 20, 2010, available at http://www.eudemocrats.org/fileadmin/user_upload/Documents/D-Reader_friendly_latest%20version.pdf. The “ordinary procedure” that Article 118 refers to is the co-decision procedure. The European Parliament has to agree to a proposal, and the Council must adopt the proposed law with a qualified majority vote. See *id.*

Arguably, Article 118 TFEU would allow not only for the introduction of Union-wide copyright titles, but also for the simultaneous abolition of national titles, which would be necessary for such an initiative to take full effect and remove territorial restrictions.

The potential advantages of such a Union-wide copyright title are undeniable. A European Copyright Law would immediately establish a truly unified legal framework, replacing the multitude of occasionally conflicting national rules of the present. It would have instant Union-wide effect, thereby creating a single market for copyrights and related rights, both online and offline. Moreover, it would enhance legal security and transparency for rightsholders and users alike, as well as greatly reducing transaction costs. Unification could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights but merely permits limitations.

Devising a European Copyright Law would be an ambitious undertaking—at best a long-term project. With copyright law today in a state of constant crisis—due in particular to the problems of mass infringement associated with the Internet—the question arises whether time would allow the EU legislature to embark on such an undertaking. The answer, in the opinion of this author, is yes. Work on a European Copyright Law could be undertaken in parallel with improvement, at the national level or in the form of further harmonization, of copyright in the EU. Indeed, such work would be less dependent on the fickle mood of the day, and might allow for sufficient reflection, thereby enhancing the quality of the final legislative product.

The European Commission's 2011 Intellectual Property Rights (I.P.R.) Strategy paper entertains the possibility of consolidating the entire body of harmonized copyright law into a single European copyright code.⁹⁴ According to the Commission, “[t]his could encompass a comprehensive 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

⁹⁴ *Communication on a Single Market for Intellectual Property Rights*, *supra* note 47, at 11.

level.”⁹⁵ The paper also states the Commission’s intention to examine the “feasibility of creating an optional ‘unitary’ copyright title” based on Article 118 TFEU, which would exist in parallel to national copyrights.⁹⁶ While these statements demonstrate that the prospect of a unification of European copyright is no longer beyond the political horizon, the European Commission apparently is not yet ready to consider the creation of a truly unified European Copyright Law that would effectively replace national copyright laws in the Member States.

In anticipation of a future EU initiative towards unification, a self-appointed group of European copyright scholars have drafted a model *European Copyright Code* that was published in April 2010.⁹⁷ Interestingly, the Group comprised scholars from both the continental European authors’ rights tradition and the British copyright tradition, demonstrating that a European Copyright Law that assimilates both traditions can be realized.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ THE WITTEM PROJECT, EUROPEAN COPYRIGHT CODE (2010), available at <http://www.copyrightcode.eu> (last visited Mar. 1, 2013).